

## **Doubts Raised About Rule Letting Judges Impose Counsel**

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Some lawyers say defendants are unlikely to cooperate with a lawyer forced upon them. The Yugoslav war crimes court has adopted a new rule allowing judges to force lawyers upon suspects representing themselves, in what observers say is a bid to stop Radovan Karadzic turning his forthcoming trial into a political platform.

The amendment – which will allow judges to “assign a counsel to represent the interests of the accused” in the interests of justice – has been introduced in the run-up to the trial of the former Bosnian Serb leader.

There has been much speculation that Karadzic, who was arrested in July on charges including genocide, will use self-representation as a means of dragging out his trial.

But some lawyers said the rule, which may also be employed in the trials of other high-profile defendants, could backfire as defendants are unlikely to cooperate with a lawyer forced upon them, and could even become more obstructive as a result.

“If the client refuses to talk to me [as his or her assigned counsel], what should I do?” asked Michiel Pestman, a lawyer with the Amsterdam firm Bohler Franken Koppe Wijngaarden.

Pestman said the tribunal had to find other ways of dealing with defendants who deliberately extended proceedings.

“To appoint a counsel is the last resort – it is a sign of desperation,” he said.

Meanwhile, others pointed out that the new rule was unlikely to change much, as judges at the tribunal have always had the power to allocate lawyers to defendants under certain circumstances.

Karadzic is the latest of several war crimes defendants who have insisted on representing themselves.

While prosecutors have opposed his request on the grounds that he is untrained in courtroom procedure, Karadzic told the court the task had to be in his own hands so he could establish “the truth about our conflict”.

“I will defend myself before this institution as I would defend myself before any natural catastrophe,” he declared during his first courtroom appearance.

According to Harvard law professor Alex Whiting, a former prosecutor at the Hague tribunal, Karadzic’s decision to represent himself is “a signal that he does not consider the process legitimate, and will not agree to abide by its procedures”.

Karadzic has already objected to the pace of proceedings, accusing the prosecution of trying to “rush and muddle” through preliminary hearings.

“Men like Karadzic are used to being in charge and he probably thinks that there is nobody better than him to represent his interests in court, both because of his knowledge of the facts and because of his political skills,” said Whiting.

Other defendants, most notably, the late Yugoslav president Slobodan Milosevic, have been accused of using self-representation as a platform to promote their political views.

The former president made it clear from the start that his decision to represent himself was politically motivated.

“This trial's aim is to produce false justification for the war crimes NATO committed in Yugoslavia,” he told the court, during his first appearance in 2001.

He repeatedly questioned the authority of the tribunal, and some observers say he made a mockery of the court by continually obstructing proceedings.

Because of Milosevic’s ill health, hearings had to be suspended repeatedly, causing a delay of at least six months. When his death in 2006 put an end to his trial before a judgement could be passed, it caused great disappointment to victims of the Balkans wars of the Nineties.

The concept of self-defence has seemingly grown in popularity among high-profile defendants at the Hague court – many of whom have also been accused of deliberately disrupting their trials.

The former Bosnian Serb politician Momcilo Krajisnik, who was sentenced to 27 years in prison in 2006, defended himself against charges including murder and persecution.

Serbian politician Vojislav Seselj, who is also a trained lawyer, continues to do so.

The leader of the Serb Radical party, SRS, who is well known for his theatrical behaviour, has been accused of misusing the courtroom to promote his beliefs and abuse his right to privileged communications with his advisors to intimidate and blackmail witnesses.

Zdravko Tolimir, the former assistant to Bosnian Serb military leader Ratko Mladic, also intends to represent himself against charges of genocide. Tolimir has been seen to challenge the legitimacy of the court, by referring to his May 2007 arrest as a “kidnapping”.

He has also held up pre-trial proceedings by refusing to accept documents in Latin script, claiming he could not read them, in spite of the fact that he trained abroad and had already signed various documents written in Latin script. The accused also burst into tears after complaining that he had been denied a

special tea to lower his blood pressure.

Earlier this year, Judge Kimberly Prost gave him a final warning to stop obstructing pre-trial proceedings as he “has persistently been doing for the past year”.

Some say the new legislation to impose counsel will make it harder for defendants representing themselves to disrupt their trials.

“Up until now, the accused have got too much leeway in their right to self-representation,” said Luka Misetić, a tribunal defence lawyer.

But others wondered how much use an assigned lawyer could possibly be if the client refused to cooperate.

It could also pose an ethical dilemma for the defence counsel instructed.

“For me, to represent someone who doesn’t want to be represented poses a legal as well as a practical problem,” said Pestman, who was previously asked to represent Seselj, but refused.

“As a lawyer practicing under European civil law, it would be against my code of conduct, and the client could even file a complaint against me.”

Yet prosecutors have already imposed lawyers on defendants at the court.

In the Milosevic trial, tribunal judges appointed a lawyer to assist with the defence of the accused, when he was deemed not fit enough to defend himself.

Meanwhile, prosecutors in the Seselj trial have made several requests to judges to impose counsel on the defendant, accusing him of obstructing proceedings.

A decision to assign counsel in the Serb politician’s case was overturned when, in late 2006, he went on a hunger strike. After four weeks of refusing to eat, the appeals chamber revoked the ruling in a decision criticised by many lawyers, who saw it as capitulating to the demands of the accused.

Thomas Unger, a programme associate at the International Center for Transitional Justice in Brussels, pointed out that the appeals chamber would continue to control any decisions made by the trial chamber to assign counsel.

He suggested that counsel would only be imposed in exceptional cases.

“If self-representation does not ‘substantially and persistently obstruct’ the proper and expeditious conduct of the trial, the appeals chamber is unlikely to affirm any trial chamber’s decisions to the contrary, the new rule notwithstanding,” he said.

The introduction of the rule has also underlined the difficulties of balancing the interests of justice – and the right of the accused to self-representation – with the judges’ desire for a rapid and orderly trial.

Under the tribunal’s completion strategy, authorised by the United Nations Security Council, the court must conclude all trials by 2010.

Whiting said that the looming deadline, along with the arrest of Karadzic, might have motivated the introduction of the rule.

“They want this train to run on time,” he said, arguing that after the disappointment of the Milosevic case, prosecutors see in Karadzic an opportunity to redeem themselves.

“If they manage to try this big and high-profile case in an orderly and fair way it will also send a signal to advance the goals of international justice.”

However, some questioned whether the court would be able to apply the new rule in the Karadzic case.

The former Bosnian Serb leader has been representing himself in court since September, and the tribunal’s rules state that an amendment should not “prejudice the rights of the accused” in any pending case.

“Karadzic could have an argument, saying this can only apply for future cases, so that means only for future cases there can be a power to assign counsel in the interest of justice,” said Goran Sluiter, a professor of international law at the University of Amsterdam.

Misetic, however, doubted that this was likely to happen.

“The judges of the tribunal obviously passed this new rule with the intent of using it. Given that only two of the tribunal’s indictees remain at large, it cannot be the case that the judges passed this new rule so that it could only apply to the last two fugitives [Ratko] Mladic or [Goran] Hadzic,” he said.

“I think the judges of the tribunal intended this new rule to be applicable to all accused who are currently on trial and who represent themselves.”

Tribunal spokesperson Nerma Jelacic, who declined to comment on any specific cases, said the rule “can be applied to any present and future case”.

“The tribunal functions in such a way that some of its rules are made up as time goes along,” Jelacic told IWPR, adding that the rule merely formalised what was already in practise.

But Sluiter questioned whether creating this rule was the right step.

Instead, he backed the creation of legislation which would outline what is permissible behaviour for defendants representing themselves.

He said the court needed “a detailed rule, setting out in detail the procedure, and giving to all involved and also to the [self-represented] accused a clear framework, what is permissible and what is not permissible”.

Pestman said the ultimate responsibility lay with the judges to tell a defendant when he is going too far.

“They have to find other ways of dealing with the accused. They should tell them to shut up when it is not relevant,” he said.

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