

The Right of Self-Representation – The Lawyers in the Eye of the Storm

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I. Introduction

“Tribunal is false tribunal” uttered Slobodan Milosevic at his first appearance before the International Criminal Tribunal for the Former Yugoslavia (ICTY) and from that moment onwards those words saw him and his defence case set on a collision course with the court.¹ He was the first accused to assert his right to self-representation at the ICTY and the controversy thereby caused was to be a permanent feature of his trial.² “I have an invisible advisor but I have decided to represent myself” asserted Radovan Karadžić at his initial appearance on 31 July 2008.³ Opting for self-representation for his trial 7 years later, Karadžić followed the example previously set by Slobodan Milošević and others and he is the most recent addition to the “self-representing” club. However, Karadžić’s appearance at the ICTY and his choice to represent himself, at a time when the court was noticeably taking measures to wind itself up, brought him into a collision with a preordained timetable.

In this article the two defence counsel who remained involved in the process in varying ways from the beginning of the proceedings until their end, reflect on the development of this issue in that case and the subsequent cases at the ICTY. This article will reflect on how the right to self-representation has seen different roles played by defence counsel during those trials.

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¹ Case No. IT-99-37-I and Initial Appearance, 3 July 2001, Trial Transcript at p1-2.

² The Washington Post 29 August 2004 *Making a Spectacle of Himself – Milosevic Wants a Stage, Not the Right to Provide His Own Defense* by Prof. Michael P. Scharf.

³ *Prosecutor v. Karadžić*, IT-95-5/18, Initial Appearance Transcript, 31 July 2008, p. 2, ll. 11-12.

The right of self-representation is enshrined in Article 21(4)(d) of the ICTY Statute entitling an accused “...to defend himself in person or through legal assistance of his own choosing...”.⁴ Not only the ICTY Statute, but also all the most fundamental human rights instruments include the right of self-representation.⁵

Even though this right has been hallmarked “an indispensable cornerstone of justice”,⁶ the ICTY – as well as other international courts – have struggled with its implementation. Allowing accused to self-represent inevitably creates tensions which the Tribunals could easily live without. Limitations on the right of self-representation have been imposed if the accused substantially and persistently obstructs the proper and expeditious conduct of trial or if caused by the ill-health of a self-representing accused. The intervention can take different forms: Assigned Counsel “representing” the accused; Standby Counsel “assisting” the accused; *Amicus Curiae* assisting the court or Counsel appointed to assist an accused on a specific issue alone.

II. Self representation in the *Milošević* Case – Limitations due to Ill health

A. Appointment of *Amici Curiae* to Assist in the Proper Determination of the Case

Milošević was the first accused at the ICTY to assert his right of self-representation.⁷ The Trial Chamber acknowledged this as his fundamental right, but nonetheless considered it to be “desirable and in the interests of securing a fair trial that an *amicus curiae* be appointed ... not to represent the accused but to assist in the proper determination of the case ...”.⁸ Three *Amici Curiae* were appointed with the clear mandate to assist the Trial Chamber in ensuring a fair trial whilst not curtailing Milošević’s right to self-representation.⁹ Initially, Milošević refused to cooperate with *Amici Curiae*. However, a

⁴ Provisions upholding the right to self-representation have also been included in the Statutes of the ICTR, ECCC, SCSL and ICC. See ICTR Statute, Article 20(4)(d), ECCC Statute, Article 35(d); ICC Rome Statute, Article 67(1)(d); SCSL Statute Article 17(4); STL Statute Article 16(4)(d).

⁵ See ICCPR, Article 14(d) ECHR, Article 6(3); ACHR, Article 8(2)(d).

⁶ *Prosecutor v. Milošević*, IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber’s Decision on the Assignment of Defense Counsel, 1 November 2004, para. 11.

⁷ See *Prosecutor v. Milošević*, IT-99-37-I, Initial Appearance Trial Transcript, 3 July 2001, pp. 1-2, ll. 18-6.

⁸ *Prosecutor v. Milošević*, IT-99-37-PT, Order Inviting Designation of *Amicus Curiae*, 30 August 2001, p. 2.

⁹ *Ibid.*

working relationship gradually developed, eventually resulting in the incorporation of the *Amici Curiae*'s assistance into Milošević's defence strategy.

B. Revisiting the Right of Self-Representation Due to Ill health

The appointment of Judge Bonomy to the Trial Chamber on 10 June 2004, heralded a change in Milošević's role.¹⁰ This newly constituted Trial Chamber determined that it was time for a "radical review" of the issue of the assignment of counsel because of the loss of trial days due to Milošević's ill health.¹¹ On 3 September 2004,¹² the two *Amici Curiae* remaining at that stage of the trial, Steven Kay QC and Gillian Higgins, were designated as Assigned Counsel to Milošević. The Trial Chamber made it very clear that Milošević's participation would be limited; dependent on leave given by the Trial Chamber.¹³ The Trial Chamber thus visibly demoted Milošević to a secondary position in the trial and effectively put Assigned Counsel in charge of his case.¹⁴ Assigned Counsel, following instructions from Milošević and bound by their duty to represent the interests of their client, submitted an appeal on his behalf to revoke their own appointment. They submitted that the Trial Chamber had exercised unreasonable discretion in assigning counsel because Milošević had not engaged in any obstructionist behaviour and the right of self-representation had been revoked without showing any further delays due to illness. They argued that the Trial Chamber failed to pay sufficient attention to practical

¹⁰ *Prosecutor v. Milošević*, IT-02-54-T, Order Replacing a Judge in a Case before a Trial Chamber, 10 June 2004. Judge May retired on 25 February because of ill health.

¹¹ A total of 66 trial days had been lost by 25 February 2004 due to the accused's ill health. The medical report indicated that Milošević's health problems were expected to recur. *See Prosecutor v. Milošević*, IT-02-54-T, Order on Future Conduct of the Trial, 6 July 2004. However, it must be noted that Judge May as the Presiding Judge was indisposed due to illness during the period after January 2004.

¹² The defence case started on 31 August 2004 with an opening statement by Milošević after several adjournments due to his ill-health. On 1 September 2004, the parties were asked to provide oral submissions concerning recent medical reports and assignment of counsel. On 2 September 2004, in an oral ruling from the Trial Chamber, Counsel were assigned based his bad state of health. *See Prosecutor v. Milošević*, IT-02-54-T, Reasons for Decision on Assignment of Defence Counsel, 22 September 2004.

¹³ *See Prosecutor v. Milošević*, IT-02-54-T, Order on the Modalities to be Followed by Court Assigned Counsel, 3 September 2004, p. 3.

¹⁴ According to the modalities set out, Assigned Counsels role was to "(a) represent the Accused by preparing and examining those witnesses court assigned counsel deem it appropriate to call; (b) make all submissions on fact and law that they deem it appropriate to make; (c) seek from the Trial Chamber such orders as they consider necessary to enable them to present the Accused's case properly, including the issuance of subpoenas; (d) discuss with the Accused the conduct of the case, endeavour to obtain his instructions thereon and take account of views expressed by the Accused, while retaining the right to determine what course to follow; and (e) act throughout in the best interests of the Accused". *Id.*, p. 2.

problems which would result from the imposition of counsel against his will, such as the likelihood of non-cooperation of witnesses with the Assigned Counsel and the significant risk that without Milošević's cooperation, the defence case put forward would not reflect his actual defence.¹⁵

The assignment of Counsel was upheld by the Appeals Chamber, albeit with a reversal of modalities. The Appeals Chamber held that the Trial Chamber had made "a fundamental error of law" when imposing those sharp restrictions on Milošević's right to self-representation. In its opinion "the Trial Chamber failed to recognize that any restrictions on Milošević's right to represent himself must be limited to the minimum extent necessary to protect the Tribunal's interest in assuring a reasonably expeditious trial."¹⁶ It relied on the principle of proportionality which provided an important check on the excessive duties placed upon Assigned Counsel. The Appeals Chamber held that if Milošević was physically able he should "take the lead in presenting his case".¹⁷ Considering the impossibility of predicting Milošević's health issues, the Appeals Chamber encouraged the Trial Chamber "to steer a careful course between allowing Milošević to exercise his fundamental right of self-representation and safeguarding the Tribunal's basic interest in a reasonably expeditious resolution of the case ...".¹⁸

The findings of the Appeals Chamber lead to a drastic shift in the role Milošević played at trial. He was no longer relegated to the backseat but once again resumed the primary role in court. From there on, Assigned Counsel became the guardians of Milošević's fair trial rights. Interestingly, the Trial Chamber did not issue any new instructions on the roles of either Assigned Counsel or Milošević. The extensive mandate provided by the Appeals Chamber made it possible for Milošević and Assigned Counsel to reassert the delicate balance between them, and resume a cooperative relationship. For the remainder of the trial, Assigned Counsel were a constant presence alongside Milošević; their skills

¹⁵ See *Prosecutor v. Milošević*, IT-02-54-AR73.7, Appeal Against the Trial Chamber's Decision on Assignment of Defence Counsel, 29 September 2004, paras. 43, 93.

¹⁶ *Prosecutor v. Milošević*, IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence Counsel, 1 November 2004, para. 17.

¹⁷ *Ibid.*, para. 19.

¹⁸ *Ibid.*, para. 19.

and knowledge of procedure always at hand to ensure that the accused was continuously protected.

Joanne Williams aptly described the role of Assigned Counsel in this instance as “hybrid” allowing for the simultaneous exercise of the right to self-representation alongside representation through counsel.¹⁹ This model has been considered the most fitting concept, as “[f]amiliarity with the vast and countless facts, figures, locations and witnesses made the Accused more suited to conducting certain aspects of his defence.”²⁰ This system of “hybrid representation allowed Milošević to publicly conduct cross-examination and examination-in-chief while relinquishing to counsel those procedural and substantive tasks which required the legal skills at which they excel.”²¹

III. Limitations to Self-Representation due to Obstructionist Behaviour

Limitations to the right of self-representation have not only been imposed due to the ill health of an accused, but have also been employed with those who have engaged in obstructionist behaviour. The use of Standby Counsel was first introduced in the ICTR case of *Barayagwiza*;²² and was thereafter fully developed in the ICTY’s *Šešelj* case. In this case, the Appeals Chamber was faced with the issue of restricting the right to self-representation at the pre-trial stage, as well as whether or not the imposition of Standby Counsel required advance warning that the right of self-representation was to be revoked. More recently, in *Karadžić*, the Appeals Chamber dealt with the issue of whether an accused had the right to actually choose imposed Standby Counsel himself.²³

¹⁹ See Joanne Williams, ‘Slobodan Milosevic and the Guarantee of Self-Representation’ (2006-2007) 32 *Brook. J. Int’l L.*, 553, 600.

²⁰ *Ibid.*, p. 600.

²¹ *Ibid.*

²² See *Prosecutor v. Barayagwiza*, ICTR-97-19-T, Decision on Defence Counsel Motion to Withdraw, 2 November 2000.

²³ See *Prosecutor v. Karadžić*, IT-95-5/18-AR73.6, Decision on Radovan Karadžić’s Appeal from Decision on Motion to Vacate Appointment of Richard Harvey, 12 February 2010 (“*Karadžić* 12 February 2010 Decision”)

C. Self Representation in the Šešelj Case – A Back-and-Forth Between Self-Representation, Standby Counsel and Assigned Counsel

In February 2003, Vojislav Šešelj invoked his right to self-representation.²⁴ The litigation which ensued from this declaration not only launched Šešelj into a battle against the Prosecution but also, at various stages, saw the Trial and Appeals Chambers in overt opposition with one another. The Prosecution requested, shortly after his initial appearance, that counsel should be appointed to assist Šešelj.²⁵ Seeking “assistance” instead of “representation” of Šešelj was a markedly different approach from that initially used by the Prosecution in *Milošević*. As will be explained below, Šešelj’s self-representation story shows that the Trial Chamber and Appeals Chamber have, on occasion, appeared indecisive and weak in the way in which they dealt with this important issue.

On 9 May 2003, the Trial Chamber assigned Standby Counsel because of Šešelj’s disruptive and obstructive behaviour.²⁶ It stressed that Šešelj’s right of self-representation was “left absolutely untouched” and that Standby Counsel was not an *Amicus Curiae* “but an assistant operating in the sphere of the accused only”; serving “to safeguard a fair and expeditious trial.”²⁷ Although the mandate of the Standby Counsel called for “assistance” and not “representation”, the Trial Chamber included a provision allowing counsel to take over the representation of the accused if— after having been warned – the accused had to be removed from the courtroom for obstructive behaviour pursuant to ICTY Rule 80(B).²⁸

²⁴ *Prosecutor v. Šešelj*, IT-03-67-I, Initial Appearance Trial Transcript, 26 February 2003, pp. 5-6.

²⁵ The Prosecution argued that he had expressed his intent “to use his trial as a forum for the defence of Serb national interests and to destroy this Tribunal” rather than as a means to defend himself. The Prosecution allowed for the possibility that “there might nevertheless remain some limited scope for the accused to participate directly in the proceedings with the leave of the Chamber” if he did not “interfere with the normal conduct of the proceedings.” *Prosecutor v. Šešelj*, IT-03-67-PT, Prosecution’s Motion for Order Appointing Counsel to Assist Vojislav Šešelj with his Defence, 28 February 2003, paras. 9, 14.

²⁶ The Chamber found that obstructive behaviour had been shown “following his declared intention to attempt to use the Tribunal as a vehicle for the furtherance of his political beliefs and aspirations.” *Prosecutor v. Šešelj*, IT-03-67-PT, Decision on Prosecution’s Motion for Order Appointing Counsel to Assist Vojislav Šešelj with his Defence, 9 May 2003, para. 22.

²⁷ *Ibid.*, para. 28.

²⁸ *Ibid.*, para. 30.

In August 2006, the Trial Chamber had to determine whether to restrict Šešelj's right of self-representation for the rest of the proceedings based on his pre-trial behaviour.²⁹ Considering the titles of his published books³⁰ and written submissions,³¹ it considered whether or not Šešelj had shown obstructive behaviour during the pre-trial phase. In its opinion the Trial Chamber had to be satisfied that the accused's behaviour "considered as a whole, provides a strong indication that self-representation *may* substantially and persistently obstruct the proper and expeditious conduct of the proceedings".³² It found that even though Šešelj had been warned and made aware of the possible consequences he "nonetheless persisted in his tactic of trying to turn the Tribunal into a stage for his private, non-forensic purposes."³³ The Trial Chamber's overall impression of Šešelj's conduct, led it to the conclusion "that there is a strong indication that his self-representation may substantially and persistently obstruct the proper and expeditious conduct of a fair trial."³⁴ The Trial Chamber saw no alternative but to assign counsel to represent him.³⁵

On appeal, the Appeals Chamber was faced with two questions of first impression: (1) is there a need to issue a warning before revoking the right of self-representation of an accused?³⁶ and (2) can obstructive behaviour at the pre-trial stage serve as a basis for revoking the right of self representation at the trial stage?³⁷ In relation to the warning, the Appeals Chamber found guidance in ICTY Rule 80(B) which allows a Trial Chamber to remove an accused from court proceedings if – after having been warned – obstructive behaviour continues. It held that the fundamental right of self-representation should be treated in the same manner; hence an accused has to receive proper warning before

²⁹ See *Prosecutor v. Šešelj*, IT-03-67-PT, Decision on Assignment of Counsel, 21 August 2006, para. 73.

³⁰ The Chamber only examined the "clearly offensive" titles of the books and not their contents. The titles of the books included: '*Genocidal Israeli Diplomat Theodor Meron*', '*In the jaws of the whore Del Ponte*'. *Ibid.*, para. 30.

³¹ The Chamber stated that Šešelj had filed 191 submissions during the pre-trial period raising inconsequential matters and therefore mounting to disruptive behaviour. *Ibid.*, para. 31.

³² *Ibid.*, para. 74 (emphasis added).

³³ *Ibid.*, para. 78.

³⁴ *Ibid.*, para. 79.

³⁵ *Ibid.*, para. 80.

³⁶ See *Prosecutor v. Šešelj*, IT-03-67-AR.73.3, Decision on Appeal Against the Trial Chamber's Decision on Assignment of Counsel, 20 October 2006, paras. 22-26.

³⁷ *Ibid.*, paras. 27-29.

revoking it.³⁸ It found that none of the warnings issued by the Trial Chamber sufficed, given that Šešelj was not specifically informed that he “would lose his right to self-representation as a sanction if his obstructionist behaviour persisted.”³⁹ Requiring a specific warning before limiting the right of self-representation hallmarked a crucial development in ICTY jurisprudence. As to the influence of pre-trial conduct on the right of self-representation, the Appeals Chamber ruled that the Trial Chamber had to satisfy itself that the pre-trial behaviour “*would* substantially and persistently obstruct the proper and expeditious conduct of the trial proceedings.”⁴⁰ Since Šešelj had not been specifically warned, it reversed the Trial Chamber’s decision.⁴¹ In doing so, however, the Appeals Chamber did not deprive itself of the opportunity to make substantial findings regarding Šešelj’s pre-trial behaviour.⁴²

Šešelj’s triumph did not last long. Five days later, the Trial Chamber re-appointed Standby Counsel furnished with the mandate to assist Šešelj. However, Standby Counsel’s mandate also expected Counsel “to be prepared to take over the conduct of the defence from the Accused and effectively bring the defence case to conclusion” if the need arose because of obstructive behaviour.⁴³ On 30 October 2006, the Registrar withdrew Assigned Counsel and reassigned them as Standby Counsel.⁴⁴ However, no warning was issued before taking this decision.

In response to the Trial Chamber’s order, Šešelj started a hunger strike on 10 November 2006 and refused to attend the status conference or to appear in court. The Trial Chamber

³⁸ *Ibid.*, para. 23.

³⁹ *Ibid.*, para. 26.

⁴⁰ *Ibid.*, para. 28.

⁴¹ However, the Appeals Chamber left the door open for assignment of counsel if Šešelj’s engaged in obstructive behaviour, allowing the Trial Chamber to promptly assign counsel if required to ensure the smooth conduct of trial. *Ibid.*, para. 52.

⁴² *Ibid.*, para. 29.

⁴³ *Prosecutor v. Šešelj*, IT-03-67-PT, Order Concerning Appointment of Standby Counsel and Delayed Commencement of Trial, 25 October 2006, para. 5.

⁴⁴ *See Prosecutor v. Šešelj*, IT-03-67-PT, Decision of Registrar, 30 October 2006.

accordingly decided that Šešelj would be warned that his conduct was substantially obstructive such as to warrant the imposition of defence counsel.⁴⁵

On 27 November 2006, the Trial Chamber issued its reasons for imposing Standby Counsel.⁴⁶ It ruled that Šešelj had “repeatedly disrupted court hearings by deliberately and unreasonably interrupting the proceedings and by refusing to appear in court to represent himself.”⁴⁷ He had been warned that if his disruptive and obstructionist conduct continued, counsel would be imposed.⁴⁸

The matter once again found its way to the Appeals Chamber, which held that the Trial Chamber had failed to provide Šešelj with a “clean slate.”⁴⁹ By immediately imposing Standby Counsel, the Trial Chamber abused its discretion “without first establishing additional obstructionist behaviour on the part of Šešelj.”⁵⁰ The Trial Chamber’s decision was overturned and the Trial Chamber was clearly instructed to only impose Standby Counsel if Šešelj’s obstructive behaviour meant that such an imposition was necessary in order to secure a fair and expeditious trial.⁵¹ Furthermore, the Appeals Chamber ruled that “should the full restoration of Šešelj’s right to self-representation fail to curb his obstructionist behaviour, the Trial Chamber would be permitted to proceed to assign counsel. Again such a decision may only be taken once Šešelj has been given a real chance to effectively exercise the right to self-representation and if the Trial Chamber feels justified in making such a decision.”⁵² Proceedings were nullified and a restart of the trial ordered.⁵³

⁴⁵ See *Prosecutor v. Šešelj*, IT-03-67-PT, Invitation to Accused to Make Submissions, 22 November 2006, p. 3.

⁴⁶ *Prosecutor v. Šešelj*, IT-03-67-T, Reasons for Decision (No. 2) on Assignment of Counsel, 27 November 2006.

⁴⁷ *Ibid.*, para. 13.

⁴⁸ *Ibid.*

⁴⁹ See *Prosecutor v. Šešelj*, IT-03-67-AR73.4, Decision on Appeal Against the Trial Chamber’s Decision (No. 2) on Assignment of Counsel, 8 December 2006 (“*Šešelj* 8 December 2006 Decision”) paras. 24, 26.

⁵⁰ *Ibid.*, para. 27.

⁵¹ *Ibid.*, para. 28.

⁵² *Ibid.*

⁵³ *Ibid.*, para. 29.

A further attempt to terminate Šešelj's self-representation was made in 2008.⁵⁴ The Prosecution alleged that Šešelj and his associates had conducted a "campaign of witness harassment and intimidation in order to obstruct the proceedings."⁵⁵ On 21 January 2009, Trial Chamber II was appointed to deal with contempt proceedings ("Contempt Trial Chamber") initiated against Šešelj "for knowingly and wilfully disclosing information in knowing violation of an order of a Chamber".⁵⁶ On 24 June 2009,⁵⁷ Šešelj (self-representing), was found guilty of one count of contempt and sentenced to 15 months imprisonment.⁵⁸ The Contempt Trial Chamber found that a book published after protective measures were granted to three witnesses revealed their identities and Šešelj knew that he was disclosing information leading to their identification.⁵⁹ It found Šešelj's acts to amount "to a serious interference with the administration of justice" potentially having an "adverse impact ... upon the witnesses' confidence in the Tribunal's ability to guarantee that protective measures will be effective in the future."⁶⁰ The Contempt Trial Chamber recognized "the need to discourage this type of behaviour, and to take such steps as it can to ensure that there is no repetition of such conduct on the part of the Accused or any other person."⁶¹ On 19 May 2010, the Appeals Chamber dismissed Šešelj's appeal in its entirety, upheld the sentence and ordered Šešelj "to immediately ... remove the Book, his initial notice of appeal and initial Appellant's brief from his internet website."⁶²

On 24 November 2009, the Trial Chamber rendered a decision holding that a contempt conviction does not necessarily mean that an accused has to lose the right of self-

⁵⁴ See *Prosecutor v. Šešelj*, IT-03-67-T, Prosecution's Motion to Terminate the Accused's Self-Representation, 28 July 2008 (confidential & *ex parte*). Public redacted version filed 8 August 2008, para. 2.

⁵⁵ *Ibid.*, para. 13.

⁵⁶ *Prosecutor v. Šešelj*, IT-03-67-R77.2, Trial Chamber II, Decision on Allegations of Contempt, 21 January 2009, para. 14. Šešelj was accused of disclosing names and personal details of three protected witnesses in a book.

⁵⁷ Šešelj entered a plea of not guilty at his initial appearance on 6 March 2009. The trial as well as closing arguments took place on 29 May 2009.

⁵⁸ See *Prosecutor v. Šešelj*, IT-03-67-R77.2, Public Edited Version of "Judgement on Allegations of Contempt" issued on 24 July 2009, 24 July 2009, para. 40.

⁵⁹ *Ibid.*, paras. 17-30.

⁶⁰ *Ibid.*, para. 37.

⁶¹ *Ibid.* Šešelj filed a confidential Notice of Appeal on 18 August 2009. See *Prosecutor v. Šešelj*, IT-03-67-R77.2-A, Order Assigning Judges to a Case before the Appeals Chamber, 27 August 2009, p. 2.

⁶² *Prosecutor v. Šešelj*, IT-03-67-R77.2-A, Judgement, 19 May 2010, para. 42.

representation.⁶³ It noted that even though the violation was serious and grave; it nevertheless was an isolated act which could not legitimately be considered as continually disruptive behaviour and substantially and persistently obstructing proceedings.⁶⁴ Furthermore, the warnings issued in 2006 related to a different issue and could not, therefore, be used in relation to the contempt conviction.⁶⁵ Imposing counsel would not be in proportion to the sanction imposed for the contempt and would lead to a lengthy delay in the trial since an adjournment would be required for new counsel to get up-to-speed.⁶⁶ Interestingly, the Trial Chamber also considered the effect that imposition of counsel would have on Šešelj's future behaviour. Unless Šešelj would not receive confidential information at all, the Trial Chamber saw little value in imposing counsel.⁶⁷ In the view of the Trial Chamber, the better approach to be taken would be to examine his books before publication.⁶⁸ Addressing the "clean slate" requirement, it noted that Šešelj's behaviour in front of the court had considerably improved.⁶⁹ Whenever disturbances were to occur, the Trial Chamber found the redaction of the transcript and the video recording to be a more appropriate approach than the imposition of counsel.⁷⁰

Almost exactly a year later, Šešelj was charged with contempt of court again. Facing strikingly similar charges. Šešelj, still representing himself, was charged this time with allegedly having disclosed information in three books revealing the identity of 11

⁶³ *Prosecutor v. Šešelj*, IT-03-67-T, Public Version of the "Consolidated Decision on Assignment of Counsel, Adjournment and Prosecution Motion for Additional Time with Separate Opinion of Presiding Judge Antonetti in Annex", 24 November 2009 ("Šešelj 24 November 2009 Decision") para. 67.

⁶⁴ *Ibid.*, para. 73.

⁶⁵ *Ibid.*, para. 75.

⁶⁶ *Ibid.*, para. 80.

⁶⁷ *Ibid.*, para. 81.

⁶⁸ *Ibid.*, para. 83. On 20 January 2010, the Registry clearly opposing the Chamber's approach submitted that in its view it is not its "role to facilitate the publication of books by an accused. Thus it would not be appropriate for the Registry to use United Nation's resources to facilitate the publication of the book by an accused. [...] Although the Registrar is prepared to use available computer software to search for the names of witnesses protected in the present case, it neither has the mandate nor the resources to actually review the books submitted for publication. [...] It is the Accused who ultimately bears responsibility for his publications, not the Registrar." *Prosecutor v. Šešelj*, IT-03-67-T, Registry Submission on Trial Chamber's Consolidated Decision on Assignment of Counsel, and Adjournment and Prosecution Motion for Additional Time, 20 January 2010, paras. 7, 10, 15. The Registrar reaffirmed this position in his latest decision. See *Prosecutor v. Šešelj*, IT-03-67-T, Registry Submission Pursuant to Rule 33(B) concerning the Trial Chamber's Second Oral Instruction for the Registry to Inspect Publications by the Accused for Disclosure of Confidential Information, 17 May 2010.

⁶⁹ See *Šešelj 24 November 2009 Decision*, para. 85.

⁷⁰ *Ibid.*, para. 86.

protected witnesses in violation of more decisions granting protective measures by the Trial Chamber.⁷¹ If a second contempt conviction is entered,⁷² Šešelj's behaviour can hardly be considered as an "isolated act". The question will then arise as to whether or not it constitutes behaviour which "substantially and persistently obstruct[s] the proper and expeditious conduct of the trial."⁷³

D. Self Representation in the *Krajišnik* Case – Opting In and Out to Hire Counsel to Assist on Specific Legal Issues on Appeal Only?

In the *Krajišnik* case, a majority of the Appeals Chamber (Judge Schomburg dissenting)⁷⁴ permitted Krajišnik to defend himself during the appeals process.⁷⁵ The Majority held that "[t]here is no textual basis for concluding that the guarantee to self-representation ... evaporates with the issuance of the trial judgement" and that "there is no obvious reason why self-representation at trial is so different in character from self-representation on appeal as to require an *a priori* distinction between the two."⁷⁶ As at the trial stage, the

⁷¹ See *Prosecutor v. Šešelj*, IT-03-67-R77.2, Public Redacted Version of Second Decision on Prosecution's Motion under Rule 77 Concerning Further Breaches of Protective Measures (Three Books) issued on 3 February 2010, 4 February 2010.

⁷² This has not yet been determined at the time of writing.

⁷³ *Šešelj* 24 November 2009 Decision, para. 73.

⁷⁴ Judge Schomburg, in a fundamentally dissenting opinion stressed that "[i]f I were tasked to show that international criminal jurisdiction cannot work I would draft the decision in the same way as was done by the majority of the Appeals Chamber." He concluded that "it is predictable that there will be a significant disruption of the appeal proceedings in this case if the Appellant is allowed to represent himself without the assistance of defence counsel, endangering the integrity of the proceedings, rendering them fundamentally unfair from the outset and in all likelihood provoking a miscarriage of justice. It is obvious that under such circumstances the Appellant will be deprived of his right to fair proceedings if he were allowed to represent himself." *Prosecutor v. Krajišnik*, IT-00-39-A, Decision on Momčilo Krajišnik's Request to Self-Represent: Fundamentally Dissenting Opinion of Judge Schomburg on the Right to Self-Representation, 11 May 2007, paras. 1, 75. On 16 May, Judge Schomburg withdrew from the Appeals Chamber in the *Krajišnik* case. See *Prosecutor v. Krajišnik*, IT-00-39-A, Order Replacing a Judge in a Case Before the Appeals Chamber and Reassigning a Pre-Appeal Judge, 16 May 2007.

⁷⁵ See *Prosecutor v. Krajišnik*, IT-00-39-A, Decision on Momčilo Krajišnik's Request to Self-Represent, 11 May 2007, para. 11. The Majority invited participation of an *Amicus Curiae* assisting the Appeals Chamber by arguing in Krajišnik's interests. *Ibid.*, para. 19. Previously Assigned Counsel Colin Nicholls QC accepted the role of *Amicus Curiae* on 7 June 2007.

⁷⁶ *Ibid.*, para. 11. The Majority further held that [s]elf-representation on appeal may be a complex and tricky business, but on its face it is no more difficult (and indeed perhaps less difficult) than self-representation at trial. Both stages involve complicated factual and legal issues and require familiarity with

right is not absolute but can be limited because of substantial and persistent obstructive behaviour.⁷⁷ Five months after granting Krajišnik the right to self-represent, the Appeals Chamber ruled that Krajišnik could not only represent himself, but could also rely upon counsel in relation to certain specific issues.⁷⁸ Permitting an opting in or out model of self-representation, the Appeals Chamber concluded that: “[t]here is no fundamental reason why a defendant may not make different choices – self-representing or engaging legal counsel – with regard to different issues.”⁷⁹ The Appeals Chamber allowed Krajišnik to engage counsel to deal with the legal concept of joint criminal enterprise. However, in part, the Appeals Chamber’s decision was based on the premise that it would not lead to a substantial delay of the trial.⁸⁰ This development of the notion of partial self-representation on appeal, may go some way to ensure that when an accused represents himself in future cases, he is able to rely on the advice of legal professionals in relation to complex legal concepts such as joint criminal enterprise. Such an approach can only benefit both the accused and the Tribunal.

E. Self Representation in the *Karadžić* Case – Imposing Standby Counsel for Refusal to Attend Trial

At his initial appearance on 31 July 2008, Radovan Karadžić followed the example set by Milošević and others and opted to represent himself.⁸¹ In 2010, almost two years later,

a daunting set of procedural rules. It may never be in an individual’s interests to represent himself, either at trial or at appeal, but he nonetheless has a “cornerstone” right to make his own case to the Tribunal.” *Ibid.*

⁷⁷ *Ibid.*, para. 13.

⁷⁸ See *Prosecutor v. Krajišnik*, IT-00-39-A, Appeals Chamber, Decision on Momčilo Krajišnik’s Motion to Reschedule Status Conference and Permit Alan Dershowitz to Appear, 28 February 2008.

⁷⁹ *Ibid.*, para. 8.

⁸⁰ *Ibid.*, para. 9. Alan Dershowitz was appointed as counsel on that specific legal issue according to Rule 44 of the ICTY Rules of Procedure and Evidence dealing with the Appointment, Qualifications and Duties of Counsel. Unlike the legal advisors of current self-representing accused, he was not funded by the ICTY. Alan Dershowitz submitted a lengthy brief on the application of JCE on behalf of Krajišnik on 4 April 2008 and presented oral arguments on that issue during the Appeals hearing. See *Prosecutor v. Krajišnik*, IT-00-39-A, Brief on Joint Criminal Enterprise on behalf of Momčilo Krajišnik, 4 April 2008. See also *Prosecutor v. Krajišnik*, IT-00-39-A, Motion of Momčilo Krajišnik to Reschedule the Filing of Mr. Alan Dershowitz’s Submission on Joint Criminal Enterprise, 20 March 2008.

⁸¹ See *Prosecutor v. Karadžić*, IT-95-5/18, Initial Appearance Transcript, 31 July 2008, p. 2, ll. 11-12.

Karadžić is still self-representing but a Standby Counsel, who is waiting in the wings, has been appointed on the basis of the accused's obstructive conduct.⁸²

On 20 August 2009, the Pre-trial Judge, upheld by the Appeals Chamber,⁸³ declared Karadžić's case ready for trial.⁸⁴ The Prosecution opened its case on 26 October 2009. Karadžić refused to attend since his request for a stay of ten months to adequately prepare for the trial was rejected.⁸⁵ After receiving several warnings⁸⁶ (in compliance with established jurisprudence), the Trial Chamber ordered the appointment of Standby Counsel on 5 November 2009.⁸⁷ The Trial Chamber assessed that Karadžić's refusal "to attend the proceedings until such time as he considers himself to be ready" constituted a substantial and persistent obstruction of the proper and expeditious conduct of the trial.⁸⁸ Richard Harvey, a British barrister, was appointed and the trial adjourned until 1 March 2010 in order to allow newly-assigned Standby Counsel to adequately prepare. Karadžić, refusing to cooperate with Standby Counsel, filed a motion followed by an appeal to vacate Harvey's appointment, based in part on the issue of whether or not a self-representing accused should be able to choose the person assigned as Standby Counsel.⁸⁹ Article 21(4)(d) provides an accused with the right "...to defend himself in person *or* through legal assistance of his own choosing...". According to the Appeals Chamber, this Article "does not provide an accused with the minimum guarantee of *both* the right to self-represent *and* the right to counsel of his own choosing; only the right to one *or* the

⁸² See *Prosecutor v. Karadžić*, IT-95-5/18-T, Decision on Appointment of Counsel and Order on Further Trial Proceedings, 5 November 2009 ("Karadžić 5 November 2009 Decision").

⁸³ See *Prosecutor v. Karadžić*, IT-95-5/18-I, Decision on Karadžić Appeal of the Decision on Commencement of Trial, 13 October 2009.

⁸⁴ See *Prosecutor v. Karadžić*, IT-95-5/18-I, Status Conference Transcript, 20 August 2009, p.434, ll. 13-15; Judge Bonomy: "Mr. Tieger, Ms. Uertz-Retzlaff, Mr. Reid, and Dr. Karadzic, it's my opinion that ... this case is now ready for trial, and that is the report I will submit to the President."

⁸⁵ See *Prosecutor v. Karadžić*, IT-95-5/18-PT, Submission on Commencement of Trial, 3 September 2009; See also *Prosecutor v. Karadžić*, IT-95-5/18-PT, Submission on the Commencement of Trial, 21 October 2009.

⁸⁶ See *Prosecutor v. Karadžić*, IT-95-5/18-T, Trial Transcript, 26 October 2009, pp. 502-04, ll. 16-13; *Prosecutor v. Karadžić*, IT-95-5/18-T, Trial Transcript, 27 October 2009, pp. 510-11, ll. 14-18 and *Prosecutor v. Karadžić*, IT-95-5/18-T, Trial Transcript, 2 November 2009, pp. 672-73, ll. 24-16.

⁸⁷ See *Karadžić 5 November 2009 Decision*.

⁸⁸ *Ibid.*, para. 21.

⁸⁹ See *Prosecutor v. Karadžić*, IT-95-5/18-T, Motion to Vacate Appointment of Richard Harvey, 4 December 2009. See also *Prosecutor v. Karadžić*, IT-95-5/18-AR73.6, Appeal from Decision on Motion to Vacate Appointment of Richard Harvey, 19 January 2010.

other.”⁹⁰ The Appeals Chamber rejected Karadžić’s argument that he has a right to choose “because the Trial Chamber ... signalled its intention to override his election to self-represent”, as unpersuasive.⁹¹ The Appeals Chamber stated that if the Trial Chamber would turn Standby Counsel “assisting” into Assigned Counsel “representing” Karadžić, then this would not be based on a voluntary decision of Karadžić to terminate self-representation but because it had found obstructive conduct and it would be in the interest of justice to limit the right of self-representation.⁹² The Appeals Chamber rejected Karadžić’s reliance on the *Šešelj* Appeal Decision⁹³ because it “was rendered in a unique factual and procedural context very different from Karadžić’s.”⁹⁴ According to the Appeals Chamber, “the provision of opportunities to participate in the selection of standby counsel beyond those required by the Rules or Article 21(4) of the Statute was necessary in order to ensure the *Šešelj* trial’s fair and expeditious conduct under Article 20(1) of the Statute.”⁹⁵ It stressed that “a Chamber’s context-limited decision to provide for processes beyond those guaranteed by the Statute and the Rules does not create an automatic right to these processes.”⁹⁶ The Appeals Chamber found Karadžić’s situation to be “markedly different” from *Šešelj*’s because the former had been repeatedly warned that his obstructive behaviour might curtail his right of self-representation.⁹⁷ The Appeals Chamber taking into account “the flexibility exhibited by the Registrar in the provision of standby counsel to Karadžić”, found that there was no basis for requiring that Karadžić “be provided with greater opportunities to select personally between individuals available to serve as standby counsel.”⁹⁸ It was further satisfied that the applied pre-screening criteria which resulted in the proposal of five counsel “neither contrived any legal requirement nor was unfair or nonsensical.”⁹⁹ The Appeals Chamber concluded that:

⁹⁰ *Karadžić* 12 February 2010 Decision, para. 26.

⁹¹ *Ibid.*, para. 27.

⁹² *Ibid.*

⁹³ In *Šešelj*, the Appeals Chamber stated that “[s]hould a time come when the Trial chamber feels justified to make such a decision, the Rule 44 list of counsel should be provided to *Šešelj* and he should be permitted to select standby counsel from that list.” *Šešelj* 8 December 2006 Decision, para. 28.

⁹⁴ *Karadžić* 12 February 2010 Decision, para. 30.

⁹⁵ *Ibid.*, para. 31 citing *Šešelj* 8 December 2006 Decision, para. 27.

⁹⁶ *Ibid.*, para. 31.

⁹⁷ *Ibid.*, para. 32.

⁹⁸ *Ibid.*

⁹⁹ *Ibid.*, para. 34. The Registrar pre-selected five counsels as eligible for Standby Counsel. The Registrar found that only three of 108 counsels were suitable. It proposed two more counsels that were not on the

Limitations on the right to self-representation are a rare occurrence, and that their details are necessarily context-specific. More particularly, the appointment of standby counsel is not subject to more formalized procedures designed to regularize the assignment of counsel to indigent suspects and accused who do not choose to self-represent. In assigning standby counsel, the Registrar or a Chamber may, but are not required to, make reference to procedures used in the assignment of counsel in other contexts. This more fluid and individualized approach to the appointment of standby counsel in cases of self-representation is amply justified by the fact that the reasons for and specific parameters of each appointment will vary considerably.¹⁰⁰

Even if the circumstances leading to the imposition of Standby Counsel vary in each case, it is questionable whether allowing one accused to choose imposed Standby Counsel while denying such a choice to another leads to equal treatment and equal protection of the fair trial rights of each accused.

On 1 and 2 March 2009, Karadžić presented his opening statement. Following its conclusion, the Trial Chamber put the trial on hold while another request for more time was resolved by the Appeals Chamber. The trial resumed on 13 April 2009,¹⁰¹ at which stage the Trial Chamber re-evaluated the designation of standby counsel. The Trial Chamber found that:

In the period since 5th of November, the Trial Chamber has continued to monitor the manner in which Mr. Karadžić has engaged in his defence and further prepared himself for the trial. The Chamber notes in particular that Mr. Karadžić gave his Defence opening statement in early March and that he has continued to file motions and to respond to motions filed by the Prosecution, largely in a responsible manner. The Chamber does not, therefore, consider it necessary at the present time to assign Mr. Harvey to represent his interest at trial. Rather, it will designate Mr. Harvey as stand-by counsel, who will attend the proceedings, address the Chamber if requested to do so by us, and continue to prepare himself so that should it become necessary, he may step in at any stage and take over the conduct of the accused's defence.¹⁰²

ICTY Rule 45 list at the time. *See Prosecutor v. Karadžić*, IT-95-5/18-T, Registrar's Submission Pursuant to Rule 33(B) Regarding Radovan Karadžić's Motion to Vacate Appointment of Richard Harvey, 14 December 2009, paras. 47, 48.

¹⁰⁰ *Karadžić* 12 February 2010 Decision, para. 35.

¹⁰¹ *See Prosecutor v. Karadžić*, IT-95-5/18-T, Scheduling Order, 1 April 2010 setting date for April 2010 and ordering the presence of Harvey to further clarify his role in the proceedings.

¹⁰² *Prosecutor v. Karadžić*, IT-95-5/18-T, Trial Transcript, 13 April 2010, pp. 998-99, ll. 17-3.

In its subsequent written decision, two days later, the Trial Chamber defined Standby counsel's current role as follows: "(a) to receive copies of all court documents, filings, and disclosed materials generated by or sent to the Accused; (b) to be present in the courtroom during the proceedings, assisted by one member of his team, should he consider it to be necessary; (c) to engage actively in ongoing substantive preparation of the case, in order to be prepared to put questions to witnesses on behalf of the Accused, or to represent his interests, at any time, should the Trial Chamber find this to be necessary; and (d) to address the Chamber whenever so requested by the Chamber."¹⁰³

Aside from being self-represented, Karadžić's legal associate, Peter Robinson, has been granted a right of audience "limited to addressing the Trial Chamber on legal issues that arise during the proceedings."¹⁰⁴ The right of audience is limited "upon a specific request for such by the Accused being granted by the Trial Chamber."¹⁰⁵ In a decision dealing with allocation of funds, the ICTY President has noted that the grant of rights of audience to Peter Robinson "more closely reflects work normally undertaken by co-counsel" and "goes beyond the tasks, functions, and level of responsibility of legal associates as envisaged by the Appeals Chamber."¹⁰⁶ Even though Robinson is not considered to be co-counsel and Karadžić technically, therefore, does not receive remuneration for "lead or co-counsel", he is paid the same rate as co-counsel. This approach appears to represent a shift in the existing jurisprudence that required that "funding should not be comparable to that paid to counsel for represented accused".¹⁰⁷

F. Self Representation and the Case of *Tolimir* – Have Your Cake and Eat it?

¹⁰³ *Prosecutor v. Karadžić*, IT-95-5/18-T, Decision on Designation of Standby Counsel, 15 April 2010, para. 9.

¹⁰⁴ *Prosecutor v. Karadžić*, IT-95-5/18-PT, Order on the Procedure for the Conduct of Trial, 8 October 2009, p. 8.

¹⁰⁵ *Ibid.*

¹⁰⁶ *See Prosecutor v. Karadžić*, IT-95-5/18-T, Decision on Request for Review of OLAD Decision on Trial Phase Remuneration, 19 February 2010, para. 51. The President further considered the instructions of the Appeals Chamber that "legal associates must be adequately compensated for their work, and that rate of pay is determined not only by experience but also the functions and tasks undertaken by legal associates, as well as the level of responsibility assumed by them." *Ibid.*

¹⁰⁷ *Prosecutor v. Karadžić*, IT-95-5/18-AR73.2, Decision on Interlocutory Appeal of the Trial Chamber's Decision on Adequate Facilities, 7 May 2009, para. 16 *Prosecutor v. Krajišnik*, IT-00-39-A, Decision on Krajišnik Request and on Prosecution Motion, 11 September 2007, para. 42.

Zdravko Tolimir opted to represent himself for self-representation when counsel of his choice was rejected because of a possible conflict of interest arising out of counsel's involvement in the trial of *Popović et al.*¹⁰⁸ On 29 April 2008, the assignment of counsel to Tolimir was sought because his behaviour, in the Prosecution's view, amounted to obstructive and disruptive conduct.¹⁰⁹

The Prosecution's request for the assignment of permanent counsel was only dealt with 22 months later, on 25 February 2010, the day before the commencement of trial. The Chamber pronounced in an oral decision that "the reasons stated in the motion for imposing counsel do not appear to the Chamber to be pertinent at this time, the motion is thereby dismissed without prejudice."¹¹⁰ The Chamber, as it had done previously on numerous occasions,¹¹¹ reminded Tolimir in the interests of justice that the trial phase will be demanding and he could engage counsel at any time if he felt unable to continue his self-representation.¹¹² The Chamber further recalled the possibility provided by ICTY Rule 45*ter* of imposing counsel on him in the interests of justice. The Chamber stressed that it "will closely monitor [his] conduct in this trial and any impact it may have on the progress of this trial."¹¹³ Tolimir's form of self-representation is with the assistance of a team of legal advisors. However, it appears that Tolimir is seeking to expand the role and scope of responsibilities/tasks of his legal advisors; gradually turning them into something more akin to counsel than legal associates/assistants. On 22 February 2010,

¹⁰⁸ See *Prosecutor v. Tolimir*, IT-05-88/2-I, Submission by the Accused to the Registrar for Leave to Conduct his own Defence or to Appoint Counsel of His Own Choosing Pursuant to Article 21.4(d), and Rule 45(F) and Amended Rule 62(C) of the Rules, 6 August 2007.

¹⁰⁹ *Prosecutor v. Tolimir*, Prosecution's Motion Requesting Appointment of Permanent Counsel for Accused Tolimir, 29 April 2008, paras. 2, 5, and 7.

¹¹⁰ *Prosecutor v. Tolimir*, IT-05-88-2/PT, Pre-Trial Conference Transcript, 25 February 2010 ("*Tolimir* Pre-Trial Transcript") p. 317, ll. 10-12.

¹¹¹ Throughout the entire pre-trial phase, Judge Prost reminded Tolimir about the consequences of self-representation. For example, on 27 February 2009 she stated that: I know you don't want to hear this again but I'm going to say it again. You're now at a point where you're going to have to work with a large amount of material ... by virtue of your election of self-representation, particularly because you are not a lawyer by training, you are depriving yourself of the full assistance that counsel could give you in that process. I appreciate you have legal advisors. Their role is much, much more limited than full counsel. ... I'm going to say in essence to the relevant individuals that this case is ready for trial, I ask you again to think your situation vis-a-vis counsel. See *Prosecutor v. Tolimir*, IT- IT-05-88/2-PT, Status Conference Transcript, p. 244, ll. 3-17.

¹¹² See *Tolimir* Pre-Trial Transcript, pp. 317-18, ll. 13-6.

¹¹³ *Ibid.*, p. 318, ll. 10-11.

the Trial Chamber granted Tolimir's request regarding Aleksandar Gajić's presence in the courtroom holding that "in the interests of justice it is desirable that [he], as the legal advisor of the Accused, be present in the courtroom".¹¹⁴ What followed was a request on 1 March 2010 wherein Tolimir sought the right of audience for Gajić. A right of audience had previously been granted to legal advisors for specific legal issues, but Tolimir's request takes matters a step further. Not only is Tolimir seeking Gajić's appearance in the courtroom but also the right for him to present legal arguments, make recommendations, raise objections, conduct direct and cross-examinations and address other issues arising in court during trial.¹¹⁵ In relation to the right to examine witnesses, Tolimir relied on the *Popović* and the *Đorđević* cases in which legal assistants had been granted permission to examine witnesses.¹¹⁶ The Prosecution stressed that contrary to the *Tolimir* case, the accused in *Popović* and *Đorđević* are all represented by counsel. Hence neither decision "implicated any defined right or principle relevant to a self-represented Accused."¹¹⁷ The Prosecution noted that what Tolimir was basically requesting is that Gajić can "appear before the Trial Chamber in a representational capacity substantively coextensive with that of appointed Counsel."¹¹⁸ The Prosecution observed that Tolimir made the considered choice to self-represent which included taking on the burdens involved.¹¹⁹ ICTY jurisprudence – even though acknowledging the significant role of legal advisors of self-represented accused – clearly recognises that an accused opting for self-representation "relinquishes many of the benefits associated with representation by counsel."¹²⁰ A decision on the matter is pending at the time of writing, however, if

¹¹⁴ *Prosecutor v. Tolimir*, IT-05-88/2-PT, Decision on Motion Requesting the Chamber to Allow the Accused's Legal Advisor to be Present in the Courtroom, 22 February 2010, p. 2. The Prosecution did not oppose Tolimir's request. See *Prosecutor v. Tolimir*, IT-05-88/2-PT, Response to Accused's Request for the Chamber to Allow his Legal Advisor, Aleksandar Gajić, to be present in the Courtroom, 18 February 2010.

¹¹⁵ See *Prosecutor v. Tolimir*, IT-05-88/2-T, Request to the Trial Chamber, 1 March 2010, paras. 1, 3. See also *Prosecutor v. Tolimir*, IT-05-88/2-T, Prosecution Response to Tolimir's Request to the Trial Chamber, 5 March 2010 ("Prosecution Response Tolimir Request") para. 3.

¹¹⁶ For example, when the Trial Chamber granted limited right of audience to conduct witness examinations to Ms. O'Leary and Mr. Popović – the team's two legal assistants – Accused Đorđević was represented by counsels Mr. Đorđević and Mr. Đurđić. See *Prosecutor v. Đorđević*, IT-05-87/1, Trial Transcript, 21 July 2009, p. 7752.

¹¹⁷ Prosecution Response Tolimir Request, para. 2.

¹¹⁸ *Ibid.*, para. 4.

¹¹⁹ *Ibid.*, para. 5.

¹²⁰ *Prosecutor v. Milošević*, IT-02-54-AR73.6, Decision on Interlocutory Appeal by the *Amici Curiae* Against the Trial Chamber Order concerning the Presentation and Preparation of the Defence Case, 20

granted, Tolimir may fall into the ever-widening category of those who are allowed to have their “cake and eat it too”.¹²¹ This is especially true in light of the recent *Karadžić* Decision by the President enabling the increased level of funding of legal associates who have responsibilities akin to those of co-counsel.¹²²

IV. Conclusions

Recent ICTY jurisprudence appears to strengthen and broaden the role of the legal team of a self-representing accused, often offering a form of double protection. This development is blurring the distinction as regards resources and roles between those who chose to represent themselves and those who are represented by counsel.

If an accused chooses to self-represent then he must take the good with the bad. Simply put, “the legal system’s respect for a defendant’s decision to forgo assistance of counsel must be reciprocated by the acceptance of responsibility for the disadvantages this choice may bring.”¹²³ In opting out of the established system the accused suggests he is able to manage the case himself, make his own in-court representations and, to the degree he is able, create a trial team of his own choosing, in terms of qualifications and structures which are necessarily outside the court’s system. By opting out of the system, the accused is accepting the risk of significantly curtailed resources. If however an accused chooses to represent himself, an *Amicus Curiae* could be appointed to assist the Chamber in the determination of critical matters related to the self-representation and to ensure the procedural efficacy of the case. This is the most effective mechanism of harmonising an accused’s right to self-representation with the need for fair and expeditious proceedings. The appointment of an *Amicus Curiae* does not equate to any form of representation of the accused. An *Amicus Curiae* would serve to ensure the fairness of the trial; acting

January 2004 (“*Milošević* 20 January 2004 Decision”). See also Prosecution Response Tolimir Request, para. 5.

¹²¹ The Appeals Chamber in *Milošević* clearly stated that “[t]he legal system’s respect for a defendant’s decision to forgo assistance of counsel must be reciprocated by the acceptance of responsibility for the disadvantages this choice may bring.” *Milošević* 20 January 2004 Decision, para. 19.

¹²² See *Karadžić* 19 February 2010 Decision.

¹²³ *Milošević* 20 January 2004 Decision, para. 19.

independently and not depending on instructions or communications with the accused. However, whether an *Amicus Curiae* will be able to provide proper assistance in cases of extreme obstructive behaviour has yet to be seen.

Nine years after Milošević invoked his right to self-representation, the ICTY is still struggling to perfect the assignment of counsel when health issues or obstructive behaviour render it necessary. Scholars have stressed that imposing counsel on a non-cooperating accused creates “legal fiction” only¹²⁴ where the “cure may be worse than the disease”.¹²⁵ Neither Assigned nor Standby Counsel can “effectively advocate on behalf of someone who does not want assistance”.¹²⁶ In the absence of co-operation and instructions from an accused, the assignment or imposition of such counsel is nothing more than window dressing.

Court systems such as the ICTY and ICTR,¹²⁷ which remain essentially adversarial, require the active and robust engagement of counsel. The practical difficulties in communication with an accused, as confronted by Assigned or Standby Counsel cannot be underestimated. The lack of communication and cooperation simply makes it impossible to guarantee a solid defence. As the jurisprudence at the ICTY has developed, it may have been far wiser with hindsight for Chambers to have adopted a strict application of the decision by an accused to represent himself as an “all or nothing” decision. Such an approach would have produced more efficient and expeditious trials. The imposition or assignment of counsel into the eyes of such storms remains open to serious question.

¹²⁴ See Jarinde Temminck Tuinstra, ‘Assisting An Accused to Represent Himself: Appointment of *Amici Curiae* as the Most Appropriate Option’ (2006) 4 J. Int’l Crim. Just, 47, 57 (“Tuinstra”).

¹²⁵ Göran Sluiter, ‘Karadzic on Trial: Two Procedural Problems’ (2008) 6 J. Int’l Crim. Just, 617, 619.

¹²⁶ Mark Ellis, ‘The Saddam Trial: Challenges to Meeting International Standards of Fairness with Regard to the Defence’ (2006-2007) 39 Case W. Res. J. Int’l L. 171, 183.

¹²⁷ The ICTY is considered to have adopted a hybrid system combining elements of the inquisitorial and the adversarial systems. However, the courtroom proceedings significantly follow the adversarial system. See Patrick L. Robinson, ‘Ensuring Fair and Expeditious Trials at the International Criminal Tribunal for the Former Yugoslavia’ (2000) 11 EJIL 569, 574.