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D 30518

CASE/AFFAIRE NO. IT-95-5/18-T (R. KARADŽIĆ) DATE 13 January 2010

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International Tribunal for the
Prosecution of Persons
Responsible for Serious Violations
of International Humanitarian Law
Committed in the Territory of the
former Yugoslavia since 1991

Case No.: IT-95-5/18-T

Date: 13 January 2010

Original: English

IN THE TRIAL CHAMBER

Before: Judge O-Gon Kwon, Presiding Judge
Judge Howard Morrison
Judge Melville Baird
Judge Flavia Lattanzi, Reserve Judge

Registrar: Mr. John Hocking

Decision of: 13 January 2010

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON ACCUSED'S APPLICATION FOR CERTIFICATION TO APPEAL THE
TRIAL CHAMBER'S DECISION ON MOTION TO VACATE APPOINTMENT OF
RICHARD HARVEY**

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused

Mr. Radovan Karadžić

Appointed Counsel

Mr. Richard Harvey

THIS TRIAL CHAMBER of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 (“Tribunal”) is seised of the “Application for Certification to Appeal Decision on Motion to Vacate Appointment of Richard Harvey”, filed on 29 December 2009 (“Application”), and hereby issues its decision thereon.

I. Background and Submissions

1. On 5 November 2009, the Trial Chamber determined that the Accused had substantially and persistently obstructed the proper and expeditious conduct of his trial by refusing to attend the proceedings until such a time as he considered himself to be ready, and instructed the Registrar to appoint counsel, who would begin immediately to prepare him or herself to represent the interests of the Accused when the trial resumes, should that be required (“5 November 2009 Decision”).¹ On 23 November 2009, the Chamber denied the Accused’s application for certification to appeal this decision (“Decision Denying Certification”).²

2. Following the 5 November 2009 Decision, the Registrar appointed Richard Harvey to prepare to represent the Accused’s interests at trial.³ On 4 December 2009, the Accused challenged this decision of the Registrar, requesting the Chamber to vacate the appointment of Richard Harvey.⁴

3. On 23 December 2009, the Trial Chamber issued its “Decision on the Accused’s Motion to Vacate the Appointment of Richard Harvey” (“Decision Denying Motion to Vacate”), in which the Chamber denied the Accused’s request to issue an order vacating the appointment of Richard Harvey. The Accused now requests certification to appeal this Decision.

4. In the Application, the Accused submits that in the Decision Denying Motion to Vacate the Chamber erred in: (i) refusing to follow the Appeals Chamber decision in the *Šešelj* case,⁵ and in holding that the decision is limited to the facts of that case; (ii) finding that the right to choose a counsel enshrined in Article 21(4)(d) of the Tribunal’s Statute (“Statute”) does not apply to standby counsel; (iii) finding that the Directive on Assignment of Counsel, including Articles 11(D) and 16(G), does not apply to standby counsel; and (iv) “upholding the Registrar’s

¹ Decision on the Appointment of Counsel and Order on Further Trial Proceedings, 5 November 2009.

² Decision on Accused’s Application for Certification to Appeal Decision on Appointment of Counsel and Order on Further Trial Proceedings, 23 November 2009

³ Registrar’s Decision, 19 November 2009.

⁴ Motion to Vacate Appointment of Richard Harvey, 4 December 2009.

⁵ See *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-AR73.4, Decision on Appeal Against the Trial Chamber’s Decision (No. 2) on Assignment of Counsel, 8 December 2006.

erroneous and arbitrary application of conflict of interest, availability, proximity, language and good conduct requirements which resulted in the disqualification of all Serbian lawyers and Dr. Karadzic's own legal associates, while qualifying lawyers from NATO countries who were ineligible under the same criteria."⁶

5. The Accused argues that the imposition of counsel has been held by two other Trial Chambers to meet the criteria for interlocutory appeal, namely in the *Milošević* and *Šešelj* cases, and that, therefore, "the jurisprudence of this Tribunal is clear that issues concerning the appointment of counsel over the objection of self-represented accused meet the criteria for certification to appeal [...]."⁷

6. The Accused further argues that the Chamber has already found that the first requirement for certification to appeal has been met as a result of the Chamber concluding, in the Decision Denying Motion to Vacate, that the fairness of the trial would be affected if Registrar had not followed the proper procedure in appointing Richard Harvey.⁸ With regard to the second requirement for certification, the Accused distinguishes the present circumstances from those that existed when he requested certification to appeal the 5 November 2009 Decision, arguing that the Application "now directly deals with the procedure followed by the Registrar in appointing the standby counsel."⁹ He argues that "[d]elaying appellate review of the issue until after 1 March 2010 will frustrate, rather than advance, the proceedings."¹⁰

7. On 6 January 2010, the Prosecution filed the "Prosecution's Response to Karadžić's Application for Certification to Appeal Decision on Motion to Vacate Appointment of Richard Harvey" ("Response"). The Prosecution does not oppose the Application. While it argues that the *Milošević* and *Šešelj* decisions are not determinative of the matter because they concern the imposition of counsel, it submits that the requirements for certification to appeal appear to be satisfied.¹¹

II. Applicable Law

8. According to the Tribunal's Rules of Procedure and Evidence ("Rules"), decisions on motions other than preliminary motions challenging jurisdiction are without interlocutory appeal

⁶ Application, para. 4.

⁷ Application, paras. 5-9.

⁸ Application, paras. 10-11.

⁹ Application, paras. 12-13.

¹⁰ Application, para. 17.

¹¹ Response, p. 1.

save with certification by the Trial Chamber.¹² Under Rule 73(B) of the Rules, a Trial Chamber may grant certification to appeal if the decision “involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.”

III. Discussion

9. As with his earlier request for certification to appeal the 5 November 2009 Decision, the Accused argues in the Application that certification should be granted on the basis that the Trial Chambers in the *Milošević* and *Šešelj* cases granted certification to appeal decisions in which counsel was imposed on the two accused.¹³ This Chamber rejected this argument in the Decision Denying Certification, noting that the “Accused mischaracterises the issue as one of imposition or assignment of counsel and then relies on previous certification decisions where this issue was deemed certifiable. However, unlike in the *Milošević* and *Šešelj* cases, the Chamber has not yet assigned counsel to the Accused.”¹⁴ In this regard, the circumstances are unchanged. As made clear in the Decision Denying Motion to Vacate, the Accused remains self-represented.¹⁵ While Richard Harvey has been appointed to prepare to represent the Accused’s interests at trial, he has not been imposed upon or assigned to the Accused. Therefore, the Chamber considers that the *Milošević* and *Šešelj* decisions are not directly applicable to the relief sought in the Application.

10. With regard to the first limb that must be met before certification to appeal can be granted under Rule 73(B) of the Rules, the Chamber notes that the Decision Denying Motion to Vacate concerned the process by which the Registrar appointed Richard Harvey, and in that Decision, the Chamber found that if the Registrar’s decision was flawed and/or illegal because he had not followed the proper procedure, this would inevitably affect the Accused’s fair trial rights and thus the propriety of the procedure was a matter that goes to the fairness of his trial.¹⁶ For the same reasons, with regard to the Application, the Chamber is of the view that as the procedural propriety of the Registrar’s decision-making process may impact upon the Accused’s

¹² Rules 72 and 73 of the Rules.

¹³ See *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Order on Request for Certification to Appeal the Decision of the Trial Chamber on Court Assigned Counsel, 10 September 2004; *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-PT, Decision on Request to Certify an Appeal against Decision on Assignment of Counsel, 29 August 2006; *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-PT, Decision on Request for Certification to Appeal Decision (No. 2) on Assignment of Counsel, 5 December 2006.

¹⁴ Decision Denying Certification, para. 8.

¹⁵ See, for example, Decision Denying Motion to Vacate, paras. 26, 28, 38.

¹⁶ Decision Denying Motion to Vacate, para. 23.

rights, the Decision Denying Motion to Vacate involves an issue that would significantly affect the fair conduct of the proceedings or the outcome of the trial.


11. With regard to the second limb of Rule 73(B), the Chamber notes that the trial is set to resume on 1 March 2010. The role and functions of Richard Harvey at that time remain to be seen and are dependent on the Accused's behaviour. However, as there is a possibility that Richard Harvey may be required to represent the interests of the Accused at trial, it is clearly desirable for the matter of the propriety of his appointment by the Registrar to be resolved immediately, and not at the end of the trial when it may raise the prospect of a re-trial. Therefore, the Chamber is satisfied that an immediate resolution by the Appeals Chamber of the validity of the manner in which Richard Harvey was appointed may materially advance the proceedings.

12. As the two requirements of Rule 73(B) are met, the Chamber will grant the Accused certification to appeal the Decision Denying Motion to Vacate.

IV. Disposition

13. Accordingly, the Trial Chamber, pursuant to Rule 73(B) of the Rules, hereby **GRANTS** the Application.

Done in English and French, the English text being authoritative.



Judge O-Gon Kwon
Presiding

Dated this thirteenth day of January 2010
At The Hague
The Netherlands

[Seal of the Tribunal]