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| CASE/AFFAIRE NO. IT-95-5/18-AR73.6 (R. KARADŽIĆ) | | DATE 01 February 2010 |
| FROM/DE RAM DORAISWAMY, COURT OFFICER | | |
| TO/A | | |
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| <input type="checkbox"/> Embassy/Ambassade | | |
| <input checked="" type="checkbox"/> Pro Se Legal Liaison Officer/Juriste chargé de la liaison avec l'accusé MS. J. GUDURIĆ | | |
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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: Judge Mehmet Guney
Judge Fausto Pocar
Judge Liu Daqun
Judge Andresia Vaz
Judge Theodor Meron

Registrar: Mr. John Hocking

Date: 1 February 2010

THE PROSECUTOR

v.

RADOVAN KARADZIC

Public

REPLY BRIEF #1:
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:
Radovan Karadzic

1. On 19 January 2010, Dr. Radovan Karadzic appealed from the *Decision on the Accused's Motion to Vacate Appointment of Richard Harvey* (23 December 2009). On 29 January 2010, the prosecution filed a response to grounds (A) and (B) of that appeal.¹ Dr. Karadzic now replies.²

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

2. The prosecution goes through contortions to justify the Trial Chamber's failure to follow the clear direction of the Appeals Chamber in the *Seselj* decision 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 Seselj refuse to cooperate in selecting counsel from the list, the Registry may choose counsel at its discretion."³

3. The prosecution first claims that *Seselj* should be limited to its facts because the procedural history of the case was "complex" and the background could not be "ignored" in reaching the decision.⁴ Such claims can be made about many decisions of the Appeals Chamber, which frequently deals with complex factual situations with unique background.

4. That does not stop the prosecution and the Trial Chamber from seeking to apply Appeals Chamber decisions in such cases as precedent. For example, the *Milosevic* case presented a complex situation for the Appeals Chamber and contained a unique background of health problems, alleged obstruction, and reluctance of *amicus curiae* to be imposed as counsel. That did not prevent the Trial Chamber from seeking to use the Appeals Chamber decision on imposition of counsel as precedent in this case.⁵

5. Therefore, it is not convincing when the prosecution urges the Appeals Chamber to forgive the Trial Chamber for failing to follow its decisions because the facts are complex and the background cannot be ignored.

¹ *Prosecution's Response to Karadzic's Appeal from Decision on Motion to Vacate Appointment of Richard Harvey*

² Dr. Karadzic will file a reply to submissions by the Registrar within 4 days of their filing. However, he replies to the prosecution's response at this time to respect the applicable time limits.

³ *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

⁴ *Response* at para. 16

⁵ See *Impugned Decision* at para. 38

6. The prosecution next argues that the Appeals Chamber granted Seselj a right he was not entitled to, and therefore, it need not grant that right to Dr. Karadzic.⁶ This reasoning reduces the Appeals Chamber decision in *Seselj* to a mere whim. The Appeals Chamber interprets the Statute and Rules and applies them as written; it does not create new rights not found in the Statute or Rules. The prosecution's argument denigrates the Appeals Chamber decision as capricious.

7. Even if the right to choose standby counsel was a whim, it would be grossly unfair to grant it to Seselj and not to Dr. Karadzic. Therefore, the prosecution's argument that the Trial Chamber need not have followed the Appeals Chamber decision because it granted more to Seselj than he was entitled is without merit.

8. The prosecution disputes that the effect of granting the right to choose standby counsel to Seselj and denying it to Dr. Karadzic would be to reward obstruction and penalize cooperation. The Appeals Chamber itself recognized that Seselj had embarked upon a hunger strike and the end of his life was imminent at the time of the decision. If it fails to grant Dr. Karadzic the same right as Seselj to choose his standby counsel, it is sending a clear message that the only way to get that right is to go on a hunger strike.

9. The prosecution and Dr. Karadzic essentially agree as to the status of that part of the decision which directed the Trial Chamber to provide Seselj with the list of counsel and the right to choose his standby counsel.⁷ It was less than the *ratio decendi* of the core decision in the case that the Trial Chamber erred in imposing counsel, but was more than the *obiter dicta* of the decision providing some alternative language, such as "even if..." The parties disagree over whether, given this status, the Trial Chamber was obligated to follow the decision of the Appeals Chamber.

10. When the Appeals Chamber holds that an accused should be provided with a list from which to choose his standby counsel, the Trial Chamber is obligated to follow it. For example, when the Appeals Chamber held that the Trial Chamber had correctly imposed counsel in the *Milosevic* case, it went ahead and specified the modalities under which the trial should proceed.⁸ Can it be fairly said that a Trial Chamber is now free to

⁶ *Response* at para. 17

⁷ *Response* at para. 21

⁸ *Prosecutor v Milosevic*, No. IT-02-54-AR73.7, *Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Counsel* (1 November 2004)

disregard modalities such as allowing the accused to put questions to the witness before the imposed counsel that the Appeals Chamber instructed be implemented?

11. The prosecution's narrow interpretation of the binding nature of Appeals Chamber precedent would bring unwanted chaos to proceedings at the Tribunal, with each party arguing that only the core holding of an Appeals Chamber decision is required to be followed and that Appeals Chamber orders implementing its decisions can be routinely ignored. The words of Judge Shahabuddeen⁹ demonstrate that such orders must indeed be followed.

12. The Trial Chamber's failure to follow the *Seselj* decision cannot be justified by labelling it "clearly *obiter*".

13. Finally, in a creative argument that not even the Trial Chamber dared to assert, the prosecution claims that Rule 45 *ter* effectively overruled *Seselj* by failing to expressly provide for the right of an accused to choose his standby counsel.¹⁰ This is absurd, as Rule 45 *ter* simply codified existing Appeals Chamber precedent that gave the Trial Chamber the right to impose counsel on an accused in the interests of justice.

14. Since Rule 45 *ter* does not authorize the appointment of a standby counsel, it could not be expected to speak to the right of the accused to choose his standby counsel. Under the prosecution's reasoning, the Trial Chamber's decision to appoint a standby counsel was unauthorized, since it is not expressly provided in Rule 45 *ter*. If that is the situation, Mr. Harvey's appointment would have to be vacated in any case.

15. The prosecution's arguments for upholding the Trial Chamber's decision not to follow *Seselj* have to be relegated to the category of "nice try." However, the reality is inescapable that the Trial Chamber's failure to follow the Appeals Chamber's decision in *Seselj* was unjustified, and that the Impugned Decision must be reversed.

⁹ *Id.* at para. 26 (separate opinion Judge Shahabuddeen).

¹⁰ *Response* at para. 24-26

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

16. The prosecution's efforts to support the Trial Chamber's conclusion that Article 21(4) does not apply are equally creative and unavailing.

17. First, the prosecution, without citation to any authority, takes the position that once an accused chooses self representation, he can never have the right to choose his counsel, since those rights are "in binary opposition".¹¹ Following this logic, an accused who elects self-representation, but changes his mind, has no right to choose his counsel. Such logic has never been applied to other rights found in the Statute, such as the right to be present at one's trial. Could it validly be argued that an accused who refused to appear at his trial on a certain day could never be allowed to turn up, having once chosen not to be present?

18. It is true that at this point in time, Dr. Karadzic continues to represent himself. But, 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.

19. The only purpose of appointing a standby counsel is to put the Trial Chamber in a position to resume the trial if it decides to revoke the accused's right to self representation. If an accused's right to choose exists only at the moment the standby counsel becomes the imposed counsel, the very purpose of appointing standby counsel is defeated. The accused will choose another counsel, who will need time to prepare, the trial will be again delayed, and the money spent on standby counsel will be wasted.

20. 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

¹¹ *Response* at para. 9

did not explicitly refer to Article 21(4), there is no other provision in the Statute or Rules which is applicable.

21. The prosecution's reference to Rule 45 *ter*¹² is once again unavailing. As stated above, that Rule was enacted to codify existing jurisprudence on the right of a Trial Chamber to impose counsel. It makes no reference to the modalities of imposition of counsel. There is no indication that it was intended to change existing practice. Nor could the enactment of a rule abrogate a right under the Statute.

22. As a fall-back position, the prosecution contends that the Registrar did give Dr. Karadzic a choice and therefore complied with the Statute.¹³ However, the Registrar's manipulation of the list of counsel presented no choice at all, only five lawyers from NATO countries whose principal experience at this Tribunal was in representing KLA members. By disqualifying all lawyers from Bosnia and Serbia, and Dr. Karadzic's legal advisor, with bogus criteria, the Registrar cannot be said to have complied with the Statute.

23. The right to choose one's counsel is not absolute, but any infringements on that right must comply with the proportionality principle.¹⁴ By refusing to provide Dr. Karadzic with the list of counsel, and by erroneously limiting the pool of candidates to five lawyers from NATO countries, the Registrar restricted the right to choose a counsel to a degree which was unwarranted and disproportionate. Dr. Karadzic is unaware of a single case at the ICTY or ICTR, and the prosecution has cited none, where an accused was prevented from even nominating a choice of counsel.

24. 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.

Conclusion

25. There is no logical reason why Dr. Karadzic should not have been provided with the list of counsel and the opportunity to nominate a candidate of his own choosing. The Appeals Chamber had specifically mandated this procedure in *Seselj*, and it is consistent with the rights guaranteed to an accused under Article 21(4).

¹² *Response* at para. 12

¹³ *Response* at para. 14

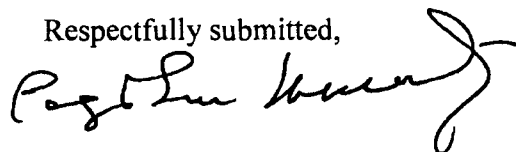
¹⁴ *Prosecutor v Milosevic*, No. IT-02-54-AR73.7, *Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Counsel* (1 November 2004) at para. 17

26. With all its legal gymnastics, the prosecution's response fails to answer this basic point. If Dr. Karadzic had nominated a counsel with a legitimate impediment to appointment, the Registrar would have clearly been justified in refusing to appoint that person as standby counsel. But there is no justification for refusing to provide him with the list in the first place, given the Appeals Chamber decision in *Seselj* and the provisions of Article 21(4).

27. The decision and the Article are clear. The Registrar's failure to follow them should be rejected.

Word count: 2075

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Radovan Karadzic', with a stylized flourish at the end.

Radovan Karadzic