Some Observations on Defence Aspects of the *Karadžić* Case – And a Plea for 'Hybrid' Representation in International Criminal Law

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The question of legal representation of Dr. Radovan Karadžić in his trial before the ICTY has turned into the type of never-ending story already well-known from other cases involving self-representation. This comment will summarize and comment on two aspects that have been subject of final decisions in the weeks prior to the recommencement of the trial, namely the assignment of standby counsel and the funding of defence legal advisors. While these main sections deal with the ICTY's approach to self-representation, the conclusion will consider the problem from a slightly different angle, namely that of the ICTY's aversion to 'hybrid' representation.

1. Assignment of (Standby) Counsel

1.1. An Overview of the Proceedings

On 3 September 2009, Karadžić first presented to the Trial Chamber his detailed arguments why he needed another 10 months' time to be adequately prepared for trial.[1] The Trial Chamber nonetheless set a trial date for October 2009,[2] which was confirmed on appeal.[3] A few days before the first trial day, the accused stated that he would not be attending the trial until he felt adequately prepared.[4] When he in fact did not appear for the first three trial days, the Chamber urged him to reconsider and warned him that this behaviour could lead to imposition of counsel and/or proceedings in his absence.[5]

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[1] Submission on Commencement of Trial, 3 September 2009.
[2] See Transcript of 8 September 2009, p. 456.
[3] Decision on Radovan Karadžić's Appeal of the Decision on Commencement of Trial, 13 October 2009 – the Appeals Chamber dismissed the appeal save for ordering a one-week delay between the filing of the final marked-up indictment and the beginning of the trial.
[4] Submission on the Commencement of Trial, 21 October 2009.
[5] See Transcript of 26 October 2009, p. 502-504, 509,; Transcript of 27 October 2009, p. 510-511; Transcript of 2 November, p. 672-673.

The Chamber held a hearing to determine the future course of the trial, which the accused did attend,[6] and on 5 November issued its decision. Finding that Karadžić's refusal to appear "substantially and persistently obstructed the proper and expeditious conduct of his trial", and noting that it had issued the requisite warnings, the Chamber ordered the Registry to appoint counsel.[7] However, counsel would not immediately take over the defence, but would be ready do so if the accused continued to absent himself once the trial resumed.[8] To allow counsel time to adequately prepare for trial, the next trial date was set for 1 March 2010.[9] The Chamber did not pronounce on the details of the appointment process.

The accused applied, under Rule 73 (B) of the Rules of Procedure and Evidence (RPE), for certification to appeal that decision, challenging the assignment of standby counsel itself and the fact that the Chamber had not ordered the Registrar to allow the accused to choose assigned counsel from the list of defence counsel.[10] The Chamber rejected this application, finding that the imposition of counsel itself did not "significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial" as counsel had not yet been tasked to take over the defence,[11] and that as to the second issue, "the Chamber's decision to instruct the Registrar to appoint counsel is separate from the procedure followed by the Registrar in doing so."[12]

In the meantime, on 19 November, the Deputy Registrar had appointed English Barrister Richard Harvey as standby counsel. Harvey had been on a list of five counsel, all from Western countries, provided to the accused. Karadžić had met with them, but had not consented to the appointment of any of them, instead requesting to be allowed to choose from the list of counsel. The Registrar noted that the accused had failed to indicate a preference among the five and appointed Harvey. He also noted that Harvey was also representing former KLA officer Lahi Brahimaj, but that Brahimaj had given his consent, under Art. 16 (G) of the Directive on Assignment of Counsel, to Harvey also being assigned as standby counsel in *Karadžić*.[13]

Karadžić attacked the assignment of Harvey in a motion of 4 December 2009, based on Art. 13 (B) of the Directive and the residual power of the Trial Chamber to review Registry decisions affecting a fair trial. He argued that the appointment of Harvey was procedurally defective, violating his right to choose his own standby counsel as codified in Art. 21 (4) (d) of the Statute and Art. 11 (D) of the Directive as well as the requirement of consent of both

[6] See Transcript of 3 November 2009.
[7] Decision on Assignment of Counsel and Order on Further Trial Proceedings, 5 November 2009, paras. 21-22.
[8] Id., paras. 25, 27.
[9] Id., paras. 24, 26.
[10] Application for Certification to Appeal Decision on Appointment of Counsel and Order on Further Trial Proceedings, 12 November 2009, paras. 5-7 with references to the *Milošević* and *Šešelj* cases.
[11] Decision on Accused's Application for Certification to Appeal Decision on Appointment of Counsel and Order on Further Trial Proceedings, 23 November 2009, paras. 8-9. The Prosecution had not opposed the application for certification as far as it related to this aspect: Prosecution Response to Karadžić's "Application for Certification to Appeal Decision on Appointment of Counsel and Order on Further Trial Proceedings", 12 November 2009.
[12] Certification Decision, supra note 11, para. 7.
[13] See Decision, 19 November 2009, pp. 2-3.

accused under Art. 16 (G) of the Directive.[14] The motion, which was opposed by both Prosecution and Registrar,[15] was denied by the Trial Chamber in a decision of 23 December 2009.[16]

The Chamber did, however, grant certification to appeal its decision.[17] The defence appeal of 19 January 2010 raised four grounds of appeal which in substance related to the same questions as the original motion.[18] It was again opposed by both Prosecution and Registrar.[19] The Appeals Chamber dismissed the appeal in a rather short[20] decision of 12 February 2010[21] and thus – for now – closed this chapter of the story.

1.2. Comments on the Imposition of Counsel

On the decision to impose counsel as such, a few short remarks shall suffice. Even though I agree that the accused was not granted nearly enough time for preparation,[22] and even though I disagree with those characterizing his behaviour as intentionally disruptive or the like,[23] I also agree with the decision of the Trial Chamber, faced with a self-represented accused who refused to appear for trial, not to conduct the trial entirely in the absence of the defence.[24] And while a good argument can be made that appointing *amici curiae* is preferable to appointing (standby) counsel in such situations,[25] there was nothing prohibiting the Chamber from choosing the latter option.

[14] Motion to Vacate Appointment of Richard Harvey, 4 December 2009, paras. 11-16.
[15] Prosecution Response to Karadžić's Motion to Vacate Appointment of Richard Harvey, 14 December 2009, paras. 3-5; Registrar's Submission Pursuant to Rule 33 (B) Regarding Radovan Karadžić's Motion to Vacate Appointment of Richard Harvey, 14 December 2009, paras. 30, 33, 35.
[16] Decision on the Accused's Motion to Vacate Appointment of Richard Harvey, 23 December 2009.
[17] Decision on Accused's Application for Certification to Appeal the Trial Chamber's Decision on Motion to Vacate Appointment of Richard Harvey, 13 January 2010.
[18] Appeal from Decision on Motion to Vacate Appointment of Richard Harvey, 19 January 2010.
[19] Prosecution's Response to Karadžić's Appeal From Decision on Motion to Vacate Appointment of Richard Harvey, 29 January 2010; Registrar's Submission Pursuant to Rule 33 (B) Regarding Radovan Karadžić's Appeal From Decision on Motion to Vacate Appointment of Richard Harvey, 4 February 2010.
[20] The decision spends all of four pages on the substantive questions raised by the appeal.
[21] Decision on Radovan Karadžić's Appeal from Decision on Motion to Vacate Appointment of Richard Harvey, 12 February 2010.
[22] See also Göran Sluiter, *Karadžić's Requests for More Time and the Response of the ICTY*, International Criminal Law Bureau Blog, 25 November 2009. <http://www.internationallawbureau.com/blog/?p=984>
[23] See, *e.g.*, Marko Milanović, *The (Aborted) Start of the Karadžić Trial*, EJIL:Talk! Blog, 26 October 2009, <http://www.ejiltalk.org/the-aborted-start-of-the-karadzic-trial/> ; against such criticisms, see Niamh Hayes, *Radovan Karadžić's Refusal to Attend Trial and the Options available to the Trial Chamber*, International Criminal Law Bureau Blog, 2 November 2009, <http://www.internationallawbureau.com/blog/?p=851>, as well as the Trial Chamber's characterization of the accused's pre-trial conduct in its Decision on Assignment, supra note 7, para. 21 *in fine*.
[24] In fact, in my view, the obiter dicta statement that the Chamber "does not exclude the possibility" of proceedings in the absence of accused, counsel or anyone else representing the interests of the defence (Decision on Assignment, supra note 7, para. 19) presents the most worrying aspect of the entire decision.
[25] See Jarinde Temminck Tuinstra, *Assisting an Accused to Represent Himself – Appointment of Amici Curiae as the Most Appropriate Option*, 4 JICJ 47 (2006).

Of course, this assessment of the Chamber's decision is made easier by the fact that, from a trial tactics perspective, it represents a (partial) success for the accused,[26] who gains about half of the required ten months for trial preparation[27] while still retaining the right to conduct his defence in person after that time.

Similarly, I would only disagree with some specific aspects of the decision denying certification to appeal. As far as it relates to the failure to allow the accused to choose from the list of counsel, the question is simply that of the suitable procedural avenue to attack this failure: If the Registrar is obliged to provide a self-represented accused with the list even in the absence of an explicit order by the Trial Chamber, then the Registrar's decision is indeed separate from the Chamber's decision and can be challenged separately (as done by the accused in the 4 December motion). If the Registrar is only obliged to provide the accused with that list when explicitly ordered to do so by the Chamber, the decisions cannot be separated and it is the Chamber's failure which must be attacked under Rule 73 (B). One may have wished for the Trial Chamber to explain why it (implicitly) took the former view, but since it dealt with the substantive questions when reviewing the Registrar's decision,[28] there is no discernable prejudice.

As to certification of the imposition of counsel as such, the Chamber is indeed following precedent in this regard. In both *Šešelj* and *Milošević*, certification to appeal was only granted when counsel were tasked to take over the defence; certification to appeal the mere appointment of standby counsel was explicitly refused in *Šešelj*.[29] A case can certainly be made that already the imposition of standby counsel has significant fair trial implications – after all, it means that the Damocles sword of counsel taking over will be hanging over the accused, which may well have a "chilling effect" on the way he conducts his defence.[30] However, the Chamber cannot be faulted for following established precedent in this regard.

[26] See also Kevin Jon Heller, *Extra Time for Dr. Karadžić – And Standby Counsel*, Opinio Juris Blog, < http://opiniojuris.org/2009/11/05/extra-time-for-dr-karadzic-and-stand-by-counsel/> 5 November 2009; Dov Jacobs, *More drama at the ICTY: bring on the popcorn for the Karadžić trial!*, Spreading the Jam Blog, 5 November 2009, <http://dovjacobs.blogspot.com/2009/11/more-drama-at-icty-bring-on-popcorn-for.html> who notes that the decision in effect "punishes" the accused for his absence by giving him part of what he wanted to achieve through this absence.

[27] Whether 5 months of preparation is sufficient for assigned counsel to be prepared to take over the defence if need be, or rather: what amount of additional time assigned counsel would need to be so prepared, is beyond the scope of this comment.

[28] See Section 1.3. below.

[29] See Certification Decision, supra note 11, para. 8 with references to those cases.

[30] The *Šešelj* Trial Chamber also noted that already the finding of obstructive behaviour may have fair trial implications – see *Prosecutor v. Vojislav Šešelj*, Decision on Request to Certify an Appeal against Decision on Assignment of Counsel, 29 August 2006, Case No. IT-03-67, p. 2 *in fine*; Decision on Request for Certification to Appeal Decision (No. 2) on Assignment of Counsel, 5 December 2006, para. 6.

1.3. Comments on the Selection of Assigned Counsel

On the other hand, the method of selection of that counsel[31] by the Registrar was clearly flawed, and the explanations offered by the Trial Chamber and Appeals Chamber in upholding his decision are far from convincing.

1.3.1. The Relevance of the *Šešelj* Precedent

This relates, first of all, to the way the Trial and Appeals Chambers[32] dealt with a decision by the Appeals Chamber in *Šešelj* which had granted a self-represented accused who was assigned standby counsel against his will the same right to choose counsel as granted to accused wishing to be represented.[33]

The Trial Chamber attempted to distinguish that decision based on its procedural history.[34] However, while the underlying factual circumstances of the two cases do in fact differ,[35] this is unpersuasive as the pronouncement on selection of counsel in Šešelj seems to have been unrelated to the specific procedural history of that case. After all, the relevant paragraph in *Šešelj* contains the exact phrase "the Rule 44 list of Counsel should be provided to Šešelj and he should be permitted to select standby counsel from that list" twice, first in reference to imposition of standby counsel, second in reference to imposition of full assigned counsel.[36] In other words, the *Šešelj* Chamber seemed to have held that this requirement applied to all cases of imposition of counsel to self-represented accused, regardless of how exactly they came about.

Even less convincing is the Trial Chamber's attempt to show the fact-specific nature of the Šešelj decision by reference to an *earlier* decision in *Milošević.* There, the lawyers who had previously been *amici curiae* in the case were assigned as standby counsel without the accused being allowed a choice in this matter.[37] However, given that the *Milošević* decision was earlier in time and that it related to a very specific type of assigned legal assistance – assignment of *amici curiae*, an experiment which the ICTY has since pretty much given up[38]

[31] I wish to state at the outset that this is not in any way meant as a negative comment on the person of *Harvey*, whose profile at Garden Court Chambers shows him to be both experienced in international criminal law and committed to a vigorous defence.
[32] The Registrar claimed to have in fact applied the Šešelj precedent – on this claim see Section 1.3.3. below.
[33] *Prosecutor v. Vojislav Šešelj*, Decision on Appeal against the Trial Chamber's Decision (No. 2) on Assignment of Counsel, Case No. IT-03-67, 8 December 2006, para. 28.
[34] Trial Chamber Decision, supra note 16, para. 36 et seq. The same argument had been made by the Prosecution: see Prosecution Response, supra note 15, para. 6; Prosecution Response (Appeal), supra note 19, para. 16 et seq.
[35] The procedural background leading to the decision in *Šešelj* is detailed in Göran Sluiter, *Compromising international criminal justice: How Šešelj runs his trial*, 5 JICJ 529 (2007).
[36] *Šešelj* Appeals Chamber decision, supra note 33, para. 28.
[37] Trial Chamber Decision, supra note 16, para. 38.
[38] The assignment of *amici curiae* in *Krajišnik* was in light of the specific situation arising from an accused who had been represented by counsel at trial being allowed to represent himself on appeal, with appeal briefs due soon thereafter – see *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, Case No. IT-00-39-A, paras. 18-19.

– one would be hard-pressed to find an argument why it, and not the later and more general[39] *Šešelj* decision should be the leading case in this matter.

It seems very likely that these attempts at distinguishing *Šešelj* were in fact based on a feeling that that decision was somehow suspect; and its procedural history is indeed quite murky.[40] However, what rendered the decision suspect was the reversal of the Appeal Chamber's *imposition* of counsel despite clear instances of disruptive behaviour, not its pronouncements on *selection* of assigned counsel. And in any event, the decision had simply not been overruled and thus still stood as the final word of the Appeals Chamber and thus generally binding on the Trial Chamber.[41]

Under these circumstances, some expected that the Appeals Chamber would use the opportunity to overrule *Šešelj*.[42] It elected not to do so, but instead also attempted to distinguish the cases – and arguably ended up writing a decision that is at least as unconvincing as the *Šešelj* decision itself.

The Appeals Chamber begins by referring to a statement in *Šešelj* that "[i]f the Appeals Chamber was to ignore the background of the Impugned Decision …, it would find no error on the part of the Trial Chamber in *ordering the imposition of assigned counsel*" as showing the fact-specific nature of that decision.[43] However, that quote itself, as well as the following passages in the decision, show that this quote related to the *imposition* of counsel; there is no indication that it concerned the pronouncements on the *selection* of assigned counsel.

The Appeals Chamber then goes on to state that, given the procedural background, the *Šešelj* Chamber had felt the need to provide to *Šešelj* "opportunities to participate in the selection of standby counsel *beyond those required by the Rules or Article 21(4)*."[44] If that is indeed what the Appeals Chamber had felt in *Šešelj*, it certainly had not done a good job at making sure it was reflected in the written decision – the referenced passage stated that *Šešelj* should have been given "a real opportunity to show to the Trial Chamber that despite his pre-trial conduct, and the conduct leading up to the imposition of assigned counsel, he now understood that in order to be permitted to conduct his defence, he would have to comply with the [RPE] and

[39] In its legal pronouncements if not necessarily the underlying facts – see above.
[40] For criticism of that decision, see e.g. Sluiter, 5 JICJ 533-536.
[41] *Prosecutor v. Zlatko Aleksovski*, Judgement, Case No.IT-95-14/1-A, 24 March 2000, paras.110, 113. The Trial Chamber and Prosecution tried to argue that the relevant statement on selection was obiter dicta and thus not binding (Trial Chamber Decision, supra note 16, paras. 35-36; Prosecution Response (Appeal), supra note 19, para. 19 et seq.). However, at least the treatment of the Trial Chamber is too facile – even though the statement in question did not concern the main legal question raised in that case, it was surely not obiter dicta in the traditional sense, but rather a pronouncement of the Appeals Chamber on a legal question that was likely to arise in later proceedings. Thus a case could be made that the precedential value of Appeals Chamber decisions also applies to that statement.
[42] The Prosecution had in fact invited it to so if it found that the decision was binding precedent – see Prosecution Response, supra note 15, para. 23; Prosecution Response (Appeal), supra note 19, para. 23 et seq.
[43] Appeals Chamber Decision, supra note 21, para. 31, referring to *Šešelj* Appeals Chamber decision, supra note 33, para. 25. The Trial Chamber had referred to the same passage: Trial Chamber Decision, supra note 16, para. 36.
[44] Appeals Chamber Decision, supra note 21, para. 31, referring to *Šešelj* Appeals Chamber decision, supra note 33, para. 27 (emphasis added).

that he was willing to do so" – it is hard to see what any of this has to do with the *selection* of assigned counsel.

However, the way the Chambers dealt with the *Šešelj* precedent should be deplored not so much because they opted for distinguishing the cases rather than the more "honest" method of overruling by the Appeals Chamber. It should be deplored because the *Šešelj* decision should have been followed – contrary to the arguments of both Chambers, its pronouncements on the selection of assigned counsel are simply the most convincing interpretation of the legal texts.

1.3.2. The Right to Counsel of One's Choice under Art. 21 ICTY Statute

This concerns, first of all, the right to counsel of one's choice as contained in Art. 21 (4) (d) of the Statute.

According to both *Karadžić* Chambers, the wording of that provision clearly shows that an accused only has the right to self-representation *or* legal assistance of his choosing; as the two rights "stand in binary opposition", an accused like Karadžić who insists on continuing to represent himself could not at the same time enjoy the right to choice of counsel.[45] This interpretation fails to consider that – as the Appeals Chamber even acknowledges in its decision[46] – the imposition of assigned counsel is not an exercise, but a *restriction* of the right of self-representation. Insofar as that imposition is concerned, the accused may insist on his right to self-representation, but he surely is not exercising it; and as far as the right to self-representation is restricted, the right to choice of counsel comes into play again. This is surely the interpretation that these two defence rights – contained also in Art. 14 (3) (d) ICCPR and Art. 6 (3) (c) ECHR, on which Art. 21 (4) of the Statute is based – have received for example in continental law systems providing for "mandatory defence": There the right to self-representation is most severely restricted, but the right to counsel of one's choice still applies, of course, not only to accused wishing to be represented, but also – or rather: *a fortiori* – to accused who would much rather represent themselves. In effect, the *Karadžić* Chambers add insult to injury when they first *restrict* the right to self-representation by imposing standby counsel and then also restrict the right to choice of counsel because the accused had *insisted* – unsuccessfully, of course, as far as such imposition is concerned – on the right to self-representation.

The fact that assigned counsel has not yet been tasked with taking over the defence[47] does not change the fact that his assignment is a restriction of the right to self-representation and must thus trigger the right to choice of counsel – particularly since, should the Trial Chamber ever decide to actually impose counsel on Karadžić, it will evidently not give him any further opportunity to choose counsel at that point, but will rather just "activate" the assigned counsel it had already chosen.

[45] Trial Chamber Decision, supra note 16, para. 26; Appeals Chamber Decision, supra note 21, para. 26.
[46] Appeals Chamber Decision, supra note 21, para. 27.
[47] See Trial Chamber Decision, supra note 16, para. 26.

1.3.3. Arts. 11 (D) and 16 (G) of the Directive on Assignment of Defence Counsel

Similarly unconvincing is the way in which the Chambers deal with Art. 11 (D) of the Directive, according to which the Registrar shall assign the counsel selected by the accused from the list of counsel "provided that there is no impediment to the assignment of that counsel." Both Chambers rightly note that this Directive is not directly applicable to the case at hand as it was drafted to deal with the situation of accused wishing to be represented by counsel.[48] Of course, as also noted in both decisions,[49] in the absence of any other applicable provisions, the Directive can provide valuable guidance to the Registrar. However, both Chambers then allow the Registrar to pick and choose, at his discretion, which elements of the Directive to apply and which not to apply – which leads to all those provisions of the Directive which would give the accused a say in the selection of counsel not being applied.[50]

This is unconvincing as the case at hand clearly calls for an application, by analogy, of precisely these provisions of the Directive. First, as the Chamber states, there is no specific provision applicable to the case; second, the interests at play in this case are similar to those at play in cases where the Directive applies directly. In fact, an accused being assigned counsel against his will will be even more interested in at least having a say in who will be so assigned. What's more, as noted above, the same is also required by defence rights as codified in Art. 21 of the Statute. Finally, the Directive itself acknowledges that the right to choose one's counsel should not be limited to accused choosing to be represented by counsel: Art. 11 (D) also applies to cases in which the accused "fails to elect in writing that he intends to conduct his own defence", in other words in cases where counsel is assigned, if not against, then at least without, the will of the accused.

Contrary to the Prosecution's contention,[51] the fact alone that counsel is being assigned against the wishes of the accused to guard against trial disruption is not a sufficient reason to limit the accused's choice: While the special role of assigned counsel in guarding against trial disruptions may conceivably lead to a different standard when it comes to the accused's influence on the *conduct* of the defence, it does not follow from that situation that there should also be a different standard when it comes to *selection* of counsel. Any other decision can only be explained by mistrust towards certain defence counsel and the fear that counsel chosen by the accused would not fulfil their role as assigned counsel diligently. Whatever the factual basis for such fear – after all, all counsel on the list of counsel have been certified by the Registry and the Association of Defence Counsel as qualified to appear before the Tribunal – it should certainly have as little impact on the accused's right to choose his counsel as it has in any other case before the Tribunal.

Accordingly, Art. 11 (D) of the Directive should have been applied. The Registrar claims that he indeed followed this requirement, but that out of the more than 150 lawyers on the Rule 45

[48] Trial Chamber Decision, supra note 16, para. 29; Appeals Chamber Decision, supra note 21, para. 28.
[49] Trial Chamber Decision, supra note 16, para. 29-30; Appeals Chamber Decision, supra note 21, para. 29.
[50] Trial Chamber Decision, supra note 16, para. 29-30, 33-34; Appeals Chamber Decision, supra note 21, para. 29.
[51] Prosecution Response, supra note 15, para. 4.

list, all but three had an "impediment to their assignment."[52] Even the Trial Chamber acknowledges that this claim is false.[53] Quite a number of the impediments cited by the Registrar[54] simply show him overstepping the boundaries of his discretion in the appointment process. Thus he eliminated six candidates because they "reside on a different continent" and because "counsel would not be living in The Hague during the period before resumption of trial on 1 March 2010, but would need to travel in and out of The Hague on short notice" – the latter statement is of course nothing but an unsupported assumption. Similarly, eliminating 42 counsel because they have no or "insufficient" experience before the Tribunal simply has the Registrar imposing an additional requirement for standby counsel, beyond the quite extensive requirements already contained in Rule 44 RPE, without any statutory basis for doing so. Finally, eliminating another 31 lawyers, apparently including most of the Serb/Serbian lawyers, because of "a conflict of interest due to their previous or current representation of accused in related cases" is not convincing either: According to Art. 14 (D) of the Defence Counsel Code of Conduct, such cases only lead to a conflict of interest where "the interests of the client are materially adverse to the interests of the former client" – a requirement that is not fulfilled just because counsel have represented other Bosnian Serb accused. In fact, in this very case, the Trial Chamber had shortly before ordered the Registry to appoint Marko Sladojević as legal associate to Karadžić [55] despite the fact Sladojević had previously worked on the defence of both Momčilo Krajišnik and Milan Gvero, both accused of crimes very closely related to those Karadžić is charged with.

Finally, the selection process is all the more worrying if one considers the composition of the final list of lawyers: As Kevin Jon Heller notes, of the five counsel on that list, none came from the Balkans, four had previously defended clients who had fought against Serbs/Serbians, and one was a former ICTY Prosecutor.[56] It is hardly surprising that Karadžić was apprehensive of one of these lawyers potentially representing him in court.

Of course, this fact alone would probably not have violated any legal rules (besides those mentioned in the sections above). However, in the case of Harvey, there was also a violation of Art. 16 (G) of the Directive due to his continuing representation of Brahimaj. Art. 16 (G) is clear in providing that counsel may only represent two accused before the ICTY if *both* accused consent in writing, and while Brahimaj gave his consent, Karadžić was not even asked.

The Registrar, with the blessing of the Trial and Appeals Chambers,[57] applied Art. 16 (G) only to Brahimaj, but not to Karadžić. He argued that the provision was not directly applicable as Karadžić was assigned counsel against his will, and that it should not be applied in such cases so as not to allow the accused to obstruct the assignment of such counsel by

[52] Registrar's Submissions, supra note 15, para. 34.
[53] Trial Chamber Decision, supra note 16, para. 31.
[54] Registrar's Submissions, supra note 15, paras. 47-48.
[55] Decision on Accused Request for Judicial Review of the Registry Decision on the Assignment of Mr. Marko Sladojević as Legal Associate, 20 April 2009, paras. 15-17, where the Chamber also takes note of the specific situation of the accused being self-represented.
[56] *More on the Selection of Standby Counsel*, Opinio Juris Blog, 21 November 2009, <http://opiniojuris.org/2009/11/21/more-on-the-selection-of-stand-by-counsel/>.
[57] Trial Chamber Decision, supra note 16, para. 33; Appeals Chamber Decision, supra note 21, paras 28-29.

refusing consent for simultaneous representation.[58] Of course, as with Art. 11 (D), the *raison d'être* of Art. 16 (G) – protecting accused against potential or actual conflicts of interest – applies not only to counsel appointed according to the accused's wishes, but *a fortiori* to counsel appointed against the will of the accused. The argument that requiring consent under Art. 16 (G) would allow accused to block the assignment of counsel is not convincing either: This was true only after the Registrar had eliminated a large percentage of eligible counsel for reasons not foreseen in the applicable legal texts, leaving only a handful of counsel all or most of which were representing other clients.[59]

1.3.4. Conclusion

The Appeals Chamber justified its approach of effectively granting the Registrar almost unfettered discretion in the selection of assigned counsel by stating that "reasons for and parameters of each appointment will vary considerably."[60] Whatever truth there may be to this statement in general, there is one thing that will not vary at all between such appointments – they will all be done against the will of the accused. As shown above, it is for this simple reason that accused in all such cases must be granted the same amount of choice of counsel as are all other accused.

2. Funding of the Defence Team

The assignment of standby counsel is not the only question of defence personnel in the *Karadžić* case which has been extensively litigated. Besides attacking the assignment of Mr. Harvey, Karadžić has also twice complained about severe underfunding of the defence team assigned to assist him in his self-representation. While both complaints were largely successful, a closer look shows that the rules on defence team funding in general, like many other decisions dealing with implications of self-representation,[61] amount to punishing the accused for exercising his right to self-representation by limiting his ability to mount an effective defence.

2.1 An Overview of the Proceedings

The provisions on funding for support staff to self-represented accused are based on an Appeals Chamber decision in *Krajišnik* that an indigent accused representing himself, while not entitled to legal aid funds, may nonetheless receive some funding for legal associates.[62]

[58] Registrar's Submission, supra note 15, paras. 30, 33, 35.
[59] On the question of conflicts of interest, the Registrar also acted inconsistently, to put it mildly: On the one hand he eliminated a number of counsel who had represented other Bosnian Serbs, finding a conflict of interest that may very well not have existed and not even asking whether the accused consented, which he may very well have done (see supra, fn. 55 on the Sladojevic appointment). On the other hand, he saw no problem in assigning counsel currently representing someone the accused probably considers his enemy, again not even asking for the accused's consent which he knew would most likely not be given.
[60] Appeals Chamber Decision, supra note 21, para. 35.
[61] Kevin Jon Heller, *The ICTY's Ongoing Attack on the Right of Self-Representation*, Opinio Juris Blog, 17 October 2009, <http://opiniojuris.org/2009/10/17/x/>.
[62] *Prosecutor v. Momčilo Krajišnik*, Decision on Krajišnik Request and on Prosecution Motion, Case No. IT-00-39-A, 11 September 2007, paras. 40-42. This followed shortly after a decision by the Pre-Trial Judge in Šešelj which went in a similar direction – see the reference id., para. 39.

The Registry established a Remuneration Scheme for such cases, which foresees payment for up to four defence team members, at the hourly rate paid to support staff, for up to 3,000 hours total in the pre-trial phase, plus monthly allotments in the trial and appeal phases.[63] In complex cases, the Registry may, at its discretion, allow additional funding up to a specific maximum number.[64]

In the *Karadžić* case, the Registry's Office for Legal Aid and Detention Matters (OLAD) had at first decided to allow funding for up to eight support personnel and a total of 4,500 hours for the pre-trial phase.[65] On 5 November, OLAD declined funding for further defence work until 1 March 2010, the date of the resumption of the trial: The 4,500 hours allotted to the pre-trial phase had been used up, and the team was considered ineligible for trial phase funding as the resumption of the trial had been postponed.[66] The accused appealed that decision to the President and informed him that his defence team, having already worked without pay for some time, had stopped further work on the defence "until all outstanding amounts are paid and the remuneration for the future work is guaranteed by a written decision."[67] OLAD's submission defended its decision, noting *inter alia* that it had already allotted funding well above the upper limit set in the Remuneration Scheme.[68] It did, however, later change course on *trial* funding and allocate 250 hours per month during the hiatus.[69]

The President overturned OLAD's decision concerning the number of hours required in the pre-trial phase – given the specific circumstances of the case (timing and amount of disclosure, number of prosecution witnesses etc.), he found that the 4,500 hours allocated were far from sufficient to allow adequate preparation for trial.[70]

Less than a month later, the President was again faced with a defence appeal, this time on trial funding[71]: As noted above, OLAD had allocated to the defence 250 hours of trial funding per month during the hiatus; for the period after the resumption of the trial, it had allocated 150 hours per month plus hearing hours. A defence request that these numbers be upped to 1,200 hours per month to allow retention of all team members who had been working on the case pre-trial had been denied in its entirety.

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[63] Remuneration Scheme for Persons Assisting Indigent Self-Represented Accused, as of 24 July 2009, Nos. 3.1, 3.3 and 3.4.
[64] Id., Nos. 3.5-3.7.
[65] The procedural background is presented in some detail in the Registrar's Submission pursuant to Rule 33 (B) Regarding Radovan Karadžić's Appeal of OLAD's Decision on Pre-Trial Funding, 25 November 2009, paras. 4-28.
[66] Letter from OLAD to Karadžić, "Re: Your request for additional funds", id., Ann. C.
[67] Appeal of OLAD Decision in Relation to Additional Pre-Trial Funds, 10 November 2009, para. 11 and Ann. D.
[68] Registrar's Submission, supra note 65, para. 51.
[69] Kevin Jon Heller, *Registry Restores Funding to Defence Team*, Opinio Juris Blog, 27 November 2009, <http://opiniojuris.org/2009/11/27/registry-restores-funding-to-defence-team/>.
[70] Decision on Appeal of OLAD Decision in Relation to Additional Pre-Trial Funds, 17 December 2009, paras. 22-25.
[71] Request for Review of OLAD Decision on Trial Phase Remuneration, 14 January 2010.

The Registrar defended these decisions, pointing to the Remuneration Scheme, which foresees a maximum of 150 out of court hours during the trial phase.[72] He felt that there were no "duly justified unforeseen circumstances beyond the influence of the defence that significantly impact on their workload" which would justify going beyond the Scheme; aspects noted by the defence (amount of disclosure etc.) either concerned typical pre-trial work or were to be expected in any trial.[73]

The President again overturned OLAD's decisions and ordered that the defence be allocated 1,200 hours per month during the hiatus and 750 hours per month once the trial had begun again. He again largely relied on the overall complexity of the case, particularly the large amount of disclosure.[74] In setting the amount of hours during the trial phase, he made reference to the Legal Aid policy for represented accused, according to which accused in the most complex cases are entitled, beside a lead counsel, to five support staff during the trial period.[75]

In both of his decisions, the President took great care to state that the allocation of additional funds to the defence was in compliance with the decision in *Krajišnik* that funding to self-representing accused "should not be comparable to that paid to counsel for represented accused."[76]

2.2. Comment

Given that the provision of funds to persons assisting self-representing accused is determined by the Remuneration Scheme, it seems that, at first glance, one cannot but agree with the Registrar that the allocation of funds to the Karadžić defence was actually quite generous: As concerns the trial period, OLAD approved the maximum amount of hours foreseen under the Scheme; as far as the pre-trial period and arguably the hiatus are concerned, it even exceptionally went beyond that maximum, in the absence of any specific statutory basis for doing so.[77] However, this simply highlights two basic misconceptions contained in the Remuneration Scheme.

First, there is simply no reasonable argument why an accused who chooses to be his own head counsel should not receive the funding he would receive if represented by counsel, minus of course funds intended for head counsel. To state in such contexts that "as part of the choice to self-represent, [the accused] must accept responsibility for the disadvantages this choice may bring"[78] presupposes that limited funding is somehow a "natural" consequence of self-representation, which is begging the question. It is of course true that there are certain

[72] Registrar's Submission Pursuant to Rule 33 (B) Regarding Radovan Karadžić's Request for Review of OLAD Decision on Trial Phase Remuneration, 28 January 2010, paras. 40 *et seq*.
[73] Id., paras. 51 et seq.
[74] Decision on Request for Review of OLAD Decision on Trial Phase Remuneration, 19 February 2010, paras. 34 et seq.
[75] Id., para. 46.
[76] President's Decision on Pre-Trial Phase, supra note 70, paras. 26 et seq.; President's Decision on Trial Phase, supra note 74, paras. 54 et seq.; both referring to *Krajišnik* Appeals Chamber Decision, supra note 62, para. 42.
[77] See Remuneration Scheme, Nos. 3.3.a. and 3.7 for the pre-trial period, No. 3.3.b for the trial period.
[78] *Krajišnik* Appeals Chamber Decision, supra note 62, para. 41.

problems faced by self-represented accused which are simply unavoidable – if the accused is in pre-trial detention, he will not be able to meet witnesses or investigators in the field and will encounter problems in communicating with the rest of his defence team; if the accused is not a lawyer, his legal submissions may not be of a particularly high quality, etc. However, limited funding is not simply a fact of life that arises from one's head counsel sitting behind bars – it is a deliberate choice by the Tribunal not to grant accused exercising their right to represent themselves the same facilities for preparing their defence that it would grant to (head counsel of) represented accused.

Even worse, the Appeals Chamber in *Krajišnik* again adds insult to injury by stating that "[t]o the extent that the accused lacks the ability to conduct his own case and his self-representation is thus 'substantially and persistently obstructing the proper and expeditious conduct of his trial', then the remedy is restriction of his right to self-representation".[79] Punishing an accused for self-representation by refusing to grant him adequate facilities for preparing a defence, and then using his inability to defend himself in the absence of such facilities as an argument to restrict self-representation, surely does not go a long way towards proving the ICTY's claims that it holds self-representation to be a right not to be taken lightly.[80]

What's more, by refusing to grant self-represented accused the same facilities as counsel representing accused, the Court seems to be implying that it expects such accused to be interested in a 'political' rather than a 'legal' defence (for which they would, after all, require such facilities). In fact, it may even end up inviting accused to mount a 'political' defence for the simple reason that this is the only one they are able to effectively mount given their limited resources.

Finally, even accepting *arguendo* that there should be a clear gap in quality between the support given to head counsel and to self-represented accused, the Remuneration Scheme is still far insufficient for dealing with the varying complexity of cases before the ICTY. Under the Legal Aid Policy for represented accused, pre-trial funds granted in the most complex Level 3 cases exceed those granted in Level 1 cases by 180 %.[81] By contrast, the Remuneration Scheme only exceptionally allows an additional 33% of pre-trial funding for complex cases, and even the OLAD's decision to go above this limit led to only a 50% increase in pre-trial funding for a case of almost unrivalled complexity before the ICTY.

It is therefore a very welcome development that the President went beyond the Remuneration Scheme and made some steps towards equating the funding for the defence teams of self-representing accused to that supplied to other defendant – even if he was still at pains to show his adherence to the *Krajišnik* precedent.

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[79] Id. This statement was also quoted by OLAD in the present case – Registrar's Submission, supra note 65, para. 65.
[80] *Prosecutor v. Slobodan Milošević*, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defense Counsel, Case No. IT-02-54, 1 November 2004, para. 11.
[81] Pre-Trial Legal Aid Policy, 1 May 2006, para. 5.

3. One Source of the Problem: The ICTY's Aversion to 'Hybrid' Representation

Given these severe limitations of defence team funding and other obstacles faced by self-representing accused, one may wonder why any accused would choose to represent themselves and thus severely limit their ability to mount a defence. Does this not prove that accused who do so are only out to 'politicize', 'disrupt' and generally disrespect their trials? Such a view, however, would overlook that accused opting for representation by counsel face a severe limitation in another direction, particularly if they wish to be able to bring their specific knowledge of their home country and its conflict into the courtroom.

The ICTY legal texts do not foresee 'hybrid' representation[82], which means that ICTY accused represented by counsel are not allowed to take part in the everyday defence by questioning witnesses, commenting on in-courtroom developments or addressing the court on legal questions. Where accused were exceptionally allowed to participate in the questioning of witnesses, this was always considered a privilege granted under the discretion of the Trial Chamber and in fact later restricted.[83] In other cases, accused were not even allowed to sit next to their counsel or to use a laptop during court proceedings.[84] In other words, accused who opt for representation by counsel also opt for exercising a very passive role in their trial.

Those accused who wish to take an active role in their defence are thus faced with a dilemma: If they do want to take that role, they have to represent themselves – and be prepared to fight an uphill battle in securing semi-adequate funding for a legal support team and face a variety of other stumbling blocks large and small. If they want to ensure adequate facilities for their defence, they have to accept representation by counsel – knowing full well that even if they are exceptionally granted some participation rights, these may later be taken away if they prove inconvenient.

Particularly in very politicized trials where the public at large already 'knows' that the accused is guilty, it is thus not surprising that an accused who might well opt for representation by counsel if he could still take an active part in courtroom proceedings nonetheless decides to represent himself. This is indeed precisely the reason why Karadžić, who works very closely with his defence team and has repeatedly stated in court that he values their contributions very highly, has opted for self-representation.[85] In fact, his motion on modalities of trial, requesting that the Chamber grant his legal advisor a right of audience

[82] This type of representation, in which the various tasks engaged in putting up a defence may be fulfilled by both counsel and accused, is the standard in many civil law systems. It should be noted, however, that these systems mostly do not allow accused to represent themselves, at least in serious cases.
[83] *Prosecutor v. Jadranko Prlić et al.*, Decision on the Mode of Interrogating Witnesses, Case No. IT-04-74, 10 May 2007, paras. 8-12; Decision on Praljak's Appeal of the Trial Chamber's 10 May Decision on the Mode of Interrogating Witnesses, 24 August 2007; Decision Adopting Guidelines for the Presentation of Defence Evidence, 24 April 2008, para. 3.
[84] *Prlić et al.*, Decision on the Oral Request of the Accused Jadranko Prlić for Authorisation to Use a Laptop Computer at Hearings or to Be Seated next to His Counsel, 29 June 2006.
[85] Personal discussion with Karadžić's legal advisor Peter Robinson.

on legal questions,[86] can be seen as an attempt to establish hybrid representation 'through the backdoor'.[87]

This, then, may show another solution for international criminal tribunals wishing to avoid many of the problems associated with self-representation. At present, they try to achieve that goal by restricting the right to self-representation and punishing accused for exercising that right. If courts also wish to further establish an effective defence as an integral part of international criminal justice, they should adopt a different approach: They should on the one hand provide those accused who genuinely wish to defend themselves with the necessary resources to put up an effective defence, while on the other hand allowing hybrid systems of representation and thus inviting accused who simply wish to take a more active role in their defence to nonetheless accept representation by counsel.[88]

[86] Submission on Trial Procedure, 28 September 2009, para. 3 *et seq*. This request was granted by the Chamber in its Order on the Procedure for the Conduct of the Trial, 8 October 2009, App. A Lit. T.
[87] In fact, the President's decision to order that the legal advisor be paid the hourly rate normally paid to co-counsel in light of his extended role (President's Decision on Trial Phase, supra note 74, para. 51 et seq.) can be seen as acknowledging that the arrangement on trial modalities had established certain elements akin to hybrid representation.
[88] The Rules of Procedure and Evidence of the Special Tribunal for Lebanon seem actually to foresee hybrid representation, albeit while further restricting self-representation: See Rules 59 (F) and 144 (A) as well as the Explanatory Memorandum by the Tribunal's President, 10 June 2009, paras. 29-30.