Karadžić on Trial: Two Procedural Problems

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At last, Karadžić is on trial in The Hague – a glorious moment for international criminal justice. These are the cases that matter and capture the attention of the world community. It is another opportunity for the International Criminal Tribunal for the former Yugoslavia (ICTY) to show to the world that it is capable of delivering fair and expeditious justice in complex trials. In a way it is a second—rather unexpected—chance.

Unfortunately, the ICTY’s record in big cases is not very positive. The Milošević case was a failure and currently the Šešelj case is causing the ICTY enormous problems. While in the international criminal justice system the focus tends to be on substantive criminal law, all these big trials—including the Karadžić case—demonstrate that the Achilles’ heel lies in procedural law. One would expect Judges and Prosecutor to have learned from past mistakes and to get the Karadžić case right from the beginning. Compared to the Milošević case there are definitely more favourable circumstances giving cause for modest optimism:

- the indictment is far more manageable in the Karadžić case, and does not seem to require any new investigation
- at the initial appearance Karadžić declared that he is in perfect health

As with the trials of Milosevic and Šešelj however, the problem of self-representation remains. Karadžić made it perfectly clear at the initial appearance on 31 July that he wants to conduct his own defence throughout the entire trial. In this commentary, I will offer my observations on this clearly visible problem, which the Prosecution in particular expressed its concern over at the initial appearance. But there is also another focus needed at this stage and that is the accused’s right to be presumed innocent, in particular the connection of this right with the right to an impartial tribunal.

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1. Self-representation

The right of an accused to represent himself has become especially popular among high-profile defendants at international criminal tribunals. At the ICTY, Krajišnik, Tolimir, Milošević and Šešelj have exercised—or are still exercising—the right to self-representation and now Karadžić will join the club. One can only speculate as to why these individuals prefer this mode of conducting their defence instead of utilising the assistance of counsel. It will certainly have to do with the personalities of these individuals, their need to be in control, as well as their desire to directly address the world and their fellow countrymen via the ICTY. But in the case of Karadžić there might be an additional factor.

Karadžić must be aware of the fact that the ICTY to this day has failed to find an appropriate response to the question of ‘difficult accused’ – individuals who refuse professional assistance and who are intent on representing themselves. Many publications have appeared on the topic. The matter has often been approached as trying to strike the correct balance between an effective defence and a defence in accordance with the wishes of the accused, thus effectiveness v. choice. This is a delicate matter. Clearly, an accused representing himself will not be able to defend himself as effectively as counsel, especially if the accused has had no legal training, no knowledge of international criminal law and no experience in cross-examining witnesses. But denial of this choice – by way of imposing defence counsel – is just as problematic, for at least two reasons. First, the cure may be worse than the disease; accused wishing to represent themselves generally do not communicate with assigned counsel, which legitimately raises the question what such counsel could effectively do. In fact, it might then be wiser – in the interests of an effective defence – to let the accused continue to represent himself. The second reason has to do with the quality of defence counsel. The international criminal justice system lacks proper mechanisms for ensuring the quality of defence (and other) counsel. For example, there is no requirement of a law degree in international criminal law nor is there a bar exam in international criminal law. As a result, assistance of defence counsel is by no means always a guarantee for a reasonably effective defence.

In this light, I argue in favour of the right to self-representation as a starting point. Any restriction of this right – in the sense of depriving the accused of being in charge of his own defence – should be made with the utmost caution when it concerns the interest to ensure an effective defence. But this is not to say that no other grounds exist on the basis of which the right can be curtailed. Especially when the accused is abusing the right to self-representation to deliver political speeches or is in any other way acting inconsistently with the decorum of the courtroom and court proceedings, there is every reason to intervene. Clearly, the Tribunal cannot allow the accused to damage the integrity and solemn nature of the proceedings.

With respect to the question of whether the accused is obstructing—through the right of self-representation—the conduct of an expeditious trial (thereby abusing that right),
and how this should be addressed, the following factors appear to be of vital importance:

a. the self-representing accused must from the beginning be informed in detail about the rules governing self-representation, and which impermissible conduct may result in the loss or restriction of the right to self-representation
b. in case of violation of these rules it must be assessed whether the accused was acting in bad faith
c. in case of violation, the accused must be warned at least once about his unlawful conduct and be informed of the consequences.

However, the Tribunal still lacks a legal framework adequately incorporating these factors. One wonders whether the time has come for drafting clear rules on self-representation, also in the interest of the accused. Failing these rules, the matter remains very uncertain.

Moreover, the jurisprudence of the ICTY on self-representation has significant flaws, and cannot be regarded as offering appropriate guidelines. This became particularly apparent following the ICTY Appeals Chamber decision at the end of 2006 dealing with Vojislav Šešelj’s right to self-representation following his hunger strike.¹ In that decision, in which any coherent legal argument is hard to detect, the highest organ of the ICTY essentially extended the right of self-representation to individuals who abuse—and continue to abuse—this right and thereby damage the integrity of the proceedings. That decision served in my view no other purpose than to put an end to Šešelj’s hunger strike. In 2007 I wrote this about the Appeals Chamber decision of 8 December 2006:

Others who stand accused before the ICTY may find support in the 8 December Decision to enforce their self-representation; frankly, in light of the circumstances of the Seselj case, especially bearing in mind his obstructionist behaviour, Chambers will have a difficult time denying requests for self-representation. (…) The cumulative effect of the Appeals Chamber’s corrections of Trial Chambers’ decisions that have curtailed the right to self-representation in Milosevic and Seselj may very well be an undesirable imbalance in the law that is not even endorsed by those who generally support the right to self-representation; in addition, it undermines the interests of fair and expeditious justice. We await to see which Chamber or Judge will have the wisdom to dismiss the 8 December Decision as an unworthy legal precedent.²

Indeed, the Appeals Chamber decision in the Šešelj case is still hanging as a dark cloud over every trial in which Judges and Prosecutors are looking at a reasonable interpretation of the right to self-representation. The current situation in the Šešelj trial is dramatic and has been adequately depicted by Alexander Zahar in a recent

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¹ Pros. v. V. Šešelj: Decision on appeal against the Trial Chamber’s decision (No. 2) on assignment of counsel, 8 December 2006 Available at: http://www.haguejusticeportal.net/eCache/DEF/6/439.html.
Clearly, both the Prosecutor and Judge(s) in the Karadžić case do not wish to have a repetition of that situation. However, Karadžić would be fully entitled to point to the Šešelj case as a precedent and in particular to the ICTY Appeals Chamber decision of 8 December 2006.

In essence, the matter comes down to the question of how to overturn the 8 December Decision and make it obsolete. Contrary to what I hoped for in my 2007 publication, no Chamber or Judge has yet dismissed the Decision despite its serious flaws in the legal analysis concerning the scope of the right to self-representation. In all likelihood, the Appeals Chamber Judges would not appreciate such a revision and – more importantly – the matter would probably end up before the same Judges who would then essentially be asked to acknowledge their serious errors of judgement.

With the Karadžić trial now imminent, the ICTY cannot afford any repetition of the Šešelj debacle regarding self-representation. Otherwise, the Tribunal may not just have to deal with the dramatic progress of the Šešelj trial, but will also run the risk of a similarly slowly progressing trial in the case of Mr. Karadžić. As everybody is hopefully (becoming) aware of this at the ICTY, the Karadžić case is an excellent opportunity for the Prosecutor to restore the reasonable interpretation to the right to self-representation and prevent serious abuse of this right, which is highly damaging to the ICTY. A strong attack of the 8 December 2006 Decision may serve a positive dual purpose: the progress and dignity in the Šešelj case may be ‘repaired’ and a repetition of the Šešelj case in the prosecution of Mr. Karadžić will be prevented at the earliest opportunity.

For the Prosecution there is unfortunately no easy way to go about this. At the origin of all current problems regarding self-representation is that the Appeals Chamber – at the end of 2006 – did away with proper legal reasoning, but gave in to an accused who was in a rather advanced stage of his hunger strike. However one conveys the message, the bottom line is that such a decision should not carry any weight, even if it comes from the Appeals Chamber. Although the Appeals Chamber in particular may find very difficult to accept, I truly hope the judges realize how damaging the alternative is: allowing the most prominent accused in custody to make a mockery of the ICTY.

2. Presumption of innocence and the right to an impartial tribunal

Cases like those of Radovan Karadžić should also be examined from a defence perspective. In light of all the (media) attention, one must address the question of what chance such a high-level accused stands at the ICTY. Legally, this must be addressed from the perspectives of the right to be presumed innocent and the right to an impartial tribunal. These are not only fundamental rights of the accused – they are rights which must also be seen as being fully respected by society in general. The

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legitimacy of the ICTY also depends on its perception among the supporters of Karadžić and the like that they are being treated in accordance with the presumption of innocence. It has already been noticed in the literature that the ‘mediatisation’ of these trials may be problematic in terms of the presumption of innocence.\textsuperscript{4} But there is not much the Tribunal can do about that, except that the ICTY authorities should always be very cautious when expressing themselves.

What does lie within the full responsibility of the ICTY is the assignment of the case to an impartial bench. The President of the ICTY has decided to assign the Karadžić case to Trial Chamber I, composed of Judge Orie (Presiding), Judge van den Wyngaert and Judge Moloto. Judge Orie has assigned himself as Pre-Trial Judge. Judge Orie is undeniably one of the best and most experienced ICTY Judges. Yet I find his role in the Karadžić case highly problematic and, according to me, this issue must be raised now before it becomes impossible to remedy it.

The problem is that Judge Orie was a presiding Judge in the Krajišnik case.

Momčilo Krajišnik was a member of the Bosnian Serb leadership, together with Karadžić. In that case, Judge Orie and his Chamber established that Krajišnik and Karadžić were members of a joint criminal enterprise, which served as the basis for the conviction of Mr. Krajišnik. Reading the Krajišnik judgement one notices numerous highly incriminating findings concerning Mr. Karadžić. Basically, it appears that by considering Karadžić as a member of this joint criminal enterprise, the Chamber not only convicted Krajišnik, but also Karadžić. There is significant overlap between the Krajišnik conviction and the current Karadžić indictment.

The question is to what degree this is a problem. The legal standard is the right to an impartial tribunal, which has a close connection with the presumption of innocence. For the interpretation of this right it is not relevant that Judge Orie is known as an excellent Judge and fully impartial; it is equally irrelevant that Mr. Karadžić might not trust Judge Orie, because he may have the general feeling that the ICTY and its judges are anti-Serb. What matters, according to the ICTY’s own jurisprudence, is that there exists an unacceptable appearance of bias if ‘the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias’ (Furundzija appeal judgement, para. 189). In human rights law, impartiality of the court implies that judges must not harbour preconceptions about the matter put before them.\textsuperscript{5}

Taking the perspective of the ‘hypothetical fair-minded observer’ and bearing in mind ICTY and human rights jurisprudence, I believe that Judge Orie’s involvement in the Karadžić trial is inappropriate and also a risk for the trial’s successful completion. Indeed, the fair minded observer may legitimately question whether any future ruling of Judge Orie is in some way based or inappropriately influenced by the ‘Krajišnik findings’. I am therefore surprised this case was assigned to him and I recommend anyone to read the Krajišnik judgement and draw one’s own conclusions.


It is a considerable risk for the successful completion of the trial. Of course, if Karadžić has a problem with the involvement of Judge Orie he can try to disqualify him, but he may do so at an inconveniently (late) stage of the proceedings. Furthermore, the ICTY Rules are silent as to what should happen when Karadžić would claim at a later stage – when Judge Orie is no longer participating – that he has not received a fair trial because of the involvement of a Judge against whom there exists an unacceptable appearance of bias. Rule 15, which deals with withdrawal, only applies to the trial and appeal stage. But fair trial challenges at a later stage may have potentially far-reaching consequences for the successful completion of the trial. It is in the ICTY’s interest to carefully reconsider the continuing involvement of the Presiding Judge in the Karadžić case, because his continuing presence – especially when decisions which negatively affect the accused are issued – is a risk not to be underestimated.

Of course, I am aware of possible justifications for Judge Orie’s involvement.

First, there is the (not unlikely) possibility that the composed Trial Chamber was the only one reasonably available and – more fundamentally – that because of the limited number of Judges at the ICTY and relatively closely related sets of facts it is difficult to find a Judge who has not in any way been involved in the facts alleged in the Karadžić indictment. These are essentially practical considerations and in face of the right to an impartial tribunal are not very convincing. Furthermore, Judge Orie not only dealt with facts alleged in the Karadžić indictment but also drew findings regarding Mr. Karadžić’s personal role. In order to give full respect to the presumption of innocence in such a case, there is of course always the option simply to hire new Judges…

Second, the argument could be submitted that Judge Orie’s involvement is not problematic, as long as he does not issue decisions regarding the guilt of the accused. This would thus mean that Judge Orie would not sit in the Karadžić trial.

This raises the question whether it would not be more desirable to have the same judges for the pre-trial and trial stage, in the interest of reaching consistent decisions on, for example, difficult matters like self-representation. But even if the ICTY President was to limit Judge Orie’s involvement to the pre-trial phase, then I am still not sure whether the right to an impartial tribunal would still be properly respected. True, Rule 15 may be satisfied as regards the disqualification of Judges at the trial or appeal stage. But as we have not yet reached trial, Rule 15 may be regarded as not applicable at this stage. However, human rights law is applicable, and there the right to an impartial tribunal runs from the issuance of a criminal charge.

In the case of Mr. Karadžić, important decisions may be taken in the pre-trial phase, with significant consequences for the accused. At his initial appearance Mr. Karadžić already announced that he considered that his arrest and transfer were unlawful; a positive ruling on his possible challenges might constitute the end of the trial. A Judge who has in a previous case more or less ‘convicted’ Karadžić for membership of a
joint criminal enterprise should not participate in decision-making on these matters. In my view, the ‘hypothetical fair-minded observer’ would see in the involvement of Judge Orie, even in the pre-trial phase, an unacceptable appearance of bias.

Conclusion

Many, including myself, were hoping that the ICTY would get another opportunity after the Milošević case to try one of the persons who are regarded generally as the principal suspects of the most serious crimes committed in the former Yugoslavia since 1991. With this opportunity – still rather unexpectedly - presenting itself in the gift of the Karadžić transfer, there is every interest to conduct a ‘perfect’ trial. As we are now aware of, since the Milošević trial, the biggest challenges lie in the law of criminal procedure.

Two major problems arise at the beginning of the Karadžić case. First, the right to self-representation continues to plague the ICTY. This problem will only be credibly tackled when the Prosecutor and the Judges clearly denounce the Appeals Chamber ruling in Šešelj as being bad law and inappropriate guidance, and restore a reasonable interpretation of this right. Second, the ICTY must be extremely cautious, especially in the situation where media may already have pronounced a verdict of guilt, to ensure the protection beyond a reasonable doubt of the right of the accused to be presumed innocent and to be tried by an impartial tribunal. I am concerned that the participation of a Judge who in a previous case has ruled that Karadžić has been a member of a joint criminal enterprise responsible for a significant amount of crimes in Bosnia is now prominently involved in the Karadžić trial. It would be a regrettable blemish on the trial before it even begins and an unnecessary risk which the Tribunal simply need not take after 13 years of waiting for Radovan Karadžić.