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CASE/AFFAIRE NO IT-95-5/18-T (R. KARADŽIĆ) **DATE** 18 December 2009

FROM/DE RAM DORAISWAMY, COURT OFFICER

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<input type="checkbox"/> Trial Chamber I/ Chambre de 1ère instance I	<input type="checkbox"/> Chief of Investigations/ Chef des enquêtes	<input checked="" type="checkbox"/> Legal Advisers MR. G. PETRONIJEVIĆ MR. P. ROBINSON MR. M. SLADOJEVIĆ
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THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA

CASE No. IT-95-05/18-T

IN TRIAL CHAMBER No. 3

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

Registrar: Mr. John Hocking

Date: 18 December 2009

THE PROSECUTOR

v.

RADOVAN KARADZIC

Public

REPLY BRIEF: MOTION TO VACATE
APPOINTMENT OF RICHARD HARVEY

The Office of the Prosecutor:
Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused:
Radovan Karadzic

1. Having been granted leave,¹ Dr. Radovan Karadzic now replies to the Registrar's Submission Pursuant to Rule 33(B) Regarding Radovan Karadzic's Motion to Vacate Appointment of Richard Harvey (14 December 2009).

Violation of Appeals Chamber precedent

2. In *Seselj*, the Appeals Chamber held 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."²

3. The Registrar has conceded that he deliberately did not follow the dictates of the Appeals Chamber. He refused to provide the Rule 44 list to Dr. Karadzic, even in the face of a specific written request for that list by Dr. Karadzic.³

4. The Appeals Chamber was undoubtedly aware when it decided the *Seselj* case that the Rule 44 list contained names of persons who may (1) decline the position of a standby counsel; (2) have represented clients in related cases before the Tribunal and therefore have a potential conflict of interest; (3) have no experience before the Tribunal; (4) be unavailable due to scheduling conflicts; (5) reside on a different continent; (6) have health problems or "conduct" issues in the eyes of the Registrar. Nevertheless, it held that the accused "should be permitted to select standby counsel from that list."

5. Had the Appeals Chamber believed that it was appropriate for the Registrar to create his own special list by pre-screening persons on the Rule 44 list, it would have said so and decided upon a different procedure. The Registrar has not and cannot point to anything in the *Seselj* decision or any other jurisprudence, or section of a directive, rule, or statute, or even previous practice that justified the course of action he took in this case.

6. Therefore, the Registrar erred in refusing to provide the Rule 44 list to Dr. Karadzic. His decision can and should be reversed on that basis alone.

¹ *Decision on the Accused's Motion for Leave to Reply: Motion to Vacate Appointment of Richard Harvey* (17 December 2009)

² *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

³ See Annex "A" to *Motion to Vacate Assignment of Richard Harvey* (4 December 2009)

Denial of Right of Review

7. By refusing to provide the Rule 44 list of counsel to Dr. Karadzic and to allow him to nominate a standby counsel from the list, the Registrar precluded review of any decision he might make to reject that choice on grounds of conflict of interest, among other reasons.

8. The Registrar's decision that legal associate Marko Sladojevic had a conflict of interest which precluded his assignment to Dr. Karadzic's team by virtue of his work on two cases closely related to this case has already been reversed by the Trial Chamber.⁴ Other Trial Chambers have also reversed the Registrar's decision denying the accused his choice of counsel.⁵

9. Therefore, the Registrar's refusal to allow Dr. Karadzic to choose a counsel from the Rule 44 list, subject to the Registry's later determination as to whether to appoint that person, violated Dr. Karadzic's right to seek review of the Registry's decision.

Misapplication of Code of Conduct

10. 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 indictment.⁶ 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".

11. 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 *Kvočka 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, Judge Howard Morrison, who represented Dragan Nikolic on events in Suisca

⁴ *Decision on Accused's Request for Judicial Review of the Registry Decision on the Assignment of Marko Sladojevic as Legal Associate* (20 April 2009)

⁵ as *Prosecutor v. Popovic et al*, IT-05-88-PT, *Decision on Appointment of Co-Counsel for Radivoje Miletic* (28 September 2005) at para. 21

⁶ *Registry submission* at para. 47

camp—part of the indictment in this case—would also automatically have a conflict of interest.

12. In addition, Article 14(E) contemplates that even where the interests may be said to be materially adverse, the situation might be cured by consent of both clients. By pre-emptively 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.

13. The Registrar also applied the conflict of interest provision inconsistently, offering Dr. Karadzic the ability to choose American attorney Coleen Rohan, who had represented Milorad Trbic in the *Popovic et al* case involving the Srebrenica events, 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.

14. 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.

15. 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 who he could trust.

Imposition of Fictitious “Impediments”

16. The Registrar’s decision to exclude Serbian and other lawyers for other reasons is nothing short of astounding. He points to no provision in the *Directive on Assignment of Counsel* or any other instrument or judicial decision which gave him the right to strike from the list lawyers who were from a different continent, who had little or no Tribunal experience, or whose conduct displeased him.

17. By imposing a “same continent” rule, the Registrar 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. 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. Finally, 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.

18. The Registrar also manipulated the definition of “availability” to exclude a Serbian lawyer such as Aleksander Aleksic, who serves as co-counsel in the *Pavkovic* appeal, while offering Dr. Karadzic the opportunity to choose German Lawyer Jens Diekmann, who serves as co-counsel in the *Sredoe Lukic* appeal. Both cases are in exactly the same posture—awaiting the filing of a reply brief by the accused.

19. By creating unauthorized, unprecedented, and straw “impediments” to assignment, the Registrar not only violated the Statute, *Seselj* decision, Rules of Procedure and Evidence, Code of Conduct, and his own *Directive*, but he ignored those same impediments when qualifying his favorites for the same reasons as disqualifying others.

Multiple Simultaneous Representation of Two Accused

20. The Registrar also ignored Article 16(G) of the directive which requires the consent of both clients in the case of simultaneous representation of more than one accused at the ICTY. His claims that the *Directive* does not apply to assignment of counsel to an unwilling accused are baseless,⁷ and belied by his own use of Article 16(G) to obtain consent from Mr. Harvey’s other client.

21. The Registrar’s decision to pick and choose which sections of the *Directive* to follow and which to ignore so as to manipulate the selection process is simply without justification. This is particularly so where two other candidates offered to Dr. Karadzic—Rodney Dixon and Stephen Powles—could have been assigned without violating Article 16(G).

22. The Registrar also misapprehends Article 16(G) as a conflict of interest provision. It is not. It is a conflict of time or loyalty provision. An accused may believe that a counsel simultaneously representing another accused could not have enough time to devote to his case, or could have divided loyalties because the other accused comes

⁷ See, for example, Article 12 (D) where the Registrar is authorized to assign a counsel to an accused who refuses to nominate one.

from a different warring party. In such case, Article 16(G) prohibits the assignment regardless of whether there is any actual conflict of interest.

23. The Registrar laid waste to that provision and its purpose by appointing Richard Harvey despite the lack of consent of Dr. Karadzic.

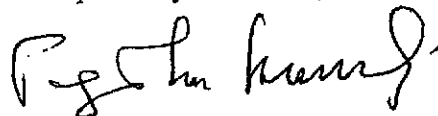
Conclusion

24. It can safely be concluded that the Registrar's action flunks each part of the *Kvocka* test for review:⁸ (1) he 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; (2) he failed to observe basic rules of procedural fairness by refusing access to the Rule 44 list and disqualifying potential counsel arbitrarily; (3) he failed to consider relevant material—the accused's choice of counsel—in making the Impugned Decision; and (4) he reached 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.

25. Dr. Karadzic remains willing to promptly select a standby counsel. The Trial Chamber should vacate the appointment of Richard Harvey forthwith and order the Registrar to do what he was obligated to do in the first place—provide Dr. Karadzic with the Rule 44 list so that he may make his selection.

Word count: 1834

Respectfully submitted,



Radovan Karadzic

⁸ *Prosecutor v Kvocka et al*, No. IT-98-30/1-A, *Decision on Review of Registrar's Decision to Withdraw Legal Aid from Zoran Zigic* (7 February 2003) at para. 13