

THE RIGHT TO SELF-REPRESENTATION IN INTERNATIONAL CRIMINAL JUSTICE

Between Legal Fairness and Judicial Effectiveness

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Abstract. One of the main challenges of international criminal justice is to find a balance between the different interests involved in international criminal proceedings. Three elements must be taken into account. On one side, the rights of the accused and the respect of the fairness of the trial. On the other side, the rights of the victims and the need for justice for the international crimes committed. Finally, the interests of the legal system to have efficient criminal trials. Self-representation is often involved in the conflict between legal fairness and judicial effectiveness of international proceedings. In this sense, it is a fundamental right of the accused and must be guaranteed, but at the same time it has to be limited, in order to impede any detrimental situation for the trial itself.

This paper will focus on the main questions raised by self-representation and on the possible alternative approaches to the limitation of this right in order to find a balance with the interests of Justice. The first part of this work will be dedicated to a brief analysis of the legal basis of the right to self-representation. Then, the analysis will concern the main problematic features of self-representation and the limits imposed by international tribunals, in particular the ICTY, on the use of this right. Finally, the paper will consider the possible future scenarios for self-representation and its limits in international criminal proceedings, with a reflection on alternative solutions to the question.

SOMMARIO: 1. A Brief Excursus of the Legal Basis. – 1.1. The Civil Law and Common Law Systems Approach. – 1.2. International Conventions. – 1.3. Statutes of International Tribunals. – 2. A Janus-Faced Issue. – 2.1. The Problematic Framework of the Objectives and Goals of International Criminal Justice. – 2.2. Chaos in the Trial: When the Right to Self-Representation is Abused. – 2.3. Procedural Issues Arising from Self-Representation. – 2.4. Limit Self-Representation: an Attempt to Reconcile Legal Fairness and Judicial Effectiveness. – 2.4.1. Main Judicial Solutions. – 2.4.2. Challenges for the Defense Counsels. – 2.5. The Future of Self-Representation and its Limits: Reflections on a Different Rationale. – 3. Conclusions.

1. A Brief Excursus of the Legal Basis.

1.1. *The Civil Law and Common Law Systems Approach.*

The right to self-representation is not universally recognized as a fundamental right of the defendant and there are different approaches in the civil law and common law legal systems¹.

In the majority of the civil law systems, an accused cannot waive his right to have a defence counsel and he cannot be self-represented in criminal proceedings. A reason for this procedural choice might be that in these legal systems the defence lawyer is not simply a representative of the accused. Indeed, he is a legal assistant that knows the rules of the criminal procedure and the applicable law in the legal case. Thus, the defence counsel is considered as an indispensable presence in the proceeding and cannot be removed at the accused's will. In other words, the defence counsel is regarded as a legal expert, who has the necessary legal knowledge for the proceeding and his action during the trial is fundamental, often more important than the one of the defendant. In common law legal systems, instead, representation is seen under a complete different perspective. The legal counsel does not assist the accused, using his defence skills in the courtroom, but he speaks on behalf of the defendant. The historical leading case in this sense is *Faretta v. California* (1975)². In *Faretta* the U.S. Supreme Court recognized the right to self-representation of the accused as a fundamental one. It was considered as to be a constitutional right and the Court stressed the fact that the accused "should be aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with eyes open"³.

The two civil law and common law approaches to self-representation are based on a different reasoning and follow a distinct rationale: the former is underpinned by the idea of the accused's legal incompetence in the trial; the latter is linked to the respect of the defendant's personal choices. The civil law and common law perspectives seem to have influenced the international legal system. But in international criminal proceedings, despite the fact that self-representation is a fundamental right, this has never been clearly defined. In this sense, the boundaries of the right are uncertain and rather blurred.

As it has been pointed out by the scholarship⁴, international tribunals have never really considered and discussed the question of self-representation. Furthermore,

¹ A. CASSESE (ed), *The Oxford Companion to International Criminal Justice*, OUP, Oxford, 2009, 508.

² *Faretta v. California* 422 US 806 (1975).

³ *Ibid.* para 835.

⁴ See, among others, A. CASSESE *supra* note 1; G. BOAS, *The Right to Self-Representation in International and Domestic Criminal Law. Limitations and Qualifications on that Right* in H. ABTAHI and G. BOAS (eds), *The Dynamics of International Criminal Justice. Essays in Honour of Sir Richard May*, Martinus Nijhoff Publishers, Leiden, 2005.

they have never distinguished between the defence counsel's assistance on one side and representation on the other. In this sense, some authors argue that international tribunals have adopted a different approach towards self-representation than the civil law and the common law one. Boas states that these Courts "represent procedurally what might be termed a 'third way'"⁵. This third way is that they recognize the right to self-representation to the accused, but this is not an 'absolute' right. Thus, the right can be limited for reasons, as it will be discussed later on, related to the 'interests' of justice and the necessity to have a speedy and effective trial.

1.2. International Conventions.

Several International Conventions have codified the right to self-representation. This fact has conferred the right certain relevance in international criminal justice and it has upgraded it to be one of the main rights of the accused in international criminal proceedings. The main international law provisions are three.

First of all, art. 14 (3) (d) of the ICCPR states: "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"⁶.

In this provision there is an expressed reference to self-representation, even if it is not an absolute right. Indeed, there is a possibility to impose a defence counsel to the accused when the interests of justice must be taken into account. As it has been pointed out⁷, in the *travaux préparatoires* of the ICCPR there was no intention to include self-representation and in particular it was not considered to be a pivotal right in international criminal procedure. It has also been pointed out that it was for the persistent intention of the U.S. representatives to include it in art. 14 of the ICCPR that at the end the final version of the norm comprehends it.

Self-representation is also considered in art. 6 (3) (c) of the ECHR. This norm reads as follows: "Everyone charged with a criminal offence has 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*"⁸.

⁵ G. BOAS, *supra* note 4, 41.

⁶ International Covenant on Civil and Political Rights [1966] Art. 14 (3) (d) (emphasis added).

⁷ G. BOAS *supra* note 4, 53; M. P. SCHARF and C. M. RASSI, *Do Former Leaders Have an International Right to Self-Representation in War Crimes Trials?*, 20 Ohio State Journal on Dispute Resolutions (2005) 3, 12.

⁸ European Convention on Human Rights [1950] art. 6 (3) (c) (emphasis added).

Once again, the norm states the right to self-representation as not absolute and subjected to a limitation with the appointment of a defence counsel when there is such a necessity for justice.

This provision has been applied in different cases before the ECtHR⁹ and it has always been interpreted as allowing the States to impose a legal counsel on the defendant under certain circumstances¹⁰. Thus, in the European scenario, in which it is possible to find the different legal traditions of civil law and common law countries, the right to self-representation has been approached trying to combine the two different positions on the matter.

Finally, self-representation is provided by art. 8 (2) (d) of the ACHR. It states that: "Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. 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"¹¹.

Noteworthy is the fact that the ACHR does not a limit on the right to self-representation as in the other two provisions recalled, but it only refers to the right itself.

1.3. Statutes of International Tribunals.

Even at the judicial level, the international community has been sensible to the question of the recognition and codification of the right to self-representation. Indeed, there are several provisions that allow such a right and use a similar language to the international conventions recalled above. The main examples are: art. 21 (4) (d) of the ICTY Statute; art 20 (4) (d) of the ICTR Statute; art. 67 (1) (d) of the ICC Statute and art. 17 (4) (d) of the SCSL Statute. In all these procedural norms, self-representation is codified as a pivotal, but not absolute right. Self-representation is fundamental because it is necessary to achieve the fairness of the trial and for the protection of the accused during the proceeding. As it has been pointed out, international courts not only recognize the right to the accused, but also to persons that are detained under the judicial control¹². Furthermore, the tribunals have codified some rules regarding the behavior of the defence counsels, promulgating codes of ethical conduct¹³.

Despite the critics received for not having formulated a common definition of self-representation, international tribunals try to deal with the problem in the practice

⁹ See, among others, *Croissant v. Germany*, App no 13611/88 (ECtHR, 25 September 1992); *Correia de Mateos v. Portugal*, App no 48188/95 (ECtHR, 15 November 2001).

¹⁰ G. BOAS *supra* note 4, 54-56.

¹¹ American Convention on Human Rights (Pact of San José) [1969] Art. 8 (2) (d) (emphasis added).

¹² S. BERESFORD and H. LAHIOUEL, *The Right to be Defended in Person or Through Legal Assistance and the International Criminal Court*, 13 (4) *Leiden Journal of International Law* (2000) 949, 984.

¹³ *Ibid.* 984.

of the criminal proceedings. In other words, considering the concrete cases involved in criminal trials, these international courts try to guarantee the adequacy and effectiveness of the use of self-representation in the trial providing for some specific rules that can be an immediate answer for the procedural issues related to self-representation. In this sense, “International criminal tribunals have to walk the fine line of scrupulosity respecting the rights of the accused while protecting their own procedure and legitimacy, and above all ensuring a fair trial”¹⁴. How this balance can be achieved and what the main legal and political issues at stake are will be discussed further on in this work.

2. A Janus-Faced Issue.

*Quem tamen esse deum te dicam, Iane biformis?
nam tibi par nullum Graecia numen habet.
ede simul causam, cur de caelestibus unus
sitque quod a tergo sitque quod ante vides.*
(Ovidius Fasti 1, 89-90)

More than two thousand years ago, during the Roman Era, one of the most ancient and venerated Gods was Janus¹⁵. He was considered the God of beginnings and transitions, the god of the past and the future. He was represented as having two faces, each one looking towards an opposite direction. This capacity to look backwards and forwards gave Janus a great power and a he was one of the most important Gods of the Roman archaic pantheon. Nowadays, we refer to a Janus-faced situation when it is problematic and with two sides. This is exactly what the right to self-representation is about.

In international criminal justice self-representation is Janus-faced in the sense that it involves a plurality of issues that can be divided in two sides, representing two faces of the same concept. On one side, there are the interests, aims and objectives of international criminal law and procedure. On the other side, there are the rights of the accused recognized and protected in international criminal proceedings. These two parts are often in conflict and several difficulties arise in trying to find a solution to this tension.

The recognition and codification of the right to self-representation has been an important step in the path of international criminal law towards a more respectful and conscious consideration of the rights of the accused. Indeed, self-representation is part of the aquis of rights that are fundamental for the fairness of international criminal trials and for reaching an equilibrium between the different interests involved into the proceeding itself. In other words, even if self-representation is a recognized

¹⁴ N. H. B. JORGENSEN, *The right of the Accused to Self-Representation Before International Criminal Tribunals*, 98 (4) *The American Journal of International Law* (2004) 711, 725.

¹⁵ M. P. O. MORFORD and R. J. LENARDON, *Classical Mythology*, OUP, Oxford, 1999, 504-505.

prerogative of the accused, nevertheless, it is problematic because it can be abused by the accused and used against the correct functioning of the trial. In this sense, self-representation is a two-fold right: it gives the defendant the possibility to deal alone with the trial, with his own ideas and techniques of defence; but at the same time it allows him to act against the proceeding and justice. Indeed, as often happens with procedural rights, there is a concrete possibility to incur in a use of those rights against the interests of the legal system that allows them. In the case of self-representation, this may happen (and in effect it did) when, for instance, the accused behaves in the courtroom as the protagonist of a 'show', and uses the time given for his defence for a personal assault of the Court and of the proceeding. The trial then turns to be a 'show', rather than a place where looking for justice. In the 'public arena' created by the accused, all the parties are unfortunately involved and they are at the mercy of this inadequate spectacle before the international community. For this continuous tension between the necessity to protect the rights of the accused and to avoid the 'show' at trial, self-representation has been limited and concerns have been raised about its compatibility with the objectives and the goals of international criminal justice. Thus, self-representation must be analyzed considering both its sides, the interests of justice and the protection of the accused's rights, in order to reconcile the two faces of Janus.

2.1. The Problematic Framework of the Objectives and Goals of International Criminal Justice.

Since the very beginning, international criminal law and international criminal procedure have been characterized by a plurality of objectives and goals. As it has been pointed out, the objectives of both these fields of law are quite similar because they have influenced each other¹⁶. Substantial and procedural criminal laws are interrelated and they share similar, if not identical, values. Their objectives are directed to achieve, as final result, the balance between the different interests involved in international criminal proceedings and the protection of important rights of both the accused and the victims. In this sense, there are several procedural rules concerning the fairness of the trial or the protection of witnesses.

Retribution, prevention and deterrence might be considered as the main objectives of international criminal law and procedure because they are directed to protect all the parties involved in an international criminal proceeding. In other words, through these three objectives it is possible to conduct a trial in a way that is acceptable and recognized as lawful by the international community. The accused must be brought before an international court, in order to face a trial and to be accountable for the atrocities committed. But at the same time an inalienable set of rights must be recognized to him, in order to have equality in the proceeding among all the parties. These rights and this balance of interests are one of the most fundamental outcomes achieved in the development of international criminal justice. Therefore, international

¹⁶ C. J. M. SAFFERLING, *International Criminal Procedure*, OUP, Oxford, 2012, 64.

criminal proceedings must take into consideration several elements: the fairness of the trial; the possibility for the victims to participate in the trial; the expeditiousness of the trial; the effectiveness of the proceeding and its efficacy; the legitimacy of the Court in the international legal system. This abundance of objectives and goals present in the international criminal law system has resulted into an overcrowded agenda for international tribunals. In this sense, international courts experience an ‘overabundance’ of interests to protect and to respect and “the resulting disparities between aspiration and achievement may damage the reputation of any system of justice”¹⁷. Thus, the Courts face a problematic situation in which on one side they have to respect, protect and apply certain rights in the trial; but on the other side, they have to balance, combine and reconcile different interests.

It is not always and easy work to do and in some respects it would not be the principal duty of international tribunals. Indeed, the judges should focus on the conducting of the trial, and not on the discrepancies present in the legal system in which they have to work. It is up to the legislator and to the international community as a whole to decide which are the priorities and the objectives of international criminal justice, without overloading the work of the judges even with this further issue. In any case, the international courts have dealt with the problem of balancing with vicissitudes, sometimes with good results and sometimes not. In this sense, self-representation has been one of the most complex rights to deal with, and the judges have not always found good solutions, especially when there has been a clash between the behavior of the defendant and the needs of the judicial system.

2.2. *Chaos in the Trial: When the Right to Self-Representation is Abused.*

‘Self-representation’ means not only that the accused can act alone without the assistance of a defence counsel, but also that he can decide the defence strategy. In this sense, as it has already been noticed, the danger of an abuse is high and sometimes it is the only real effect of self-representation for a defendant that since the very beginning refuse to cooperate in the proceeding.

When the right to self-representation has been recognized for the first time, it was not surely in the mind of the legislators the fact that it could be a double-edged sword. It was only codified in favor of the principles of justice and fairness of the trial. But when rights are created (in particular procedural rights), then it is necessary to see if they work in practice. In other words, sometimes the shift from theory to practice is not easy and the abuses can make things worse. In the debate about the abuse of the right to self-representation, this has been described in very hard terms, underlying a main danger that can arise: the chaos in the trial. This fear is due to precedent legal

¹⁷ M. DAMAŠKA, *Problematic Features of International Criminal Procedure* in A. CASSESE (ed), *The Oxford Companion to International Criminal Justice*, OUP, Oxford, 2009, 178.

cases such as the *Milošević* case¹⁸, where the accused took the floor only for political agitation and for a public harassment of the Court and of the Prosecutor. As a consequence, some scholars have started to deny the right itself; others have stated that “self-representations should be avoided in order to abolish any disruptive behavior of the accused”¹⁹, and the proceedings have turned into a ‘circus’²⁰.

The ‘chaos in the trial’ has been particularly present in the legal cases concerning self-represented former leaders. Indeed, when former leaders are brought before an international court and they invoke the right to self-representation, there is a plurality of matters involved. Not only legal and procedural issues, but also political and social ones. In particular, the possible undue interference in the proceeding and in the work carried out by the judges. Former leaders, as in the *Milošević* case, can make speeches and they can use their time to perform the role of the victims trying to have the public opinion on their side. As in the majority of international criminal proceedings, public opinion has an important role to play. This is because on one side there might be a public condemnation of the atrocities perpetrated by the accused and for which he is at trial; but on the other side, public opinion might be manipulated by the accused, trying to convince people that there were good reasons for committing even atrocious crimes. This is a realistic danger and cannot be underestimated. Otherwise there might be an even counterproductive result from the trial: the accused could be morally supported by a part of the public opinion, as it happened in the *Milošević* case. In this trial, indeed, it has been estimated that only 33% of the Serb population was convinced that he was responsible for the crimes that were alleged to him²¹. Therefore, there is a concrete necessity to regulate the phenomenon of self-representation for former leaders in a different and more specific way than for other accused.

2.3. Procedural Issues Arising from Self-Representation.

The possibility for the accused to be self-represented does not only raise questions of ‘show’ at trial, but also some more practical procedural ones. Indeed, as it has been pointed out²², as no defence counsel is present in the courtroom and the accused must rely on his own legal ‘forces’, the equality of arms, the expeditiousness of the trial and the fairness of the proceeding can be affected.

First of all, equality of arms means that (in particular in complex cases) the accused will not have the same legal preparation and knowledge of the documents of

¹⁸ *Prosecutor v Slobodan Milošević*, case no IT-02-54, Trial Chamber III, ICTY.

¹⁹ A. HARTWIG, *The accused and the defence counsel* in C. J. M. SAFFERLING, *International Criminal Procedure*, OUP, Oxford, 2012, 192.

²⁰ G. BOAS, *Self-representation before the ICTY. A case for reform*, 9 *Journal of International Criminal Justice* (2011), 53.

²¹ M. P. SCHARF and C. M. RASSI *supra* note 7, 6.

²² G. BOAS *supra* note 20, 77.

the trial as the Office of the Prosecutor. In other words, the huge amount of data to be analyzed to have an effective defence cannot be correctly used by the accused when he is alone in the proceeding with no external help. This is also true in regards to the examination of hundreds of witnesses or of the reports provided by experts in the trial for the most technical issues. Furthermore, the accused is directly involved by the documents, the reports and the witnesses in the proceeding and this can influence his preparation of the defence. Indeed, the defendant cannot have an 'external' point of view on these materials and he has a complete different legal preparation than a defence counsel. In this sense, the counsels "are able to control the flow of material, make forensic choices, dedicate resources to the right place at the right time and dispassionately assess the capacity of that legal team to respond to the different phases of the case"²³.

Secondly, the trial can be slowed down by self-representation. To have an expeditious trial is one of the goals of international criminal justice and it is also a necessity for the demand of justice coming from the international community. But when in the trial the accused is self-represented and he is alone before the court, this goal might be irremediably compromised. Indeed, either through a disruptive behavior, or through the impossibility to conduct the defence in a proper way because of the complexity of the case, in both situations the trial will not be expeditious. Thus, proceedings that could be concluded in few years, take much more time. Hearings are delayed and the entire schedule of the trial is affected, with detrimental effects not only for the Court and its public credibility, but also for the victims that are waiting for a judgment.

Thirdly, the fairness of the trial can be affected. Indeed, concerns have been raised about the relationship between self-representation, expediency and fairness. Fairness and expediency are important for the protection of the rights of the victims and of the witnesses. Nevertheless, among the scholars it is debated whether the imposition of a defence counsel is compatible with the concept of 'fair trial'. Indeed, some authors argue that the fairness of the proceeding is even more protected and guaranteed when a defence counsel is imposed. Others, say that the 'fair and expeditious' rationale is the only basis that can be used in order to justify the limitation of self-representation. Nonetheless, even if the judges are acting in the interests of justice, "judicial management should not justify the circumscription of the pro se defense right"²⁴. Moreover, it has been noticed that to speed-up the trial with the imposition of a defence counsel is unfair because it will be at the expenses of the accused's rights²⁵. Indeed, in order to save the Court from a long and extenuating

²³ *Ibid.* 79.

²⁴ C. HOTIS, A "Fair and Expeditious" Trial: A Reappraisal of Slobodan Milosevic's Right to Self-Representation before the International Criminal Tribunal for the Former Yugoslavia, 6 (2) Chicago Journal of International Law (2005-2006) 775, 787.

²⁵ M. DAMAŠKA, Assignment of Counsel and Perception of Fairness, 3 Journal of International Criminal Justice (2005) 3, 7.

proceeding, the Court itself decides to solve the problem appointing a defence counsel, as “a regrettable means of last resort”²⁶.

2.4. *Limit Self-Representation: an Attempt to Reconcile Legal Fairness and Judicial Effectiveness.*

The limits imposed over the right to self-representation by international tribunals are justified on the ground of the ‘interests of justice’. These ‘magic’ words are often used by the Courts to appoint a defense counsel to a defendant that behaves in a disruptive manner. However, ‘interests of justice’ is a really vague expression, with no specific and clear meaning. Therefore, the main problem is to define the ‘interests of justice’ and to understand what the boundaries of these ‘interests’ are, in order to better balance them with the rights of the accused. With no definition, even the good intentions of the judges that are beneath the reference to the ‘interests of justice’ will be undermined and there will be a breach of the principle of legality. In several occasions, this justification has been used in relation to the necessity to have a fair trial; to ensure the effectiveness of the proceeding and to guarantee the equality of arms in the proceeding²⁷. This last reason might be considered as a paradox, in the sense that, even if self-representation is an accepted right of the accused, nevertheless the Court can consider the lack of a more technical representation as detrimental for the defendant. In other words, under certain circumstances he must have a defense counsel in order to be at the same technical level as the other parties in the trial. Looking at this situation, it seems that the solution found by international courts is problematic. Indeed, the issues related to the right to self-representation are present when it is necessary to understand what the content of this right is. But the problems arise also when it is applied and limited²⁸. In effect, self-representation has always been limited when it is abused by the accused and, (as already discussed) the trial has been transformed into a political stage in which the defendant can behave freely. The Courts forcedly appoints a defense counsel to the accused when the limit of decency has been reached. They do not want to intervene into his sphere of rights prior to that moment. Therefore, they seem to have in their hands only the instrument of the ‘interests of justice’. This also might be considered the reason why the ‘interests of justice’ is a broad expression and the Courts do not want to define it better. The more the terms are vague, the better it is for the control of the judges over the right to self-representation

²⁶ *Ibid* 8.

²⁷ For the critics to this approach to the limits of self-representation see G. SLUITER, *Fairness and the Interests of Justice. Illusive Concepts in the Milošević Case*, 3 *Journal of International Criminal Justice* (2005) 9.

²⁸ It has been argued by some authors that the ‘interests of justice’ may limit the accused’s rights, in order to have a better balance in the trial and to preserve the fairness of the proceeding. For an analysis of this argument see N. H. B. JORGENSEN, *The Problem of Self-Representation at International Criminal Tribunals. Striking a Balance between Fairness and Effectiveness*, 4 *Journal of International Criminal Justice* (2006) 64, 69-70.

and its limitation. Thus, the question is whether it is possible to find other solutions to the problem and whether these solutions can rely on different grounds than the 'interests of justice'.

2.4.1. Main Judicial Solutions.

The main legal cases concerning self-representation have been decided by the ICTY. The two main relevant cases²⁹ for the development of the standards of the limits are the *Milošević* case³⁰ and the *Šešelj* case³¹. The former has been problematic for the combination of the right to self-representation and the health conditions of the defendant. The latter has concerned self-representation linked to the disruptive behavior of the accused.

In the *Milošević* case the Appeals Chamber set some parameters in order to better deal with the numerous issues related to self-representation, in an attempt to find a balance between this right and the exigencies of the proceeding. In order to understand what the threshold for limiting self-representation is³² let first consider these parameters. The *Milošević* case has been really controversial. Indeed, after the Trial Chamber had imposed a defense counsel to Milošević in order to avoid a delay of the trial because of his bad health conditions³³, the Appeals Chamber confirmed this decision, but based on different arguments³⁴. First of all, the Appeals Chamber stated that the appointment of a defense counsel to the accused was right, but the Trial Chamber had failed to take a measure that was proportionate to the trial's interests. Therefore, referring to the principle of proportionality, the Court said that the Trial Chamber had not decided reasonably and it had restricted the right to self-representation in an excessive way. Then, the Appeals Chamber pointed out some

²⁹ Other interesting cases brought before the ICTY concerning self-representation are: Decision following Registrar's notification of Radovan Stanković's request for self-representation, *Prosecutor v. Gojko Janković and Radovan Stanković*, case no IT-96-23/2-PT, Trial Chamber I ICTY, 19 August 2005; Decision on Momcilo Krajišnik Request to Self-Represent, on Counsel's Motion in Relation to Appointment of *Amicus Curiae*, and on the Prosecutor's Motion of 16 February 2007, *Prosecutor v. Momcilo Krajišnik*, case no IT-00-39-A, Appeals Chamber ICTY, 11 May 2007.

³⁰ *Prosecutor v. Slobodan Milošević*, case no IT-02-54-T, Trial Chamber III, ICTY.

³¹ *Prosecutor v. Vojislav Šešelj*, case no IT-03-67-T, Trial Chamber III, ICTY.

³² Some authors have tried to define it. N. H. B. JORGENSEN *supra* note 28, at 70 states that "The threshold is clearly crossed where an accused engages in deliberate and serious obstructionism or harassment of witnesses, or boycotts his trial, or in other words, where an accused behaves in such a manner as to forfeit his right completely"; for R. K. JONES, *Untangling the right to self-representation in the International Criminal Tribunal for The Former Yugoslavia*, 43 *Georgia Law Review* (2008-2009) 1285, 1316: "If a defendant's actions, intentional or not, systematically and substantially delay the trial, and the defendant's actions cannot be remedied in some way, counsel may be imposed".

³³ Reasons for decision on assignment of defence counsel, *Prosecutor v. Slobodan Milošević*, case no IT-02-54-T, Trial Chamber III ICTY, 22 September 2004.

³⁴ Decision on interlocutory appeal of the trial chamber's decision on the assignment of defense counsel, *Slobodan Milošević v. Prosecutor*, case no IT-02-54-AR73.7, Appeals Chamber ICTY, 1 November 2004.

principles and requirements that must be respected when limiting self-representation and these are, for instance, creating “a regime that minimizes the practical impact of the formal assignment of counsel, except to the extent required by the interests of justice”³⁵. As it has been underlined, with this decision the Appeals Chamber has changed the role given to the appointed defense counsel, relegating him to a less effective role, such as a standby counsel³⁶. Moreover, in *Milošević* the assigned defense counsel asked for a withdrawal, because of the obstacles and the obstructive behavior carried out by the defendant. In other words, it was not possible to defend the accused in a way compatible with the Code of Conduct of the Tribunal and in a professional manner. These were recognized to be good reasons for having the withdrawal accepted by the Court.

In the *Šešelj* case, following the first decision taken in the *Milošević* case, in 2006 the Trial Chamber decided to appoint a standby counsel to Šešelj in order to protect both the ‘interests of justice’ and the rights of the accused. The judges considered a two-fold question: whether the accused’s behavior “warrants the imposition of restrictions on his right to represent himself in the interests of justice” and “whether imposing counsel is in the interests of a reasonably expeditious trial”³⁷. The Trial Chamber referred to art. 21 of the Statute and to the jurisprudence of the U.S.A. Courts, in particular the *Faretta* case, underlying the fact that the right to self-representation could be limited for the obstructive behavior of the accused. In this sense, it could not be claimed any violation of the rights of the defendant. The Court stressed the reference to the ‘interests of justice’ and to the fact that the limitation of self-representation has already well-accepted by the jurisprudence of both the ICTY and the ICTR.

As it has been recalled by the scholarship, the Court considered the concept of the ‘interests of justice’ as a broad one and with a direct link to the principle of fairness in international criminal proceedings³⁸. It is also recognized as being a “nebulous principle”³⁹ and this is not of help in trying to understand the standards that were applied by the judges in the case concerned. The decision taken by the Trial Chamber was later overridden by the Appeals Chamber. Indeed, the Trial Chamber was considered to have acted in a superficial way, without making clear to the accused the fact that his behavior could be the ground for revoking self-representation by the judges. According to Rule 80 (b) of the ICTY, the Court must give a specific warning to the accused before taking any measure in the trial. For the Appeals Chamber this rule had not been respected in the *Šešelj* case, therefore the Trial Chamber erred in its decision. In line with the above mentioned reasoning, the ICTY has introduced the Rule 45 ter in the Rules of Procedure that affirms the necessity to impose a defence

³⁵ *Ibid.* paras 19-20.

³⁶ G. BOAS *supra* note 20, 83.

³⁷ *Ibid.* 62. Here Boas recalls the words used by the Trial Chamber in the *Decision on Assignment of Counsel*.

³⁸ G. BOAS, *The Dynamics of International Criminal Justice. Essays in Honour of Sir Richard May*, Martinus Nijhoff Publishers, Leiden, 2006, 64.

³⁹ G. BOAS *supra* note 20, 62.

counsel on the accused when the interests of justice so require. This new procedural rule can be considered as the matter of course of the parameters set by the ICTY in its jurisprudence and not as a further development of the debate over self-representation. But, as it has been pointed out, the Rule 45 ter has been contested by the Appeals Chamber in *Šešelj* and the Court has interpreted it simply as an instrument to codify the precedent findings of the jurisprudence⁴⁰. Therefore, the new rule is not an innovation but just a confirmation of what has already been decided⁴¹.

2.4.2. Challenges for the Defense Counsels.

When the Court limits the right to self-representation and appoints a defence counsel to the accused, there might be problems on how the counsel can carry out his duties. In this sense, considering the types of defence counsels appointed by international tribunals, such as the standby counsels, in the majority of the cases they had encountered serious difficulties in defending a reluctant accused⁴².

As it has already been argued, the necessity to appoint a defence counsel rises because of the lack of legal experience and knowledge of the defendant. Indeed, in international criminal trials, either the defense counsel or the accused alone must have a substantial knowledge of humanitarian law, international criminal law and procedure and other subjects that are not part of the common domestic legal framework⁴³. Thus, it is unrealistic to say that the accused self-represented might have the requested legal skills for these trials. Furthermore, the accused “may be insufficiently qualified to represent himself or herself adequately in a complex case and in such circumstances should be provided with counsel”⁴⁴.

Despite the necessity to have a defence counsel, this is not always an easy experience. Indeed, the counsel can be in a very hard position because he has not been chosen by the accused and in the majority of the cases the defendant refuses to cooperate and to provide instructions. As it has been noted by the scholarship, his situation is one of the most difficult because, at the same time, he must adhere to the code of conduct set by the Court and he must fight with the opposition of the accused and the lack of collaboration. Thus, the question is what the behavior of these defence counsels must be. Indeed, “if it is impossible for them to guarantee an effective defense, the very existence of such ‘imposed’ counsel might harm the integrity of the

⁴⁰ *Ibid.* 69.

⁴¹ For an analysis of the weak and strength points of the ICTY’s reasoning towards self-representation see N. L. CAMIER, *Controlling the Wrath of Self-Representation: The ICTY’s Crucial Trial of Radovan Karadzic*, 44 *Valparaiso University Law Review* (2009-2010) 957.

⁴² Sometimes *Amici Curiae* have been appointed as well to support the defendant’s self-representation. For an analysis of the characteristics and the difficulties of these counsels see J. P. W. TEMMINCK TUINSTRAN, *Assisting an Accused to Represent Himself. Appointment of Amici Curiae as the Most Appropriate Option*, *Journal of International Criminal Justice* (2006) 47.

⁴³ M. P. SCHARF and C. M. RASSI *supra* note 7, 21.

⁴⁴ *Ibid.* 23.

legal profession and, more broadly, the fairness of the proceeding”⁴⁵. They must follow a certain set of rules that protect the free choices of the defendant, but at the same time they have to respect specific ethical and professional rules that permit to be within the borders of legality, fairness and judicial effectiveness⁴⁶.

What the future of the appointed defence counsels will be in the further development of self-representation is not clear and it is even more blurred when we consider the obstacles put on their path by both the Courts (with their underestimation of the counsels as subjects of few importance in the trial) and the accused (with his obstructive behavior).

2.5. *The Future of Self-Representation and its Limits: Reflections on a Different Rationale.*

The right to self-representation is a Janus-faced issue also for its capacity to look onwards and to personify the passage from the past to the future. Indeed, as Janus was worshipped as the god of the passages, transformations and changes, self-representation in international criminal justice represents the change and development. Self-representation and its limits can be studied in a different perspective, trying to find out a new rationale for them. Thus, it is a question of finding new solutions to the problem of the balance between the rights of the accused and the interests of the international legal system. In this sense, the scholarship is divided on the possible consequences that this change can have for the future jurisprudence of international tribunals and for the attitude of the judges towards the use of new criteria better-defined than the ‘interests of justice’.

One of the new solutions proposed is to put some conditions on the use of self-representation before the beginning of the proceeding, in order to have an already fixed set of rules about how the parties must behave during the trial itself. In other words, the idea is to put some preliminary conditions on the right of the accused in order to force him to act within certain boundaries and to avoid any possible abuse. In this way the Tribunal can maintain the overall control of the proceeding. These preliminary conditions can be, for example, the imposition of the respect of the procedural rules of the tribunal and the impossibility to delay the trial through a disruptive behavior and the use of the time conferred to the detriment of the proceeding⁴⁷. The accused would be obliged to follow the procedural steps indicated,

⁴⁵ J. P. W. TEMMINCK TUINSTRA, *Defense counsel in International Criminal Law*, CUP, Cambridge, 2009.

⁴⁶ For an analysis of the ethical and professional issues faced by the appointed defence counsels see: J. GOLDSCHMIDT, *Judicial Ethics and Assistance to Self-Represented Litigants*, 28 *The Justice System Journal* (2007) 324; J. I. TURNER, *Legal Ethics in International Criminal Defence*, 10 *Chicago Journal of International Law* (2009-2010) 685.

⁴⁷ The amount of control exercised by the Court may vary, but some authors suggest that it might include also some specific actions inside and outside the courtroom. For instance, controlling the use of the microphone; controlling the media exposition of the accused; giving warnings to the defendant at the beginning and during the trial. In this sense, see P. M. WALD, *Tyrants on Trial. Keeping Order in the Courtroom*, Open Society Institute, New York, 2009).

without the possibility to create a 'new' trial and to disturb its effectiveness and fairness. If the defendant does not want to collaborate and to fulfill the conditions, then the Court can impose a defense counsel. Thus, with this solution "the court is denying the accused the opportunity to portray him or herself as a martyr, silenced by the court to ensure a guilty verdict"⁴⁸. Furthermore, it is balanced and respectful of both the rights of the accused and the necessities of justice and of the proceeding. Nevertheless, the imposition of a defense counsel must not be regarded as a rule for international criminal trials, but only as an exceptional mean used in exceptional circumstances. In other words, it must be conceived as an *extrema ratio*.

Some authors are concerned with the use of appointed counsels and the limitation of self-representation because they argue that "any violation must be strictly necessary" and "if a trial is to be fair, it is essential that the accused be allowed to exercise the maximum degree of autonomy over their own case as possible"⁴⁹. This concern is undoubtedly correct and to some extent sharable, but it must also be kept in mind the fact that, in the attempt to counterweight different interests in criminal proceedings, the main goals of international criminal law must prevail. Indeed, it is not possible to talk about a fair and effective trial if the trial itself is impaired by the constant disruptive behavior of the accused. Even if a certain level of protection shall be given to the substantial and procedural rights of the accused, it is not possible to 'sacrifice' an entire trial to the 'altar' of a legally correct procedure. As it has been pointed out, self-representation over the years has developed into a practice of 'compromise', not protecting only the accused's interests anymore⁵⁰.

Another solution points out that the difficulties met in finding equilibrium in respect of the right to self-representation are the reflection of the inability of the courts to set some fixed pickets on the path of international criminal law and procedure. In this sense is the interesting dissenting opinion of Judge Wolfgang Schomburg in the *Krajisnik* case⁵¹. In Schomburg's view there is no conflict between the right of the accused to self-representation and the right to be assisted by a counsel. This theoretical opposition between the two rights is only a 'false dichotomy' and there is "a misunderstanding" in considering these rights as mutually exclusive⁵². Indeed, contrary to what has always been argued, it is the continuous opposition of the two rights that undermines the fairness of the trial. This impedes to have the interests and rights of both the accused and the victims respected. Schomburg points out that the right to self-representation must always be recognized to the accused, but this does not

⁴⁸ P. BASSETT, *The right to self-representation before International Criminal Tribunals, while not absolute, should only be denied in limited circumstances*, 62 (3) Northern Ireland Legal Quarterly (2011) 235, 242.

⁴⁹ *Ibid* 246.

⁵⁰ E. CERRUTI, *Self-Representation in the International Arena: removing a false right of spectacle*, 40 Georgetown Journal of International Law (2009) 919, 925.

⁵¹ Judge Wolfgang Schomburg, Dissenting opinion, Decision on Momcilo Krajisnik'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, *Prosecutor v. Momcilo Krajisnik*, case no IT-00-39-A, Appeals Chamber ICTY, 11 May 2007.

⁵² *Ibid* 1.

mean that a defense counsel must not be appointed. In fact, it is impossible in international criminal proceedings to not have a defense counsel, due to the complexity of the trial itself. This dissenting opinion is interesting because it uses an innovative view of the problem, in order to combine the two necessities of self-representation and of the interests of justice. The two positions are not incompatible, but they are two sides of the same coin. Therefore, they must be combined to have the whole picture of the problem and to solve it⁵³.

Considering the new scenarios that are proposed by the scholarship and the jurisprudence, it is clear that in every case self-representation is a fundamental right of the accused and must always be respected. Nevertheless, at the same time there are compelling reasons to limit it or, put in another way, to match it with the appointment of a defense counsel, an *amicus curiae* or a standby counsel⁵⁴. In any case, the right to self-representation cannot be exercised by the accused *sic et simpliciter*, but it has to be adapted to the requirements of nowadays international criminal proceedings and goals of international criminal law and procedure. In this sense, the different rationale for the limits to self-representation might be found not in another complete different legal reasoning, but in the already existing arguments analyzed in a different perspective. In other words, the limits provided for must achieve a new aim: the harmony of interests and rights and not the distinction or the systematic opposition of them. ‘Unity not diversity’ and ‘unification not differentiation’ must become the new ‘mottos’ of international criminal law and procedure in the case of self-representation.

Some authors talk about a ‘reform’ of the system and their attention is put on a change that must be done by the legislator or by the jurisprudence in the next years. Thus, the proposed solution is “representation by counsel should be the norm, derogated from only in exceptional circumstances and only to the extent that the trial can still be rendered fairly and expeditiously”⁵⁵.

3. Conclusions.

In international criminal justice we have passed from an era primarily focused on accountability and punishment of the accused, to one more respectful of the rights of all the parties of the trial. International tribunals have started to search for other horizons and to reconsider the relationship between the principle of fair trial and the

⁵³ For further reflections of Judge Schomburg over self-representation see W. SCHOMBURG, *Some Reflections on the Right to Self-Representation Before International Tribunals*, 12 ERA Forum (2011) 189.

⁵⁴ A further interesting position has been expressed by A. ZAHAR in *Legal Aid, Self-Representation, and the Crisis at The Hague Tribunal*, 19 Criminal Law Forum (2008) 241. The author argues that the Courts must take into account also the question of the expenses related to the appointment of a defence counsel to self-represented accused. In Zahar’s view, the decision of granting a free-of-charge defence counsel must be considered carefully case by case. Indeed, public financing could be arguable in cases such as *Seselij* case in which the defendant acts in a disruptive way.

⁵⁵ G. BOAS *supra* note 20, 53.

respect of the interests of justice. In this sense, international criminal procedural rules are changed because they reflect the necessities of the society and of the legal system in which they must be applied. There is a direct connection between procedural rules and aims of the legal system and it is not possible to consider the development of the latter without an implementation of the former.

In this dynamic scenario, the right to self-representation has been adapted to the new needs of the now-a-days international criminal proceedings. In other words, self-representation has been recognized and respected as a fundamental right of the accused and the main issues related to its use in the trial come indeed from the fact that it is an important element in the interplay between the parties of the proceeding. Once it has been given a role in the trial, nonetheless it is subject to an evolution and it cannot be considered as a static component. In this sense, recognition has been accompanied by limitation and the necessity to balance it with the other needs of international criminal justice. Indeed, self-representation is not an absolute right and can be limited under certain circumstances. However, these limits are the Achilles' heel of the self-representation and of the procedural rules related to it. In fact, to limit a right means to make a choice in favor of some values and in disfavor of the right itself. Therefore, the question is who can make this choice and what the parameters that must be applied are.

In the analysis made in this work it has been pointed out that the solutions to these questions are different and it is still an ongoing process in which no fix points are present and no safe haven is reached. The jurisprudence and the scholarship are struggling with the problem and the various attempts made by the ICTY to establish the threshold for limiting self-representation have been controversial and more likely a failure. Thus, as it has been proposed, the only reasonable and concrete solution seems to be the one that is looking at the problem from a different perspective. That is to put more strength over the capacities and the decisions of the judges in order to have a more efficient legal response. In other words, instead of being afraid of finding a compromise between the different instances at trial, international tribunals must act and impose a certain discipline over self-representation. They must respect this right until the accused's behavior is not totally disruptive of the proceeding, letting the accused know what the consequences of this behavior can be. Then, if the accused does not want to cooperate and continues in his conduct, they can impose a defense counsel with no possibility to reverse the decision. This way of deciding over self-representation seems to be the only acceptable, because at the same time it respects the various instances made in the trial and it applies a rule of procedure in a clear and precise way. Therefore, the necessity is to have no legal uncertainty, but clarification. This must be done since the beginning of the trial, expressly identifying the conditions under which the right to self-representation can be exercised. In this way, the Janus-faced right can have a role in the future of international criminal justice and neither it will be denied, nor it will be overestimated by the jurisprudence of international courts.