UNITED
NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991

Case No. IT-00-39-A

Date: 11 May 2007

Original: English

IN THE APPEALS CHAMBER

Before: **Judge Fausto Pocar, Presiding**
Judge Mohamed Shahabuddeen
Judge Andrésia Vaz
Judge Theodor Meron
Judge Wolfgang Schomburg

Registrar: **Mr. Hans Holthuis**

Decision of: **11 May 2007**

PROSECUTOR

v.

MOMČILO KRAJIŠNIK

DECISION ON MOMČILO KRAJIŠNIK'S REQUEST TO SELF-REPRESENT, ON COUNSEL'S MOTIONS IN RELATION TO APPOINTMENT OF *AMICUS CURIAE*, AND ON THE PROSECUTION MOTION OF 16 FEBRUARY 2007

The Office of the Prosecutor:

Mr. Peter Kremer
Ms. Christine Dahl

Previously Assigned Counsel for Mr. Krajišnik:

Mr. Colin Nicholls

The Appellant:

Momčilo Krajišnik

1. The Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ("Appeals Chamber" and "Tribunal", respectively) is seized of three motions filed by Assigned Counsel for Momčilo Krajišnik ("Assigned Counsel" and "Mr. Krajišnik", respectively). One motion, filed 27 December 2006, is the "Motion Seeking Review of the Decision of the Registry in Relation to Assignment of Counsel" ("First Motion"); the second one, filed 2 January 2007, is the "Motion Requesting Assignment as *Amicus Curiae*" ("Second Motion"); and the third one, filed 12 April 2007, is the "Motion Regarding Proposed Assignment as *Amicus*" ("Third Motion"). The Appeals Chamber is also seized of the "Prosecution Motion Regarding Filing of Notice of Appeal and Response by Momčilo Krajišnik" ("Prosecution Motion"), filed on 16 February 2007.

I. Preliminary Observations

2. The Appeals Chamber will not discuss the procedural history related to the First and Second Motions, as it has done so in its prior decision in the present case.[1] Indeed, the Appeals Chamber has already ruled as to some issues raised in the First Motion.[2]

3. With regard to this First Motion, the only issue still pending before the Appeals Chamber is Mr. Krajišnik's request to represent himself, which Mr. Krajišnik both wishes to do and believes he has a right to do. With regard to the Second Motion, the Appeals Chamber has before it a request by assigned counsel for Mr. Krajišnik that the Appeals Chamber appoint *amicus curiae* to "complement Mr. Krajišnik's self-representation on appeal."[3]

4. In the Third Motion, Assigned Counsel clarifies two points with regard to the Second Motion. First, Assigned Counsel specified that in requesting the appointment of *amicus curiae*, the Appeals Chamber "should not exclusively consider whether" Assigned Counsel himself "should be so appointed."[4] Second, Assigned Counsel stated that the Appeals Chamber should delineate the role that it envisions for *amicus curiae* prior to appointing a specific *amicus curiae*, so as to ensure

[1] "Decision on 'Motion Seeking Review of the Decisions of the Registry in Relation to Assignment of Counsel'", 29 January 2007 ("29 January Decision"); *cf.* "Decision on Request for Review by the President of the Decisions of the Registry in Relation to Assignment of Counsel", 1 February 2007 ("President's Decision").
[2] *See generally* 29 January Decision (declaring one issue moot and finding that power to review two other issues lay with the President of the Tribunal); *cf.* President's Decision, paras 12-13 (reviewing and resolving these two other issues).
[3] Second Motion, para. 32.
[4] Third Motion, para. 8.

that the specific *amicus curiae* chosen is "aware beforehand of the role which he would be undertaking and ... agree[s] to fulfill that role."[5]

5. The Prosecution has not responded to the First, Second, or Third Motions. At the request of the Pre-Appeal Judge, however, the Prosecution filed "The Prosecution's Submissions in Relation to the Right to Self-Representation and the Role of *Amicus Curiae* in Appellate Proceedings" on 2 April 2007 and related submissions on the following day.[6] These filings detail the Prosecution's research regarding the right of self-representation on appeal and the role of *amici curiae* in criminal appeals. In addition, Assigned Counsel filed "Further Submissions Relating to Self-Representation on Appeal" ("Further Submissions") on 2 April 2007. In the Further Submissions, Assigned Counsel elaborates on his views regarding the right of self-representation, making reference to, among other things, some case law in England and Wales. Finally, two Status Conferences held in this case touched upon the pending issues in the First, Second, and Third Motions.[7] The Appeals Chamber has taken these filings and the transcripts of the Status Conferences into consideration.[8]

6. The Prosecution Motion relates to other filings in this case – namely, the Notice of Appeal and Response Brief filed personally by Mr. Krajišnik.[9] The Prosecution moved to strike these filings on the ground that Mr. Krajišnik had Assigned Counsel (who had also filed a Notice of Appeal and a Response Brief) and was thus not entitled to make his own filings.[10] Assigned Counsel filed a response to the Prosecution Motion, in which Assigned Counsel argued that, given the pending First Motion and the request for self-representation contained therein, Mr. Krajišnik's filings should be treated as validly filed.[11] The Prosecution filed a reply in which it reiterated its original arguments.[12]

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[5] Third Motion, para. 10. Assigned Counsel also clarified that he did not intend to file a Consolidated Notice of Appeal prior to a decision by the Appeals Chamber on the issue of self-representation raised in the First Motion. *Ibid.*, paras 11-14.

[6] "Prosecution's Corrigendum Re Submissions", filed 3 April 2007 ("Prosecution's Corrigendum"); "Book of Authorities for the Prosecution Submission in Relation to the Right to Self-Representation and the Role of *Amicus Curiae* in Appellate Proceedings", 3 April 2007.

[7] AT 21-70 (transcript of 26 March 2007 Status Conference); AT 71-98 (transcript of 5 April 2007 Status Conference).

[8] The Appeals Chamber need not address "The Registrar's Submission on Counsel's Request for Review of the Registrar's Decisions on Assignment of Counsel", filed 16 January 2007, and Assigned Counsel's "Response to 'The Registrar's Submission on Counsel's Request for Review of the Registrar's Decisions on Assignment of Counsel'", filed 26 January 2007. These two filings deal either with issues that have since been resolved, *see generally* 29 January Decision; President's Decision, or with matters that the Appeals Chamber does not deem relevant to the core issues at hand.

[9] "The Accused, Momčilo Krajišnik: Notice of Appeal", 20 February 2007; "Response to the Prosecution's Appeal Brief Against the Judgement of 27 September 2006 in the Case of Momčilo Krajišnik", 20 February 2007.

[10] Prosecution Motion, para. 11.

[11] "Response to 'Prosecution Motion Regarding Filing of Notice of Appeal and Response by Momčilo Krajišnik'", 22 February 2007, paras 20-30.

[12] "Prosecution Reply Regarding Filing of Notice of Appeal and Response by Momčilo Krajišnik", 26 February 2007.

7. The Appeals Chamber now turns to discuss the substance and merits of the First Motion and, subsequently, of the Second and Third Motions. The Appeals Chamber addresses the Prosecution Motion in the course of discussing the First Motion.

II. The First Motion (Issue of Self-Representation on Appeal)

8. In the First Motion, Mr. Krajišnik claims that he is entitled to represent himself. He notes that the Appeals Chamber recognized a right to self-representation in the course of the *Slobodan Milošević* and *Vojislav Šešelj* trial proceedings.[13] He considers that "there is no inherent or compelling reason why the right to self-representation on appeal at the ICTY should be understood any differently from the right to self-representation during trial proceedings."[14] He recognizes that the right to self-representation is not unqualified and that, in case-by-case circumstances, a Chamber may impose counsel "in order to ensure that the conduct of a fair trial is not disrupted."[15] He considers, however, that no case-specific reasons here justify denial of the right of self-representation. He explains that he is a "literate and highly intelligent person who is certainly capable of defending himself in person"; that he "has made an informed waiver of professional legal assistance in full awareness of the possible consequences of waiving the opportunity of skilled legal representation"; and that he "has never engaged in any kind of obstructionist behavior during his lengthy pre-trial, trial, and now pre-appeal detention".[16]

9. The Appeals Chamber recalls its discussion of self-representation in the course of an interlocutory appeal in *Slobodan Milošević*.[17] There, the Appeals Chamber looked to the text of Article 21(4)(d) of the Statute of the Tribunal, which provides in relevant part that a defendant has the right "to defend himself in person or through legal assistance of his own choosing". The Appeals Chamber "s[aw] no reasonable way to interpret Article 21 except as a guarantee of the right of self-representation".[18] It considered that the "drafters of the Statute clearly viewed the right to self-representation as an indispensable cornerstone of justice, placing it on a structural par with defendants' right to remain silent, to confront the witnesses against them, to a speedy trial, and even to demand a court-appointed attorney if they cannot afford one themselves."[19] It concluded that "[d]efendants before this Tribunal, then, have the presumptive right to represent themselves notwithstanding a Trial Chamber's judgement that they would be better off if represented by

[13] First Motion, para. 38 & fn. 18.
[14] *Ibid.*, para. 42.
[15] *Ibid.*, para. 38.
[16] *Ibid.*, paras 43-44.
[17] *Slobodan Milošević v. Prosecutor,* Case No. IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Counsel, 1 November 2004 ("*Milošević* Decision of 1 November 2004").
[18] *Ibid.*, para. 11.
[19] *Ibid.*, para. 11 (footnotes omitted).

counsel."[20] The Appeals Chamber went on to note, however, that this right is a qualified one and "may be curtailed on the grounds that a defendant's self-representation is substantially and persistently obstructing the proper and expeditious conduct of his trial."[21]

10. In the case at hand, the Appeals Chamber sees no case-specific reasons why any right to self-representation possessed by Mr. Krajišnik should be curtailed.[22] Rather, the core question before the Appeals Chamber is whether individuals possess a right to self-representation before this Tribunal during appeals from judgement. For the reasons that follow, the Appeals Chamber concludes that they do.

11. To begin with, Article 21(4)(d) of the Statute draws no distinctions between the trial stage and the appeal stage of a case. There is thus no textual basis for concluding that the guarantee to self-representation therein (as recognized in the *Milošević* Decision) evaporates with the issuance of the trial judgement.[23] Moreover, there is no obvious reason why self-representation at trial is so different in character from self-representation on appeal as to require an *a priori* distinction between the two. Self-representation on appeal may be a complex and tricky business, but on its face it is no more difficult (and indeed perhaps less difficult) than self-representation at trial. Both stages involve complicated factual and legal issues and require familiarity with a daunting set of procedural rules. It may never be in an individual's interests to represent himself, either at trial or at appeal, but he nonetheless has a "cornerstone" right to make his own case to the Tribunal.

12. Finally, a review of the case law of domestic jurisdictions does not support a distinction between the trial and appeal stages for purposes of self-representation. In the course of substantial research, as supplemented by the helpful submissions of the parties, the Appeals Chamber has come across only one jurisdiction – the United States – that finds a right to self-representation at trial but not on appeal.[24] Moreover, in concluding that the United States federal Constitution grants defendants a right to self-representation at trial but not on appeal, the United States Supreme Court relied heavily on the fact that the relevant constitutional provision "does not include any right to appeal" and thus that "[i]t necessarily follows that [this provision] does not provide any basis for

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[20] *Ibid.*, para. 11; *see also Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-AR73.3, Decision on Appeal Against the Trial Chamber's Decision on Assignment of Counsel, 20 October 2006 ("*Šešelj* Decision"), para. 8.
[21] *Milošević* Decision of 1 November 2004, paras 12-13; *see also Šešelj* Decision, para. 8.
[22] In this regard, the Appeals Chamber notes that Krajišnik's background and health present no case-specific barriers to self-representation; that he asserted his right to self-representation near the beginning of the appeal process; and that to date there has been no opportunity for obstruction to stem from his self-representation since, over his objections, he has not been representing himself but rather has had assigned counsel.
[23] *See* Further Submissions, para. 4 (making this point).
[24] *See Faretta v. California*, 422 U.S. 806 (1975) (finding a federal constitutional right to self-representation at trial); *Martinez v. Court of Appeal of California, Fourth Appellate District*, 528 U.S. 152 (2000) (finding no federal constitutional right to self-representation on appeal).

finding a right to self-representation on appeal."[25] Such reasoning has no force in the situation at hand, since Article 25 of the Statute of the Tribunal plainly provides a right of appeal. The Appeals Chamber thus declines to rely on the distinction drawn in United States jurisprudence. The Appeals Chamber further considers it noteworthy that no other jurisdiction appears to draw such a distinction.[26]

13. Accordingly, the Appeals Chamber concludes that Mr. Krajišnik has a right to represent himself on his appeal. As at trial, however, this right is not unqualified. Should Mr. Krajišnik's self-representation substantially and persistently obstruct the proper and expeditious conduct of his appeal, then counsel may be imposed upon him.

14. In light of the foregoing, the Appeals Chamber dismisses the Prosecution Motion and will treat Mr. Krajišnik's Notice of Appeal and his Response Brief as validly filed self-represented submissions.

15. The Appeals Chamber further considers it appropriate to specify time limits for Mr. Krajišnik's future filings. His Appeal Brief will be due within seventy-five days of the filing of the Trial Judgement translated into B/C/S. His Reply Brief will be due within fifteen days of the translation into B/C/S of the Prosecution Response to this Appeal Brief.

III. The Second and Third Motions (Issue of *Amicus Curiae*)

16. Having held that Mr. Krajišnik is currently entitled to represent himself on appeal, the Appeals Chamber now turns to the Second and Third Motions. In the Second Motion, Assigned Counsel observes that "[w]here an accused elects self-representation, the concerns about the fairness of the proceedings are, of course, heightened, and a Chamber must be particularly attentive to its duty of ensuring that the proceedings are fair."[27] Assigned counsel notes that in *Slobodan Milošević*, the Trial Chamber assigned *amici curiae* to assist in ensuring the fairness of the proceedings and suggests that the Appeals Chamber in this case should do likewise.[28] Assigned Counsel considers that this approach "will respect Mr. Krajišnik's right to self-representation while ensuring the Appeals Chamber is given all the legal assistance it requires."[29]

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[25] *Martinez*, 528 U.S., at 160.
[26] Indeed, the Prosecution's extensive research led it to conclude affirmatively that common law systems which permit self-representation at trial also typically permit self-representation on appeal. Prosecution's Corrigendum, para. 39 ("Most common law systems studied allow self-representation on appeal").
[27] Second Motion, para. 24.
[28] *Ibid.*, para. 25.
[29] *Ibid.*, para. 29.

17. The Appeals Chamber notes that, pursuant to Rule 74 of the Rules of Procedure and Evidence ("Rules"), the Appeals Chamber may, "if it considers it desirable for the proper determination of the case", invite submissions from an *amicus curiae* "on any issue specified by the Chamber". The Appeals Chamber further considers that, as was done in *Slobodan Milošević*, the Appeals Chamber can ask the *amicus curiae* to argue in favour of the interests of a particular party where this approach will serve the interests of justice.[30]

18. As part of the choice to self-represent, Mr. Krajišnik must "accept[] responsibility for the disadvantages this choice may bring."[31] He is not entitled to *amicus curiae*. Rather, the issue is whether, in being "particularly attentive to its duty of ensuring that the [appeal] be fair,"[32] the Appeals Chamber deems the appointment of *amicus curiae* to be warranted. The Appeals Chamber considers that in this case the answer is yes. The appointment of *amicus curiae* will not infringe on any rights of Mr. Krajišnik, such as the right to self-represent or the right to a speedy appeal. Moreover, such an appointment will help ensure that the appeal is a fair one. Of course, a fair appeal could well occur in the absence of *amicus curiae*, but this is an issue better judged with hindsight rather than with foresight. Since Mr. Krajišnik is the first defendant seeking to self-represent on appeal, the Appeals Chamber deems it prudent to appoint *amicus curiae* to keep an eye on his interests.

19. Accordingly, pursuant to Rule 74, the Appeals Chamber invites the participation of a particular *amicus curiae* to assist the Appeals Chamber by arguing in favour of Mr. Krajišnik's interests. *Amicus curiae* is not requested to conduct any new factual investigations. Rather, in light of the evidence at issue in the trial record, *amicus curiae* is to put forth grounds of appeal seeking reversal of convictions or reduction in sentence and to argue against grounds of appeal advanced by the Prosecution. *Amicus curiae* is to work independently from Mr. Krajišnik.

20. The Appeals Chamber emphasizes that *amicus curiae* is not a party to the proceedings.[33] The Appeals Chamber is therefore under no obligations to address all arguments raised by *amicus curiae*. Rather, the Appeals Chamber will look to the arguments raised by *amicus curiae* in

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[30] *See, e.g., Prosecutor v. Slobodan Milošević*, Case No. IT-99-37-PT, Order Inviting Designation of *Amicus Curiae*, 30 August 2001, pp. 2-3; *Prosecutor v. Slobodan Milošević*, Case No. IT-01-50-PT, Order Inviting Designation of *Amicus Curiae*, 30 October 2001, pp. 2-3; *Prosecutor v. Slobodan Milošević*, Case No. IT-99-37-PT, Order Concerning *Amici Curiae*, 11 January 2002; *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Order of Further Instruction to the *Amici Curiae*, 6 October 2003, p. 2; *see also Dickerson v. United States*, 530 U.S. 428, 441-442 & n.7 (2000) (noting the appointment of the *amicus* "to assist our deliberations by arguing in support of the judgment below").

[31] *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR73.6, Decision on the Interlocutory Appeal by the *Amici Curiae* Against the Trial Chamber Order Concerning the Presentation and Preparation of the Defence Case, 20 January 2004, para. 19.

[32] *Ibid.*, para. 19.

[33] *See ibid.*, para. 4.

assessing whether the interest of justice requires the Appeals Chamber to consider, *proprio motu*, issues not raised in Mr. Krajišnik's appeal or in his responses to the Prosecution's appeal.

21. In the absence of other instructions from the Pre-Appeal Judge or the Appeals Chamber, *amicus curaie* is to make submissions to the Appeals Chamber similar to those which a party would make (including a notice of appeal, appeal brief, response brief, and reply brief) and pursuant to the requirements set out in the Rules and the relevant Practice Directions,[34] with one exception. This exception is that the word counts for *amicus curiae* are limited to two-thirds of those available to the parties under the Practice Direction on the Length of Briefs and Motions. *Amicus curiae* is to attend Status Conferences, either in person or via tele-conference, and to appear at the oral hearing of the appeal. *Amicus curiae* is also to have access to all *inter partes* confidential material in the case.

22. The Prosecution is entitled to respond to *amicus curiae* in the same way that, pursuant to the Rules and the relevant Practice Directions, it is entitled to respond to the other party, save that the word counts for its responses are limited to two-thirds of those available to the parties under the Practice Direction on the Length of Briefs and Motions. The Appeals Chamber notes that the Prosecution may choose to respond separately to Mr. Krajišnik and to *amicus curiae* or instead choose to file consolidated responses and replies (with word counts for these consolidated filings equal to one and two-thirds those set forth in the the Practice Direction on the Length of Briefs and Motions). In oral proceedings, the Prosecution will similarly have a right of response with regard to *amicus curiae*.

23. As to the specific identity of *amicus curiae*, the Appeals Chamber agrees with Assigned Counsel's position in the Third Motion that no specific appointment should be made until after the issuance of this decision. This will enable the proposed *amicus curiae* to make an informed decision about whether to accept the assignment. The Appeals Chamber further agrees with Assigned Counsel's position in the Third Motion that the post of *amicus curiae* need not necessarily be filled by Colin Nicholls, QC, who has acted to date as Assigned Counsel. The Appeals Chamber nonetheless considers that Mr. Nicholls would be fit to fill the role of *amicus curiae* and wished to offer him the option of doing so. In particular, the Appeals Chamber notes both Mr. Nicholls' familiarity with the case and his impressive professional abilities. The Appeals Chamber therefore requests the Registry to consult with Mr. Nicholls as to his willingness to serve as *amicus curiae*. Should Mr. Nicholls accept this appointment, then the Notice of Appeal filed by Mr. Nicholls on

[34] Except as otherwise specified in this opinion, time limits for *amicus* will begin running from the date of *amicus*'s appointment.

behalf of Mr. Krajišnik[35] will be deemed to be the Notice of Appeal of *amicus curiae* unless, within one week of this decision, Mr. Nicholls files a new Notice of Appeal as *amicus curiae*. Similarly, the Response Brief filed by Mr. Nicholls on behalf of Mr. Krajišnik[36] will be deemed to be the Response Brief of *amicus curiae* unless, within one week of this decision, Mr. Nicholls files a new Response Brief as *amicus curiae*.[37] Finally, Mr. Nicholls' Appeal Brief will be due within seventy-five days of the date of this decision. Should Mr. Nicholls decline the appointment as *amicus curiae*, then the Appeals Chamber will take other steps to identify a suitable *amicus curiae*.

IV. Disposition

24. For the foregoing reasons, the Appeals Chamber **GRANTS**, Judge Schomburg dissenting, the First Motion, as it relates to Mr. Krajišnik's request to represent himself; **GRANTS**, Judge Pocar and Judge Schomburg dissenting, the Second and Third Motions, according to the conditions set forth below; and **DISMISSES** the Prosecution's Motion.

25. The Appeals Chamber **REQUESTS** the Registry to take any necessary steps to implement the Appeals Chamber's decision as to the First Motion. With regard to the Second and Third Motions, the Appeals Chamber **REQUESTS** the Registry to consult with Mr. Nicholls to see whether he is willing to serve as *amicus curiae*, pursuant to the terms set out in paragraphs 19 and 21 above, and, if so, to make any necessary arrangements. Should Mr. Nicholls decline to serve as *amicus curiae*, the Appeals Chamber **REQUESTS** the Registry to consult further with the Appeals Chamber on the issue. The Appeals Chamber further **REQUESTS** the Registry to provide *amicus curiae*, once appointed, with access to all *inter partes* confidential information from the proceedings in this case.

26. The Appeals Chamber **ORDERS** Mr. Krajišnik to file his Appeal Brief within seventy-five days after the filing of the Trial Judgement translated into B/C/S, and to file his Reply Brief within 15 days of the translation of the Prosecution Response Brief into B/C/S.

27. The Appeals Chamber **ORDERS** *amicus curiae*, once appointed, to act pursuant to the terms set out in paragraphs 19 and 21 above. The Appeals Chamber further **STATES** that, should Mr. Nicholls accept the appointment as *amicus curiae*, the Notice of Appeal and Response Brief

[35] "Counsel's Notice of Appeal", 12 February 2007 (filed confidentially, with a public and redacted version filed the same day).
[36] "Counsel's Response to the Prosecution's Appeal Brief", 12 February 2007.
[37] The Appeals Chamber notes that this existing filing satisfies the page limit requirements that an *amicus* would have to abide by pursuant to paragraph 21 of this decision. The Appeals Chamber also notes that the Prosecution's existing reply to this filing also satisfies the page limits set forth in paragraph 22 of this decision. *See* "The Prosecution's Reply Brief", 22 February 2007.

filed by Mr. Nicholls on behalf of Mr. Krajišnik will be deemed to be the Notice of Appeal and Response Brief of *amicus curiae* unless, within one week of this decision, Mr. Nicholls files a new Notice of Appeal and/or Response Brief as *amicus curiae*. The Appeals Chamber further **STATES** that, should Mr. Nicholls accept the appointment as *amicus curiae*, his Appeal Brief will be due within seventy-five days of the date of this decision.

28. The Appeals Chamber **FURTHER ORDERS** that *amicus*, once appointed, and any employees who have been instructed or authorized by *amicus* to have access to the *inter partes* confidential material in this case shall not, without express leave of the Appeals Chamber:

(a) disclose to any third party information contained in this material in whole or in part, including the names of witnesses, their whereabouts, transcripts of witness testimonies, exhibits, written statements, prior testimony, any other information which would enable these witnesses to be identified and would breach the confidentiality of the protective measures already in place, documentary evidence, or other evidence; or

(b) contact any witness whose identity is subject to protective measures.

29. For the purposes of paragraph 28, third parties exclude: (i) Mr. Krajišnik; (ii) any employees who have been instructed or authorized by *amicus* to have access to confidential material; and (iii) personnel from the International Tribunal, including members of the Prosecution.

30. The Appeals Chamber **INFORMS** the Prosecution that it is entitled to respond to filings and oral submissions by *amicus*, as described in paragraph 22 above.

31. Judge Pocar dissents from this decision, Judge Shahabuddeen files a separate opinion and Judge Schomburg also dissents. The dissenting and separate opinions are attached.

Done in English and French, the English text being authoritative.

Dated this 11th day of May 2007,
At The Hague, The Netherlands.

Judge Fausto Pocar
Presiding Judge

[Seal of the Tribunal]

DISSENTING OPINION OF JUDGE POCAR

1. I am unable to agree with the majority in this case. I disagree with the majority's view that any difficulties faced by Mr Krajišnik as a self-represented accused can be ameliorated by the appointment of *amicus curiae*.[38] Furthermore, I note that there is nothing in our Statute or Rules of Procedure and Evidence that allows for the appointment of *amicus curiae* to a trial or appeal proceeding to act as a *de facto* counsel.

Done in English and French, the English text being authoritative.

Dated this 11th day of May 2007,
At The Hague, The Netherlands.

Judge Fausto Pocar

[Seal of the International Tribunal]

[38] Paras., 18 -20.

SEPARATE OPINION OF JUDGE SHAHABUDDEEEN

The issue

1. The issue, which is both important and one of first impression for the Appeals Chamber, is whether the appellant has a right to self-representation at his appeal from a conviction, or whether he only has a right to representation by counsel – in this case, by an assigned counsel, the appellant being indigent. Put another way, the question is whether the appellant has a right to do his appeal alone, or whether, without proven obstruction from him, the Appeals Chamber can force counsel on him, regarding counsel's words and actions as his, even if he makes it plain that he does not want counsel. Discounting early exchanges, it appears to me that the foregoing represents the present issue. Effectively, the instant appeal has not yet begun; when they do, the proceedings will be partly written and partly oral. In these circumstances, I respectfully agree with the preference of the Appeals Chamber for the view that the appellant has a right to self-representation, and give this separate opinion in support.

My primary position

2. Customary international law – the controlling body of law – requires that a trial shall be fair. There is indeed a question as to whether that is correct. In *Gbao*,[1] the Designated Judge of the Special Court for Sierra Leone, with seeming approval of the implied legal proposition, expressed "the considered view that it has not been established that the right of the Accused to a fair trial has become part of customary international law". I respect that view, but prefer to follow the Appeals Chamber of the Tribunal in *Aleksovski*; there it said: "The right to a fair trial is, of course, a requirement of customary international law".[2] Likewise there is the Trial Chamber's judgement in *Simić*,[3] stating that the right to a fair trial is encompassed in common article 3 of the Geneva Conventions of 1949, paragraph (d), which affords "all judicial guarantees, recognizable as indispensable by civilized peoples, an article which has reached international customary law status". Fair trial is represented by a situation which is the result of the application of a bundle of norms. The distinction between customary international law and general principles is not always easily drawn, but it may be noted that general principles know of important elements of that bundle of norms[4] which, when applied together, result in a trial being fair. Formally established international criminal tribunals did not exist earlier on, but that did not affect the development of

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[1] SCSL-2003-09-PT, Decision on Prosecution Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure, 10 October 2003, para. 41.
[2] IT-95-14/1-A, 24 March 2000, Judgement, para 104.
[3] IT-95-9-T, 17 October 2003, Judgement, para. 678.
[4] Bin Cheng, *General Principles of Law* (Cambridge, 1987), cap. 13, referring to *nemo debet esse judex in propria sua causa, audiatur et altera pars,* judicial impartiality.

norms applicable to criminal situations, or the classification of such norms as part of customary international law.

3. If, as I therefore think, fairness is part of customary international law,[5] it applies to all proceedings in the Tribunal, inclusive of appeals to the Appeals Chamber from convictions. In thus applying, it answers possible argument that the reference in article 20(1) of the Statute of the Tribunal to the "Trial Chambers" confines the duty to be fair, as referred to in that provision, to those chambers. However, customary international law does not stipulate whether fairness at appeal is to be achieved through self-representation or through representation by counsel. The methods are each in fact used in relation to an appeal in one part of the world or another, but neither method has acquired the indicia entitling it to be regarded as customary international law. The Tribunal is not therefore bound by customary international law to apply one method or another. Customary international law may, however, be construed as giving the Tribunal a competence, or discretion, to select one method or the other, provided of course that the method selected is designed to achieve the objective of that law, namely, the dispensing of international criminal justice. But the Rules of Procedure and Evidence made by the judges of the Tribunal under article 15 of the Statute have not determined which method applies in the Tribunal. So the position may be understood as meaning that the matter has been left to the determination of the concerned judicial branch of the Tribunal, in this case, the Appeals Chamber.

4. The Appeals Chamber has determined the matter by now holding that there is a right to self-representation at appeal, having earlier held that there is a right to self-representation at trial.[6] The most that can be said in opposition to a holding that there is a right to self-representation at appeal is that some states consider that representation by counsel is better crafted to accomplish the objective of dispensing justice. But there are other states which do not share that view. The Appeals Chamber is not bound to exercise its competence by selecting what some states consider to be the better of the two methods. As noted above, neither method can now be regarded as customary international law which the Appeals Chamber is obliged to apply. Customary international law has at most given the Appeals Chamber a competence as to which of the two methods is to be selected. There is no basis for condemning the selection which the Appeals Chamber has made in the exercise of that competence.

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[5] *See also Ohashi*, 5 LRTWC 25, 30 (1946); *Shinohara*, 5 LRTWC 32, 34 (1946); *Hisakasu*, 5 LRTWC 66, 73-77 (1946); *Altstötter*, 6 LRWTC 1, 96-104 (1947); and *Latza*, 14 LRTWC 49, 63, 67, 71, 77, 80, 81, 84 (1948).
[6] *Milosević*, IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Counsel, 1 November 2004, para. 11.

The basis of the opposite view

5. The foregoing represents my primary view. A secondary view derives from the fact that, as it seems to me, the jurisprudence relating to representation by counsel in other courts of appeal itself shows that in appeals from convictions to the Appeals Chamber there is a right to self-representation.

6. An inquiry might begin by noticing the position at trials. The Appeals Chamber has already established that article 21(4)(d) of the Statute is a "guarantee of the right to self-representation"[7] at trial. However, as is recognised, the right to self-representation at trial is not absolute. It is settled law that it can be restricted if an accused is guilty of misbehaviour which substantially and persistently obstructs the fairness and expeditiousness[8] of the trial. But, in the instant case, it is not said that the appellant, when an accused, misbehaved at trial – whether by boycotting the proceedings or otherwise. It is not suggested that he lacks intelligence; on the contrary, he was described by the Trial Chamber as "an intelligent and educated man".[9] The Trial Chamber also noted that he was "President of the Bosnian-Serb Assembly, a member of the SDS Main Board, a member of the SNB, and a member of the Presidency".[10] Nor is it suggested that, at trial, his health situation caused obstructive delays – intended or unintended. No reason has been given for fearing that any of these things will happen at appeal.

7. The inquiry might then pass on to consider the theoretical basis of the objection to the right to self-representation at appeal. The essence of the objection may be collected from the proposition that the "status of the accused defendant, who retains a presumption of innocence throughout the trial process, changes dramatically when a jury returns a guilty verdict".[11] Whereas he is presumed to be innocent during the trial, he does not enjoy that presumption during the appeal. But that is only the general position in common law countries; the general position in civil law countries is that

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[7] Speaking of the reference in article 21(4)(d) of the Statute to the right of an accused "to defend himself in person or through legal assistance of his own choosing", the Appeals Chamber remarked that this "is a straightforward proposition. Given the text's binary opposition between representation žthrough legal assistance' and representation žin person', the Appeals Chamber sees no reasonable way to interpret Article 21 except as a guarantee of the right to self-representation". *See Milosević*, IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on Assignment of Counsel, 1 November 2004, para. 11. Since the provision is "straightforward", it does not appear to be necessary to refer to the interesting drafting history of model provisions.

[8] A trial can be expeditious without being fair, but a trial cannot be fair unless it is also expeditious. See generally *Halilović*, IT-01-48-A, Decision on Defence Motion for Prompt Scheduling of Appeal Hearing, 27 October 2006, para. 17; *Kvočka*, IT-98-30/1-AR73.5, Decision on Interlocutory Appeal by the Accused Zoran Žigić Against the Decision of Trial Chamber I Dated 5 December 2000, 25 May 2001, para. 20; *Kovačević*, IT-97-24-AR73, Decision Stating the Reasons for the Appeal Chamber's Order of 29 May 1998, 2 July 1998, para. 30; *Karemera*, ICTR-98-44-AR73, Decision on Prosecutor's Interlocutory Appeal against Trial Chamber III Decision of 8 October 2003 Denying Leave to File an Amended Indictment, 19 December 2003, paras. 13 and 14.

[9] Trial Judgement, para. 1160.

[10] *Ibid.*, para. 1158.

[11] *Martinez v. Court of Appeal of California, Fourth Appellate District*, 528 U.S. 152, 162 (2000).

the presumption of innocence continues and comes to an end only when the conviction at trial is upheld on appeal. The objection lacks a sufficient measure of universality to be convincing.

8. I am likewise not persuaded by arguments based on the length, the size, the magnitude, the intricacies and the complexities of an appeal. An appeal may well have all of these qualities, but I am unable to assent to the suggestion which they convey that, *of necessity*, an appeal is technically and professionally more demanding than a trial. An appellant admittedly has a right to self-representation at trial, and is therefore to be presumed capable of managing on his own at trial. This being so, there is no reason to suppose that he cannot manage on his own at appeal. The factors mentioned may give rise to a need for a court of appeal to have the supplementary services of *amicus curiae*, but of themselves they cannot justify non-recognition of a right to self-representation at appeal.

9. In any event, it is hard to see how those factors (including those relating to the presumption of innocence) operate to deny an appellant's right to self-representation at an appeal to challenge a trial finding that he is guilty of having committed a crime – an appeal which the law of the Tribunal guarantees him. If a man is to suffer a loss of liberty, he has to be accorded a right to present a case in opposition – personally, if he wishes. Is there something in the Statute of the Tribunal to rebut that view?

The jurisprudence

10. There is much learning on the subject, both judicial and non-judicial. It is all helpful, and I am grateful for it. However, I do not propose to survey it *in extenso*. I shall limit myself to three cases. In various ways, they raise questions concerning representation by counsel, but, in my opinion, their underlying principles do not prohibit the right to self-representation by a convicted appellant in an appeal to the Appeals Chamber.

(i) The Martinez case

11. The first case is *Martinez v. Court of Appeal of California,*[12] decided in 2000 by the Supreme Court of the United States. This may seem to support mandatory representation by counsel at an appeal. But perhaps the case may be looked at again. The appellant claimed a right to self-representation under the constitution of the United States. The judgement of the Supreme Court of that country was based on the view that historically a man had a right to be sent for trial before a jury for a serious crime before he was punished for it; the constitution of the United States was concerned only with such trials. But, while the Supreme Court did not say that a right to appeal was

[12] *Ibid.*, 152.

conferred by the constitution of the United States, it took the view that that constitution – a federal one – left each constituent State with a discretion, under its own constitution, to create a right to appeal and to determine the mode of exploitation of that right.

12. In his opinion concurring in the judgement of the Supreme Court, Justice Scalia summed up the position by stating "that there is no constitutional right to appeal."[13] Thus, the appellant could not rely on the constitution of the United States, as he had sought to do. Here, by contrast, there is something in the nature of a constitutional right to appeal: article 25 of the Statute – the organic instrument of the Tribunal – gives to a convicted appellant a right to appeal.

13. The local faculty is exercised on the basis that each State has an interest in ensuring that judicial proceedings are fair. This objective might be interfered with by the appellant's interest in self-representation, giving rise, as it might, to misunderstandings by the appellant of the law and the procedures of the court and to consequential delays and other difficulties. The Supreme Court balanced these two competing interests – a State's interest in ensuring the fairness and efficiency of the proceedings and the appellant's interest in self-representation – in holding that the "States are clearly within their discretion to conclude that the government's interests outweigh an invasion of the appellant's interest in self-representation".[14] Where a State has in its discretion so concluded, representation by counsel prevails over self-representation.

14. However, not every State is obliged so to conclude; its decision is to be made by the way it makes its own balance of those two competing interests. The Supreme Court made it clear that its holding against the right to self-representation at an appeal in California was "narrow" and did "not preclude the States [i.e., the other States of the Union] from recognizing such a right under their own constitutions".[15] I understand this to mean that the question whether an appellant was entitled to self-representation at an appeal depended on a study of the California legal position; the legal position need not be the same in all States of the Union – although it might. Moreover, even where a State required representation by counsel, this did not remove the ordinary discretion of courts to see that justice was done, if necessary by ordering self-representation. In the words of the Supreme Court, "Courts, of course, may still exercise their discretion to allow a lay person to proceed *pro se*".[16] Courts continue to be entitled to exercise that discretion by virtue of their inherent and overriding responsibility to be fair. *Martinez* does not automatically ban self-representation at every appeal, but allows it in some cases.

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[13] *Ibid.*, 165.
[14] *Ibid.*, 163.
[15] *Ibid.*
[16] *Ibid.*

(ii) The Belziuk case

15. The second case is *Belziuk v. Poland,*[17] decided in 1998 by the European Court of Human Rights. That case stands for the proposition that the right of an accused to "defend himself in person" applies to any part of the proceedings – including appeal proceedings.[18] The court said:

> Criminal proceedings form an entity and the protection afforded by Article 6 does not cease with the decision at first instance. A State is required to ensure also before courts of appeal that persons amenable to the law shall enjoy before these courts the fundamental guarantees contained in this Article.[19]

However, in applying that right to appeal proceedings, the special features of the case have to be considered.[20] As the court also said:

> [T]he personal attendance of the defendant does not necessarily take on the same significance for an appeal hearing. Indeed, even where an appellate court has full jurisdiction to review the case on questions both of fact and law, Article 6 does not always entail rights to a public hearing and to be present in person. Regard must be had in assessing this question to, inter alia, the special features of the proceedings involved and the manner in which the defence's interests are presented and protected before the appellate court, particularly in the light of the issues to be decided by it and their importance for the appellant. [21]

The court indeed took the view that the differences between trial and appeal meant that an appellant does not have a right to be present at his appeal. However, in the view of the court, that prohibition is not absolute; it is conditional. The right to be present, indeed the associated right to self-representation, could be restored by the special features of the case. Observing that there was no counsel present at the appeal on behalf of the appellant, who himself was absent, the court said: "Had [the appellant] been present at the appeal hearing, he would have had an opportunity to challenge his convictions and the submissions of the public prosecutor and to present evidence in support of his appeal. ... [He] had the right in the circumstances to be present at his appeal and to defend himself in person".[22]

16. Belziuk could not present evidence – additional evidence – unless he had a previous opportunity to make the necessary arrangements. The case did not turn on the mere fact that it happened that on that specific occasion the appellant's counsel did not turn up. The reasoning was that the appellant had a continuing right to self-representation and could have used this right to fill

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[17] *Belziuk v. Poland*, ECtHR, App. No. 45/1997/829/1035, 25 March 1998.
[18] See also *Delcourt v. Belgium*, ECtHR, App. No. 2689/65, 17 January 1970, paras. 23-26; *Kremzow v. Austria,* ECtHR, App. No. 12350/86, 21 September 1993, para. 58; and *Halilović*, IT-01-48-A, Decision on Defence Motion for Prompt Scheduling of Appeal Hearing, 27 October 2006, para. 17 (recognizing that the right of an "accused" to be tried without due delay under article 21(4)(c) of the Statute "applies to all stages of the proceedings, including an appeal").
[19] *Belziuk v. Poland*, ECtHR, App. No. 45/1997/829/1035, 25 March 1998, para. 37(i) (citations omitted).
[20] See also *Monnell and Morris v. The United Kingdom*, ECtHR, App. No. 9562/81, 9818/82, 2 March 1987, para. 56, and *Meftah v. France*, ECtHR, App. No. 32911/96, 35237/97 and 34595/97, 26 July 2002, para. 42 (citations omitted).
[21] *Belziuk v. Poland*, ECtHR, App. No. 45/1997/829/1035, 25 March 1998, para. 37(ii).
[22] *Ibid.*, para, 38. See likewise, on this point, *Kremzow v. Austria*, ECtHR, App. No. 12350/86, 21 September 1993, para. 67.

the breach caused by the absence of his counsel; the appellant himself could have adduced additional evidence. No doubt, the right could not be actively exercised while counsel was present, but in counsel's absence it could be – and indeed was expected to be. In this important sense, the right always existed. So, in certain circumstances, *Belziuk* allows self-representation at an appeal.

(iii) The Farhad case

17. The third case is *United States v. Farhad*,[23] decided in 1999 by the United States Court of Appeals for the Ninth Circuit. The accused in that case was allowed a right to self-representation at trial pursuant to *Faretta v. California*,[24] decided in 1975 by the United States Supreme Court. Through his lack of familiarity with the law, he made various mistakes; in particular, he made the egregious error of disclosing his previous crimes. On appeal, his counsel sought to argue that the fact that it was he [Farhad] who made the mistakes did not deprive him of the right to plead that the result of the mistakes was nevertheless a violation of his right to a fair trial. The argument was rejected on the ground that, having knowingly, intelligently and voluntarily waived his right to counsel, he had to bear the consequences of his ignorance. In the later words of the United States District Court for the District of Hawaii: "The U.S. Supreme Court has made it abundantly clear that once a defendant knowingly and voluntarily waives his right to representation, he cannot later complain that his own self representation was deficient".[25]

18. In his concurrence in *Farhad*, Judge Reinhardt thought that the circumstances showed a need to reconsider *Faretta*, which had upheld a right to self-representation at trial; he considered that the holding in that case should be reversed and a right to representation by counsel at trial substituted for a right to self-representation at trial. Thus, the concurrence was not concerned with self-representation at appeal. However, it becomes more difficult to argue for a right to self-representation at appeal if the right has been removed at trial. Should the Appeals Chamber, which is now considering the general subject of representation at appeal, depart from its previous holding on the grounds given by Judge Reinhardt?

19. Judge Reinhardt accepted the view that, though the mistakes were made by Farhad himself, they led to a violation of his fundamental right to a fair trial. A right to self-representation at trial, which could produce mistakes leading to such a violation, should therefore be nullified. It is trite that a court cannot validly hold a hearing which is unfair, and that an appellant has no competence to waive his right to a fair hearing. However, in *Farhad* there was no necessary clash with those

[23] 190 F.3d 1097 (9th Cir. 1999).
[24] 422 U.S. 806, 834 (1975).
[25] See *United States v. Low*, 2006 U.S. Dist. LEXIS 90944, *22 (D. Haw. 15 December 2006). The United States jurisprudence shows some concern with the question whether the courts should inquire into the issue whether the

principles. Taking the disclosure of the previous crimes as an example of his mistakes, the law gave him a right not to have his previous crimes disclosed. But, if he himself wanted to disclose them, he was not violating any legal prohibition: all that happened was that he chose not to use an entitlement that the law gave him. The disclosed material came before the court which would assess it in accordance with the rules of evidence relating to admissibility and weight.

20. Thus understood, an accused has a right to disclose his previous crimes. It becomes difficult to accept that the exercise by him of that right is at the same time a violation of his right to a fair trial. If there is such a violation, any similar disclosure, even if made while the accused is represented by counsel, would be reversible error. All that the accused has to do to secure a quashing of his possible conviction is to make such a disclosure. True, the mistakes made by Farhad might not have been made had he a lawyer. But the desirability of avoiding those mistakes is a matter of policy for the lawgiver; it is not a reason why, absent appropriate legislation, a court of law should take the position that the trial was not fair.

21. Finally, it is to be noted that what Judge Reinhardt was suggesting was that there was need to reverse *Faretta* in so far as it granted a right of self-representation at trial. Before today, there has not been any judicial suggestion that the ICTY should reverse the previous holding by the Appeals Chamber[26] that there is such a right in the case of this Tribunal. I am of the respectful view that, like that of Judge Reinhardt, such a suggestion, made today, will not bear fruit.

22. In my opinion, the reasoning in *Martinez, Belziuk* and *Farhad* is not against the appellant's claim to a right to self-representation at appeal in this case.

The special features in the case of appeals to the Appeals Chamber

23. Some countries tend to regard a criminal appeal as a technical matter to be determined by a court of appeal with the assistance of trained lawyers only. But even such countries seem to have a let-out permitting self-representation if the case, as in *Belziuk,* possesses special features justifying an exception. Are there any special features in this case? I believe the answer is in the affirmative. Some of the matters mentioned below may well occur in the case of other appellate judicial bodies, but, in the case of the Tribunal, they operate with special emphasis. I turn to them as follows:

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accused had some minimum level of ability. *See Brooks v. McCaughtry*, 380 F.3d 1009 (7th Cir. 2004), and *Gomez v. Berge*, 2004 U.S. Dist. LEXIS 16360 (W.D. Wis., August 18, 2004).

[26] *Milosević*, IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Counsel, 1 November 2004, para. 11.

(i) The appellant has a right to be present at his appeal

24. Under the law of the Tribunal an appellant has a right, outside but not inconsistent with *Belziuk*, to be present at his appeal from a conviction. It does not follow that he has a right to self-representation at appeal; but the existence of the right to be present at least predisposes towards a holding that the right to self-representation at appeal exists.[27]

25. In support of the proposition that there is no right to be present at an appeal, it may be said that article 21(4) of the Statute[28] does not guarantee an appellant such a right. Assuming that this is so, it has to be recalled that the provision is only concerned to provide for certain "minimum guarantees"; nothing prevents the Appeals Chamber from, by practice, providing for a right to be present during the hearing of an appeal.[29] Has the Appeals Chamber done so?

26. The United Nations Detention Unit (UNDU), from where an appellant normally comes, is just a mile away from the Appeals Chamber, which is housed in the very building in which his trial took place. There are no travelling problems; all appellants at UNDU have an opportunity to come to the Appeals Chamber. Cases at the ICTY can involve an appellant who is not at UNDU, but, even in such cases, there is no dispute that the appellant has a right to be present at his appeal. The ICTR Appeals Chamber has likewise recognised the right of an appellant to be present during the hearing of his appeal – even when parts of the hearing are held in The Hague, thousands of miles away from the seat of that Appeals Chamber in Arusha.[30] It thus appears that the Appeals Chambers of both tribunals have a practice of allowing an appellant to be present at his appeal.

27. I have referred above to an assumption that article 21(4) of the Statute of the Tribunal does not guarantee an appellant a right to be present during the hearing of his appeal from conviction. The assumption is not founded. The provision gives to an "accused" a right "to defend himself in person". There is little of substance to say that the right "to defend himself in person" does not apply at the appeal stage. The opposite view is based on the fact that article 21(4) opens with the

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[27] Possibly because of its special features, there is generally no right to be present during the hearing of an interlocutory appeal. Special features may explain why in various jurisdictions the right of an accused to defend himself in person is qualified in cases involving crimes of a sexual nature. Such features may also explain why there is no right to personal appearance in an application for special leave to appeal. *See Milat v. R.*, 205 ALR 338 (2004) (High Court of Australia).

[28] Article 21 (4) of the Statute provides: "In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality ... (d) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; or 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".

[29] *Martinez v. Court of Appeal of California* 528 U.S. 152, 158 (2000), recognises that, under controlling statutes, the position as regards the right to self-representation at appeal may be affected by rules of court. There is no reason why practice is not admissible.

[30] In *Musema*, ICTR-96-13-A, Judgement, 16 November 2001, para. 5 of annex "A" to proceedings on appeal, additional evidence was taken in The Hague; the appellant was brought from Arusha to The Hague. The same thing happened in *Rutaganda*; see ICTR-96-3-A, 26 May 2003, AT. 1. In *Kamuhanda*, ICTR-99-54A-A, 19 September 2005, the judgement was delivered in The Hague; the appellant was brought there from Arusha.

words, "In the determination of any charge against the accused ...". It may be argued that this language (particularly but not exclusively the reference to "the accused") contemplates a limitation to the trial phase, since in relation to an appeal article 25 speaks of "persons convicted by the Trial Chambers". But a reasonable reading is that an appeal, where it is resorted to, is part of the overall proceedings for imposing punishment for the crime.[31] Such a construction is justified on the view that the whole regime was concerned to demonstrate to an accused that he would not be punished without his having a right to be present in court at all times. Where the liberty of an accused is concerned, it is cheese-paring to cut down that approach.[32]

28. Though, as I have recognised, a right to self-representation does not follow from a right to be present, the non-existence of a right to be present seems to be the unspoken premise of the argument in favour of a denial of the right to self-representation. Indeed, in *Martinez* the United States Supreme Court noted that its holding that the absence of a right to self-representation on appeal would not have any significant impact on the law "because a lay appellant's rights to participate in appellate proceedings have long been limited by the well-established conclusions that he has no right to be present during appellate proceedings."[33] As has been seen, the premise that an appellant has no right to be physically present at appeal does not hold good at the Tribunal. The fact that the appellant has a right to be present during the hearing of his appeal favours a right to self-representation. It at any rate provokes this question: why does an appellant have a right to be present during the hearing of his appeal if he must sit there condemned to silence while he watches an assigned lawyer speak on his behalf – a lawyer whom he may not want and with whose statements he may disagree? There is difficulty in locating a convincing answer which would justify the Appeals Chamber in taking the radical step of what, despite the sanitised reference to "restricting" the right to self-representation, has the effect of altogether removing the right.

(ii) Additional evidence

29. The Appeals Chamber may admit additional evidence at the instance of the appellant. This may involve witnesses testifying and documents being tendered. In one case, the evidentiary portion of the appeal lasted four days.[34] Extensive documentation was admitted from a national archive which had been closed during the trial stage.[35] The Appeals Chamber rightly remarked that this "long appeal has, in part, been characterized by the filing of an enormous amount of additional

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[31] See the reasoning in *Delcourt v. Belgium*, ECtHR, App. No. 2689/65, 17 January 1970, paras. 23-26. Paragraph 25 stated: "In criminal matters, especially, accused persons do not disappear from the scene when the decision of the judges at first instance or appeal gives rise to an appeal in cassation."
[32] *See Delcourt, supra*, para. 25, last sentence.
[33] 528 U.S. 152, 163 (2000).
[34] *Blaškić*, IT-95-14-A, Judgement, 29 July 2004, para. 6.

evidence".[36] An informed and fair-minded observer might take the view that, especially from the standpoint of the appellant, the trial, in part, was in substance reopened on appeal. If, as is not disputed, the appellant had a right to self-representation at trial,[37] and if, as it appears to me, he also had a right to be physically present during the hearing of his appeal, there would be difficulty in understanding why he should not have the right to self-representation during the hearing of the appeal. As has been seen, in *Belziuk v. Poland*,[38] the European Court of Human Rights gave the circumstance that the appellant had the right to adduce additional evidence on appeal as one of the factors supportive of what amounted to a right to self-representation during the hearing of his appeal.

(iii) The prosecution may appeal

30. There is the possibility of appeals by the prosecution. In this matter, for example, the prosecution has appealed. If the prosecution's appeal succeeds, the appellant may be punished.[39] On the opposing view, that could happen with the appellant himself being forbidden to present new material or to argue. These things would have to be done by a lawyer whom the appellant possibly does not want. The appellant himself would have had nothing to do with the processes by which he is punished. He is not likely to regard the result as fair; neither would the international community. The reason is that fairness inextricably and inevitably includes fairness as seen by the appellant, though it may be qualified by other factors. I am not satisfied that the possibility of the appellant being punished as a result of an appeal by the prosecution was fully taken into account in arguments favouring the opposite view.

(iv) The international status of the Tribunal

31. There is the international status of the Tribunal to be considered. The Tribunal, as a judicial body established on behalf of practically the whole of the international community, has to satisfy the highest possible standards. True, the opposite argument is that these standards will include the fairness of the appeal hearing and that this can be jeopardised by the exercise of a right to self-

[35] *Ibid.*, paras. 4 and 6. The former stated that the appellant "sought to admit over 8,000 pages of material as additional evidence on appeal"; the latter stated that a "total of 108 items were admitted, and as a consequence, several witnesses were heard in the evidentiary portion of the hearing on appeal ...".
[36] *Ibid.*, para. 4.
[37] *See Milosević*, Decision on Interlocutory Appeal of the Trial Chamber's Decision on Assignment of Counsel, IT-02-54-AR73.7, 1 November 2004, para. 11; and *Faretta*, 422 U.S. 806 (1975).
[38] *Belziuk v. Poland*, ECtHR, App. No. 45/1997/829/1035, 25 March 1998, para. 38.
[39] In some states, the sentence may even be increased on appeal without further appeal. In *Kremzow v. Austria*, ECtHR, App. No. 12350/86, 21 September 1993, para. 67, the European Court of Human Rights referred to that possibility, stating: "The Court observes that the Supreme Court [of Austria] was called upon in the appeal proceedings to examine whether the applicant's sentence should be increased from twenty years to life imprisonment". In paragraph 4(b) of her statement of ratification of the International Covenant on Civil and Political Rights, Austria stated that she did not consider that article 14(5) of the covenant was "in conflict with legal regulations which stipulate that after an acquittal or lighter sentence passed by a court of the first instance, a higher tribunal may pronounce conviction or a higher

representation. But there could be a preliminary question as to what in the first instance is unfair. In determining what is unfair, any apparent shortcoming in the exercise of the right to self-representation to achieve fairness has to be balanced by the status of the Tribunal as an international judicial body. In my view, that international judicial body is designed to satisfy the sense of fairness felt by the individual appellant by, among other things, permitting him a right to self-representation. Moreover, in making that balance, also to be considered are the powers of the Appeals Chamber to take remedial or corrective measures during the hearing in respect of any abuse of the right to self-representation. When the balance is struck on this basis, the result is a trial which is fair.

(v) The effect of special features

32. If differences between trial procedures and appeal procedures suggest that representation at an appeal has to be by counsel (even if not wanted by the appellant), the special features of ICTY appeals, when considered in the light of the international status of the Tribunal, return those appeals to self-representation. That is to say, the international status of the Tribunal, when applied to the special features, produces a rule that in all appeals to the Appeals Chamber from a conviction or acquittal[40] there is a right to self-representation in accordance with the practice of those national courts which allow such a right. It is not in dispute that there are such courts; specific examples need not be given.[41]

Self-representation may be unwise but is a right

33. It may be unwise of an appellant to insist on self-representation; the right has probably never been used in this Appeals Chamber. The task before the appellant in the instant case is daunting. Further, the implementation of a right to self-representation might prove burdensome to the Appeals Chamber. But the Appeals Chamber should shoulder its responsibilities.[42] If the right is abused, the Appeals Chamber has available remedies: in the last analysis, it can impose counsel. But, subject to remedial and corrective measures, the right exists and is important. Paragraph 9 of today's decision aptly describes it as a "cornerstone" right. *Faretta* concerned self-representation at trial, not at appeal, but it is still appropriate to recall the principle enunciated by the Supreme Court of the

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sentence for the same offence, while they exclude the convicted person's right to have such conviction or heavier sentence reviewed by a still higher tribunal".

[40] That is to say, not interlocutory appeals.

[41] However, reference may be made to *Blackstone's Criminal Practice 2007* (Oxford, 2006), p. 1949, para. D25.9. And see *R. v. Commissioner of Police of the Metropolis, Ex parte Blackburn,* [1968] 2 Q.B. 118, CA, and *R. v. Commissioner of Police of the Metropolis, Ex parte Blackburn (No. 2),* [1968] 2 Q.B. 150, CA, in which the defendant personally argued in a criminal appeal before the Court of Appeal of England and Wales. See likewise the position in Scotland, as recalled in *Granger v. United Kingdom,* ECtHR, App. No. 11932/86, 28 March 1990, paras. 18-21.

[42] The Tribunal (including of course its Appeals Chamber) is under an obligation, without acting as defence counsel, to give to a self-representing appellant such information and advice as is necessary to ensure that the hearing is fair. See *R. v. Zorad* (1990) 19 NSWLR 91, 99. The observations of the Court of Criminal Appeal of New South Wales related to the duties of a trial judge, but those duties appear to be transposable to the Appeals Chamber of the ICTY.

United States in that case that to "force a lawyer on a defendant can only lead him to believe that the law contrives against him. ... The right to defend is personal. The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage"[43] The pertinence of these observations does not evaporate with the conclusion of a trial at first instance; their rationale extends to the entire judicial process ending in a final declaration of guilt or innocence.

Self-representation and assignment of counsel are not consistent

34. I agree to the appointment of *amicus curiae*. He can raise issues within the field of competence delineated for him by the Appeals Chamber. The Appeals Chamber can in turn select from among those issues, using its power to administer justice, provided of course that all parties have had an opportunity to respond to the point. The point is really being raised by the Appeals Chamber itself acting in the interests of justice. This differentiates the case from the workings of the general rule that an appellant is not entitled to argue a ground not specified in his notice of appeal. Also, it is not relevant to consider restrictions applicable to the raising by a party of a point which, however important, does not affect the outcome of the case. The power of the Appeals Chamber to decide an issue raised by *amicus curiae* does not convert *amicus* into a *de facto* defence counsel. He does not represent the accused; he is a friend of the court.

35. By contrast, an assigned counsel is defence counsel;[44] he represents the accused. It is true that, normally, authority for representation flows from the person represented. But there are circumstances in which an accused cannot or will not give authority. The court judges that. If it holds that the accused cannot or will not give authority in a proper case, it may in his place give the authority. In this way, an assigned counsel represents the accused; he is defence counsel.

36. However, the court cannot grant authority to counsel to represent the appellant where the court itself recognises that the appellant has a right to self-representation. In asserting his right to self-representation, the appellant is saying (as in this case) that he does not wish to be represented by counsel – that he will act as his own counsel. It is not therefore correct to take the position that the Appeals Chamber is granting the appellant's request for self-representation while it is at the same time placing him alongside an assigned counsel and by implication requiring him to act in cooperation with the latter. That would not be accepting a right to self-representation, but denying it.

[43] *Faretta v. California*, 422 U.S. 806, 834 (1975).

Conclusion

37. The appellant has a right to self-representation at his appeal. For the reasons given in the second section above, it was competent for the Appeals Chamber to select that method of achieving fairness even if representation by counsel was in some states considered to be the superior method. In any event, having regard to the special features of an appeal to the Appeals Chamber, the reasoning underlying representation by counsel in appeals to other courts of appeal would itself admit self-representation in appeals to the Appeals Chamber.

Done in English and French, the English text being authoritative.

Dated 11 May 2007,
The Hague,
The Netherlands

Mohamed Shahabuddeen

[Seal of the International Tribunal]

[44] It is submitted that so are other forms of legal aid counsel to the accused – "duty" counsel, "court-appointed" counsel, "independent" counsel, i.e., as long as they are acting for the accused.

FUNDAMENTALLY DISSENTING OPINION OF JUDGE SCHOMBURG ON THE RIGHT TO SELF-REPRESENTATION[1]

A. Introduction

1. If I were tasked to show that international criminal jurisdiction cannot work I would draft the decision in the same way as was done by the majority of the Appeals Chamber. Therefore, with all due respect, I have to fundamentally disagree with the decision.

2. I am deeply convinced that international criminal tribunals dealing with mega crimes can only carry out their important task of balancing the interests of victims with the interests of an accused by requiring the latter to be assisted by counsel for his own benefit. Indeed, the overarching right to a fair, expeditious and public trial (Articles 20(1) and 21(2) of the Statute of the International Tribunal ("Statute")) demand that counsel acting in open court be assigned even against an accused's wishes if the interests of fair proceedings so demand. In interpreting Article 21(4)(d) of the Statute,[2] which guarantees an accused the right "to defend himself in person or through legal assistance of his own choosing," rights emanating from the aforementioned fundamental right enshrined in Article 20(1) of the Statute, the Appeals Chamber's jurisprudence is based on a false dichotomy which assumes that the right to defend oneself negates the right to be assisted by counsel. This fundamental misunderstanding that both rights are mutually exclusive adversely affects the fairness of the proceedings. There is no fair procedure before international tribunals without public legal assistance.

3. For historical reasons human rights instruments ratified by countries from different legal systems have stipulated that at least one of the two rights set out in Article 21(4)(d) of the Statute has to be granted. This, however, does not mean that the competent authority cannot grant both rights cumulatively. On the contrary, in serious cases like those before international criminal tribunals it is impossible for an accused to defend himself. It is the accused, not the court by appointing *amicus curiae*,[3] who needs the legal assistance of a professional counsel, well-trained in criminal matters. At the same time, an accused's right to present his defence can never be denied. The international community has come to accept that an accused must never become the mere

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[1] I would like to thank Matthias Schuster, Associate Legal Officer, and Christine Schön, Interna, for their extraordinary support and careful research in preparation of this opinion.

[2] It has to be noted that this Article almost verbatim repeats Article 14(3)(d) of the ICCPR. Both must be read in their entirety: Article 14(3)(d) of the ICCPR reads: In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: [...] (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it; [...].

[3] Latin "friend of the court", see BLACK'S LAW DICTIONARY 93 (8th ed. 2004).

object of criminal proceedings. In this context, it has to be noted that in the practice of the International Tribunal an accused is to a large degree excluded from his own defence the very moment that counsel is engaged,[4] and usually sits in the last row of the courtroom, well apart from his counsel. He is only allowed to give a "statement"[5] or to testify as a witness in his own case,[6] thereby altering his own role as an accused. This unsatisfactory situation- once counsel is engaged, any accused has only limited influence over his defence – is the main obstacle to an accused being willing to be represented by counsel.

4. The decision in this case is a glaring example in a long line of unfortunate decisions by the Appeals Chamber, such as the decision in *Prosecutor v. Milošević* of 1 November 2004[7] and most recently the decision in *Prosecutor v. Šešelj* of 8 December 2006.[8] These decisions completely disregard the fact that, in the interests of fair proceedings, a huge number of countries assign counsel both at trial and on appeal from the very moment that a case reaches a certain degree of gravity or a specifically serious sentence is to be expected, *i.e.* in scenarios in which it cannot be reasonably expected that an individual will be able to represent himself adequately. The same applies to all other international tribunals. Domestic law rarely regards obstructive behaviour as a reason to impose counsel, although this is certainly possible. Rather, such conduct is usually addressed by sanctioning an accused without touching upon issues of representation.

5. Due to time constraints and considering the particular question before this bench of the Appeals Chamber, I have to restrict my analysis to whether there is a right to self-representation in proceedings at the appellate level.[9] This does not mean, however, that I hold the Appeals

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[4] *See* Code of Professional Conduct for Counsel Appearing Before the International Tribunal, as amended on 29 June 2006, IT/125/Rev.2, Article 8(B) reads as follows: When representing a client, counsel shall: (i) abide by the client's decisions concerning the objectives of representation; (ii) consult with the client about the means by which those objectives are to pursued, but *is not bound by the client's decision* [...]. Italics added for emphasis.

[5] Rule 84*bis* of the Rules.

[6] Rule 85(C) of the Rules.

[7] *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defense Counsel, 1 November 2004 ("*Milošević* Decision").

[8] *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-AR73.4, Decision on Appeal Against the Trial Chamber's Decision (No.2) on Assignment of Counsel, 8 December 2006, which apparently was drafted under the impression of an accused blatantly exerting pressure on the judiciary.

[9] For an analysis of the issue *see, inter alia,* (in chronological order) Nina H. B. Jørgensen, *The Right of the Accused to Self-Representation Before International Criminal Tribunals*, 98 AM. J. INT'L L. 711-726 (2004); Göran Sluiter, *'Fairness and the Interests of Justice,' Illusive Concepts in the Milošević Case,* 3 J. INT'L CRIM. JUST. 9-19 (2005); Nina H. B. Jørgensen, *The Right of Self-Representation Before International Criminal Tribunals: Further Developments*, 99 AM. J. INT'L L., 663-668 (2005); Gideon Boas, *The Right to Self-Representation in International and Domestic Criminal Law – Limitations and Qualifications on that Right, in* THE DYNAMICS OF INTERNATIONAL CRIMINAL JUSTICE 39-93, (Hirad Abthai & Gideon Boas eds., 2005); STEFAN TRECHSEL, HUMAN RIGHTS IN INTERNATIONAL CRIMINAL PROCEEDINGS 251-266 (2005); Michael P. Scharf, *Self-Representation versus Assignment of Defence Counsel before International Criminal Tribunals*, 4 J. INT'L CRIM. JUST. 31-46 (2006); Nina H. B. Jørgensen, *The Problem of Self-Representation at International Criminal Tribunals, Striking a Balance between Fairness and Effectiveness*, 4 J. INT'L CRIM. JUST. 64-77 (2006); Göran Sluiter, *Compromising the Authority of International Criminal Justice, How Vojislav Šešelj Runs His Trial*, 5 J. INT'L CRIM. JUST. 1-8 (2007).

Chamber's past jurisprudence on self-representation during trial to be correct, having never been assigned to a bench of the Appeals Chamber ruling on this issue. My necessary self-restraint is based on the fact that this is the first Appeals Chamber decision dealing with self-representation on appeal. Thus, *stare decisis* does not apply.

6. Moreover, the attempt to ameliorate the effects of the Appellant's self-representation by assigning *amicus curiae*, which as a permanent institution is not at all covered by the International Tribunal's Rules of Procedure and Evidence ("Rules"), will only obfuscate the proceedings while doing little to safeguard the Appellant's right to a fair and expeditious trial, as past experiences have shown. Also here, *stare decisis* is not applicable as the Appeals Chamber has never ruled on this issue before.

B. The Applicable Law on Self-Representation with Special Reference to the Appellate Level

7. Article 21(4) of the Statute reads as follows:

> In the determination of any charge against the accused, pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:
>
> (d) to be tried in his 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.

1. The Right to Self-Representation on Appeal – Comparative Analysis

8. As mentioned above, the Appeals Chamber has not been previously seized of a convicted person's request to represent himself on appeal. I note that earlier decisions of the International Tribunal were limited to addressing the question of an accused's wish for self-representation either during trial (in *Milošević, Krajišnik and Šešelj*) or during pre-trial (in *Šešelj*). In those decisions, the International Tribunal has created certain guidelines and principles. I have to stress that I do not agree with these principles, which disregard the established practice under transnational/supranational and domestic law in most States.

9. In the case before us, the Appellant argues that his right to self-representation at the appellate level is the same as that at trial. However, even if assumed, *arguendo*, that there is a right to self-representation during trial, the role of an accused changes dramatically on appeal. This is primarily due to the fact that there is a fundamental difference between the role of an accused at trial, where he bears no burden of persuasion, and at the appellate level where an accused is confronted with the task of convincing the Appeals Chamber to quash the judgement of the first instance in whole or in part:

> "[T]here are significant differences between the trial and appellate stages of a criminal proceeding." [...] "By contrast, it is ordinarily the defendant, rather than the State, who initiates the appellate process, seeking not to fend off the efforts of the State's prosecutor but rather to overturn a finding of guilt made by a judge or a jury below."[10]

10. In claiming that he has the right to self-representation on appeal, the Appellant relies upon the authority of various other jurisdictions. I have already felt compelled to emphasize in the context of another decision that the International Tribunal is not bound by any national and/or regional jurisprudence, but that at the same time it is the Tribunal's obligation "not to turn a blind eye to these and to show open-mindedness, respect and tolerance [...] by accepting internationally recognized legal interpretations[,] [...] theories"[11] and principles. However, in the case at hand, the decision of the Appeals Chamber even lacks a serious discussion of the matter. It is therefore again necessary – with the limited resources available to a Judge of this Tribunal – to conduct a comparative analysis of (a) transnational/supranational law and jurisprudence, (b) national law and jurisprudence and (c) the law and jurisprudence of other international criminal tribunals and courts.

11. I am aware that many jurisdictions do not draw a clear distinction between trial proceedings on the one hand and appellate proceedings on the other when determining the scope of the right to self-representation. However, turning now to the comparative analysis of the applicable transnational/supranational and national law and jurisprudence, and also the approach taken by other international criminal tribunals and courts, the aim is to come to a solution which draws on the shared values of these different legal systems.

(a) Transnational/Supranational Law and Jurisprudence.

12. From the outset it must be considered that Article 21(4) of the Statute is a reflection of the relevant provisions contained in various global and regional human rights conventions and therefore cannot be viewed in isolation. In fact, the question of a right to self-representation (during trial or on appeal) is not new and has often arisen in the context of the application of these global or regional instruments. The International Tribunal is not a party to any of these conventions. However, the International Covenant on Civil and Political Rights of 19 December 1966 (ICCPR/Covenant)[12] was adopted by resolution of the General Assembly of the United Nations. It can easily be assumed that the Security Council felt obliged to respect the rights as guaranteed under the Covenant when establishing the ICTY as a measure under Chapter VII of the U.N.

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[10] *Martinez v. Court of Appeal of California*, 528 U.S. 152, 162-163 (2000), referring to *Ross v. Moffitt*, 417 U.S. 600, 610 (1974).
[11] *Prosecutor v. Blagoje Simić*, Case No. IT-95-9-A, Judgement, Dissenting Opinion of Judge Schomburg, 28 November 2006, para. 17.
[12] 999 U.N.T.S. 171.

Charter.[13] Moreover, as an accused would enjoy the guarantees of some of these agreements, such as the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 (ECHR),[14] had he been charged with crimes on the territory of the former Yugoslavia, it is an obligation of the Tribunal to fully respect the rights as granted under this convention as well. To quote the report of the Secretary-General:

> It is axiomatic that the International Tribunal must fully respect internationally recognized standards regarding the rights of the accused at all stages of its proceedings. In the view of the Secretary-General, such internationally recognized standards are, *in particular*, contained in article 14 of the International Covenant on Civil and Political Rights.[15]

13. Both the ICCPR and the ECHR contain provisions almost identical to Article 21(4)(d) of the Statute:

> **Article 14(3)(d) of the ICCPR**
>
> In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: [...]
>
> (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing [...].
>
> **Article 6(3)(c) of the ECHR**
>
> Everyone charged with a criminal offence shall have the following minimum rights: [...]
>
> (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require [...].

14. The jurisprudence of the European Court of Human Rights (ECtHR) is particularly instructive because of its abundance of case-law related to alleged violations of Article 6(3)(c) of the ECHR. Furthermore, a number of judgements have specifically addressed the right of an accused to self-representation on appeal. It is clear from ECtHR's jurisprudence that this right must be considered in particular with a view to the overarching right of an accused to fair proceedings: In *Granger v. United Kingdom* the ECtHR emphasized that the rights as guaranteed in Article 6(3) are nothing but specific aspects of the right to a fair trial in criminal proceedings as regulated in Article 6(1) of the Convention,[16] which provides that "*everyone is entitled to a fair and public hearing.*"[17]

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[13] *See Georges Anderson Nderubumwe Rutaganda v. The Prosecutor*, Case No. ICTR-96-3-A, Judgement, Dissenting Opinion of Judge Pocar, 26 May 2003.
[14] 213 U.N.T.S. 221, CETS 005.
[15] The Secretary General, *Report of the Secretary-General pursuant to Paragraph 2 of the Security Council Resolution 808 (1993)*, U.N. Doc S/25704 (3 May 1993), para. 106 (italics added for emphasis).
[16] *Granger v. The United Kingdom*, ECtHR, App. No. 11932/86, 28 March 1990, para. 43 (with further references).
[17] Italics added for emphasis. Article 6(1) of the ECHR reads as follows: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a

The ECtHR therefore drew the conclusion that it was "appropriate to examine the applicant's complaints from the angle of paragraphs 3(c) and (1) [of Article 6] taken together."[18]

15. The ECtHR also held that as a basic principle those rights as guaranteed in Article 6 of the Convention apply to any part of the proceedings, *i.e.* including appellate proceedings.[19] However, in the case of *Monnell and Morris v. The United Kingdom,* the ECtHR ruled that when applying Article 6 in relation to appellate proceedings the special features of the proceedings had to be taken into consideration. The ECtHR emphasized that "account must be taken of the entirety of the proceedings conducted in the domestic legal order and of the role of the appellate or cassation court therein."[20] In order to determine whether the procedure met the requirements of the right to a fair trial, the ECtHR considered matters such as the scope of powers of the court of appeal and the manner in which the applicant's interests were actually presented and protected before the court of appeal.[21] Similarly, in *Tripodi v. Italy* the ECtHR emphasized that the manner in which Articles 6(1) and (3)(c) of the Convention were applied depended on the "special features of the proceedings in question."[22] The ECtHR took into consideration that the Italian court of cassation decided on points of law, that its proceedings were essentially written and that at the hearing the appellant's lawyer was only allowed to present arguments in relation to submissions already made in the appeal brief and the memorials.[23]

16. In the case of *Croissant v. Germany* the Court was seized of a case where the defendant was initially represented by two lawyers of his own choice. The president of the regional court then designated a third defence counsel who, unlike the first two lawyers, practiced in the jurisdiction of this court. The applicant objected to the appointment of defence counsel itself and not only to the choice of the person. In this context the ECtHR significantly held:

> The requirement that a defendant be assisted by counsel at all stages of the Regional Court's proceedings [...] - which finds parallels in the legislation of other Contracting States – cannot, in the Court's opinion, be deemed incompatible with the Convention.[24]

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democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

[18] *Granger v. The United Kingdom*, ECtHR, App. No. 11932/86, 28 March 1990, para. 43.

[19] *Meftah v. France*, ECtHR, App. No. 32911/96, 26 April 2001, para. 42: "La Cour rappelle en effet que selon la jurisprudence, un Etat qui se dote d'une Cour de cassation a l'obligation de veiller à ce que les justiciables jouissent auprès d'elle des garanties fondamentales de l'article 6." *See also Kremzow v. Austria*, ECtHR, App. No. 12350/86, 21 September 1993, para. 58: "The Court recalls that Article 6 extends to nullity and appeal proceedings [...]."

[20] *Monell and Morris v. United Kingdom* , ECtHR, App. No. 9562/81; 9819/82, 2 March 1987, para. 56.

[21] *Id.*

[22] *Tripodi v. Italy* , ECtHR, App. No. 13743/88, 22 February 1994, para. 27.

[23] *Id.* at para. 28.

[24] *Croissant v. Germany*, ECtHR, App. No. 13611/88 , 25 September 1992, para. 27.

The ECtHR further emphasized that despite the importance of a relationship of trust between lawyer and client, the right to self-representation could not be considered absolute. "It is necessarily subject to certain limitations [...] where [...] it is for the courts to decide whether the interests of justice require that the accused be defended by counsel appointed by them."[25]

17. In *Lagerblom v. Sweden*, the ECtHR confirmed again that "[a] legal requirement that an accused be assisted by counsel in criminal proceedings cannot be deemed incompatible with the Convention."[26] The ECtHR moreover held:

> When appointing defence counsel the courts must certainly have regard to the accused's wishes but these can be overridden when there are relevant and sufficient grounds for holding that this is necessary in the interests of justice.[27]

18. Quite recently, in *Mayzit v. Russia*, the ECtHR came to the following conclusion:

> In examining questions under Article 6(3)(c) the Court takes account of the treatment of the defence as a whole rather than the position of the accused taken in isolation, with particular regard to the principle of equality of arms as included in the concept of a fair hearing.[28]
>
> Article 6(3)(c) guarantees that proceedings against the accused will not take place without an adequate representation for the defence, but does not give the accused the right to decide himself in what manner his defence should be assured. The decision as to which of the two alternatives mentioned in the provision should be chosen, namely the applicant's right to defend himself in person or to be represented by a lawyer of his own choosing, or in certain circumstances one appointed by the court, depends upon the applicable legislation or rules of court.[29]

19. Even before the recent ruling of the ECtHR in *Mayzit v. Russia*, there has been unambiguous jurisprudence, some of it directly related to the question of the right to self-representation during criminal appeal proceedings, of the European Commission of Human Rights (EComHR).[30] In one of the first decisions on the matter, the EComHR ruled in relation to civil proceedings that

> it should be noted that the right to a fair hearing guaranteed by Article 6(1) of the Convention does not imply an obligation on the Contracting Party to allow litigants free access to the *Court of last resort* [...]. Article 6(1) does not debar Contracting Parties from making regulations governing the access of litigants to the said Court, provided that such regulations do not deviate from their exclusive purpose of assuring justice according to law.[31]

20. As regards criminal proceedings, the EComHR considered that Article 6(3)(c)

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[25] *Id.* at para. 29.
[26] *Lagerblom v. Sweden,* ECtHR, App. No. 26891/95, 14 January 2003, para. 50.
[27] *Id.* at para. 54.
[28] *Mayzit v. Russia,* ECtHR, App. No. 63378/00, 20 January 2005, para. 64.
[29] *Id.* at para. 65.
[30] Until its abolishment in 1998 (by Protocol No. 11 to the ECHR – CETS No. 155 – which entered into force on 1 November 1998), the Commission played the role of an intermediary body by filtering the numerous complaints the Court received and declaring them either admissible or inadmissible with a view to the ECtHR's jurisprudence.
[31] *X. v. Germany*, EComHR, App. No. 727/60, 5 August 1960 (italics added for emphasis). In relation to civil proceedings, the ECtHR explicitly accepted in the *Gillow v. United Kingdom,* ECtHR, App. No. 9063/80, 24 November 1986, para. 69, the requirement of representation by lawyer to lodge an appeal as a "common feature of the legal systems in several Member States of the Council of Europe."

> does not confer upon the person charged with a criminal offence the right to decide in what way provision should be made for his defence. [...] The competent authorities are entitled to decide whether the person charged shall defend himself in person or shall be represented by a lawyer of his own choice or appointed ex officio as the case may be.[32]

21. In a later decision the EComHR held the following:

> It is true that in the wording of Art. 6(3)(c) of the convention everyone charged with a criminal offence shall have the right to defend himself in person or through legal assistance of his own choosing [...].
>
> In its case law the Commission has considered complaints by applicants that they were not allowed to defend themselves in person. These applications concerned appeal proceedings. However, the Commission expressed certain general principles. It took account of the treatment of the defence as a whole rather than the position of the accused taken in isolation, and it had particular regard to the principle of equality of arms as included in the concept of a fair hearing.
>
> Consequently, the Commission held that Art. 6(3)(c) guarantees that proceedings against the accused will not take place without an adequate representation for the defence, but does not give the accused the right to decide himself in what manners his defence should be assured. The decision as to which of the two alternatives mentioned in the provision should be chosen, namely the applicant's right to defend himself in person or to be represented by a lawyer of his own choosing, or in certain circumstances one appointed by the court, depends upon the applicable legislation or rules of the court.[33]

The ECtHR adopted this language not only in *Mayzit v. Russia*.[34]

22. With regard to the legal complexities of an appeals case, the EComHR decided that

> [...] it is apparent to the Commission from the Court of Appeal's judgment that it was in the interest of the applicant in this particular case that he should be represented by a barrister on the appeal. This follows from the fact that no merit was found in the applicant's own grounds of appeal and that leave to appeal was granted by the Court of Appeal on a legal issue specified by the court itself, on which clearly the applicant needed the services of a lawyer.[35]

23. Therefore, the jurisprudence of the ECtHR clarifies that a restriction of the right to self-representation on appeal does not violate the rights granted under Article 6(3)(c) of the Convention. Indeed, none of the cases in which the ECtHR found Article 6(3)(c) of the Convention to be violated can be compared to the case at hand. For example, in the case of *Belzuik v. Poland* the ECtHR ruled that an appellant's right to be present at his appeal and to defend himself in person

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[32] *Scheichelbauer v. Austria*, EComHR, App. No. 2645/65, 1969, para. 28.
[33] *X. v. Norway*, EComHR, App. No. 5923/72, 30 May 1975.
[34] *See also Philis v. Greece*, EComHR, App. No. 16598/90, 11 December 1990 and *Philis v. Greece*, EComHR, App. No. 19773/92, 31 August 1994, recalling the "constant case-law under Article 6 para 3. (c)." In this context, *see* Jørgensen, *The Right of the Accused to Self-Representation Before International Criminal Tribunals*, *supra* note 9, 715-716: "The case of *Philis v. Greece* similarly suggests that a provision in the Greek Code of Criminal Procedure stating that at a hearing before the Court of Cassation the parties must be presented by a lawyer must not be incompatible with Article 6(3)(c) of the European Convention. Invoking Article 6(3)(c), the applicant had presented his case before the Greek Court of Cassation submitting that this provision gave him the right to defend himself in person, notwithstanding the provision in the Greek code requiring that he be represented by a lawyer. The applicant's appeal was declared inadmissible because he was not duly represented and the European Commission did not accept any complaint in that regard."
[35] EComHR, App. No. 5730/72, 11 December 1973 (unpublished), printed in 2 COUNCIL OF EUROPE, DIGEST OF STRASBOURG CASE-LAW RELATING TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS (ARTICLE 6) 826 (1984).

had been violated. However, in that case the appellant was denied even the right to be present at the appeal hearing. At the same time, he was not represented by a counsel, *i.e.* the accused was not represented at that hearing.[36] Consequently, the underlying facts of the case decided by the ECtHR differ fundamentally from the present case.

24. Another case where the ECtHR found a violation of Article 6(3)(c) is the case of *Kremzow v. Austria*.[37] As happened in *Belzuik v. Poland*, the accused was not allowed to be present at all during his appeal hearing at which he was represented by a lawyer. The ECtHR held "that given the gravity of what was at stake for the applicant, he ought to have been able 'to defend himself in person' as required by Article 6(3)(c) and that the State was under a positive duty, notwithstanding his failure to make a request, to ensure his presence in such circumstances."[38] As in *Belzuik v. Poland*, the ECtHR did see a violation of Article 6(3)(c) of the ECHR, not because the applicant was represented by defence counsel against his own will, but because he was not allowed to be present at one specific hearing where important matters were at stake. If anything, the case shows that the ECtHR understands the right to "defend oneself in person" as relating to the fact of being present at a hearing. Therefore, it cannot be concluded from this case that the right to self-representation would be violated by the requirement of defence counsel on appeal.

25. In sum, under the ECHR, an accused does not have an absolute right to represent himself either at trial or, as in this case, on appeal. Both the ECtHR and the EComHR held that Article 6(3)(c) of the ECHR, being almost identical to Article 21(4)(d) of the Statute, must be interpreted in a holistic way, considering the right to self-representation in the context of the overarching fair trial guarantees, thus sometimes restricting the right to self-representation in the interests of a fair trial.[39] Moreover, the jurisprudence shows that it is not only the behaviour of an appellant during the proceedings that may justify the imposition of counsel, but primarily the nature of those proceedings as well.

26. The Human Rights Committee, established under the ICCPR, was seized of a case relating to the issue of self-representation and addressed this question only at the trial level. The Committee found Article 14 to be violated in the case of *Michael and Brian Hill v. Spain* because Hill's right to defend himself had not been respected.[40] However, the *Hill* case is not comparable to the case at hand as it relates solely to proceedings at trial and not on appeal. Moreover, the holding of the Human Rights Committee merely relates to a specific case where the defendant was not allowed to

[36] *Belzuik v. Poland*, ECtHR, App. No. 45/1997/829/1035, 25 March 1998, para. 38.
[37] *Kremzow v. Austria*, ECtHR. App. No. 12350/86, 21 September 1993, para. 69.
[38] *Id.* at para. 68.
[39] *See also* TRECHSEL, *supra* note 9, 263-266.

cross-examine or call witnesses, or in fact to participate in the proceedings at all. It is already clear therefore, that little weight can be afforded to this decision when assessing the case before the Appeals Chamber. On the other hand, this case shows the importance of recognizing the accused as a subject of the proceedings, *i.e.* a human being actively participating in the proceedings.

27. Another important international legal instrument is the American Convention on Human Rights of 22 November 1969 (AMCHR),[41] Article 8(2) of which reads as follows (again similar to Article 21(4)(d) of the Statute):

> [...] During the proceedings, every person is entitled, with full equality, to the following minimum guarantees: [...]
>
> (d) the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel; (e) the inalienable right to be assisted by counsel provided by the state, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law; [...].

In an Advisory Opinion, the Inter-American Court of Human Rights (IACHR) stated that under sub-paragraphs (d) and (e) of Article 8(2) an accused had a right to defend himself personally or to be assisted by legal counsel of his own choosing. In this context, however, the IACHR held:

> Thus, a defendant may defend himself personally, but it is important to bear in mind that this would only be possible where permitted under domestic law. If a person refuses or is unable to defend himself personally, he has the right to be assisted by counsel of his own choosing. [...] To that extent the Convention guarantees the right to counsel in criminal proceedings. [...] Article 8 must, then, be read to require legal counsel only when that is necessary for a fair hearing.[42]

Therefore, the IACHR assumed that the right to self-representation could be limited by domestic legislation without violating the rights guaranteed under Article 8 of the AMCHR as long as the general requirements of a fair trial were observed.

28. The African (Banjul) Charter on Human and Peoples' Rights of 26 June 1981[43] reads:

> Article 7(1): Every individual shall have the right to have his cause heard. This comprises: [...] (c) the right to defence, including the right to be defended by counsel of his choice.

From the wording it is clear that the right to self-representation is not explicitly included in the Charter.[44] Moreover, the African Commission on Human and Peoples' Rights held that, if

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[40] *Michael and Brian Hill v. Spain*, Communication No. 526/1993, U.N. Doc. CCPR/C/59/D/526/1993, 2 April 1997, Para. 14.2.
[41] 1144 U.N.T.S. 123.
[42] Exceptions to the Exhaustion of Domestic Remedies (Arts. 46(1), 46(2)(a) and 46 (2)(b) of the American Convention on Human Rights), Advisory Opinion OC-11/90, 10 August 1990, Inter-Am. Ct. H.R. (Ser. A) No. 11 (1990), paras 25-26.
[43] 1520 U.N.T.S. 217. The African Charter of Human and Peoples' Rights was adopted on 27 June 1981.
[44] *See also* M. Cherif Bassiouni, *Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions*, 3 DUKE J. COMP. & INT'L L. 235, 283 (1993): "The

defendants at a criminal trial are not represented by counsel for all or part of the trial, this will violate the right to defence as stipulated in Article 7(1)(c).[45]

(b) National Law and Jurisprudence

29. I am conscious of the fact that one distinctive feature of Romano-Germanic law influenced proceedings is that an accused is still presumed innocent until the final judgment is rendered whereas the Anglo-Saxon law influenced systems retain the presumption of innocence only until the conclusion of the trial phase.[46] This *de jure* difference however does not change the *de facto* role of a convicted person. As already explained above, the role of an accused changes dramatically[47] once he has been convicted on trial. In both legal systems he must convince the judges in a higher instance to overturn the judgement of the lower court in whole or in part.

(i) Jurisdictions Influenced by Anglo-Saxon Legal Traditions

30. The **United States of America** has ratified the ICCPR and is bound by it. In recognition of the right to self-representation as granted under Article 14(3)(d) of the Covenant the Supreme Court of the United States held in *Faretta v. California*:

> The right to defend is personal. The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. It is the defendant therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. And although he may conduct his own defense ultimately to his own detriment, his choice must be honoured out of "that respect for the individual which is the lifeblood of the law."[48]

However, the Supreme Court also indicated certain restrictions to the right to self-representation. It referred to a trial judge's option to terminate self-representation in cases where the defendant deliberately engaged in serious and obstructionist misconduct.[49]

31. In *Farhad v. United States* a United States Court of Appeal followed the ruling in *Faretta v. California* and affirmed the right to self-representation in the trial phase.[50] However, Judge *Reinhardt* emphasized the following points in his concurring opinion:

> The Constitution guarantees every defendant the fundamental, absolute right to fair trial. By contrast, the right to counsel (or even the implied right to self-representation) is not absolute. It, like all other procedural guarantees found in the Sixth Amendment, is intended primarily to

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right to self-representation is guaranteed by the ICCPR, the Fundamental Freedoms, the AMCHR, and *possibly* the Banjul Charter." (Italics added for emphasis).

[45] *See* Rachel Murray, *Decisions by the African Commission on Individual Communications under the African Charter on Human and Peoples' Rights*, 46 INT'L & COMP. L.Q. 412, 429 (1997).

[46] *See Martinez v. Court of Appeal of California*, 528 U.S. 152, 162 (2000).

[47] *Id.*

[48] *Faretta v. California*, 422 U.S. 806, 834 (1975), referring to *Illinois v. Allen*, 397 U.S. 337, 350-351 (Brennan, J., concurring).

[49] *Id.* at 806, note 46, referring to *Illinois v. Allen*, 397 U.S. 337.

[50] *U.S. v. Farhad*, 190 F.3d 1097, 1098 (1999).

> achieve the substantive objective of a fair trial. Where the right to self-representation conflicts with the paramount Fifth Amendment right to a fair and reliable trial, I believe that the former and not the latter, must yield. [...] I strongly question whether such a waiver [of the right to a fair trial], express or implied, is permissible.[51]

Judge *Reinhardt* further pointed out that permitting self-representation regardless of the consequences threatened to divert criminal trials from their clearly defined purpose of providing a fair and reliable determination of guilt or innocence.[52] He also observed that a defendant should not be able to waive his right to a fair trial[53] and that this right touched upon not only the interests of an accused, but also the institutional interests of the judicial system.[54]

32. In the same vein, the Supreme Court of the United States restricted the right to self-representation in *Martinez v. Court of Appeal of California* and made clear that the decision of *Faretta v. California* applied only to the right to defend oneself at the trial stage.[55] The Supreme Court held that the issue was fundamentally different once the defendant became an appellant:

> Our conclusion in Faretta extended only to a defendant's "constitutional right to conduct his own defense." Accordingly, our specific holding was confined to the right to defend oneself at trial. We now address the different question whether the reasoning in support of that holding also applies when the defendant becomes an appellant and assumes the burden of persuading a reviewing court that the conviction should be reserved. We have concluded that it does not.[56] [...]
>
> In the appellate context, the balance between the two competing interests surely tips in favour of the State. The status of the accused defendant, who retains a presumption of innocence throughout the trial process, changes dramatically when a jury returns a guilty verdict.[57] [...] The requirement of representation by trained counsel implies no disrespect for the individual inasmuch as it tends to benefit the appellant as well as the court.[58]

Recognizing this shifting focus the Supreme Court referred to an earlier decision:

> "[T]here are significant differences between the trial and appellate stages of a criminal proceeding." [...] "By contrast, it is ordinarily the defendant, rather than the State, who initiates the appellate process, seeking not to fend off the efforts of the State's prosecutor but rather to overturn a finding of guilt made by a judge or a jury below."[59]

Furthermore, the Supreme Court stressed that there was neither a "historical consensus establishing a right of self-representation on appeal" nor a "long-respected right of self-representation on appeal."[60]

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[51] *Id.* at 1102.
[52] *Id.* at 1106.
[53] *Id.* at 1102, 1107.
[54] *Id.* at 1107.
[55] *Martinez v. Court of Appeal of California,* 528 U.S. 152, 154 (2000).
[56] *Id.*
[57] *Id.* at 162.
[58] *Id.* at 163.
[59] *Id.* at 162-163, referring to *Ross v. Moffitt*, 417 U.S. 600, 610 (1974).
[60] *Martinez v. Court of Appeal of California,* 528 U.S. 152, 159 (2000).

33. There are several other decisions by United States high courts that follow the Martinez precedent.[61] To quote only a few:

> Initially, we note that Mr. Reyes did not have a constitutional right to appear *pro se* on direct appeal.[62]
>
> Rufus does not have a constitutional right to proceed on appeal pro se.[63]
>
> But, there is no federal constitutional right to self representation on direct appeal from a criminal conviction.[64]
>
> And where the defendant chooses neither attorney representation nor self-representation, the default position for the court should be to mandate attorney representation. After all, while there are competing fundamental rights to counsel and to self-representation, "it is representation by counsel that is the standard, not the exception."[65]

34. In **Australia** an accused has the right to self-representation at any stage of the criminal proceedings.[66] However, in cases where sexual offences are at stake, the accused cannot cross-examine the alleged victim.[67] Thus, the right to self-representation can be restricted under certain conditions.

35. There is a general right to self-representation in **Canada**.[68] However, the Criminal Code includes a provision under which defence counsel can be assigned at appellate level.

> **Section 684(1)**
>
> A court of appeal or a judge of that court may, at any time, assign counsel to act on behalf of an accused who is a party to an appeal or to proceedings preliminary or incidental to an appeal where, in the opinion of the court or judge, it appears desirable in the interests of justice that the accused should have legal assistance and where it appears that the accused has not sufficient means to obtain that assistance.

A similar provision can be found in Section 694(1) in relation to an appeal to the Supreme Court of Canada.[69] Those regulations have to be read in the context of the legal aid system provided for in

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[61] *U.S. v. Frazier-El*, 204 F.3d 553 (2000); *see also Fudge v. State* 341 Ark. 652, 653 (2000), "While the Court in *Martinez* left to the State appellate courts the discretion to allow a lay person to proceed *pro se* on appeal, it also recognized that representation by trained appellate counsel is of distinct benefit to the appellant as well as the court. We conclude that appellant, who is represented by counsel qualified to represent defendants in capital cases, has not demonstrated that there is any good cause to permit him to serve as co-counsel or to file a supplemental *pro se* brief."
[62] *Reyes v. Sedillo*, 2007 WL 867175 (10th Cir.(Kan.)), 1 (March 23, 2007).
[63] *United States v. Rufus*, 114 Fed.Appx. 56, 56 (2004).
[64] *Kenney v. Massachusetts*, 111 Fed.Appx. 20, 21 (2004).
[65] *Fischetti v. Johnson*, 384 F.3d 140, 147 (2004).
[66] *See* MARK FINDLAY, STEPHEN ODGERS & STANLEY YEO, AUSTRALIAN CRIMINAL JUSTICE 142, 160 (2nd ed. 1999).
[67] Section 294A of the Criminal Procedure Act reads: Arrangement for complainant in sexual offence proceedings giving evidence when accused person is unrepresented. (1) This section applies to sexual offence proceedings during which the accused person is not represented by counsel. (2) The complainant cannot be examined in chief, cross-examined or re-examined by the accused person, but may be so examined instead by a person appointed by the court. (3) The person appointed by the court is to ask the complainant only the questions that the accused person requests that person to put to the complainant. [...]
[68] *R. v. Romanowicz*, 14 C.R. (5th) 100, [1998] O.J. No. 12, 6 January 1998, para. 30.

the Canadian Criminal Code. Assigning counsel on appeal is accordingly only possible in cases where justice so requires but the appellant lacks sufficient means to obtain such aid. Nevertheless, they are relevant to the case at hand. As a corresponding regulation does not exist for proceedings at trial level,[70] those provisions clarify that the role of an accused is decisively different on appeal and that the interests of justice might require the assignment of defence counsel on appeal even where that was not necessary at trial level.

36. In *R. v. Bernardo*[71] the Ontario Court of Appeal specified the criteria in which this rule was applicable:

> In deciding whether counsel should be appointed, it is appropriate to begin with an inquiry into the merits of the appeal. [...] Having decided that the appeal raises arguable issues, the question becomes whether the appellant can effectively advance his grounds of appeal without the assistance of counsel. This inquiry looks to the complexities of the arguments to be advanced and the accused's ability to make an oral argument in support of the grounds of appeal. The complexity of the argument is a product of the grounds of appeal, the length and content of the record on appeal, the legal principles engaged, and the application of those principles to the facts of the case. An accused's ability to make arguments in support of his or her grounds of appeal turns on a number of factors, including the accused's ability to understand the written word, comprehend the applicable legal principles, relate those principles to the facts of the case, and articulate the end product of that process before the court. [72]

37. The legal system of **England** and **Wales** clearly recognizes the right to self-representation at any stage of proceedings.[73] However, the Youth Justice and Criminal Evidence Act 1999 includes provisions for the protection of witnesses from cross-examination by the accused in person. In proceedings for sexual offences, in cases where children are concerned, and in any other cases where it appears to the court that the quality of evidence given by the witness in cross-examination is likely to be diminished if the cross-examination is conducted by the accused in person, the court may give, where it is not contrary to the interest of justice, a direction prohibiting the accused from cross-examining the witness in person.[74] In such cases the court can assign defence counsel. The relevant provision reads:

> **Section 38**
>
> (2) Where it appears to the court that this section applies, it must-
>
> (a) invite the accused to arrange for a legal representative to act for him for the purpose of cross-examining the witness; and

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[69] This provision reads: "The Supreme Court of Canada or a judge thereof may, at any time, assign counsel to act on behalf of an accused who is a party to an appeal to the Court or to proceedings preliminary or incidental to an appeal to the Court where, in the opinion of the Court or judge, it appears desirable in the interests of justice that the accused should have legal assistance and where it appears that the accused has not sufficient means to obtain that assistance."
[70] *See* DAVID WATT & MICHELLE FUERST, THE 2007 ANNOTATED TREMEEAR'S CRIMINAL CODE 1337 (2006).
[71] *R v. Bernardo*, 12 C.R. (5th) 310, 121 C.C.C. (3d) 123 (Ont. C.A.) (1997).
[72] *Id.* at paras 22, 24.
[73] PETER MURPHY, BLACKSTONE'S CRIMINAL PRACTICE 1137 (2005).
[74] *See* Section 34-36 of the Youth Justice and Criminal Evidence Act 1999.

> (b) require the accused to notify the court, by the end of such a period as it may specify, whether a legal representative is to act for him for that purpose.
>
> (3) If by the end of the period mentioned in subsection 2(b) either-
>
> (a) the accused has notified the court that no legal representative is to act for him for the purpose of cross-examining the witness, or
>
> (b) no notification has been received by the court and it appears to the court that no legal representative is to so act,
>
> the court must consider whether it is necessary in the interests of justice for the witness to be cross-examined by a legal representative appointed to represent the interests of the accused.
>
> (4) If the court decides that it is necessary in the interests of justice for the witness to be so cross-examined, the court must appoint a qualified legal representative (chosen by the court) to cross-examine the witness in the interests of justice.

Thus, these provisions clearly show that the right to self-representation is not absolute and has to be seen in the overall context of fair proceedings. It can be restricted under certain conditions and defence counsel can be assigned *proprio motu*.

38. The rules of the Supreme Court of **India**[75] provide in relation to criminal appeals that "where an accused is not represented by an Advocate on Record of his choice the Court may in a proper case direct the engagement of an Advocate at the cost of the Government."

39. In **New Zealand** the right to self-representation is recognized at any stage of proceedings.[76] The same applies in **Scotland**.[77]

(ii) Jurisdictions Influenced by Romano-Germanic Legal Traditions

40. Many countries influenced by Romano-Germanic legal traditions restrict the right to self-representation and impose mandatory defence counsel in serious cases. For obvious reasons I will first turn to the law of the **States on the territory of the former Yugoslavia**:

- The Criminal Procedure Code of **Bosnia and Herzegovina** recognizes mandatory defence counsel in cases of serious crimes until the verdict becomes final, *i.e.* also on appeal. The relevant provision reads:

> **Article 59**
>
> (1) A suspect shall have a defence attorney at the first questioning [...] if he is suspected of a criminal offence for which a penalty of long-term imprisonment may be pronounced. [...]

[75] Supreme Court Rules, 1966, as amended, Order XXI, para 25.
[76] *R. v. Cumming*, 2 N.Z.L.R. 597, 2 November 2005, para. 40.
[77] Criminal Procedure Act (Scotland) 1995, Sections 92 and 110.

> (4) If the suspect, or the accused in the case of a mandatory defence, does not retain a defence attorney himself, or if the persons referred to in Article 53, Paragraph 3, of this Code do not retain a defence attorney, the preliminary proceeding judge, preliminary hearing judge, the judge or the Presiding judge shall appoint him a defence attorney in the proceedings. In this case, the suspect or the accused shall have the right to a defence attorney *until the verdict becomes final* and, if a long-term imprisonment is pronounced, for proceedings under legal remedies [...].
>
> (5) If the Court finds it necessary for *the sake of justice, due to the complexity of the case* or the mental condition of the suspect or the accused, it shall appoint an attorney for his defence.[78]

- Similarly, the Criminal Procedure Code of **Serbia** reads:

> **Article 71**
>
> (1) If the defendant is [...] unable successfully to defend himself or if the proceedings are carried out for a criminal offence punishable by imprisonment for a term of more than ten years or by a more severe punishment, the defendant must have a defence counsel even at his first interrogation. [...]
>
> (4) When in the case of mandatory defence referred to in the preceding paragraphs of this Article the defendant fails to retain a defence counsel by himself, the president of the court shall, by virtue of the office, appoint a defence counsel to represent him in further criminal proceedings up *until the judgement becomes final*, and if the punishment by imprisonment for a term of twenty years or a more severe punishment is imposed – then in proceedings upon extraordinary judicial remedies as well [...].[79]

- The law of the **former Socialist Federal Republic of Yugoslavia**[80] and the laws of the other successor States[81] on the territory of the former Yugoslavia contain similar provisions.

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[78] Italics added for emphasis.

[79] Italics added for emphasis.

[80] Criminal Procedure Code of the **Federal Socialist Republic of Yugoslavia**, Article 70 (1): If the accused is [...] incapable of effectively defending himself, or if proceedings are being conducted for a crime for which the death penalty may be pronounced, the accused must have defence counsel from the first examination. [...] (4) If in the cases of mandatory defence referred to in the previous cases the accused does not himself engage defence counsel, the president of the court shall automatically appoint counsel for his defence. [...]

[81] Code of Criminal Procedure of **Croatia**: *Article 65* (1) If the defendant [...] unable successfully to defend himself or if the proceedings are carried out for an offence punishable by long-term imprisonment, the defendant must have a defence counsel even at his first interrogation. [...] (5) When in the case of mandatory defence referred to in paragraph 1, 2, 3, and 4 of this Article the defendant fails to retain a defence counsel, the president of the court shall, by virtue of the office, appoint a defence counsel to represent him in further criminal proceedings; up until the judgement becomes final, and if the punishment by imprisonment for a term of twenty years is imposed then in proceedings upon extraordinary judicial remedies as well. [...]

Code of Criminal Procedure of the **Former Yugoslav Republic of Macedonia**: *Article 66:* (1) If the Accused is [...] incapable to defend himself successfully or if a criminal procedure is conducted against him for a crime for which, according to the Code a sentence to life imprisonment is proscribed, then he must have a counsel during his first hearing. (5) If the accused in cases of obligatory defence according to the previous paragraphs of this Article does not provide a counsel for himself, the President of the court will assign a counsel ex officio for the further duration of the criminal procedure until the final legally valid verdict. [...]

Code of Criminal Procedure of **Montenegro:** *Article 69*: (1) If the defendant is [...] unable to defend himself successfully or if the proceedings are conducted for a criminal offence punishable by the maximum term of imprisonment, the defendant must have a defence attorney as early as his first interrogation. (2) When the indictment is brought for the criminal offence punishable by imprisonment of ten years, the defendant must have a defence attorney when the indictment is served on him. [...] (5) When in the case of mandatory defence referred to in the preceding paragraphs of this Article the defendant fails to retain a defence attorney by himself, the President of the Court shall, by virtue of an office, appoint a defence attorney to represent the defendant in the further criminal proceedings up until the judgement becomes final [...] If in the case of mandatory defence, the defendant is left without a defence attorney, the

41. Likewise, the codes of criminal procedure and the respective jurisprudence of other civil law countries restrict the right to self-representation, especially on appeal. To give only a few examples:

42. The Criminal Procedure Code of **Argentina**[82] reads:

> **Article 104**
>
> An accused has the right to be represented by a registered lawyer of his choice or by a public defence counsel; an accused may also represent himself when to do so does not prejudice the effectiveness of the defence and does not interfere with the ordinary course of the proceedings. In this case the Court will order him to elect counsel **within three days**, failing which he will be assigned the public defence counsel *ex officio*.[83]

43. The Code of Criminal Procedure of **Austria** reads:

> **Section 41**
>
> (1) Defence counsel is mandatory in the following cases (mandatory defence counsel): [...] 4. to carry out the plea of nullity and for the public hearing of it or of an appeal against a judgement of the court of assize [...].[84]

44. The *Code d'Instruction Criminelle* of **Belgium** reads:

> **Section 293**
>
> Au moins quinze jours avant l'ouverture de la session et au plus tard le jour de la première audience, le président vérifiera si l'accusé a fait choix d'un conseil pour l'aider dans sa défense. Sinon le président lui en désignera un sur-le-champ, à peine de nullité de tout ce qui suivra.
>
> Cette désignation sera considérée comme non avenue, et la nullité ne sera pas prononcée si l'accusé choisit un conseil.
>
> Le président pourra interroger l'accusé. Dans ce cas, l'interrogatoire est constaté par un procès-verbal que signent le président, le greffier, l'accusé et s'il y a lieu, l'interprète.

45. The Penal Procedure Code of **Bulgaria** reads:

> **Article 70**
>
> (1) Participation of the defence counsel or the defender in the penal proceedings shall be mandatory in cases where: [...] (3.) the case refers to crime for which the punishment provided is life imprisonment or deprivation of liberty not less than ten years; [...]

President of the Court before which the proceedings are being conducted shall appoint by virtue of an office a defence attorney to the defendant. [...]

Code of Criminal Procedure of **Slovenia**: *Article 70*: (1) If the accused is [...] incapable of defending himself successfully, or if criminal proceedings are conducted against the accused for a criminal offence punishable by twenty years of imprisonment, the accused shall have defence counsel from the very first interrogation. [...] (4) If in the cases of mandatory defence referred to in the preceding paragraphs the accused fails to retain defence counsel by himself, the president of the court shall appoint defence counsel ex officio for the further course of criminal proceedings until the finality of the judgement: if the accused has been sentenced to twenty years in prison he shall have defence counsel appointed for him for the extraordinary judicial review as well. [...].

[82] A similar provision can be found in Articles 80 and 83 of the Criminal Procedural Code of Costa Rica.

[83] Unofficial courtesy translation. Italics added for emphasis.

[84] Unofficial courtesy translation.

(3) Where the participation of defence counsel is mandatory, the respective authority shall be obliged to appoint as defence counsel a person practising the legal profession. [...]

46. The Bill to Institute the Criminal Procedure Code of **Cameroon** reads:

Section 490

Where an appellant sentenced to life imprisonment or to death has not briefed counsel, the President of the Supreme Court shall of his own motion, assign one to him as soon as the application for appeal is received in the registry of the said court.[85]

47. In **Denmark**, Section 731 of the Law on Criminal Procedure describes a number of situations where a suspect/an accused must have counsel.[86]

48. The *Code de Procédure Pénale* of **France** reads:

Article 274

L'accusé est ensuite invité à choisir un avocat pour l'assister dans sa défense.

Si l'accusé ne choisit pas son avocat, le président ou son délégué lui en désigne un d'office.

Cette désignation est non avenue si, par la suite, l'accusé choisit un avocat.

Article 317

A l'audience, la présence d'un défenseur auprès de l'accusé est obligatoire.

Si le défenseur choisi ou désigné conformément à l'article 274 ne se présente pas, le président en commet un d'office.

Article 380-1

Les arrêts de condamnation rendus par la cour d'assises en premier ressort peuvent faire l'objet d'un appel dans les conditions prévues par le présent chapitre.

Cet appel est porté devant une autre cour d'assises désignée par la chambre criminelle de la Cour de cassation et qui procède au réexamen de l'affaire selon les modalités et dans les conditions prévues par les chapitres II à VII du présent titre.

Article 576

La déclaration de pourvoi doit être faite au greffier de la juridiction qui a rendu la décision attaquée.

Elle doit être signée par le greffier et par le demandeur en cassation lui-même ou par un avoué près la juridiction qui a statué, ou par un fondé de pouvoir spécial ; dans ce dernier cas, le pouvoir est annexé à l'acte dressé par le greffier. Si le déclarant ne peut signer, le greffier en fera mention.

Elle est inscrite sur un registre public, à ce destiné et toute personne a le droit de s'en faire délivrer une copie.

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[85] As cited in Book of Authorities for the Prosecution Submission in Relation to the Right to Self-Representation and the Role of Amicus Curiae in Appellate Proceedings, 3 April 2007, IV 34.
[86] *See* LARS BO LANGSTED ET AL., CRIMINAL LAW IN DENMARK 128 (1998).

Article 584

Le demandeur en cassation, soit en faisant sa déclaration, soit dans les dix jours suivants, peut déposer, au greffe de la juridiction qui a rendu la décision attaquée, un mémoire, signé par lui, contenant ses moyens de cassation. Le greffier lui en délivre reçu.

49. **Germany**'s Code of Criminal Procedure reads:

Section 140

(1) The assistance of defence counsel shall be mandatory if [...]: 2. the accused is charged with a serious criminal offence;

(2) In other cases the presiding judge shall appoint defence counsel upon application or *ex officio* if the assistance of defence counsel appears necessary because of the seriousness of the offence, or because of the difficult factual or legal situation, or if it is evident that the accused cannot defend himself, particularly where an attorney-at-law has been assigned to the aggrieved person pursuant to Sections 397a and 406g subsections [...].

Section 345

(1) Notices of appeal together with the grounds therefore shall be submitted to the court whose judgment is being contested no later than one month after expiry of the time limit for seeking the appellate remedy. If the judgment has not been served by then, the time limit shall commence upon service thereof.

(2) The defendant may *only* act in the form of a notice signed by defence counsel or by an attorney-at-law, or to be recorded by the court registry.[87]

50. In general, the question of whether a defence counsel has to be assigned on appeal is determined pursuant to section 140(2) of the Code of Criminal Procedure. Additionally, according to settled jurisprudence this is always necessary in cases where there is a possibility that the court of appeal could increase the sentence of the court of first instance. Otherwise, not assigning a defence counsel would ultimately lead to a breach of the right to a fair trial.[88]

51. Under German law, even in cases where the rules of mandatory defence counsel do not apply, it is still required to file the leading documents for appellate proceedings with the help of legal assistance. Thus, these regulations show that the legislator has recognized the difficulty of filing a legally valid Notice of Appeal or Appeal Brief by requiring legal assistance, regardless of whether or not the conditions for mandatory defence counsel are met.

52. The Code of Criminal Procedure of **Italy** reads:

Section 97

[87] Unofficial courtesy translation.

[88] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] 19 October 1977, 46 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 202, paras. 32-33; Oberlandesgericht Düsseldorf [OLG Düsseldorf] [Court of Appeals Düsseldorf] 9 September 1983, 4 Neue Zeitschrift für Strafrecht [NStZ] 44-46 (1984); Heinrich Laufhütte, *§ 140, in* KARLSRUHER KOMMENTAR ZUR STRAFPROZESSORDNUNG, § 140, marginal number 6 (Gerhard Pfeifer, ed., 5th ed. 2003).

> An accused who has not designated Counsel of his own choosing or has no access to such a Counsel shall be assisted by *ex officio* defence counsel.[89]

53. The Code of Criminal Procedure of **The Netherlands** reads:

> **Article 437(2)**
>
> The accused, who or on whose behalf an appeal has been lodged, is obliged at the sanction of inadmissibility, to file with the *Hoge Raad*[90] within two months after the notification pursuant to Article 435(1) a written submission through his counsel stating the reasons for the appeal.[91]

54. The *Code de Procédure Pénale* of **Senegal** reads:

> **Article 257**
>
> L'accusé est ensuite invité à choisir un conseil pour l'assister dans sa défense.
>
> Si l'accusé ne choisit pas son conseil, le président ou son délégué lui en désigné un d'office.
>
> Cette désignation est non avenue, si par la suite, l'accusé choisit un conseil.

55. Summarizing these national approaches one can state that, in any event on appeal the principle of fair proceedings calls for, warrants, or sometimes even demands assignment of counsel either when a serious sanction is at stake and/or when the case at hand is factually and/or legally extraordinarily difficult. On appeal there is an almost unanimous approach[92] that, because of the inherent difficulties of appellate proceedings before a higher court, an appellant cannot refuse the assistance of counsel as this would amount to a waiver of a fair trial. Furthermore, some regulations clearly show that the assignment of mandatory defence counsel does not exclude an active role of an accused.

(iii) Law and Jurisprudence of International Tribunals and Courts

56. The legal provisions of international courts and the decisions rendered by them addressing the issue of self-representation must also be considered:

57. Article 20(4)(d) of the Statute of the **International Criminal Tribunal for Rwanda** (ICTR) has the same wording as Article 21(4)(d) of the Statute of the ICTY. When faced with a

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[89] Unofficial courtesy translation.
[90] The *Hoge Raad* is the highest court in criminal matters in The Netherlands.
[91] Unofficial courtesy translation.
[92] Out of more than twenty countries randomly analyzed, a large number have come to accept mandatory defence counsel, both on trial but at least on appeal. In particular, a number of countries, *inter alia*, Austria, Germany, The Netherlands, and the United States, draw a clear or further distinction between the trial and the appeals stage when determining whether counsel must be assigned.

request by assigned counsel to withdraw in light of the accused's non-cooperation, Trial Chamber I of the ICTR held that

> [...] Counsel is assigned, not appointed. In the view of the Chamber, this does not only entail obligations towards the client, but also implies that he represents the interest of the Tribunal to ensure that the Accused receives a fair trial. The aim is to obtain efficient representation and adversarial proceedings.[93]

In *Prosecutor v. Nyiramasuhuko and Ntahobali*, the Trial Chamber recognized in relation to trial proceedings an accused's "right, pursuant to Rule 45(F) and Article 20 of the Statute, to conduct his own defence."[94] The Chamber explained, however, that:

> Nonetheless, the Chamber has duly considered the seriousness of the charges pending against the Accused who is currently being tried and has taken note of the Prosecution's arguments as to the Accused directly cross-examining witnesses. In light of these factors, and by virtue of its inherent powers to control its own proceedings, the Chamber decides *proprio motu* that it is in the interest of justice that a Duty Counsel be immediately appointed so as to ensure that the Accused is assisted in the conduct of his defence [...].[95]

58. Significantly, in 2002, the ICTR Rules of Procedure and Evidence were amended by consensus with Rule 45*quater* ("Assignment of Counsel in the Interests of Justice"), which reads as follows:

> The Trial Chamber may, if it decides that it is in the interests of justice, instruct the Registrar to assign a counsel to represent the interests of the accused.

Rule 45*quater* is also applicable to the ICTR's appeal proceedings.[96] Moreover, the Rules of Procedure and Evidence of the ICTR were adopted pursuant to Article 14 of the ICTR Statute. It is clear that the Judges of the ICTR, who are authorized pursuant to Article 14 of its Statute and Rule 6 of its Rules of Procedure and Evidence to adopt and to amend the Rules, did not view Rule 45*quater* as being in conflict with Article 20(4)(d) of its Statute. In sum, the jurisprudence of the ICTR and the existence of Rule 45*quater* illustrate that the right given to an accused in Article 20(4)(d) of the ICTR's Statute is not unrestricted, and that, indeed, at any stage of the proceedings, including appeals, counsel may be assigned to an accused if it is in the interests of justice to do so.

59. The Statute of the **Special Court for Sierra Leone**[97] in Article 17(4)(d) also contains the same wording as Article 21(4)(d) of the Statute of the ICTY. In *Prosecutor v. Sam Hinga Norman*

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[93] *Prosecutor v. Jean-Bosco Barayagwiza*, Case No. ICTR-97-19-T, Decision on Defence Counsel Motion to Withdraw, 2 November 2000, para. 21.
[94] *Prosecutor v. Pauline Nyiramasuhuko and Arsène Ntahobali*, Case No. ICTR-97-21-T, Decision on Ntahobali's Motion for Withdrawal of Counsel, 22 June 2001, para. 19.
[95] *Id.* at para. 20.
[96] Rule 107 of the ICTR Rules of Procedure and Evidence specifies that the Rules that "govern proceedings in the Trial Chambers shall apply *mutatis mutandis* to proceedings in the Appeals Chamber."
[97] 2178 U.N.T.S. 138.

et al.,[98] a Trial Chamber of the Court held that in the context of trial proceedings the right to self-representation is "qualified and not absolute."[99] It stressed that

> [t]he philosophy of the Chamber on this crucial issue compels us to factor into the equation, certain critical issues namely: (i) that the right of counsel which is statutorily guaranteed by Article 17(4)(d) of our Statute is predicated upon the notion that representation by Counsel is an essential and necessary component of a fair trial. (ii) The right to counsel relieves trial Judges of the burden to explain and enforce basic rules of courtroom protocol and to assist the accused in overcoming routine and regular legal obstacles which the accused may encounter if he represents himself, for, the Court, to our mind, is supposed, in the adversarial context, to remain the arbiter and not a pro-active participant in the proceedings. (iii) Given the complexity of the trial in the present case, it cannot be denied that a joint trial of such magnitude, having regard to the gravity of the offences charged, and considering the number of witnesses to be called by the Prosecution and the Defence, make for a trial fraught with a high potential of complexities and intricacies typical of evolving international criminal law. (iv) There is also the public interest, national and international, in the expeditious completion of the trial. (v) Furthermore, there is the high potential for further disruption to the Court's timetable and calendar which we are already witnessing in this case. [...] (vi) The tension between giving effect to the 1st Accused's right to self representation and that of his co-accused, to a fair and expeditious trial as required by law.[100]

The Chamber further stated that all these factors were to be "taken into consideration and weighed individually and cumulatively."[101] The decision was not appealed and the Chamber later assigned standby-counsel to "provide legal assistance to the Accused and [to] ensure the safeguard to his right to a fair and expeditious trial."[102]

60. In conclusion, the Special Court for Sierra Leone has also allowed for a limitation of the right to self-representation; in particular by assessing the complexity of the proceedings, their expeditiousness and the right to a fair trial.

61. Article 67(1)(d) of the Rome Statute for an **International Criminal Court** (ICC)[103] provides an accused with the right

> [...] to conduct the defense in person or through legal assistance of the accused's choosing, to be informed, if the accused does not have legal assistance or the accused's choosing, of this right *and to have legal assistance assigned by the Court in any case where the interests of justice so require*, and without payment if the accused lacks sufficient means to pay for it.[104]

The ICC's Regulations, adopted by the judges of the court pursuant to Article 52 of its Statute, provide in Regulation 76(1) a norm that allows for the appointment of defence counsel by a Chamber of the court:

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[98] *Prosecutor v. Sam Hinga Norman et al.*, SCSL-04-14-T, Decision on the Application of Samuel Hinga Norman for Self Representation under Art. 17(4)(d) of the Statute of the Special Court, 8 June 2004.
[99] *Id.* at para 27.
[100] *Id.* at para 26.
[101] *Id.* at para. 27.
[102] *Prosecutor v. Sam Hinga Norman et al.*, SCSL-04-14-T, Consequential Order on Assignment and Role of Standby Counsel, 14 June 2004, p. 3, cited by Boas, *supra* note 9, at 60.
[103] 2187 U.N.T.S. 90.
[104] Italics added for emphasis.

> A Chamber, following consultation with the Registrar, may appoint counsel in the circumstances specified in the Statute and the Rules or where the interests of justice so require.

62. Again, this overview shows that the general test is whether or not in an individual case the interests of fair proceedings require the legal assistance by court assigned counsel.

(c) Comparative Analysis – Conclusion

63. The analysis of transnational/supranational law and jurisprudence, national law and jurisprudence and the law and jurisprudence of other international criminal tribunals and courts shows that in appellate proceedings it is not only the behaviour of an accused as such that justifies a restriction of the right to self-representation but the nature of those proceedings. The different role of an accused at the appellate level allows for a greater restriction of the right to self-representation than may be justified at trial.

2. Application of these Parameters to the Case at Hand

64. Having found guidance from sources of transnational/supranational and national law and, in particular, jurisprudence, I will now turn to apply the principles found therein to the specific case before this Appeals Chamber.

65. Let me note in passing that even though I do not agree with the Appeals Chamber's stance that disallows self-representation at the trial stage only when there is obstructive behaviour by an accused, it is clear that the Appellant in this case has indeed been obstructive. Although he first indicated that the wanted counsel[105] he did not make a *bona fide* effort to actually obtain it.[106] It has to be recalled that for several months after the rendering of the Trial Judgement,[107] the Appellant stalled in finding a defence counsel even though he was provided with the International Tribunal's list of counsel prepared and willing to appear before the Tribunal. Specifically, the Appellant only proposed counsel who were unwilling and/or unable to represent him for the purposes of his appeal. I note that in the system before the International Tribunal it is for the Registrar to assign counsel. Despite of all the efforts of the Registry, the Appellant did not select a counsel from the list presented to him. It has to be noted that an appellant can be reasonably expected to select counsel within three days or one week. In this case, the Appellant had ample time – from September 2006 up to the present – to select counsel. Furthermore, it was only after a considerable delay of more than two and half months from the rendering of the Trial Judgement that the Appellant for the first

[105] *See* Request to Extend the Deadline for Filing an Appeal Against the Judgement, 17 October 2006.
[106] *See* Registrar's Submission on Counsel's Request for Review of the Registrar's Decisions on Assignment of Counsel, 16 January 2007, paras. 2-27.
[107] *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-T, Judgement, 27 September 2006 ("Trial Judgement").

time indicated that he wanted to represent himself on appeal, however with the assistance of a "legal team."[108]

66. Returning to the legal question at stake, the point of departure for any assessment of the right to self-representation on appeal must be the fundamental requirement, enshrined in Article 21(2) of the Statute, that an accused shall be entitled to a "fair and public hearing."

67. It follows that Article 21(4)(d), stating that an accused has a right to defend himself in person, must be interpreted in the overall context of the fair trial requirement of the Statute and cannot be viewed in isolation from other rights and guarantees ensuring the fairness of proceedings.[109] Indeed, the fairness and expeditiousness of appeal proceedings cannot be seen in a legal vacuum and directly benefits an appellant.

68. The right to self-representation at the appellate level must be seen against the backdrop of the nature of the appellate proceedings. Conversely, the general principle of fairness depends on how the specific minimum guarantees afforded to an accused – among them the right to self-representation and the right to be assisted by counsel – are observed. This interdependency can be viewed as a form of reciprocal interaction whose components must be delicately balanced. In that regard, I would refer to the Appeals Chamber's decision in *Prosecutor v. Milošević*, which considered that restrictions of that right at trial "must be limited to the minimum extent necessary to protect the Tribunal's interest in assuring a reasonably expeditious trial."[110] The same line of reasoning applies to the fairness of the proceedings at the appellate level. The expeditiousness and fairness of the proceedings are intertwined. Therefore, when deciding whether the right to self-representation can be limited or qualified in appellate proceedings, it must be assessed whether such a step would benefit an appellant by ensuring his fundamental right to be the subject, not the object, of a fair and expeditious appeals process. An accused cannot waive his right to fair proceedings, under whatever circumstances.[111]

69. That said, I am aware of the importance of a correct assessment of the relationship between the general right to fair appeal proceedings and the right to self-representation. Again I refer to the

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[108] *See* Krajišnik Response to the Prosecution's Appeal Brief Against the Judgement of 27 September 2006, 12 February 2007 (filed 20 February 2007), p. 1.
[109] *See Evrenos Önen v. Turkey*, ECtHR, App. No. 29782/02, 15 February 2007, para. 29: "The Court considers that, in the instant case, it is more appropriate to deal with the applicant's complaints under Article 6(1) globally due to the overlapping nature of the issues and since the sub-paragraphs of Article 6(3) may be regarded as specific aspects of the general fairness guarantee of the first paragraph."
[110] *Milošević* Decision, *supra* note 7, para. 17.
[111] *See also Prosecutor v. Issa Hassan Sesay et al.*, Case No. SCSL-04-15-AR73, Gbao – Decision on Appeal Against Decision on Withdrawal of Counsel, 23 November 2004, para. 46, quoting the Trial Chamber Decision.

Milošević Decision's recognition of the general principle of proportionality[112] as being useful when determining whether and to what extent the restriction of one right is required to safeguard the important objective of another, potentially conflicting, right. Indeed, the application of this principle is also called for in the context of this decision. This means that if there is a balancing of potentially conflicting rights of an accused, the restriction of one right to the advantage of another right is contingent on three factors: it must be suitable, it must be necessary, and the degree and scope of the restriction must remain in a reasonable relationship to the preference given to the other right.

70. Consequently, in this case it must be assessed whether and to what extent the Appellant's wish to represent himself at this stage of the case against him affects the general fairness of the proceedings and vice versa. In light of the nature of appellate proceedings I am convinced that there are circumstances other than obstructive behaviour by an appellant that allow for the assignment of counsel, if need be even against the will of an appellant in his well-understood own interests. It is clear that there is a difference between pre-trial and trial proceedings on the one hand and the appeals stage on the other. Indeed, the difference is nothing less than dramatic:[113] The Appellant has already been convicted by the Trial Chamber for five counts of crimes against humanity and sentenced to 27 years of imprisonment. According to the Trial Judgement, the "trial record contains a vast amount of evidence", with presentation of evidence lasting for more than two years and more than 27,000 pages of transcript. The burden is now on the Appellant to consider this entire material, make a meaningful and legally sound assessment of its contents in relation to the reasoning of the Trial Judgement, point with specificity to purported errors of fact and errors of law by the Trial Chamber, formulate such allegations of error in a comprehensive and precise manner, and, at the same time, respond to the appeal by the Prosecution. It is difficult to envisage how the Appellant could muster the significant legal resources necessary to successfully exercise his right to have the Trial Judgement reviewed and – in the case of errors – revised or reversed. Indeed, the Appellant has on several occasions pointed out that he is not able to present his appeal without the assistance of professional counsel. The following exchange in the recent Status Conference is just one example:

> THE APPELLANT: "At the moment there are certain items for which we would have to engage two Defence lawyers who would analyse, in professional terms, the appeal. *I cannot do this myself* [...]."
>
> JUDGE SCHOMBURG: "So it is your submission that you can't exercise your defence yourself? Am I correct in reading this on the transcript?"

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[112] *Milošević* Decision, *supra* note 7, paras 17-18.
[113] *See Martinez v. Court of Appeal of California,* 528 U.S. 152, 162 (2000); *see further* Judge Reinhardt's Concurring Opinion, *supra* at para. 31.

> THE APPELLANT: "[...] I am convinced that I can defend myself in a more professional way than the team that I currently have could do, but *I believe that the appeal procedure is specific and I would need counsel's assistance to deal with this appeals procedure*. So when I'm defending myself, *I would like to have a very experienced lawyer as a member of the Defence team.*"[114]

71. In this context it should also be recalled that it is for an appellant to *inter alia* provide precise references to relevant pages of transcript or paragraphs in the judgement to which challenge is made.[115] The Appeals Chamber's jurisprudence is moreover abundantly clear that when an appellant's submissions are obscure, contradictory, vague, or suffer from other formal and obvious insufficiencies, the Appeals Chamber will not consider those submissions.[116] The Practice Directions on Formal Requirements for Appeals from Judgement,[117] the Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings before the International Tribunal,[118] and the Practice Directions on the Length of Briefs and Motions[119] illustrate the complicated nature of appellate proceedings before the International Tribunal and highlight that formal requirements are not easily met. Sometimes even trained lawyers cannot effortlessly navigate the proceedings on appeal. Much less so could the Appellant, to his own detriment.

72. Aside from the complex formalities of appellate proceedings, it must be further taken into consideration that the substantive case-law of the International Tribunal is extensive and legally sophisticated. The Appellant's convictions for persecution, extermination, murder, deportation and inhumane acts, as crimes against humanity pursuant to Article 5 of the Statute, relate to a time period of 18 months,[120] and he was found to have committed these crimes as a member of a joint criminal enterprise,[121] a legal concept unknown in his home country. The heavy burden to have these findings overturned now rests solely on the Appellant's shoulders. Consequently, the complexity of the proceedings, for instance the proper filing of a motion for additional evidence pursuant to Rule 115 of the Rules, renders the appeal proceedings unfair if he is left to his own devices – even when he so wishes. Already a comparison of the two Notices of Appeal submitted by the Appellant and by properly assigned counsel clearly shows the advantage of having the assistance of a professional lawyer acting in public appellate proceedings. For the Appeals Chamber to rely solely on the Appellant's own Notice of Appeal would render the proceedings unfair.

73. In conclusion, even though I am not in agreement with the prior jurisprudence of the Appeals Chamber, which gives precedence to an accused's right to self-representation during trial

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[114] Transcript, p. 32 (26 March 2007), italics added for emphasis.
[115] *See Prosecutor v. Stanislav Galić,* Case No. IT-98-29-A, Judgement, 30 November 2006, para. 11.
[116] *Id.*
[117] IT/201, 7 March 2002.
[118] IT/155/Rev. 3, 16 September 2005.
[119] IT/184/Rev. 2, 16 September 2005.
[120] Trial Judgement, para. 5.
[121] *Id.*, para. 1078.

over his right to a fair trial, on top of that there is a fundamental difference between trial and appeals proceedings. While during trial an accused has ample occasion to rebut the evidence against him, his role is by its nature far more challenging during the appeals proceedings as he has already been convicted by the Trial Chamber and it is now up to him to contest the findings and holdings of the impugned judgement.

74. A related consideration pertains to the expeditious disposal of the Appellant's appeal. As noted previously, expeditiousness has to be seen as a twin to the concept of fairness in criminal proceedings. Even if all other concerns were disregarded, it can hardly be ignored that the Appellant's self-representation would lead to significant delays in appeal proceedings. It is evident that the swiftness of the judicial process before the International Tribunal is in direct correlation with the rights of the Appellant. Of particular concern in this context, disregarded and mitigated by nothing in the decision of the Appeals Chamber, are the foreseeable translation delays. The Appellant apparently does not speak either of the official working languages of the International Tribunal well enough to enable him to participate, which is highly problematic in light of the primarily document-driven procedure before the Appeals Chamber. All filings by the Appellant will have to be translated into at least one of the official working languages of the International Tribunal. Likewise, all filings by the Prosecution and decisions of the Chamber will have to be translated into B/C/S. Even assuming that the translation requirements of this case are given priority, it is clear that appeal proceedings will fall victim to constant hold-ups. A conservative estimate of the translation delays shows that with this decision briefing will be completed at the earliest in December 2007. However, it would be more realistic to assume that all briefs will be before the Appeals Chamber only in 2008, making the preparation of an appeal hearing possible at the earliest in the spring if not summer of 2008. Given the length of the time spent in detention by the Appellant, the need for a prompt hearing and decision on the pending appeals carries extraordinary weight, the timely hearing of a case being part of the sound administration of justice.[122]

C. Remarks in Relation to the Decision's Disposition

75. In sum, it is predictable that there will be a significant disruption of the appeal proceedings in this case if the Appellant is allowed to represent himself without the assistance of defence counsel, endangering the integrity of the proceedings, rendering them fundamentally unfair from the outset and in all likelihood provoking a miscarriage of justice. It is obvious that under such

[122] *See Foti et al. v. Italy*, EComHR, Opinion, 15 October 1980, para. 97 (unpublished), printed in 2 COUNCIL OF EUROPE, *supra* note 35, at 505.

circumstances the Appellant will be deprived of his right to fair proceedings if he were allowed to represent himself.

76. Indeed, the disposition of the decision supported by the majority shows several major flaws:

1. No Guidelines for Modalities of Self-Representation

77. The decision grants the Appellant's request to be allowed to represent himself and orders the Registrar "to take the necessary steps." However, it fails to stipulate what these "necessary steps" mean. While I recognize that the modalities of counsel-related issues lie within the purview of the Registrar, the Appeals Chamber should have given clear guidelines to the Registrar on how to proceed. This is particularly true in light of the Appellant's statements that he intends to hire outside lawyers, who are not on the International Tribunal's Rule 45 list of counsel and will not be acting in public, to help him in the preparation of his appeal.[123]

78. Indeed, Mr. Brašić, one of the lawyers that the Appellant tried to hire[124] was recently fined and reprimanded for violating the Code of Professional Conduct for Counsel Appearing before the International Tribunal.[125] The decision neglects to establish how, for instance, the Appellant will be permitted to communicate with outside lawyers or non-lawyers. This raises the concern that the Appellant will be allowed to have unsupervised communications with individuals about whom the International Tribunal has no knowledge, thereby circumventing the strict requirements of Rules 44 and 45 of the Rules, which exist to ensure that only legal professionals of integrity are allowed to practice before the Tribunal. It is particularly worrisome in relation to potential access to confidential material, including the identities of protected witnesses, when the Appeals Chamber fails to address the Appellant's openly expressed wish to employ a defence team working behind the scenes, unknown to the Appeals Chamber and without any ethical obligations. The question arises whether this concept of undercover counsel is reconcilable with the fundamental principle of a public hearing.

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[123] *See, e.g.*, Transcript, p. 73 *et seq.* (5 April 2007).

[124] *See* Letter of the Appellant to the Pre-Appeal Judge, 2 April 2007 (filed 5 April 2007) and Transcript, p. 75-76 (5 April 2007). In his Letter to the Appeals Chamber, 7 May 2007 (filed 10 May 2007), the Appellant again emphasized "that Mr Brašić had agreed to work on the appeal *pro bono*. The only obligation [the Appellant] would have was to cover the costs of his stay in The Hague. [...] I would ask [the Appeals Chamber] [...] to enable me to finance my defence myself and involve Mr Brašić, Karganović and others in work on the appeal [...]" (emphasis in the original).

[125] *See* Decision in the Appeal by the Disciplinary Board in the Matter of Mr. Deyan Ranko Brashich, Attorney at Law From the United States, Case No. IT-00-39-A, 22 March 2007. I also note the fact that Mr. Brašić's assignment as defence counsel in the *Krajišnik* case was withdrawn by the Registry on 2 May 2003. This decision was based on the fact that Mr. Brašić had been suspended from the practice of law in the United States for one year. As a result of the withdrawal, the start of the *Krajišnik* trial was delayed for more than nine months, not to mention the substantial costs. *See* Trial Judgement, paras 1226 and 1235.

2. The Appointment of an *Amicus Curiae*

79. Before considering the fact that appointing an *amicus curiae* does not adequately address the fundamental problems arising from a situation where an accused wishes to be self-represented on appeal, I draw attention to the fact that the decision is not founded on any legal basis in this regard. I note that in the *Milošević* case, the *amici curiae* were initially appointed during the trial,[126] but that this, as can be clearly stated in hindsight, had adverse consequences for the trial. Indeed, in that case, the decision to appoint the *amici curiae* was never appealed, thus, the Appeals Chamber is not bound by any prior jurisprudence.

80. The wording of Rule 74 of the Rules is clear in that it is applicable in situations where the court might find it useful to hear from a State, organization or individual about "any issue specified by the Chamber." In general, this means that an *amicus curiae* shall assist the court only in relation to specific issues, usually on points of law. It is thus obvious that the rule was not meant to introduce a third party to the courtroom. However, this is exactly what the decision does: the *amicus curiae* is supposed to "make submissions to the Appeals Chamber similar to those which a party would make (including a notice of appeal, appeal brief, response brief, and reply brief) [...]."[127] The artificial construct of an *amicus curiae* acting as *de facto* counsel must inevitably lead to a conflict of interest in the mind of any lawyer appointed as an *amicus curiae* who takes his role seriously.[128]

81. Furthermore, even disregarding the fact that the International Tribunal's Statute and Rules do not have a provision explicitly allowing for such an appointment instead of the assignment of Counsel, it begs the question of how the *amicus curiae* could do anything to mitigate the negative effects of the Appellant's self-representation. Moreover, as was acknowledged even by then assigned counsel during a recent Status Conference, the *amicus curiae* could indeed make submissions that run contrary to the Appellant's best interests or defence tactics.[129] Therefore, considering again what is at stake for the Appellant following his conviction by the Trial Chamber, it must be concluded, as explained in detail above, that in appeal proceedings before the

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[126] *Prosecutor v. Milošević*, Case No. IT-01-51-PT, Order Inviting Designation of *Amicus Curiae*, 23 November 2001.
[127] Decision, para. 21.
[128] *See* the statement by Mr. Nicholls, at that time assigned counsel, during a recent Status Conference, Transcript, p. 53 (26 March 2007): MR. NICHOLLS: Well, the function of an amicus curiae is normally to assist the Court, not to take instructions from the client but to read, listen to the arguments advanced by others and to put forward such arguments as the amicus considers are appropriate. Those arguments may be on the -- in the interests of the client or may be against the interests of the client. That is the normal position of an amicus curiae. JUDGE SCHOMBURG: So you would submit that it might even happen that you, acting as an amicus curiae, would have to act when exercising your work conscientiously, also to act against the interests of Mr. Krajišnik? MR. NICHOLLS: As amicus curiae, yes. As Defence counsel, of course, totally different situation. [...]
[129] *Id.*

International Tribunal only defence counsel, working solely in the interests of the Appellant, can guarantee that the Appellant's right to fair and expeditious proceedings is fully respected.

3. Competing Briefs

82. The decision orders both the Appellant and the *amicus curiae*, once appointed, to file each their own appeal brief. It also allows for the dual filings of the notices of appeal and response briefs to the Prosecution appeal.[130] Once again, it is not clear how the *amicus curiae* could assist the court by filing his own appeal brief. Moreover, the decision does not clarify what happens in the event there is a conflict between the appeal brief filed by the Appellant and the one filed by *amicus curiae* or why the Chamber should accept grounds of appeal that were explicitly not raised or even rejected by the Appellant. Indeed, the majority wants to have it both ways – on the one hand it allows the Appellant to represent himself, on the other, it seeks the involvement of a professional lawyer, acting, however, not as a friend of the Appellant, but as a friend of the court. With all due respect, these two conflicting desiderata cannot be reconciled: the ensuing melee is a recipe for disaster.

D. Conclusion

83. When it conflicts with the overarching right to a fair, public and expeditious trial, the right to self-representation must yield.[131] I firmly believe that a waiver of the right to a fair trial is not possible under any circumstances. I must therefore respectfully come to the conclusion that the decision supported by majority has no basis in law and from the outset renders these appellate proceedings before us unfair. Furthermore, I doubt that the disposition as it stands now can serve as a sound basis for the appeal proceedings in this case. For these reasons, with all due respect, I fundamentally dissent from the decision of the Appeals Chamber.

Done in English and French, the English text being authoritative.

Dated this 11th day of May 2007,
At The Hague, The Netherlands.

Judge Wolfgang Schomburg

[Seal of the International Tribunal]

[130] In passing I note that the effect of an *amicus curiae* making submissions – even though only up to two thirds the length of those by the Appellant and the Prosecution – will be that further delays in the appeal proceedings can safely be expected.