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**CASE/AFFAIRE NO.** IT-95-5/18-AR73.6 **DATE** 19 January 2010

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THE INTERNATIONAL CRIMINAL TRIBUNAL  
FOR THE FORMER YUGOSLAVIA

CASE No. IT-95-05/18-AR73.6

IN THE APPEALS CHAMBER

Before: An Appeals Chamber

Registrar: Mr. John Hocking

Date: 19 January 2010

THE PROSECUTOR

v.

RADOVAN KARADZIC

*Public*

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APPEAL FROM DECISION ON MOTION TO  
VACATE APPOINTMENT OF RICHARD HARVEY

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The Office of the Prosecutor:

Mr. Alan Tieger

Ms. Hildegard Uertz-Retzlaff

The Accused:

Radovan Karadzic

1. Dr. Radovan Karadzic respectfully appeals from the *Decision on the Accused's Motion to Vacate Appointment of Richard Harvey* (23 December 2009). He contends that the Trial Chamber erred in refusing to follow the Appeals Chamber decision in *Seselj*,<sup>1</sup> in upholding the Registrar's erroneous refusal to apply the Statute and applicable provisions of the *Directive on Assignment of Counsel*, and in refusing to overturn the Registrar's unreasonable and arbitrary selection procedure which resulted in the exclusion of all lawyers from the Balkans.

### **Procedural History**

2. Dr. Radovan Karadzic has elected to exercise his right of self-representation. On 5 November 2009, after Dr. Karadzic indicated he was not adequately prepared to commence the trial, the Trial Chamber ordered the Registrar to appoint a counsel to prepare to represent the interests of the accused at the trial and scheduled the resumption of the trial for 1 March 2010.<sup>2</sup>

3. Dr. Karadzic sought certification to appeal the decision, contending that the Trial Chamber had erred in failing "to direct the Registrar to provide him with the Rule 44 list from which he can select the standby counsel as required by Appeals Chamber jurisprudence."<sup>3</sup> The Trial Chamber denied certification to appeal, finding, *inter alia*, that "the Chamber's Decision to instruct the Registrar to appoint counsel is separate from the procedure followed by the Registrar in doing so."<sup>4</sup>

4. The Registrar appointed Richard Harvey on 19 November 2009.<sup>5</sup> On 4 December 2009, Dr. Karadzic filed his *Motion to Vacate Appointment of Richard Harvey* with the Trial Chamber. The prosecution filed a response,<sup>6</sup> and the Registrar made submissions on the motion.<sup>7</sup> Dr. Karadzic filed a reply.<sup>8</sup>

<sup>1</sup> *Prosecutor v Seselj*, No. IT-03-67-AR73.4, *Decision on Appeal Against the Trial Chamber's Decision (No. 2) on Assignment of Counsel* (6 December 2006) at para. 28

<sup>2</sup> *Decision on Appointment of Counsel and Order on Further Trial Proceedings* (5 November 2009)

<sup>3</sup> *Application for Certification to Appeal Decision on Appointment of Counsel and Order on Further Trial Proceedings* (12 November 2009) at para. 9

<sup>4</sup> *Decision on Accused's Application for Certification to Appeal Decision on Appointment of Counsel and Order on Further Trial Proceedings* (23 November 2009) at para. 7

<sup>5</sup> *Decision* (19 November 2009)

<sup>6</sup> *Prosecution's Response to Karadzic's Motion to Vacate Appointment of Richard Harvey* (14 December 2009)

<sup>7</sup> *Registrar's Submission Pursuant to Rule 33(B) Regarding Radovan Karadzic's Motion to Vacate Appointment of Richard Harvey* (14 December 2009)

<sup>8</sup> *Reply Brief: Motion to Vacate Appointment of Richard Harvey* (18 December 2009)

5. The Trial Chamber issued the Impugned Decision on 23 December 2009.<sup>9</sup> Dr. Karadzic sought certification to appeal,<sup>10</sup> which the prosecution did not oppose.<sup>11</sup> On 13 January 2010, the Trial Chamber granted certification to appeal.<sup>12</sup>

### **The Impugned Decision**

6. The Trial Chamber found that it was not bound by the Appeals Chamber's *Seselj* decision, which had held that the Rule 44 list of counsel should be provided to the Accused and that he should be permitted to select standby counsel from that list.<sup>13</sup> The Trial Chamber reasoned that the Appeals Chamber pronouncement was "clearly *obiter*" and therefore it was not obligated to follow it.<sup>14</sup>

7. The Trial Chamber further held that the *Seselj* decision was "fact-specific" and distinguishable from the facts in Dr. Karadzic's case because *Seselj* had expressed animosity towards his standby counsel, while Dr. Karadzic had not.<sup>15</sup>

8. The Trial Chamber found that Article 21(4)(d)'s right of an accused to "defend himself in person or through legal assistance **of his own choosing**" was inapplicable to the appointment of a standby counsel, and that the Registrar did not err in refusing to allow Dr. Karadzic to choose his standby counsel.<sup>16</sup>

9. The Trial Chamber found that the *Directive on Assignment of Counsel's* provision providing that an accused should be given an opportunity to select a counsel from the list was also inapplicable to the appointment of a standby counsel, and that the Registrar did not err in refusing to provide the list to Dr. Karadzic or allow him to choose his standby counsel.<sup>17</sup>

10. The Trial Chamber found that the *Directive on Assignment of Counsel's* provision requiring the consent of an accused to assignment of counsel who was

<sup>9</sup> *Decision on the Accused's Motion to Vacate Appointment of Richard Harvey* (23 December 2009)

<sup>10</sup> *Application for Certification to Appeal Decision on Motion to Vacate Appointment of Richard Harvey* (29 December 2009)

<sup>11</sup> *Prosecution's Response to Karadzic's Application for Certification to Appeal Decision on Motion to Vacate Appointment of Richard Harvey* (6 January 2010)

<sup>12</sup> *Decision on Accused's Application for Certification to Appeal Decision on Motion to Vacate Appointment of Richard Harvey* (13 January 2010)

<sup>13</sup> *Prosecutor v Seselj*, No. IT-03-67-AR73.4, *Decision on Appeal Against the Trial Chamber's Decision (No. 2) on Assignment of Counsel* (6 December 2006) at para. 28

<sup>14</sup> Impugned Decision at para. 36

<sup>15</sup> Impugned Decision at paras. 37-38

<sup>16</sup> Impugned Decision at paras. 25-28

<sup>17</sup> Impugned Decision at paras. 29-31

concurrently representing another accused at the ICTY was also inapplicable, and that the Registrar did not err in assigning Richard Harvey when Dr. Karadzic had not consented to his dual representation.<sup>18</sup>

11. The Trial Chamber also held that the decision of the Registrar to exclude all lawyers from consideration for appointment of standby counsel who had represented persons charged in cases somehow related to the charges against Dr. Karadzic, without any determination as to whether the interests of the two clients were “materially adverse” was reasonable.<sup>19</sup>

12. The Trial Chamber further held that the decision of the Registrar to exclude lawyers from consideration on grounds of (1) perceived unavailability; (2) reservations about acting as imposed counsel; (3) inexperience; and (4) geographical proximity to the Tribunal was also reasonable.<sup>20</sup>

13. The Trial Chamber also rejected the contention of the Accused that the Registrar had applied these criteria unfairly, excluding Serbian lawyers while including lawyers from NATO countries who had the same alleged disabilities.<sup>21</sup>

14. For all of these reasons, the Trial Chamber upheld the Registrar’s decision to appoint Richard Harvey.

### **Grounds of Appeal**

15. Dr. Karadzic presents the following grounds of appeal:

- (A) The Trial Chamber erred in refusing to follow the *Seselj* decision, and in holding that the decision was limited to its facts—in effect rewarding an accused who is obstructive and penalizing an accused who is cooperative
- (B) The Trial Chamber erred in finding that the right to choose a counsel enshrined in Article 21(4) does not apply to standby counsel
- (C) The Trial Chamber erred in finding that certain provisions of the *Directive on Assignment of Counsel* do not apply to standby counsel.
- (D) The Trial Chamber erred in upholding the Registrar’s erroneous and arbitrary application of conflict of interest, availability, proximity, language and good conduct requirements which resulted in the disqualification of all lawyers from the Balkans and Dr. Karadzic’s own

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<sup>18</sup> Impugned Decision at paras. 33-34

<sup>19</sup> Impugned Decision at para. 40

<sup>20</sup> Impugned Decision at para. 40

<sup>21</sup> Impugned Decision at para. 41

legal associates, while qualifying lawyers from NATO countries who were ineligible under the same criteria.

### **Standard of Review**

16. The standard of review to be applied to an appeal of a judicial review of an administrative decision is whether the Trial Chamber has committed a “discernible error” resulting in prejudice to a party. The Trial Chamber’s decision must be shown to be (1) based upon an incorrect interpretation of governing law; (2) based on a patently incorrect conclusion of fact; or (3) so unfair or unreasonable as to constitute an abuse of the Trial Chamber’s discretion.<sup>22</sup>

### **Statement of Facts**

17. The facts leading to the appointment of Richard Harvey are not disputed.

18. Following the issuance of the Trial Chamber’s order for appointment of counsel, the Registrar determined that he would not provide a list of counsel to the Accused as required by the Appeals Chamber in *Seselj*. Instead, he prepared his own list of five counsel with “no impediment to their assignment.”<sup>23</sup>

19. The Registrar started with the Rule 44 list, and struck from the list counsel who had the following “impediments”:

- (A) a conflict of interest as a result of previous representation of a client at the ICTY (31 lawyers struck from the list);
- (B) no previous experience before the ICTY (38 lawyers struck from the list);
- (C) not available for the assignment (23 lawyers struck from the list);
- (D) is not proficient in English or French (4 lawyers struck from the list);
- (E) is geographically remote from the Tribunal, residing on another continent (6 lawyers struck from the list);
- (F) is unsuitable due to health or conduct reasons (6 lawyers struck from the list)<sup>24</sup>

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<sup>22</sup> *Decision on Interlocutory Appeal of the Trial Chamber’s Decision on Adequate Facilities* (7 May 2009) at para. 11

<sup>23</sup> *Registrar’s Submission Pursuant to Rule 33(B) Regarding Radovan Karadzic’s Motion to Vacate Appointment of Richard Harvey* (14 December 2009) at para. 34

<sup>24</sup> *Registrar’s Submission Pursuant to Rule 33(B) Regarding Radovan Karadzic’s Motion to Vacate Appointment of Richard Harvey* (14 December 2009) at paras. 46-47

20. This procedure resulted in the elimination of every single lawyer from the Balkans and left only three lawyers eligible for the appointment. The Registrar then added two British lawyers who were not on the list and came up with a total of five candidates.<sup>25</sup>

21. The Registrar then presented the names of the five candidates to Dr. Karadzic.

22. At that time, the Registrar had also terminated all funding for Dr. Karadzic's defence team.<sup>26</sup> Therefore, Dr. Karadzic saw it as advantageous to select a standby counsel who knew the Bosnian conflict and in whom he had personal confidence and with whom he could easily communicate. However, by disqualifying all Serbian and Bosnian lawyers, and his own Legal Advisor, the Registrar made that impossible.

23. The Registrar's candidates included Jens Dieckmann of Germany, who was representing Sredoje Lukic on appeal. The *Lukic* case was at the stage where the prosecution's response brief was being prepared and a reply brief would have to be filed on behalf of the accused.<sup>27</sup>

24. A candidate who was excluded by the Registrar was Aleksander Aleksic of Serbia, who was co-counsel for Nebojsa Pavkovic on appeal of a Kosovo-related conviction. The *Pavkovic* case was at the same stage as the *Lukic* case—awaiting the prosecution's response brief, and requiring the filing of a reply brief.

25. The Registrar never provided a reason for including Mr. Dieckmann as a candidate for standby counsel and excluding Mr. Aleksic.

26. Similarly, another candidate deemed eligible for appointment by the Registrar was Colleen Rohan of the United States, who previously served as Lead Counsel for Milorad Trbic in the *Popovic et al* case involving the Srebrenica events.<sup>28</sup>

27. However, the Registrar excluded Serbian candidates such as Branislav Tapuskovic, who had represented General Dragomir Milosevic in a case involving

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<sup>25</sup> Registrar's Submission Pursuant to Rule 33(B) Regarding Radovan Karadzic's Motion to Vacate Appointment of Richard Harvey (14 December 2009) at para. 49

<sup>26</sup> See Annex C, Appeal of OLAD Decision in Relation to Additional Pre-Trial Funds (10 November 2009)

<sup>27</sup> Reply Brief: Motion to Vacate Appointment of Richard Harvey (18 December 2009) at para. 18

<sup>28</sup> The Registrar later went a step further and assigned Ms. Rohan as Legal Consultant to Richard Harvey.

Sarajevo events, and Toma Fila, who had represented Miroslav Kvočka in a Bosnia prison camp case on the grounds of their previous representation.<sup>29</sup>

28. The Registrar never provided a reason for including Ms. Rohan as a candidate for standby counsel and excluding Mr. Tapuskovic or Mr. Fila.

29. When presented with the names of the five persons deemed eligible by the Registrar, Dr. Karadzic requested to meet them. He thereafter met each of them and determined that none of them had sufficient knowledge of the conflict in Bosnia. He requested that the Registrar provide him with the Rule 44 list so that he could select someone from the region with whom he could communicate more easily and who would have prior knowledge of the conflict.<sup>30</sup>

30. The Registrar refused this request and appointed Richard Harvey. At the time of the appointment, Mr. Harvey represented Lahi Brahimaj in the *Hardinaj et al* case. The Registrar obtained Mr. Brahimaj's consent to the dual representation. Dr. Karadzic never consented, however, as required by Rule 16(G) of the *Directive*.

31. Of the five candidates found by the Registrar to have no "impediments to their appointment", three of them, Richard Harvey, Colleen Rohan, and Jens Dieckmann, currently represented other clients at the ICTY. The Registrar never explained why Dr. Karadzic's failure to consent to this dual representation did not constitute an impediment to their appointment, or why he did not appoint one of the two candidates who had no such impediment—Rodney Dixon or Stephen Powles.<sup>31</sup>

## Argument

### I. The Trial Chamber Erred in Refusing to Follow the *Seselj* Decision \_\_\_\_\_

32. It is trite law that a Trial Chamber is bound by the decisions of the Appeals Chamber.<sup>32</sup> In the *Seselj* decision, the Appeals Chamber explicitly ruled that:

"Should a time come when the Trial Chamber feels justified to make such a decision [imposing standby counsel], the Rule 44 list of counsel should be provided to Seselj and he should be permitted to select standby counsel from that list...Should

<sup>29</sup> *Reply Brief: Motion to Vacate Appointment of Richard Harvey* (18 December 2009) at para. 11

<sup>30</sup> Letter of 13 November 2009 attached as Annex A to *Motion to Vacate Appointment of Richard Harvey* (4 December 2009)

<sup>31</sup> *Reply Brief: Motion to Vacate Appointment of Richard Harvey* (18 December 2009) at para. 21

<sup>32</sup> *Prosecutor v Aleksovski*, No. IT-95-14/1-A, *Judgement* (24 March 2000) at paras 112 -113.

Seselj refuse to cooperate in selecting counsel from the list, the Registry may choose counsel at its discretion.”<sup>33</sup>

33. The Trial Chamber gave two reasons for refusing to follow this precedent. First, it stated that this part of the *Seselj* decision was “clearly *obiter*.” Second, it found that the circumstances in *Seselj* were distinguishable from those in Dr. Karadzic’s case. Respectfully, it was wrong on both counts.

(A) Clearly *Obiter*

34. The portion of the *Seselj* Appeals Chamber decision was not *obiter* at all. It was an order to the Trial Chamber on what to do in the event that standby counsel had to be appointed. It was binding on the *Seselj* Trial Chamber, and is binding on other Chambers as well.

35. Dr. Karadzic observes that there is nothing “clear” about “*obiter*” in the jurisprudence of this Tribunal.<sup>34</sup> But even if the ruling in *Seselj* that the accused must be given the list of counsel was not strictly part of the *ratio decendi*, the Trial Chamber in Dr. Karadzic’s case was obligated to follow it.

36. As Judge Shahabuddeen said:

Even if a holding went beyond what was really necessary for the decision of the issue which was actually involved and was therefore *obiter*, it has to be fully regarded by lower courts if it represented the considered views of the highest court in the system.”<sup>35</sup>

37. Therefore, the Trial Chamber erred when it dismissed the pertinent part of the *Seselj* decision as “clearly *obiter*.”

(B) Rewarding Obstruction and Penalizing Cooperation

38. The Trial Chamber recognized that the Appeals Chamber had held that an accused for whom standby counsel was appointed had the right to select that standby counsel from the list.<sup>36</sup> However, it justified departing from that rule by finding that the circumstances of the *Seselj* case and Dr. Karadzic’s case were distinguishable.<sup>37</sup>

<sup>33</sup> *Prosecutor v Seselj*, No. IT-03-67-AR73.4, *Decision on Appeal Against the Trial Chamber’s Decision (No. 2) on Assignment of Counsel* (6 December 2006) at para. 28

<sup>34</sup> Compare Separate Opinions of Judge Shahabuddeen and Judge Hunt in *Prosecutor v. Milutinovic et al.*, Case No. IT-99-37-AR72, *Decision On Dragoljub Odjanic’s Motion Challenging Jurisdiction – Joint Criminal Enterprise* (May 21, 2003) at paras. 17-28 and 38-43, respectively.

<sup>35</sup> *Id.* at para. 26 (separate opinion Judge Shahabuddeen).

<sup>36</sup> Impugned Decision at para. 35

<sup>37</sup> Impugned Decision at paras. 36-37

39. The Trial Chamber was quite correct that the conduct of Seselj towards the Tribunal was quite different than that of Dr. Karadzic. Prior to the imposition of standby counsel, the Trial Chamber found that:

- (1) Seselj had authored books with titles such as “Genocidal Israeli Diplomat Theodor Meron”, “In the Jaws of the Whore Del Ponte”, and “The Lying Hague Homosexual Geoffrey Nice”.<sup>38</sup>
- (2) Seselj persisted in requesting the Judges not wear robes, stating that it reminds him of the Catholic inquisition or of German SS or Gestapo uniforms.<sup>39</sup>
- (3) Seselj violated the Rules of Detention by engaging in unauthorized communications with the media concerning the upcoming elections<sup>40</sup>
- (4) Seselj used obscene and offensive language in his submissions, which regularly ignored the word limits and other requirements of the Practice Directions<sup>41</sup>
- (5) Seselj disclosed confidential documents without authorization.<sup>42</sup>
- (6) Seselj regularly accused the Tribunal’s Judges and personnel with misconduct in obscene and offensive language<sup>43</sup>
- (7) Seselj disclosed the identity of protected witnesses to persons over the telephone, in written communications, and by publishing a book<sup>44</sup>
- (8) Seselj repeatedly disrupted the proceedings at the status conference of 1 November 2006, refused to remain in court in the presence of standby counsel, and had to be escorted out of the courtroom.<sup>45</sup>
- (9) Seselj commenced a hunger strike in protest of the appointment of standby counsel.<sup>46</sup>
- (10) Seselj refused to appear for a status conference.<sup>47</sup>
- (11) Seselj refused to appear at the Pre-Trial conference.<sup>48</sup>

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<sup>38</sup> *Decision on Assignment of Counsel* (21 August 2006) at para. 30

<sup>39</sup> *Decision on Assignment of Counsel* (21 August 2006) at para.34

<sup>40</sup> *Decision on Assignment of Counsel* (21 August 2006) at para.43

<sup>41</sup> *Decision on Assignment of Counsel* (21 August 2006) at paras. 45-52

<sup>42</sup> *Decision on Assignment of Counsel* (21 August 2006) at para. 54

<sup>43</sup> *Decision on Assignment of Counsel* (21 August 2006) at paras. 55-62

<sup>44</sup> *Decision on Assignment of Counsel* (21 August 2006) at para. 63; *Judgement* (24 July 2009).

<sup>45</sup> *Reasons for Decision (No 2) on Assignment of Counsel* (27 November 2006) at para. 5

<sup>46</sup> *Reasons for Decision (No 2) on Assignment of Counsel* (27 November 2006) at para.7

<sup>47</sup> *Reasons for Decision (No 2) on Assignment of Counsel* (27 November 2006) at paras. 8-9

40. In contrast, Dr. Karadzic has been polite in his written and oral communications with the Tribunal, has fully obeyed all of the Rules of Detention, has never disclosed confidential information or fallen in breach of witness protective measures, has filed pleadings which conform in all respects to the Tribunal's Rules and Practice Directions, and has appeared at all status conferences.

41. The issue is whether these marked differences in conduct mean that Dr. Karadzic is not entitled to the same rights as Seselj. Does a disruptive accused get to choose his standby counsel while a cooperative accused does not? That is the practical effect of the holding of the Trial Chamber. It flies in the face of reason and common sense.

42. While it was apparent that Seselj, or other disruptive accused, would have nothing to do with a standby counsel, Dr. Karadzic was willing to cooperate with a standby counsel to augment the paltry resources granted to him by the Registry provided that the standby counsel was someone he could trust. By holding that the right to select a standby counsel is only available to disruptive accused, the Trial Chamber has stood reason on its head. Its decision defeats the very purpose for which a standby counsel is appointed—to have a lawyer who is prepared in the event that he must take over from a self-represented accused. Instead of allowing the accused to choose a lawyer, and thereby enjoy a collaborative relationship, the Trial Chamber sanctioned the imposition of a lawyer on the accused who the accused did not want and cannot trust.

43. The Trial Chamber's decision also defies common sense in that it sends a completely wrong message to self-represented accused. The more obstructive and disobedient one is, the more rights he receives.

44. The Trial Chamber also stretched when it claimed that the *Milosevic* case was support for its belief that only a disruptive accused got to select his standby counsel.<sup>48</sup> But the *Milosevic* case predated the Appeals Chamber decision in *Seselj* and therefore does not represent an example of a Trial Chamber refusing to follow it. In addition, Milosevic never requested the right to choose his standby counsel, or his assigned counsel, while Dr. Karadzic clearly did. And finally, it is hard to reconcile the Trial

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<sup>48</sup> *Reasons for Decision (No 2) on Assignment of Counsel* (27 November 2006) at para. 11

<sup>49</sup> Impugned Decision at para. 38

Chamber's dismissal of the Appeals Chamber's decision on this precise issue in *Seselj* as "clearly *obiter*" while relying on *Milosevic* as authority, where the issue was not even discussed.

(C) Conclusion

45. The Trial Chamber offered no cogent reason for its failure to follow the Appeals Chamber's decision in *Seselj*. Its incorrect interpretation of this governing precedent requires that the Impugned Decision be reversed.

II. The Trial Chamber Erred in Finding that the Right to Choose a Counsel Enshrined in Article 21(4) Does not Apply to Standby Counsel

46. Article 21(4) of the ICTY Statute provides that the accused shall be entitled to the following minimum guarantees, in full equality:

- (b) to have adequate time and facilities for the preparation of his defence and to communicate with counsel **of his own choosing**;
- (d) ...to defend himself in person or through legal assistance **of his own choosing** (emphasis added)

47. The Trial Chamber held that this article is inapplicable to the imposition of standby counsel on a self-represented accused. It reasoned that since the accused retains his right of self-representation, he is not entitled to both represent himself **and** have legal assistance of his own choosing.<sup>50</sup>

48. This reasoning is flawed for two reasons. Firstly, in imposing standby counsel, the Trial Chamber has signaled its intention to override Dr Karadzic's election to self-represent if it deems necessary. If and when the standby counsel is imposed, he then becomes the person who represents the accused—a person whom the accused is entitled to choose. As such, there will never be a moment in time where Dr Karadzic is representing himself and having legal assistance of his own choosing. His self-representation ceases when representation by his standby counsel begins. Secondly, the Chamber's reasoning is flawed because it ignores the purpose of appointing a standby counsel, which is to put the Trial Chamber in a position to resume the trial if the accused seeks to obstruct it. As an accused is entitled under the Statute to choose his imposed

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<sup>50</sup> Impugned Decision at paras. 26-28

counsel, a standby counsel who is not of the accused's choosing will likely be dismissed, and the imposed counsel chosen by the accused will need time and resources to prepare all over again—defeating the very purpose of a standby counsel. As such, the Trial Chamber's approach of imposing a standby counsel not chosen by the accused could well result in a waste of funds and time.

49. The Appeals Chamber surely recognized this in the *Seselj* decision when it provided for the right of the accused to choose his standby counsel. While the decision did not explicitly refer to Article 21(4), there is no other provision in the Statute or Rules which is applicable. Since the Appeals Chamber ensures the protection of rights, rather than creates them, it can safely be presumed that it interpreted Article 21(4) as giving the accused the right to choose his standby counsel.

50. The fact that the right to choose one's own counsel is not "absolute" does not entitle the Registrar to arbitrarily abrogate that right. The expressed preference of an accused may only be overridden where it is in the interest of justice to do so.

51. In the *Barayagwiza* case cited by the Trial Chamber, the Appeals Chamber held that:

When deciding on the assignment of counsel, **some weight** is accorded to the accused's preference, but such preference may be overridden where it is in the interests of justice to do so.<sup>51</sup> (emphasis added)

In the *Stojic* case, the Appeals Chamber held that:

In principle the choice of any accused regarding his Defence counsel in proceedings before the International Tribunals **should be respected** unless there are sufficient grounds to override the accused's preference in the interests of justice.<sup>52</sup>

52. Neither the Registrar nor the Trial Chamber found that the interest of justice required that Dr. Karadzic not be given a choice at all. Had Dr. Karadzic made a choice of a person who was ineligible or unfit, the Registrar would be justified in denying him his right to counsel of his own choosing. However, the Registrar never even allowed Dr. Karadzic to see the list of counsel to make that choice.

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<sup>51</sup> *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Decision on Accused Jean-Bosco Barayagwiza's Motion Contesting the Decision of the President Refusing to Review and Reverse the Decision of the Registrar Relating to the Withdrawal of Counsel* (23 November 2006) at para. 10

<sup>52</sup> *Prosecutor v Prlic et al*, No. IT-04-74-AR73.1, *Decision on Appeal by Bruno Stojic Against Trial Chamber's Decision on Request for Appointment of Counsel* (24 November 2004) at para. 19

53. By refusing to provide the list of counsel to Dr. Karadzic and thus allow him to make a choice, the Registrar accorded no weight or respect to Dr. Karadzic's preference, in violation of the Appeals Chamber's jurisprudence. Indeed, Dr. Karadzic is unaware of a single case at the ICTY or ICTR, and the Trial Chamber or Registrar has cited none, where an accused was prevented from even nominating a choice of counsel.

54. Article 21(4) makes no distinction between legal assistance to an accused who wishes to be represented by counsel and one who does not. Its principle is the same—when the Tribunal provides a lawyer to an accused, the accused has the qualified right to choose that lawyer.

55. The Trial Chamber erred in finding that Article 21(4) was inapplicable in this case. Because it misinterpreted this governing law, its decision must be reversed.

III. The Trial Chamber Erred in Finding that  
Certain Provisions of the *Directive on Assignment  
of Counsel* Do Not Apply to Standby Counsel

56. In appointing Richard Harvey as standby counsel, the Registrar violated two separate provisions of the *Directive on Assignment of Counsel*.

57. Article 11(D) provides that:

Where the Registrar decides to assign counsel in accordance with this Article, the Registrar shall:

- (i) **assign the counsel selected by the suspect or accused** from the list drawn up in accordance with Rule 45(B), provided that there is no impediment to the assignment of that counsel; or
- (ii) if the suspect or accused fails to select a counsel from the list drawn up in accordance with Rule 45(B) or if the Registrar determines that there is an impediment to the assignment of the counsel selected, assign other counsel from that list after hearing the suspect or accused. (emphasis added)

58. The Registrar refused to even provide Dr. Karadzic with the list from which he could select a counsel.

59. Article 16(G) of the *Directive* provides that:

No counsel shall be assigned to more than one suspect or accused at a time, unless:

- (i) each accused has received independent legal advice from the **Registrar and both have consented in writing** and
- (ii) the Registrar is satisfied that there is no potential or actual conflict of interest or a scheduling conflict, and that the assignment would not otherwise prejudice the defence of either accused, or the integrity of the proceedings. (emphasis added)

60. The Registrar's appointment of Richard Harvey violated this section because Mr. Harvey is assigned to another accused and Dr. Karadzic never consented to this dual representation.

61. The Trial Chamber approved these violations by holding that these provisions of the *Directive on Assignment of Counsel* did not apply to the imposition of a standby counsel.

(A) The Directive as a Whole

62. The *Directive on Assignment of Counsel* was adopted by the Plenary of Judges and has as its purpose "to codify the Tribunal's system of assignment of counsel."<sup>53</sup> No exclusion is made for assignment of counsel to a self-represented accused and no indication appears in the *Directive* that it was not intended to apply to all cases in which counsel is assigned to an accused or suspect.

63. The Trial Chamber's approach of allowing the Registrar to pick and choose which sections of the Directive to apply and which to ignore violates the very purpose of the Directive to **codify** the procedure for assignment of counsel, rather than leaving the matter entirely to the Registrar's discretion.

64. In addition, the *Directive* was enacted to "safeguard" the rights afforded to suspects and accused under the Statute and Rules.<sup>54</sup> Nothing in the text of the *Directive* indicates that it was intended to safeguard the rights of some accused, but not others. Indeed, the explicit definition of "accused" in the *Directive* makes no exclusion for those who have chosen self-representation.<sup>55</sup>

65. Thus the *Directive* as a whole applies to assignment of counsel, whether desired or imposed.

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<sup>53</sup> Article 1(A)

<sup>54</sup> Article 1(A)

<sup>55</sup> Article 2

(B) Article 11(D)

66. The Trial Chamber, without citing any jurisprudence, concluded that “it is clear on its plain reading that it is meant to apply in cases where an accused wishes to have counsel assigned to him or where he has failed to take any action with respect to his representation or self-representation.”<sup>56</sup>

67. Article 11(C) applies to situations where an accused:

- (i) requests the assignment of counsel but does not comply with the requirements set out above within a reasonable time; or
- (ii) fails to obtain or request the assignment of counsel; or
- (iii) fails to elect in writing that he intends to conduct his own defence

68. Rule 11(D) applies to “where the Registrar decides to assign counsel **in accordance with this Article**”. This “Article” applies not only to accused who want to be represented by counsel, but to accused who must have counsel assigned to them against their will or in spite of their inaction under section 11(C).

69. Dr. Karadzic initially elected in writing to conduct his own defence. However, by ordering the appointment of standby counsel, the Trial Chamber signaled its intention to override that election if necessary. Therefore, Dr. Karadzic became an accused under section 11(C)(ii) who failed to obtain or request the assignment of counsel. The Registrar was therefore obligated, under Article 11(D) to give him the opportunity to select a counsel and to assign that counsel, providing there was no impediment to his assignment.

70. Article 11 clearly applies to the situation where counsel is imposed on an accused. There is no logic to allowing an accused who refuses to comply with the requirements for assignment of counsel, or who fails to request the assignment of counsel, to select the counsel imposed upon him, while refusing to allow a previously self-represented accused the same right.

71. The Trial Chamber erred in holding that Article 11(D) was inapplicable to Dr. Karadzic’s case and thus misinterpreted governing law by failing to require that the Rule be applied by the Registrar.

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<sup>56</sup> Impugned Decision at para. 29

(C) Article 16(G)

72. The Trial Chamber held that Article 16(G)'s requirement that an accused consent to dual representation by a counsel before this Tribunal was also inapplicable to a case where counsel was imposed upon an accused. It reasoned that an accused upon whom counsel was imposed could halt the proceedings by withholding his consent.<sup>57</sup>

73. This reasoning is similarly flawed. First, there is nothing in the Directive as a whole which indicates it was not intended to apply to situations where counsel was assigned to an accused over his objection, and Article 11(C) expressly provides for assignment of counsel in such cases.

74. Second, the solution is simply to not impose a counsel who already represents another client at the Tribunal. Given the long list of "impediments to representation" that the Registrar drew up in this case, there is no reason why the simultaneous representation of another accused at the Tribunal should not have been included as an impediment to assignment. The Registrar could have assigned one of the two counsel who had no such impediment—Rodney Dixon or Stephen Powles—and there would have been no violation of Rule 16(G). The Registrar has never explained why he chose to assign Richard Harvey knowing that such assignment would violate the *Directive*.

75. By imposing a counsel whose representation would not require the consent of the accused pursuant to Rule 16(G), there could be no ability of an accused to obstruct the proceedings. The Trial Chamber thus created a "straw man" by claiming that Article 16(G) did not apply to a situation where counsel was imposed.

76. The Trial Chamber's interpretation also vitiates the purpose of Article 16(G), which is to prevent breakdowns in the representation by assuring that a counsel simultaneously representing another accused has enough time to devote to the case, and can act with loyalty to each accused. An accused who has counsel imposed upon him has the same rights to time and loyalty as an accused who chooses to be represented by counsel.

77. Therefore the Trial Chamber erred in holding that Article 16(G) was inapplicable to Dr. Karadzic's case and misinterpreted governing law by failing to require that the Registrar follow it.

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<sup>57</sup> Impugned Decision at para. 33

IV. The Trial Chamber Erred in upholding the Registrar's Erroneous and Arbitrary Application of "Impediments to Representation"

80. Even if the Appeals Chamber were to find that its decision in *Seselj*, the Statute, and the *Directive* were inapplicable, it cannot possibly countenance, as the Trial Chamber did, the unreasonable and prejudicial manner in which the Registrar manipulated the list of counsel to exclude all lawyers from the Balkans from consideration as standby counsel, and to see to it that only lawyers from NATO countries were eligible.

81. In every other case before this Tribunal and the ICTR, the Registrar has followed the procedure of allowing the accused to choose a counsel from the list and thereafter deciding if there were any impediments to the assignment of that counsel, such as conflict of interest, language skills, or availability. Under this regime, an accused whose choice is not honored by the Registrar can seek review of that decision.<sup>58</sup>

82. Neither the Registrar nor the Trial Chamber could point to a single instance where the list was reduced by the Registrar before being made available to an accused. By proceeding in that manner, the Registrar's determination of impediments to assignment remains unknown to the accused and the Trial Chamber. Indeed, the Trial Chamber blamed the accused for this state of affairs, finding that his arguments were "misleading" because "the Registrar does not name each individual counsel and explain how he or she was disqualified."<sup>59</sup>

83. Therefore, the Registrar's decision to withhold the list of counsel from Dr. Karadzic and instead present him with his own list of five names was unreasonable and violated basic rules of procedural fairness.

84. In addition to this error of procedure, it is also obvious that the Registrar made substantive errors which led to the disqualification of all lawyers from the region.

(A) Conflict of Interest

85. The Registrar disqualified all Serbian lawyers because they had, at one time or another, represented persons accused of crimes that are also the subject of Dr. Karadzic's

<sup>58</sup> See, i.e. *Prosecutor v. Popovic et al*, IT-05-88-PT, *Decision on Appointment of Co-Counsel for Radivoje Miletic* (28 September 2005) at para. 21

<sup>59</sup> Impugned Decision at para. 41

indictment.<sup>60</sup> This was a serious misinterpretation of Article 14 (D) of the Code of Conduct. That section expressly contemplates subsequent representation of clients accused in the same events, and only provides for a conflict where the interests of the two clients are “materially adverse”.

86. Article 14(D) provides:

Counsel or his firm shall not represent a client with respect to a matter if:

- (i) such representation will be, or may reasonably be expected to be, adversely affected by representation of another client;
- (ii) representation of another client will be, or may reasonably be expected to be, adversely affected by such representation;
- (iii) the matter is the same or substantially related to another matter in which counsel or his firm had formerly represented another client (“former client”), and the interests of the client are materially adverse to the interests of the former client; or
- (iv) counsel’s professional judgement on behalf of the client will be, or may reasonably be expected to be, adversely affected by:
  - (1) counsel’s responsibilities to, or interests in, a third party; or
  - (2) to counsel’s own financial, business, property or personal interests.

87. The Registrar misapplied these criteria when disqualifying everyone who had represented a Serb in a case covered by events in the indictment. For example, how are the interests of General Milosevic represented by Serbian attorney Branislav Tapuskovic or the accused in the *Kvocka et al* prison camp case, represented by lawyers such as Serbian attorney Toma Fila, materially adverse to the case of Dr. Karadzic? If that were the case, the Trial Chamber’s own Judge Howard Morrison, who represented Dragan Nikolic on events in Suisca camp—part of the indictment in this case—would also automatically have a conflict of interest.

88. In addition, Article 14(E) of the Code of Conduct contemplates that even where the interests may be said to be materially adverse, the situation might be cured by consent of both clients. That Article provides:

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<sup>60</sup> Registry submission at para. 47

(E) Where a conflict of interest does arise, counsel shall:

- (i) promptly and fully inform each potentially affected present and former client of the nature and extent of the conflict; and
- (ii) either:
  - (1) take all steps necessary to remove the conflict; or
  - (2) obtain the full and informed consent of all potentially affected present and former clients to continue the representation unless such consent is likely to irreversibly prejudice the administration of justice.

89. By preemptively disqualifying all Serbian lawyers, the Registrar not only misapplied the standard for conflict of interest but precluded any possibility of such an arrangement by consent.

90. The Registrar also applied the conflict of interest provision inconsistently, offering Dr. Karadzic the ability to choose American attorney Colleen Rohan, who had represented Milorad Trbic in the *Popovic et al* case involving the Srebrenica events, and been on the defence team in the *Perisic* case involving many of the same events in the indictment in this case, while at the same time refusing him the right to choose a Serbian attorney who had represented accused in other cases involving events which are part of his indictment. The Registrar later went a step further and assigned Ms. Rohan as Legal Consultant to Richard Harvey, once again ignoring the same conflict of interest provision which it used to disqualify the Serbian lawyers.

91. Indeed, the Registrar had earlier appointed attorneys Kay and Wladimiroff as assigned counsel for Slobodan Milosevic even though they had represented Dusko Tadic on events which were part of the *Milosevic* case.

92. The Registrar badly misinterpreted and misapplied the Code of Conduct preventing Dr. Karadzic from choosing a lawyer familiar with the events in Bosnia and one in which he had confidence and with whom he could communicate more easily. .

93. The Trial Chamber failed to address this argument, other than to note that Colleen Rohan had only represented the accused in the *Trbic* case only “briefly”.<sup>61</sup> In fact, Ms. Rohan represented the accused for almost one year.<sup>62</sup> It was also reported that

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<sup>61</sup> Impugned Decision at para. 41

<sup>62</sup> From 23 June 2005 to 1 June 2006

"prosecutors have previously said that Trbic has implicated several of his co-accused in the Srebrenica crimes - both in testimony he gave in separate proceedings in The Hague against two other officers, Vidoje Blagojevic and Dragan Jokic, and in statements that he has provided to the prosecution."<sup>63</sup> Therefore, there is more reason to believe that the interests of Dr. Karadzic and Ms. Rohan's former client are materially adverse, and that a conflict of interest may exist, than for the 31 or so Serbian lawyers disqualified simply because they had previously represented an accused charged with crimes in Bosnia.

94. The Trial Chamber justified its failure to address Dr. Karadzic's claim that the Registrar misapplied the conflict of interest provisions by stating that:

In reviewing the Registrar's decision, the Chamber is concerned with the procedural propriety with which he made his decision and it cannot enter into an analysis of every aspect of the decision.<sup>64</sup>

95. However, the Trial Chamber failed to recognize that by improperly eliminating 31 Serbian lawyers from the list presented to Dr. Karadzic from which he could choose a standby counsel, and qualifying lawyers from NATO countries such as Colleen Rohan who suffered from the same or even greater impediment, the Registrar committed a procedural impropriety which operated to deny Dr. Karadzic counsel of his choice.

96. The Trial Chamber upheld the wholesale disqualification of Serbian lawyers on the basis of a conflict of interest as a result of their previous representation, but at the same time dismissed Dr Karadzic's objection to Richard Harvey's prior representation on the basis that counsel at the ICTY represent their clients diligently, in order to protect the clients' best interests, and exercise independent and professional judgement.<sup>65</sup> The Trial Chamber cannot have it both ways. It cannot sanction the Registrar's disqualification of otherwise qualified Serbian lawyers on the basis of prior representation, while expounding Richard Harvey's ability to navigate his conflict on the basis that all counsel have a duty to act in the best interests of their client.

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<sup>63</sup> Srebrenica Genocide Blog, <http://srebrenica-genocide.blogspot.com/2006/05/srebrenica-massacre-suspect-to-be.html>

<sup>64</sup> Impugned Decision at para. 41

<sup>65</sup> Impugned Decision at para. 43

(B) Other Impediments

97. Dr. Karadzic also contended that the Registrar also acted unreasonably in finding lawyers from the region to be “unavailable” while finding lawyers from NATO countries available under the same circumstances. He specifically pointed to the case of Serbian lawyer such as Aleksander Aleksic, who serves as co-counsel in the *Pavkovic* appeal and was deemed ineligible, and German Lawyer Jens Dieckmann, who serves as co-counsel in the *Sredoe Lukic* appeal and was deemed eligible. Both cases were in exactly the same posture—awaiting the filing of a reply brief by the accused.

98. The Trial Chamber failed to address this argument in its decision and the Registrar never provided a reason for its seemingly inconsistent application of the “unavailability” criteria. Had the Registrar followed the proper procedure and presented the list of counsel to Dr. Karadzic, then rejected his selection of Mr. Aleksic for unavailability reasons, the Chambers would be in a position to meaningfully review the Registrar’s decision. However, by deeming counsel ineligible on a wholesale basis, the Registrar precluded meaningful review of his decision.

99. Similarly, by imposing an “inexperience” rule, the Registrar precluded Dr. Karadzic from choosing a lawyer who by necessity had at least seven years experience as a lawyer and who may have had detailed knowledge and experience in such venues as the War Crimes Courts in the region, or the ICTR. Had the Registrar provided the entire list to Dr. Karadzic and had Dr. Karadzic chosen a person who lacked the experience that the Registrar deemed necessary, the Chambers would be in a position to meaningfully review the Registrar’s decision. However, by deeming counsel ineligible on a wholesale basis, the Registrar precluded meaningful review of his decision.

100. The Registrar also acted improperly by striking lawyers who were on the list, but had displeased the Registrar with their conduct. By imposing a “conduct” rule, the Registrar ignored the procedures in his own *Directive on the Assignment of Counsel* for striking a lawyer from the list—and only after a hearing.<sup>66</sup> Had the Registrar provided the entire list to Dr. Karadzic and had Dr. Karadzic chosen a person who the Registrar believed had committed misconduct, the Chambers would be in a position to

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<sup>66</sup> See Article 14(D)(E) and (F)

meaningfully review the Registrar's decision. However, by deeming counsel ineligible on a wholesale basis, the Registrar precluded meaningful review of his decision.

101. The Registrar also erred in imposing a "same continent" rule, by which he prevented Dr. Karadzic from choosing his American Legal Advisor, who has worked on his case for over a year, had he wanted to do so. The Trial Chamber held that "there was nothing in the Registrar's Decision or his Submission that indicates that this adviser was not placed on the list because of the requirement of geographical proximity."<sup>67</sup> This simply illuminates the error in the Registrar's approach. By precluding the accused from choosing a standby counsel from the list, he prevented meaningful review of his reasons for finding a counsel ineligible.

102. The Trial Chamber went on to speculate that the Registrar may have eliminated the Legal Advisor so as to not diminish the accused's own resources.<sup>68</sup> However, the Registrar has already made it impossible for the Legal Advisor to participate in the trial by refusing to remunerate him at a rate higher than support staff.<sup>69</sup> Therefore, Dr. Karadzic may have wished to have his Legal Advisor as standby counsel so that he may at least participate in the trial in some capacity and have the benefit of his familiarity with the case as well as combine the resources of the two teams for mutual benefit. The Registrar's finding that Dr. Karadzic's Legal Advisor had an impediment to representation, for whatever reason, was erroneous and unreasonable.

103. Again, had the Registrar provided the entire list to Dr. Karadzic and had Dr. Karadzic's Legal Advisor been deemed ineligible by the Registrar, the Chambers would be in a position to meaningfully review the Registrar's decision. However, by deeming counsel ineligible on a wholesale basis, the Registrar precluded meaningful review of his decision.

104. For all of these reasons, in refusing to provide the list of counsel to Dr. Karadzic, the Registrar failed to comply with the relevant legal requirement set forth in *Seselj* that the Rule 44 list be provided to an accused for whom standby counsel is appointed; failed to observe basic rules of procedural fairness by refusing access to the Rule 44 list and disqualifying potential counsel arbitrarily; failed to consider relevant

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<sup>67</sup> Impugned Decision at para. 42

<sup>68</sup> Impugned Decision at para. 42

<sup>69</sup> *Submissions on Trial Procedure* (28 September 2009) at para. 5

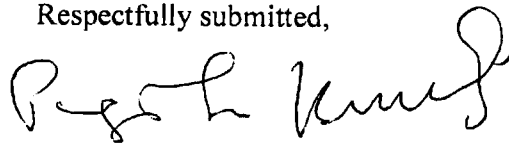
material—the accused’s choice of counsel—in making the Impugned Decision; and caused him to reach an unreasonable conclusion by appointing a lawyer, who was himself not eligible, without giving the accused the opportunity to chose a lawyer from the Rule 44 list.

#### Conclusion

105. The Trial Chamber erred in failing to follow the Appeals Chamber decision in *Seselj*, in finding that Article 21(4) of the Statute and Articles 11(D) and 16(G) of the *Directive* were inapplicable, and in upholding the Registrar’s erroneous, arbitrary, and discriminatory application of eligibility criteria for counsel. The Appeals Chamber is respectfully requested to reverse the Impugned Decision, and order that Dr. Karadzic be given the list of counsel so that he may choose a standby counsel and get on with his trial.

Word count: 7953

Respectfully submitted,



Radovan Karadzic<sup>70</sup>

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<sup>70</sup> The contributions of Legal Intern Elinor Fry of Utrecht University (Netherlands) to the research of the *obiter* issue, Kate Gibson of University of Queensland (Australia) to the editing of this appeal, and Kevin Heller of the University of Melbourne (Australia) to analysing of the flaws in the Trial Chamber judgement, <http://opiniojuris.org/2009/12/24/the-trial-chambers-flawed-decision-upholding-registry-choice-of-stand-by-counsel/> are gratefully acknowledged.