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CASE/AFFAIRE NO. IT-95-5/18-AR73.6		DATE 29 January 2010
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**UNITED
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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-AR73.6
	Date:	29 January 2010

IN THE APPEALS CHAMBER

Before: Judge Mehmet Güney
Judge Fausto Pocar
Judge Liu Daqun
Judge Andrézia Vaz
Judge Theodor Meron

Registrar: Mr. John Hocking

THE PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**PROSECUTION'S RESPONSE TO KARADŽIĆ'S APPEAL
FROM DECISION ON MOTION TO VACATE APPOINTMENT
OF RICHARD HARVEY**

The Office of the Prosecutor:

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused:

Mr. Radovan Karadžić

Appointed Counsel:

Mr. Richard Harvey

**THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA**

Case No. IT-95-5/18-AR73.6

THE PROSECUTOR

v.

RADOVAN KARADŽIĆ

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**PROSECUTION'S RESPONSE TO KARADŽIĆ'S APPEAL FROM
DECISION ON MOTION TO VACATE APPOINTMENT OF RICHARD
HARVEY**

I. OVERVIEW

1. Karadžić appeals against the Chamber's discretionary decision denying his Motion to Vacate the Appointment of Richard Harvey.¹ In this response, the Prosecution will specifically address Grounds (A) and (B) of Karadžić's appeal,² as these grounds relate to the Chamber's correct interpretation of the Statute, the Rules of Procedure and Evidence and Appeals Chamber case-law. The Prosecution will not address Grounds (C) and (D) of his appeal, relating to the application of the Directive on the Assignment of Defence Counsel³ and the manner in which the Registrar eliminated counsel from the Rule 45(B) list,⁴ as the Registrar is in the best position to address issues related to the exercise of his own discretion.

¹ Decision on the Accused's Motion to Vacate Appointment of Richard Harvey, 23 December 2009 ("Decision").

² Appeal from Decision on Motion to Vacate Appointment of Richard Harvey, 19 January 2010 ("Appeal"), para.15. Ground A, on the decision by the Appeals Chamber in *Šešelj*, is set out in Appeal, paras.32-45. Ground B, regarding Article 21(4) of the Statute, is set out in Appeal, paras.46-55.

³ Directive on the Assignment of Defence Counsel (Directive No.1/94), as amended 29 June 2006, (IT/73/Rev.11) ("Directive").

⁴ Ground C, regarding the Directive is set out in Appeal, paras.56-77 and Ground (D), on the criteria applied by the Registry, is set out in Appeal, paras.80-104.

II. FACTUAL BACKGROUND

2. Karadžić chose to represent himself in these proceedings and currently continues to do so.⁵ His trial was originally scheduled to begin in late October 2009. Karadžić requested an additional ten months to prepare. The Chamber denied his request and this denial was confirmed on appeal.⁶

3. Five days before the scheduled commencement of trial, Karadžić informed the Chamber that he would not appear.⁷ Despite continued warnings from the Presiding Judge that measures could be taken to assign counsel should he continue to obstruct the proceedings, Karadžić chose to absent himself from the trial for three consecutive days.⁸ The Chamber then held a hearing to determine how to proceed, which Karadžić attended.⁹ At the hearing, he stated that he was not prepared for trial and that he would not attend until he deemed himself ready.¹⁰

4. By decision dated 5 November 2009, the Chamber determined that the overall interests of justice were best met by the appointment of counsel and ordered the Registrar to appoint a counsel to prepare to represent Karadžić's interests at trial.¹¹ Such appointed counsel was to be given three and a half months to prepare.¹² The Chamber set the trial to resume on 1 March 2010.¹³ As a result, to comply with the Chamber's time-frame, the Registrar had to appoint counsel by mid-November 2009.

5. In its Decision Appointing Counsel, the Chamber made clear that, should Karadžić continue to absent himself from the resumed trial proceedings, or engage in any other obstructive conduct, appointed counsel would take over as assigned counsel to represent his interests.¹⁴

⁵ Decision, para.26.

⁶ Decision on Appointment of Counsel and Order on Further Trial Proceedings, 5 November 2009 ("Decision Appointing Counsel"), paras.1-3.

⁷ Decision Appointing Counsel, para.4.

⁸ Decision Appointing Counsel, paras.5-11.

⁹ Decision Appointing Counsel, para.12.

¹⁰ Decision Appointing Counsel, para.12.

¹¹ Decision Appointing Counsel, para.28.

¹² Decision Appointing Counsel, para.26.

¹³ Decision Appointing Counsel, para.28.

¹⁴ Decision Appointing Counsel, para.27.

6. On 19 November 2009, the Registrar appointed Richard Harvey as “counsel to prepare to represent the interests of the Accused at trial.”¹⁵ Karadžić challenged the Registrar’s decision, which was upheld by the Chamber. He now appeals the Chamber’s Decision.

III. THE CHAMBER CORRECTLY INTERPRETED GOVERNING LAW

A. The Chamber correctly held that the relevant portions of Article 21(4)(b) and (d) of the Statute were inapplicable

7. The Chamber correctly held that Article 21(4)(b) and (d) of the Statute did not apply to the imposition of appointed counsel in these circumstances.¹⁶ In arguing otherwise, Karadžić ignores the plain language of the Statute. Article 21(4)(b) and (d) provide an Accused with, *inter alia*, the following minimum guarantees:

(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 [...]¹⁷

8. Karadžić has been provided with these minimum guarantees—he was given the choice of either representing himself or being represented by counsel. He elected to represent himself and continues to do so.¹⁸ As a result, the guarantees of Article 21(4)(d) have been met. The correlative right under Article 21(4)(b) to communicate with counsel of his own choosing is not implicated, as Karadžić has chosen to self-represent.

9. The appointment of Richard Harvey does not alter this conclusion. Indeed, the very necessity of appointing counsel for potential assignment to represent an

¹⁵ Decision (signed by the Deputy Registrar), 19 November 2009, p.3.

¹⁶ Decision, para.25.

¹⁷ Article 21(4)(b) and (d) (emphasis added).

Accused's interests only arises after the Accused has already made his Article 21(4)(d) choice to self-represent. Having made that choice, the portion of the provision relating to legal assistance of an Accused's own choosing does not apply. As the Trial Chamber correctly observed,¹⁹ Appeals Chamber precedent supports this reading of Article 21(4)(d)—the text provides a “binary opposition between representation ‘through legal assistance’ and representation ‘in person.’”²⁰

10. To the extent an Accused is provided with a choice of counsel after having elected to self-represent and maintained that position, such choice is not provided *as of right* pursuant to Article 21(4)(d). Article 21(4) provides an accused with certain “minimum guarantees,” but a chamber or the Registrar can choose to provide an accused with more than the minimum.²¹ For example, in cases where an accused is self-represented, the chamber can choose to appoint *amicus curiae* though it is not required to do so.²² In this respect, it is important to recall that an appeal of a judicial review of an administrative decision amounts to appellate review of a trial chamber's discretionary decision.²³ As such, “the issue for the Appeals Chamber is not whether it agrees with the decision made by the Trial Chamber but whether the Trial Chamber correctly exercised its discretion in reaching that decision.”²⁴ The relevant issue here, therefore, is not whether this Appeals Chamber disagrees with the Trial Chamber's decision and would have, in the first instance, provided Karadžić with the opportunity to choose appointed counsel from the Rule 45(B) list, but rather whether such an opportunity is mandated by Article 21(4).

¹⁸ Decision, para.26 (citing Decision Appointing Counsel, para.25).

¹⁹ Decision, para.26 and fn.52.

²⁰ *Prosecutor v. Slobodan Milošević*, Case No.IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defense Counsel, 1 November 2004 (“*Milošević* Decision”), para.11; *see also* *Prosecutor v. Krajišnik*, Case No.IT-00-39-A, Decision on Krajišnik Request and on Prosecution Motion, 11 September 2007 (“11 September 2007 *Krajišnik* Decision”), para.40.

²¹ Indeed, here the Registrar did just that. He provided Karadžić with a list of five counsel to choose from, provided Karadžić with the opportunity to interview all five candidates, and was prepared to take Karadžić's preference into account. *See below* para.14.

²² *See also* 11 September 2007 *Krajišnik* Decision, fn.100 (citing *Prosecutor v. Krajišnik*, Case No.IT-00-39-A, Decision on Momčilo Krajišnik's Request to Self-Represent, on Counsel's Motion in Relation to Appointment of Amicus Curiae, and on the Prosecution Motion of 16 February 2007, 11 May 2007, para.18).

²³ Decision on Interlocutory Appeal of the Trial Chamber's Decision on Adequate Facilities, 7 May 2009, para.11.

11. By persistently refusing to attend the trial, Karadžić engaged in deliberately obstructive conduct, which literally brought his trial to a halt.²⁵ This substantial and persistent obstruction led the Chamber to order the appointment of counsel to immediately prepare to represent Karadžić's interests when the trial resumes, in the event he continues to obstruct the proceedings.²⁶ In Karadžić's view, his continued obstruction effectively operates as a voluntary choice to stop self-representing and opt instead for representation by counsel pursuant to Article 21(4)(d).²⁷ But the potential assignment of counsel to Karadžić is qualitatively different and serves instead as "an imposed limitation of [his] right to self-represent."²⁸ In the event that appointed counsel becomes assigned counsel, it is because Karadžić's continued obstruction will have caused the Chamber to limit his right to self-represent, not because he has chosen to exercise his Article 21(4)(d) right to counsel.

12. There is thus a fundamental difference between an accused's voluntary decision to choose counsel to represent him and a trial chamber's imposition of assigned counsel on a self-represented accused. An analysis of the relevant Rules confirms this difference. The Chamber ordered the appointment of counsel for Karadžić pursuant to Article 20(1) of the Statute and Rule 54 of the Rules.²⁹ It made clear that appointed counsel's eventual assignment as counsel "to represent the interests of the Accused at trial" would be "subject to further order of the Chamber."³⁰ Such an order from the Chamber would necessarily be made pursuant to Rule 45*ter*, not Rule 45.³¹ This distinction is important because Rule 45*ter* does **not** include Rule

²⁴ *Prosecutor v. 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 ("Šešelj Decision"), para.18 (internal quotation marks omitted).

²⁵ See Decision Appointing Counsel, para.21.

²⁶ Decision Appointing Counsel, paras.25, 27.

²⁷ See Appeal, para.48.

²⁸ 11 September 2007 *Krajišnik* Decision, fn.100 (citing *Milošević* Decision, para.17).

²⁹ Decision Appointing Counsel, para.28.

³⁰ Decision Appointing Counsel, para.28(ii).

³¹ Rule 45*ter* provides that the "Trial Chamber may, if it decides that it is in the interests of justice, instruct the Registrar to assign a counsel to represent the interests of the accused." Rule 45, on the other hand, relates specifically to indigent suspects or accused and speaks in terms of assigning counsel to such suspects and accused, rather than using Rule 45*ter*'s language of assigning a counsel to *represent the interests* of the accused. It is clear, therefore, that should the Trial Chamber order that appointed counsel become counsel assigned to represent Karadžić's interests, it will do so pursuant to Rule 45*ter*. See also Decision Appointing Counsel, para.14 (noting, in the context of discussing the options available when an accused persists in disruptive conduct, that "Rule 45 *ter* permits a Trial Chamber to instruct the Registrar to assign a counsel to represent the interests of an accused, if it determines that to

45's requirement that "[s]uch assignments shall be treated in accordance with the procedure established in a Directive set out by the Registrar and approved by the permanent Judges."³² By its terms, Rule 45 implements an indigent accused's right to counsel of his choosing under Article 21(4)(d). The Directive gives effect to Rule 45 and, therefore, Article 21(4)(d).³³ The fact that Rule 45*ter* does not require use of the procedure in the Directive thus confirms that a Rule 45*ter* order, as well as an antecedent order to appoint counsel to prepare for the eventuality of a Rule 45*ter* order,³⁴ does not implicate the rights set forth in Article 21(4)(d) of the Statute.³⁵

B. The Registrar's decision to appoint Richard Harvey nonetheless complied with the requirements of Article 21(4)(d)

13. Notwithstanding that Article 21(4)(d) of the Statute does not apply to the Registrar's decision to appoint Richard Harvey, the Registrar complied with its requirements. Where an Accused is indigent, his "right to publicly paid counsel of [his] own choice is limited."³⁶ "[W]hile the Registrar's decision to assign counsel to an indigent accused should take into account the preferences of a suspect or accused, the right to free legal assistance of counsel does not confer the right to counsel of

do so would be in the interests of justice"); Judge Kwon, T.511 (27 October 2009) (warning Karadžić that if he continues to absent himself from trial, counsel may, in the interests of justice, be assigned to represent his interests pursuant to Rule 45*ter*).

³² Rule 45; *see also* Decision, para.29.

³³ *See* Directive, Art.1(A).

³⁴ The Trial Chamber issued this antecedent order under Rule 54, a general rule allowing a judge or Trial Chamber to "issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial." The text of Rule 54 also says nothing about the use of the procedure in the Directive. *See* Decision, para.29.

³⁵ Article 21(4) would only be implicated should Karadžić voluntarily choose to appoint counsel to represent him. An accused's decision to engage legal assistance may be limited, however, if the engagement of counsel at that stage would cause substantial or persistent obstruction or delay in the proceedings. *See Prosecutor v. Krajišnik*, Case No.IT-00-39-A, Decision on Momcilo Krajišnik's Motion to Reschedule Status Conference and Permit Alan Dershowitz to Appear, 28 February 2008, paras.8-9.

³⁶ *Prosecutor v. Krajišnik*, Case No.IT-00-39-A, Decision on Request for Review of the Decision of the Registry in Relation to Assignment of Counsel, 1 February 2007 ("1 February 2007 *Krajišnik* Decision"), para.13 (internal quotation marks omitted) (citing *Prosecutor v. Šljivančanin*, Case No.IT-95-13/1-PT, Decision on Assignment of Defence Counsel, 20 August 2003 ("*Šljivančanin* Decision"), para.20; *Prosecutor v. Delić*, Case No.IT-04-83-PT, Decision on Request for Review, 9 June 2005, para.13); *see also* Decision, para.27.

one's own choosing and a suspect or accused must accept any duly qualified counsel appointed from the list maintained by the Registrar."³⁷

14. Here, the Registrar provided Karadžić with a choice of five counsel using the Rule 45(B) list. In the exercise of his discretion, the Registrar excluded certain counsel from the list.³⁸ Because this left only three eligible candidates from the Rule 45(B) list, the Registrar endeavoured to provide Karadžić with more choice, adding two more candidates who satisfied the Rule 44 qualifications.³⁹ The Registrar was prepared to take Karadžić's preferences into account. Indeed, Karadžić was given the opportunity to meet with and interview all five candidates.⁴⁰ Instead of making his preference known, however, Karadžić determined not to choose any of the five candidates, resulting in the Registrar's decision to appoint Richard Harvey.

15. There can be no doubt that (1) Karadžić was given a choice; (2) the Registrar was prepared to take his preferences into consideration; and (3) duly qualified counsel from the list maintained by the Registrar was appointed. The requirements of Article 21(4)(d) related to publicly-paid counsel were thus respected.⁴¹

C. The *Šešelj* Decision does not provide Karadžić with the right to choose imposed appointed counsel

1. The Chamber correctly found that the *Šešelj* Decision was limited to its facts

16. The Chamber correctly determined that the *Šešelj* Decision is limited to its "very specific facts [...], which differ considerably from those of the present case."⁴² In the *Šešelj* Decision, the Appeals Chamber made clear that in order to "understand fully the nature of this appeal," it was necessary for the Appeals Chamber to revisit the complex factual background to the Trial Chamber's decision to assign counsel.⁴³ It then spent approximately half of its decision setting forth in detail this complex

³⁷ 1 February 2007 *Krajišnik* Decision, para.13 (internal footnotes and quotation marks omitted); *Šljivčanin* Decision, para.20; see also *Prosecutor v. Akayesu*, Case No.ICTR-96-4-A, Judgement, 1 June 2001 ("*Akayesu* Appeal Judgement"), paras.61-62; *Prosecutor v. Kambanda*, Case No.ICTR-97-23-A, Judgement, 19 October 2000 ("*Kambanda* Appeal Judgement"), para.33; Decision, para.27.

³⁸ Decision, para.40.

³⁹ Decision, para.40; see also Registrar's Submission Pursuant to Rule 33(B) Regarding Radovan Karadžić's Motion to Vacate Appointment of Richard Harvey, 14 December 2009, paras.43 (Rule 44 establishes the basic qualification requirements for defence counsel appearing before the Tribunal), 49.

⁴⁰ Decision, para.40.

⁴¹ See also Decision, para.40.

⁴² Decision, para.36.

factual background.⁴⁴ In addition, it explicitly stated that “[i]f the Appeals Chamber was to ignore the background to the Impugned Decision and apply the applicable law and the standard of review to the Impugned Decision, it would find no error on the part of the Trial Chamber in ordering the imposition of assigned counsel.”⁴⁵ As a result, the Appeals Chamber itself effectively limited its holding to the specific facts before it. In these circumstances, the Chamber correctly determined not to rely on the *Šešelj* Decision.

17. In addition, as discussed more fully below,⁴⁶ the Appeals Chamber’s direction that *Šešelj* be provided with “the Rule 44 list of Counsel” was not the central holding of the *Šešelj* Decision and there is no indication that this opportunity was provided as of right pursuant to Article 21(4)(d). Indeed, as Karadžić concedes, Article 21(4)(d) is not even mentioned in the *Šešelj* Decision.⁴⁷ Contrary to Karadžić’s characterisation, the Appeals Chamber in *Šešelj* never “provided for *the right* of the accused to choose his standby counsel.”⁴⁸ It simply indicated that “[s]hould a time come when the Trial Chamber feels justified to make such a decision [imposing stand-by counsel], the Rule 44 list of Counsel should be provided to *Šešelj* and he should be permitted to select standby counsel from that list.”⁴⁹ Given the unique circumstances of the *Šešelj* Decision, this cannot be understood as granting *Šešelj* the right to choose from the “Rule 44 list.” Instead, it is an example of a chamber providing an accused with more than the required minimum guarantees provided for in Article 21(4).⁵⁰

⁴³ *Šešelj* Decision, para.2.

⁴⁴ *Šešelj* Decision, paras.2-15. For a summary of the unique factual circumstances presented by the *Šešelj* Decision, see Decision, paras.35-37.

⁴⁵ *Šešelj* Decision, para.25.

⁴⁶ See below paras.19-21.

⁴⁷ Appeal, para.49.

⁴⁸ Appeal, para.49 (emphasis added).

⁴⁹ *Šešelj* Decision, para.28.

⁵⁰ See above para.10. Moreover, the Chamber found that even if the *Šešelj* Decision were applicable, “the Registrar has complied with its direction to the extent required by the circumstances of this case.” Decision, para.40.

2. Limiting the Šešelj Decision to its facts does not reward obstruction and penalise cooperation

18. Karadžić is incorrect in suggesting that limiting the Šešelj Decision to its facts rewards obstruction and penalises cooperation.⁵¹ First, the Appeals Chamber made clear that its decision “should in no way be construed as evidence of the Appeals Chamber rewarding Šešelj’s behaviour.”⁵² More importantly, Karadžić’s argument conveniently ignores his own substantial and persistent obstructive behaviour. Whether or not Karadžić has been “polite in his written and oral communications with the Tribunal,”⁵³ the fact remains that his continued obstructive behaviour brought his trial to a halt and delayed its continuation for four months.

3. The Chamber correctly found that the direction for Šešelj to be provided with the “Rule 44 list” was *obiter dicta*

19. The Chamber correctly found that the Šešelj Decision’s direction that “the Rule 44 list of Counsel should be provided to Šešelj” was *obiter dicta*, and that it was not bound to follow it.⁵⁴ Trial Chambers are bound by the *ratio decidendi* of Appeals Chamber decisions,⁵⁵ but are not bound by *obiter dicta*.⁵⁶

20. The issue for consideration in the Šešelj appeal was whether the Appeals Chamber’s prior decision requiring restoration of Šešelj’s right to self-representation “allowed the Trial Chamber to immediately order the assignment of standby counsel without establishing any persistent or obstructionist behaviour on his part.”⁵⁷ The

⁵¹ Appeal, paras.38-43.

⁵² Šešelj Decision, para.15.

⁵³ Appeal, para.40.

⁵⁴ Decision, paras.35-36 (citing Šešelj Decision, para.28). Compare Appeal, para.34.

⁵⁵ *Prosecutor v. Aleksovski*, Case No.IT-95-14/1-A, Judgement, 24 March 2000, paras.110, 113 (“*Aleksovski* Appeal Judgement”). See also, e.g., *Prosecutor v. Milutinović et al*, Case No.IT-99-37-AR72, Decision on Dragoljub Odjanić’s Motion Challenging Jurisdiction–Joint Criminal Enterprise, 21 May 2003 (“*Milutinović* Decision”), para.31; *Prosecutor v. Martić*, Case No.IT-95-11-A, Judgement, 8 October 2008, para.81. For the definition of *ratio decidendi*, see *Milutinović* Decision, Separate Opinion of Judge David Hunt, 28 February 2003, para.3; *Prosecutor v. Karadžić*, Case No.IT-95-5/18-PT, Decision on Motion to Recuse Judge Baird and Report to Judge Güney, 20 October 2009, para.15; *Aleksovski* Appeal Judgement, para.110.

⁵⁶ See *Prosecutor v. Krstić*, Case No.IT-98-33-T, Judgement, 2 August 2001, para.642; see also *Prosecutor v. Blaškić*, Case No.IT-05-14-A, Decision Granting Access to non-Public Materials, 20 February 2002, para.7. For a definition of *obiter*, see *Milutinović* Decision, Separate Opinion of Judge David Hunt, para.3. See also *Milutinović* Decision, para.17 (citing Odjanić’s submissions).

⁵⁷ Šešelj Decision, para.20; see also para.24.

Šešelj Appeals Chamber's direction regarding the "Rule 44 list" was not a necessary step in reaching the conclusion that his right had not been restored.⁵⁸

21. When the Appeals Chamber stated that "the Rule 44 list of Counsel should be provided to *Šešelj*", it was making a statement regarding a related procedural matter that would follow the Trial Chamber's order assigning counsel, should such an order be made upon the "persistent or obstructionist behaviour" of *Šešelj*. The adoption of such a procedure had no impact on the Appeals Chamber's finding that the Trial Chamber should not have assigned standby counsel at that time, because the latter decision relates to the decision to assign counsel, whereas the former deals with the selection that follows such a decision.

22. Furthermore, contrary to Karadžić's submission, the Trial Chamber was not bound to follow the Appeals Chamber's *obiter dicta* in *Šešelj* simply because the Appeals Chamber is a higher court.⁵⁹ Karadžić mischaracterises the position of Judge Shahabuddeen.⁶⁰ Judge Shahabuddeen limited his assertion that the *obiter dicta* of a higher court should be followed by a lower court to situations where the Chamber's *dicta* "resulted from careful and exhaustive examination by the court of material relevant to a manifestly important point bearing on its jurisdiction."⁶¹ This was not the case in *Šešelj*. For this reason, the *Šešelj* direction should not be relied upon even as *obiter*. Moreover, the Appeals Chamber clearly limited its decision to the unique and specific circumstances before it.⁶²

4. Assuming that the *Šešelj* Decision is binding, there are cogent reasons to depart from it

23. In the event the Appeals Chamber disagrees with the Trial Chamber's findings that the *Šešelj* Decision was limited to its facts and that its direction regarding the "Rule 44 list" was *obiter*, there are cogent reasons in the interests of justice to depart

⁵⁸ See *Šešelj* Decision, para.28.

⁵⁹ Compare Appeal, para.35

⁶⁰ See Appeal, paras.35-37.

⁶¹ See *Milutinović* Decision, Separate Opinion of Judge Shahabuddeen, para.24; see also *Milutinović* Decision, para.17.

⁶² See above para.16.

from the *Šešelj* Decision.⁶³ As previously discussed, the *Šešelj* Decision did not find that *Šešelj* was entitled *as of right* to choose his stand-by counsel from the “Rule 44 list.” Instead, the Appeals Chamber exercised its discretion to provide *Šešelj* with more than the required minimum guarantees in Article 21(4).⁶⁴

24. The *Šešelj* Decision was issued on 8 December 2006 — long before Rule 45ter existed.⁶⁵ As a result, when the Appeals Chamber exercised its discretion to provide *Šešelj* with the opportunity to choose stand-by counsel from the “Rule 44 list,” it did so without the benefit of Rule 45ter.

25. Rule 45ter now clearly governs the assignment of counsel “to represent the interests of the accused” in circumstances where a self-represented accused obstructs the proceedings.⁶⁶ It does **not** include Rule 45’s requirement that the procedure in the Directive be used to assign counsel. This exclusion must have been intentional.

26. The *Šešelj* Decision, of course, could not have taken the difference between Rule 45ter and Rule 45 into account when it decided that *Šešelj* should be provided with the list because Rule 45ter did not yet exist. As a result, the adoption of Rule 45ter provides a cogent reason to depart from the portion of the *Šešelj* Decision requiring that *Šešelj* be provided with the list of counsel. Such a departure would be in the interests of justice as it would ensure that Rule 45ter is given effect as well as clarify the interpretation of Rule 45, taking Rule 45ter into consideration.⁶⁷

27. Departing from the *Šešelj* Decision in this way does not run afoul of Rule 6(D), which provides that an amendment of the Rules “shall not operate to prejudice the rights of the accused or of a convicted person or acquitted person in any pending

⁶³ See *Aleksovski* Appeal Judgement, para.107; see also *Prosecutor v. Galić*, Case No.IT-98-29-A, Judgment, 30 November 2006, para.117; *Prosecutor v. Kordić, et al.*, Case No.IT-95-14/2-A, Judgment, 17 December 2004, para.1040; *Prosecutor v. Orić*, Case No.IT-03-68-A, Judgment, 3 July 2008 (“*Orić* Appeal Judgement”), Separate and Partially Dissenting Opinion of Judge Schomburg, para.27, Partially Dissenting Opinion and Declaration of Judge Liu, para.8; *Milutinović* Decision, Separate Opinion of Judge Hunt, paras.18, 30; *Prosecutor v. Semanza*, Case No.ICTR-97-20-A, Decision, 31 May 2000, para.9.

⁶⁴ See above para.17.

⁶⁵ Rule 45ter was adopted on 4 November 2008.

⁶⁶ See above para.12. In addition, utilising Rule 45 instead of Rule 45ter in these circumstances would make little sense, given that Rule 45 by its terms only applies to an indigent accused. An accused need not be indigent, however, to self-represent and obstruct the proceedings.


⁶⁷ See *Orić* Appeal Judgement, Separate and Partially Dissenting Opinion of Judge Schomburg, para.27 (clarifying the interpretation of law is in the interests of justice).

case.” The “rights” contemplated in Rule 6(B) are “confined [...] to those rights to which an accused, or a convicted or acquitted person, in a pending case has a legal entitlement, and do not extend to that wide variety of advantages or benefits which are frequently described as rights, particularly by those seeking to secure them.”⁶⁸ Though the Appeals Chamber extended Šešelj the opportunity to choose counsel from the “Rule 44 list,” it did not provide him with the *right* to do so.

IV. CONCLUSION

28. In denying Karadžić’s challenges to the Registry’s decision appointing Richard Harvey, the Chamber correctly interpreted the Statute, the Rules and Appeals Chamber case-law. Grounds A and B of Karadžić’s Appeal should be dismissed.

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At The Hague, The Netherlands

⁶⁸ *Prosecutor v. Međaković, et al.*, Case No.IT-02-65-PT, Decision on Prosecutor’s Motion for Referral of Case Pursuant to Rule 11 *bis*, 20 July 2005, para.123, *confirmed on appeal by Prosecutor v. Međaković, et al.*, Case No.IT-02-65-AR11*bis*.1, Decision on Joint Defence Appeal against Decision on Referral under Rule 11 *bis*, 7 April 2006, para.85.