# Right to counsel, commentary

**Commentary**

The right to counsel is an essential element of the concept of fair trial and as such is incorporated in Article 20, paragraph 4 sub d, of the Statute of the ICTR which provides that the accused has the right to be tried in his or her presence; to defend himself or herself in person or through legal assistance; to have legal assistance assigned to him or her, in any case where the interests of justice so requires, with such assistance being free if he or she does not have sufficient means to pay for it.

The text of Article 20, paragraph 3 sub d, is similar to the text of Article 6, paragraph 3 sub c, of the European Convention on Human Rights (ECHR) and Article 14, paragraph 3 sub d, of the International Covenant on Civil and Political Rights (ICCPR) and has the same problems of interpretation. Questions as to whether an indignant defendant has the right to choose counsel assigned to him, whether counsel can be assigned to the defendant against his will 'when the interest of justice so requires' and how a defendant's claim that he has no confidence in his assigned counsel should be treated by the legal authorities, have arisen under the jurisdictions of the European Court of Human Rights and the Human Rights Committee, as well as the ICTR and ICTY.

The decisions in Barayagwiza, Rutaganda and Ngeze also deal with the freedom of choice of counsel, problems in the client-counsel relationship and the situation when a defendant does not want to be represented by counsel at all. Before going into these aspects it seems appropriate to summarise the rules that apply under the ICTR Statute concerning the right to be represented by counsel.

*ICTR provisions concerning the right to be represented by counsel*[1]

As mentioned above, Article 20, paragraph 4 sub d, of the Statute provides for the right to counsel. Defendants who pay for their defence counsel can choose the counsel, provided that the lawyer can speak one of the official languages of the Tribunal, unless special permission is given to use another language[2] and the lawyer concerned is admitted to practice of law in a State or is university Professor of law.[3] The issue is further dealt with in Rules 44-46 of the Rules of Procedure and Evidence, which assign the organizational responsibility for assignment of counsel to the Registry. The Registry has an office to deal with issues dealing with assigned counsel – the Lawyers and Detention Facility Management Section (LDFMS). This office maintains a list of defence counsel who have expressed a willingness to be appointed to represent indignant defendants. At the beginning of 2002, the ICTR had over 250 lawyers available coming from many African countries, Europe, Australia, Canada, the United States and some Asian countries.

Apart from the qualifications mentioned above, there are additional requirements for the counsel to be put on the list. Rule 45(A) of the Rules of Procedure and Evidence requires 10 years of relevant experience. This provision makes it possible for the Registrar to refuse those counsel to be assigned who do not have the appropriate experience in criminal and/or international law needed to act as a defence counsel before the Tribunal. If the counsel of preference of a defendant does not appear on the list, in practice he may be included if he meets the requirements of Rule 45(A).[4]

The LDFMS also publishes directives, rules, forms and guidelines for counsel, of which the most important are the Code of Professional Conduct for Defence Counsel[5] and the Directive on the Assignment of Defence Counsel.[6] Article 19(A) of the Directive provides *inter alia* that the Registrar may in exceptional circumstances, at the request of the accused, or his counsel, revoke the assignment of counsel. Although there

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1 See Richard J. Wilson, Assigned defence counsel in domestic and international war crimes tribunals: The need for a structural approach, 2 International Criminal Law Review 2002, p. 145-194.

2 Rules 3(C) and 3(D) of the Rules of Procedure and Evidence.

3 Rule 44 of the Rules of Procedure and Evidence.

4 See Alphonse Orie in Klip/ Sluiter ALC-II-303.

5 Adopted on 8 June 1998.

6 Last amended 1 July 1999.

are several organisations of international criminal defence lawyers,[7] there is no official bar for international defence lawyers that appear before the ICTR or the ICTY.[8]

*The right to choose counsel for indignant defendants*

In the second volume of Annotated Leading Cases of International Criminal Tribunals, two decisions of the ICTR were published, with a commentary by Alphonse Orie concerning the question of whether indignant defendants have the right to be represented by counsel of their choice.[9] This right is not expressly stipulated in Article 20 of the Statute. The decision of 11 June 1997[10] by the Trial Chamber in Ntakirutimana illustrates that the defendant has a right to be consulted by the Registrar prior to the assignment of counsel, but an indignant defendant has no absolute right to choice of counsel and the Registrar "is not necessarily bound by the wishes of an indigent accused. He has wide discretion, which he exercises in the interests of justice." Nevertheless Alphonse Orie concludes from the Akayesu decision of 27 July 1999,[11] in which the Appeals Chamber, without providing detailed reasoning, directed the Registrar to assign the counsel requested by Akayesu, that the defendant has a right to be consulted and that there is a certain obligation to respect the choice of the defendant unless there are reasonable and valid grounds not to do so. However, in the final Judgment by the Appeals Chamber in Kambanda on 19 October 2000[12] the Appeals Chamber adopted the reasoning of the Trial Court in Ntakirutimana and concluded that "in the light of a textual and systematic interpretation of the provisions of the Statute and the Rules, read in conjunction with relevant decisions from the Human Rights Committee[13] and the organs of the European Convention for the Protection of Human Rights and Fundamental Freedoms, that the right to free legal assistance by counsel does not confer the right to choose one's counsel." The Appeals Chamber refers to the jurisprudence of the bodies under the European Convention on Human Rights, according to which the right to legal assistance of one's own choosing is not absolute[14] and – according to the Appeals Chamber – particularly does not apply when legal assistance is free.

The Appeals Chamber was of the opinion that Article 6, paragraph 3 sub c, of the ECHR does not guarantee the right to choose the defence counsel assigned by the court, nor does it guarantee the right to be consulted on the choice of the defence counsel to be assigned.[15] The Appeals Chamber recalled that under the ECHR, the authority responsible for appointing counsel has broad discretionary powers: "the right to counsel of one's own choosing] is necessarily subject to certain limitations where free legal aid is concerned and also where [...] it is for the courts to decide whether the interests of justice require that the accused be defended by counsel appointed by them. When appointing defence counsel, the national courts must certainly have regard to the defendant's wishes [...]. However, they can override those wishes when there are relevant and sufficient grounds for holding that this is necessary in the interests of justice."[16]

In the judgment in Akayesu of 1 June 2001, the Appeals Chamber, referring to its judgment in Kambanda, held that: "in principle, the right to free legal assistance of counsel does not confer the right to counsel of one's own

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7 The International Defence Attorney Association and the Association des Avocats de la Defence aupres du Tribunal International pour Rwanda.

8 With regard to the International Criminal Court in the Hague, the International Criminal Bar has been founded in Montreal on 15 June 2002; see www.bpi-icb.org.

9 See Klip/ Sluiter ALC-II-302-305.

10 ICTR, Decision on the Motions of the Accused for Replacement of Assigned Counsel, *Prosecutor v. Ntakirutimana*, Case No. ICTR-96-10-T and ICTR-96-17-T, T. Ch. I, 11 June 1997, Klip/ Sluiter ALC-II-291.

11 ICTR, Decision Relating to the Assignment of Counsel, *Akayesu v. Prosecutor*, Case No. ICTR-96-4-A, A. Ch., 27 July 1999, Klip/ Sluiter ALC-II-299.

12 ICTR, Judgement, *Kambanda v. Prosecutor*, Case No. ICTR 97-23-A, A. Ch., 19 October 2000, in this volume, p. 659.

13 According to the Human Rights Committee, "article 14, paragraph 3 (d) [of the International Convention on Civil and Political Rights] does not entitle the accused to choose counsel provided to him free of charge". Osbourne Wright and Eric Harvey v. Jamaica, Comm. No. 459/1991, 8 November 1995, UN Doc. CCPR/C/50/D/380/1988, par. 11.6.

14 European Commission on Human Rights, X v. United Kingdom, 9 October 1978, Application No. 8295/78; European Court of Human Rights, Croissant v. Germany, 25 September 1992, Series A-237-B, par. 29.

15 European Commission on Human Rights, X v. Federal Republic of Germany, 6 July 1976, Application No. 6946/75 and F v. Switzerland, 9 May 1989, Application No. 12152/86.

16 European Court of Human Rights, Croissant v. Germany, 25 September 1992, Series A-237-B, par. 29.

choosing. The right to choose counsel applies only to those accused who can financially bear the costs of counsel." The Appeals Chamber concluded that the "Registrar assigns counsel to an indignant accused from a list of available counsel whom he finds eligible under the Tribunal's formal requirements. To be sure, in practice an indignant accused may choose from among counsel included in the list and the Registrar generally takes into consideration the choice of the accused. Nevertheless, in the opinion of the Appeals Chamber the Registrar is not necessarily bound by the wishes of an indignant accused. He has wide discretion, which he exercises in the interests of justice."[17]

The rule that, in practice, the choice of the defendant must be taken into consideration seems also to apply to co-counsel, as appears from the decision of the President of the Trial Court in Rutaganda. The Registrar had refused to appoint the requested co-counsel and had made no response to the request of the President to give reasons for his refusal. The President subsequently considered it to be in the interests of justice that Mr. Rutaganda be assigned the co-counsel he had selected from the list of counsel. The request for reconsideration of the Registrar was denied because "no persuasive argument had been made to merit a reconsideration of the decision already made." It is unclear as to why the Registrar had denied Rutaganda's request, but the decisions seem to confirm that the choice of the defendant should be respected, unless the Registrar presents reasonable and valid grounds not to do so. Delay caused by a change of counsel appears not to be a valid ground to deny the wishes of a defendant.

The decision of the Appeals Chamber of 31 January 2000 in Barayagwiza also indicates that the choice of counsel should be respected. Barayagwiza had applied for the withdrawal of his assigned defence counsel Mr. Nyaberi, in whom he lacked confidence, and the President had confirmed the decision of the Registrar to decline the request, because Mr. Nyaberi seemed to be functioning properly and a change of counsel would unduly delay the proceedings. Nevertheless, the Appeals Chamber ordered – without giving any reasons – that the assignment of Mr. Nyaberi should immediately be withdrawn and that the Registrar should assign a new counsel along with a co-counsel.

More complex is the decision of 29 March 2001 by the Trial Chamber in Ngeze. Ngeze had also requested withdrawal of his counsel because he no longer had confidence in their competence to represent him. He argued that they had failed to consult with him, that he disagreed with their defence strategy, that they had not succeeded in convincing the Registry and Tribunal to ensure that certain translations were done and that his counsel had dismissed two investigators and an assistant against his will. In this case the Trial Chamber examined the complaints separately and dismissed them all. Interestingly, in Rutaganda, the Trial Chamber, invoking Article 15 (c) and (d) of the Directive on the Assignment of Defense Counsel, considered that "[i]t is clear that the accused is not entitled as of right to have co-counsel, investigators and assistants appointed; nor can he assert the right of decision over the appointment or termination of their contracts. As stated above, these are matters for Lead Counsel."

Although the Chamber was mindful of the need to ensure efficient representation of the accused, it considered that Ngeze had not placed any reliable information before the Chamber which suggested that this right was encroached. The Chamber denied the request for withdrawal of counsel, having taken into account the fact that Ngeze was requesting for change of counsel for the fifth time (in the decision in Akayesu of 27 July 1999 it was the sixth change of counsel), because it believed the request was only made to delay the proceedings. The dissenting opinion of Judge Gunawardana in Ngeze indicated that it was questionable whether the allegations made by Ngeze were false, as some could not be examined properly because Lead Counsel did not disclose confidential information to the Trial Chamber and the Prosecutor, allegedly in the interests of his client.

What conclusions can be drawn from the decisions and judgments described above? It is quite clear that according to the Appeals Chamber, an indignant defendant does not have the right to choose counsel, although in practice his choice will be respected unless the Registrar decides otherwise in the interests of justice. Due to the lack of a thorough explanation in those decisions that seem to support the free choice of assigned counsel – the cases of Rutaganda and Barayagwiza – it is unclear in which situations the Registrar *casu quo* the Tribunal is entitled not to follow the choice of the defendant. This unsatisfactory situation leaves room for

[17] ICTR, Judgement, *Prosecutor v. Akayesu*, Case No. ICTR-96-4-A, A. Ch., 1 June 2001.

arbitrary decisions. This lack of clarity has been criticized by Amnesty International, which has stated that even if "international law does not guarantee the accused the right to choose defence counsel where they are indignant, it is good practice to allow the accused the widest possible choice in order to ensure that the accused has trust in his or her counsel and that representation can be effective."[18]

The ICTY appears to give priority to the freedom of choice of assigned counsel. This appears in Kupreškić, in which the defendants requested the assignment of defence counsel who did not speak one of the two working languages of the ICTY, and in which the Trial Chamber authorized "the Registrar to assign to each of the accused counsel of their choice, even if that counsel does not speak either of the two working languages of the International Tribunal, provided however that should the accused later seek the assignment of co-counsel, such co-counsel must speak one of the working languages of the International Tribunal."[19]

Although the Human Rights Committee has held that a defendant cannot rely on Article 14, paragraph 4 sub d, of the ICCPR to choose counsel provided to him free of charge,[20] it is arguable whether the reliance by the Appeals Chamber in Kambanda on the jurisprudence of the European Court of Human Rights on this point is sufficient. It is true that the European Commission on Human Rights has denied a defendant the right to choose counsel to be assigned to him and even the right to be consulted.[21] In the Pakelli case[22] however, the European Court of Human Rights concluded, after an examination of the textual difference between the English and French version of Article 6, paragraph 3 sub c of the ECHR, that the right to choose counsel is linked to the right to have legal assistance for those who cannot pay for it. This was confirmed by the Court in the case of Croissant in which the Court held "It is true that Art. 6§3(c) entitles "everyone charged with a criminal offence" to be defended by counsel of his own choosing."[23]

In Article 20, paragraph 4 sub d, of the ICTR Statute, the word "and" is also used between the sentences that give the accused the right to defend himself through legal assistance of his own choosing and the right to have legal assistance assigned to him even if he is unable to pay for it. Therefore, a textual analysis of Article 20, paragraph 4 sub d, of the Statute could lead to a similar interpretation to that given by the European Court of Human Rights to Article 6, paragraph 3 sub c, of the ECHR. Alphons Orie has concluded in a previous commentary that in practice it might not make a significant difference whether the choice of the defendant is to be respected in principle while allowing exceptions to be made, or that the wishes of the defendant are to be taken into account unless there are reasonable and valid grounds not to follow his choice.[24] Nevertheless, an approach that gives priority to the free choice of assigned counsel to indignant defendants would be more in accordance with the aims of Article 20 of the Statute to secure a fair trial for the defendant. Even if this right to choose counsel is not absolute, such an approach would restrict the discretion of the Registrar to not follow the choice of the defendant.

In my opinion the ICTR should adopt a general rule that an indignant defendant has, in principle, the right to be defended by counsel of his own choosing, particularly bearing in mind the importance of mutual confidence between the lawyer and his or her client. A lawyer chosen by the accused himself is better equipped to undertake the defence. However, even if such a rule were to be adopted, the problem remains how to establish the limits of this right. The Ngeze case illustrates how difficult it is for a Trial Chamber to examine whether the allegations of a defendant, who has apparently lost confidence in his counsel, are true. The conduct of the

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18 Amnesty International, United Nations (UN) International Criminal Tribunal for Rwanda: Trials and Tribulations, Section 11, April 1998. See also Wilson, *id.* at p. 166-167.

19 ICTY, Decision on Defence Request for Assignment of Counsel, *Prosecutor v. Kupreškić, Kupreškić, Kupreškić, Santić, Josipović and Papić*, Case No. IT-95-16-T, T. Ch. II, 10 March 1998.

20 Apart from the case the Appeals Chamber refers to in Kambanda, (Osbourne Wright and Eric Harvey v. Jamaica, 8 November 1995, Comm. No. 459/1991, UN Doc. CCPR/C/50/D/380/1988, par. 11.6) the Human Rights Committee took the same point of view in Price v. Jamaica, 6 November 1996, UN Doc. CCPR/C/58/D/572/1994.

21 European Commission on Human Rights, X v. Federal Republic of Germany, 6 July 1976, Application No. 6946/75 and F v. Switzerland, Decision of 9 May 1989, Application No. 12152/86

22 European Court of Human Rights, Pakelli v. Federal Republic of Germany, 25 April 1983, Series A-64, par. 31.

23 European Court of Human Rights, Croissant v. Germany, 25 September 1992, Series A 237-B, par. 29.

24 See Klip/ Sluiter, ALC-II-305.

defence is essentially a matter between the defendant and his counsel and it should not be for the Judge or the Prosecutor, who are the triers of fact in the case against the defendant, to intervene in this relationship.[25]

I believe a better solution would be to let this kind of dispute be resolved by an independent ethical commission, or a Chamber of the Tribunal that is not the Trial Chamber, to which counsel can give confidential information without prejudicing the position of his client. However, even where the defendant does not seem to have any objective claim against his counsel, an effective defence becomes impossible when the differences between the accused and his lawyer become irreconcilable and result in a breakdown of communication. A fair trial cannot take place when it becomes impossible for counsel to be instructed by the accused. In such a situation the request for withdrawal of counsel should be granted.

*The right of the accused (not) to defend himself*

The decision on defence counsel motion to withdraw in Barayagwiza on 2 November 2000 deals with another issue that touches upon the right to defence and the relationship between defendant and counsel – namely, who decides how the defence is to be conducted.

The defence counsel of Barayagwiza filed a motion for withdrawal of their mandate because the accused, who had chosen not to attend the proceedings, had instructed his lawyers not to represent him in the courtroom. Defence counsel argued that, according to their respective code of ethics, they had to abide with their client's decision and could not act contrary to his instructions. Because the lawyers were not allowed to withdraw from the hearing, according to the Trial Chambers decision of 25 October 2000, they argued that it was unreasonable to require their presence when they were to take no active part in the trial as a result of their clients decision. Barayagwiza had decided not to attend the trial and had instructed counsel to remain passive since he believed that he would not be given a fair trial because the ICTR was not an independent and impartial Tribunal but instead was dependent on the Kigali regime.

The Trial Chamber did not consider Barayagwiza's arguments as constituting exceptional circumstances, as required under Rule 45(I) of the Rules of Procedure and Evidence, and denied the request for withdrawal of Barayagwiza's counsel on this basis, stating that the accused was merely boycotting the trial and obstructing the course of justice. The Trial Chamber was of the opinion that Barayagwiza's lawyers could not simply comply with his instruction not to defend him, because in such a situation "it cannot possibly be argued that Counsel is under an obligation to follow them, and that not to do so would constitute grounds for withdrawal." In addition, the Trial Chamber did not find there to be an unequivocal termination of counsel's mandate by Barayagwiza and held that, unless Barayagwiza made a clear decision to terminate representation, it would deny the request for withdrawal.[26]

In my opinion the decision of the Trial Chamber not only puts defense counsel in an untenable position but also violates the right of an accused to decide how to defend himself and even if he wants to defend himself at all. This right is not specifically mentioned in the Statute, nor in Article 6 of the ECHR or Article 14 of the ICCPR, but nevertheless lies at the heart of the right to remain silent and not to incriminate oneself, both generally recognised international standards of the notion of a fair procedure.[27] When a defendant chooses to remain silent, his defence counsel cannot be obliged to speak, even if this is considered to be in the best interests of the accused. It follows that counsel cannot be obliged to actively defend his client when his client chooses not to defend himself at all, whatever his reasons for doing so – the *right* of the accused to defend himself as stipulated in Article 20, paragraph 4 sub d, of the Statute can not be considered an *obligation*.[28]

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[25] See European Court of Human Rights, Imbrioscia v. Switserland, 24 November 1993, Series A-275.

[26] This conclusion seems incomprehensible if one takes into account the letter of Barayagwiza to the Trial Chamber in which he states "If this Chamber rules that my counsels are required to continue to be present at trial contrary to my instructions, I no longer wish to be represented by them. I would regret it if I am forced to make this decision because my counsel have properly represented me from the beginning. However, under no circumstances are they authorized to represent me in any respect whatsoever in this trial. It is for this reason that I am forced to put an end to the mandate I entrusted given them."

[27] See European Court of Human Rights, Funke v. France, 25 February 1993, Series A-256A and European Court of Human Rights, Saunders v. United Kingdom, 17 December 1996, Reports 1996-VI.

[28] See European Court of Human Rights, Corigliano v. Italy, 10 December 1982, Series A-57 in which the Court held "it should be recalled that Article 6 does not require the person concerned actively to co-operate with the judicial authorities."

Where this right is forced upon the defendant it paradoxically comes close to constituting a violation of his right to a fair trial. Of course the judiciary must ensure the rights of the accused are maintained and see to it that he has access to legal advice. In addition it must be carefully established whether a defendant really wants to waive these rights. However, it cannot be deduced from the judgment of the European Court of Human Rights in Poitrimol v. France[29] that a person charged with a criminal offence is *obliged* to legal assistance when he is not present at the trial, because the Court held only that a person charged with a criminal offence does not lose the benefit of the *right* to legal assistance merely on account of not being present at the trial.[30] The right to defend oneself should include the right *not* to defend oneself.

It is interesting to note the reasoning of the Trial Chamber (at paragraph 21) in which it holds that where counsel that is assigned, not appointed, this entails not only 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." This last sentence expresses the real concern of the Trial Chamber – without legal representation it is difficult to efficiently conduct a trial based on the Anglo-American system of adversarial proceedings, in which the defence has an active part in establishing the facts. However, in my opinion this cannot be the concern of defence counsel who, according to Article 4, paragraph 2 sub a, of the Code of Conduct, must abide by his client's decisions concerning the objectives of representation. It would be inconsistent with counsel's ethical duties to act against his client's will.[31]

The question remains as to what would have happened if the Trial Chamber had accepted that Barayagwiza had made a clear and unequivocal decision to terminate his counsels' representation. In his concurring and separate opinion, Judge Gunawardana argues that the interests of justice would not be served by allowing the accused, who does not wish to attend his trial, to remain without representation. As a consequence, he suggests the appointment of a "standby" counsel. A similar solution was reached by the ICTY in Milošević, where the accused had not appointed counsel to act on his behalf and had informed the Tribunal that he had no intention of engaging a lawyer to represent him.[32] The ICTY appointed three lawyers as *amicus curiae* to assist the Trial Chamber by:

"a) Making any submissions properly open to the accused by way of preliminary or other pre-trial motion;

b) making any submissions or objections to evidence properly open to the accused during the trial proceedings and cross-examining witnesses as appropriate;

c) drawing to the attention of the Trial Chamber any exculpatory or mitigating evidence; and

d) acting in any other way which designated counsel considers appropriate in order to secure a fair trial."[33]

In practice the *amici curiae* have been handicapped by a lack of consultation with Milošević, who did not want any contact with them. Because Milošević conducted his own defence, the *amici curiae* could present their views – even call witnesses – to the Tribunal only after Milošević had raised a specific issue in his defence (they could not bring anything to the attention of the Tribunal of their own motion). This would have been impossible if Milošević had decided not to attend his trial at all. Therefore, a solution like this in Barayagwiza would have had no real effect but would instead have been a superfluous and artificial solution to keep up the appearance of a fair trial. In a genuinely fair trial, which is not necessarily synonymous with the due

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29 European Court of Human Rights, Poitrimol v. France, 23 November 1993, Series A-277A.

30 See par. 23 of the decision of the Trial Chamber.

31 The Chamber noted in par. 22 that, in several jurisdictions a lawyer will not be obliged to comply with a clients' instructions to take no action in court, without specifically mentioning the jurisdictions. However, I am unable to identify a single jurisdiction that respects the rights of the accused, in which a lawyer is *obliged* to take action in court, despite the instructions of his client.

32 In this respect it should be noted that the Trial Chamber of the ICTY in Milošević has expressed its opinion that, although the right to defend oneself in person is not absolute, counsel cannot be imposed on a competent and understanding accused who wants to defend himself in person. See ICTY, Reasons for Decision on the Prosecution Motion concerning Assignment of Counsel, *Prosecutor v. Milošević*, Case No. IT-02-54, T. Ch. III, 4 April 2003.

33 ICTY, Order Inviting Designation of Amicus Curiae, *Prosecutor v. Milošević*, Case No. IT-02-54, T. Ch. III, 30 August 2001, to be published in volume VII.

administration of justice, the wishes of a defendant – presuming that he is competent and understanding – should be respected, even if the defendant waives his rights to attend the trial and to defend himself at all.[34]

*Taru Spronken*

[34] See also Daniel D. Ntanda Nsereko, Ethical obligations of counsel in criminal proceedings: representing an unwilling client, 12 Criminal Law Forum 2001, p. 487-507, who comes to the same conclusion as I do – namely that when the accused freely and voluntarily decides not to be represented, this decision should be respected.