



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: 12 February 2010
Original: English

IN THE APPEALS CHAMBER

Before: Judge Theodor Meron, Presiding
Judge Mehmet Güney
Judge Fausto Pocar
Judge Liu Daqun
Judge Andréia Vaz

Registrar: Mr. John Hocking

Decision: 12 February 2010

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON RADOVAN 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, *pro se*

1. The Appeals 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 (“Appeals Chamber” and “Tribunal”, respectively) is seized of the “Appeal from Decision on Motion to Vacate Appointment of Richard Harvey” (“Appeal”), filed by Radovan Karadžić (“Karadžić”) on 19 January 2010. The Office of the Prosecutor (“Prosecution”) filed its response on 29 January 2010¹ and Karadžić replied on 1 February 2010.² The Registrar filed his “Registrar’s Submission Pursuant to Rule 33 (B) Regarding Radovan Karadžić’s Appeal from Decision on Motion to Vacate Appointment of Richard Harvey” (“Registrar’s Response”) on 4 February 2010, and Karadžić filed his second reply on 8 February 2010.³

BACKGROUND

2. Karadžić’s arrest was announced by Serbian authorities on 21 July 2008⁴ pursuant to an indictment filed on 24 May 2000.⁵ On 30 July 2008, he was transferred to the custody of the Tribunal and made his initial appearance the following day.⁶ At a further appearance on 29 August 2008, pleas of not guilty were entered on his behalf.⁷ Karadžić stands accused of genocide, crimes against humanity and violations of the laws or customs of war.⁸

3. At a status conference on 17 September 2008, Karadžić elected to conduct his own defence rather than accept representation by counsel.⁹ In order to assist him in this task, the Registry has assigned a number of paid legal assistants.¹⁰

4. Karadžić’s trial proceedings were scheduled to begin on 26 October 2009 before Trial Chamber III (“Trial Chamber”).¹¹ However, on the opening day of trial, Karadžić chose not to

¹ Prosecution’s Response to Karadžić’s Appeal from Decision on Motion to Vacate Appointment of Richard Harvey, 29 January 2010 (“Response”).

² Reply Brief #1: Appeal from Decision on Motion to Vacate Appointment of Richard Harvey, 1 February 2010 (“Reply”).

³ Reply Brief #2: Appeal from Decision on Motion to Vacate Appointment of Richard Harvey, 8 February 2010 (“Second Reply”).

⁴ Initial Appearance, T. 3, 31 July 2008.

⁵ *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-I, Amended Indictment, 24 May 2000. A further amended version of the Indictment was filed on 18 February 2009, and a Third Amended Indictment was filed on 27 February 2009. *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Second Amended Indictment, 18 February 2009. *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Third Amended Indictment, 27 February 2009 (“Third Amended Indictment”). Karadžić was initially indicted on 24 July 1995. *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5-I, Indictment, 24 July 1995.

⁶ Initial Appearance, T. 1-3, 31 July 2008.

⁷ Further Initial Appearance, T. 29 August 2008, pp. 32-33. Pleas of not guilty were entered with regard to the Third Amended Indictment on 3 March 2009. Further Initial Appearance, T. 132-134, 3 March 2009.

⁸ Third Amended Indictment, p. 1.

⁹ Status Conference, T. 43, 17 September 2008.

¹⁰ Status Conference, T. 455, 8 September 2009.

¹¹ *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Scheduling Order for the Commencement of Trial, 14 October 2009, p. 3.

attend the proceedings, contending that he was not adequately prepared.¹² Despite repeated warnings by the Trial Chamber that failure to attend the trial proceedings might result in the curtailment of his right to self-representation, Karadžić continued to absent himself from the proceedings.¹³

5. On 5 November 2009, after issuing him with four specific warnings, the Trial Chamber found that Karadžić had “substantially and persistently obstructed the proper and expeditious conduct of his trial by refusing to attend the proceedings”.¹⁴ Accordingly, the Trial Chamber, citing Article 20(1) of the Statute of the Tribunal (“Statute”) and Rule 54 of the Rules of Procedure and Evidence (“Rules”), instructed the Registrar to appoint standby counsel, and adjourned the proceedings until 1 March 2010 to provide the appointed standby counsel adequate time to prepare.¹⁵

6. The Registrar complied with the Trial Chamber’s instructions and on 19 November 2009 appointed Richard Harvey (“Harvey”) as “counsel to prepare to represent the interests of the Accused at trial”.¹⁶ In selecting Harvey, the Registrar considered a number of factors, including: (i) Articles 20 and 21 of the Statute and Articles 14, 16 and 23 of the Directive on the Assignment of Defence Counsel (“Directive”);¹⁷ (ii) the preferences of Karadžić as solicited in a meeting where the Registrar informed him of the practical consequences of the Decision on Appointment of Counsel; (iii) Karadžić’s request to meet with eligible counsel that were on the list provided to him; and (iv) Karadžić’s failure to indicate any preferences among the eligible counsel.¹⁸ The Registrar also noted that although Harvey formerly represented Haradin Bala and is currently representing Lahi Brahimaj, neither representation posed a conflict of interest to his engagement as counsel for Karadžić.¹⁹

7. On 4 December 2009, Karadžić filed a motion in the Trial Chamber challenging the Registrar’s procedure in selecting Harvey as standby counsel.²⁰ Karadžić argued, *inter alia*, that the Registrar failed to comply with: (i) Article 21(4)(b) and (d) of the Statute; (ii) the decision of the

¹² See *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Appointment of Counsel and Order on Further Trial Proceedings, 5 November 2009 (“Decision on Appointment of Counsel”), para. 7, quoting T. 502, 26 October 2009.

¹³ Decision on Appointment of Counsel, paras 7-11.

¹⁴ *Id.*, para. 21.

¹⁵ *Id.*, paras 25, 28.

¹⁶ *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision by the Registrar, 19 November 2009 (“Registrar’s Decision”), p. 3.

¹⁷ IT/73/Rev. 11, 11 July 2006.

¹⁸ Registrar’s Decision, pp. 1-2.

¹⁹ *Id.*, pp. 2-3.

²⁰ See *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Motion to Vacate Appointment of Richard Harvey, 4 December 2009 (“Motion to Vacate”).

Appeals Chamber in the *Šešelj* case relating to the appointment of standby counsel;²¹ and (iii) Articles 11(D) and 16(G) of the Directive.²² The Trial Chamber found that Article 21(4)(b) and (d) of the Statute was inapplicable to Karadžić, noting that an accused could not both exercise his right to self-representation and concurrently demand that the Registrar allow him to have his choice of appointed counsel.²³ Further, the Trial Chamber found that Article 11 of the Directive only applies to situations where an accused wishes to have counsel assigned to him, or where he has failed to take any action with respect to his representation.²⁴ The Trial Chamber also found that Article 16(G)(i) of the Directive only applies to indigent accused who wish to have counsel appointed to represent them, and not to an obstructive accused.²⁵ The Trial Chamber distinguished the *Šešelj* Decision on its facts, and found that its instruction that Vojislav Šešelj (“Šešelj”) be allowed to select a standby counsel from a “Rule 44 list” was inapplicable to the *Karadžić* case.²⁶ Finally, the Trial Chamber reviewed the Registrar’s exercise of his discretion in choosing Harvey as standby counsel, and found no error.²⁷

8. Karadžić filed his application for certification to appeal the Impugned Decision on 30 December 2009,²⁸ and the Trial Chamber granted certification on 13 January 2010.²⁹

STANDARD OF REVIEW

9. The Appeals Chamber recalls that Trial Chamber decisions reviewing administrative decisions relate to the general conduct of trial proceedings,³⁰ and as such are matters that fall within the discretion of the Trial Chamber.³¹ In order to successfully challenge a discretionary decision, a party must demonstrate that the Trial Chamber has committed a “discernible error” resulting in

²¹ *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 (“*Šešelj* Decision”).

²² See Motion to Vacate, paras 6-16.

²³ *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on the Accused’s Motion to Vacate Appointment of Richard Harvey, 23 December 2009 (“Impugned Decision”), para. 26.

²⁴ *Id.*, para. 29.

²⁵ *Id.*, paras 33-34.

²⁶ *Id.*, paras 36-39.

²⁷ *Id.*, paras 40-47.

²⁸ *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Application for Certification to Appeal Decision on Motion to Vacate Appointment of Richard Harvey, 30 December 2009.

²⁹ *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Accused’s Application for Certification to Appeal the Trial Chamber’s Decision on Motion to Vacate Appointment of Richard Harvey, 13 January 2010, p. 5.

³⁰ See *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-AR73.2, Decision on Interlocutory Appeal of the Trial Chamber’s Decision on Adequate Facilities, 7 May 2009 (“*Karadžić* Facilities Decision”), para. 11, citing *Prosecutor v. Milan Milutinović et al.*, Case No. IT-99-37-AR73.2, Decision on Interlocutory Appeal on Motion for Additional Funds, 13 November 2003 (“*Milutinović* Decision”), paras 21, 24-26.

³¹ See *Karadžić* Facilities Decision, para. 11. See also *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR73.4, Decision on Prosecution Appeal Concerning the Trial Chamber’s Ruling Reducing Time for the Prosecution Case, 6 February 2007 (“*Prlić* Decision”), para. 8; *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 Defence Counsel, 1 November 2004 (“*Milošević* Decision”), para. 9.

prejudice to that party.³² The Appeals Chamber will only overturn a Trial Chamber's discretionary decision where it is found to be: (i) based on an incorrect interpretation of governing law; (ii) based on a patently incorrect conclusion of fact; or (iii) so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion.³³

DISCUSSION

A. Arguments of the parties

10. Karadžić grounds his claim that the Trial Chamber erred in rendering the Impugned Decision on three central issues: (i) the texts of the Statute and the Directive; (ii) the holding of the *Šešelj* Decision; and (iii) the allegedly arbitrary and erroneous actions of the Registrar in selecting standby counsel.³⁴ With respect to the Statute, Karadžić maintains that the Trial Chamber erred in finding that, under Article 21(4) of the Statute, he was not entitled to both retain his right to self-representation and choose standby counsel at the same time. He asserts that when and if counsel are imposed on him, he will have effectively ceased to be self-represented, and thus will not concurrently exercise two sets of rights.³⁵ Karadžić posits that the right to choose counsel under Article 21(4) of the Statute applies irrespective of the circumstances under which counsel are selected.³⁶

11. Karadžić further contends that the Trial Chamber erred in finding Articles 11(D) and 16(G) of the Directive inapplicable. Karadžić maintains that, as the Directive was authored for the purpose of both “codify[ing] the Tribunal's system of assignment of counsel”³⁷ and safeguarding the rights of defendants, it applies to situations where a chamber must assign standby counsel.³⁸ More specifically, Karadžić maintains that according to Article 11(C) of the Directive, since he has “fail[ed] to obtain or request the assignment of counsel”,³⁹ the Registrar was required to assign counsel in accordance with Article 11(D) of the Directive,⁴⁰ which allows an Appellant to select from a list of available counsel meeting the requirements of Rule 45(B) of the Rules. Karadžić further maintains that Article 16(G) of the Directive's requirement that concurrent representation of two Appellants before the Tribunal only be allowed if both Appellants accede in writing should have been part of the Registrar's criteria in assigning standby counsel.⁴¹ Finally, Karadžić contends

³² *Karadžić Facilities Decision*, para. 11. *See also Prlić Decision*, para. 8.

³³ *Id.* *See also Milošević Decision*, para. 10.

³⁴ Appeal, para. 15.

³⁵ *Id.*, para. 48.

³⁶ *Id.*, para. 54.

³⁷ *Id.*, para. 62, quoting Directive, Article 1(A).

³⁸ *Id.*, paras 62-65.

³⁹ *Id.*, para. 67, quoting Directive, Article 11(C)(ii).

⁴⁰ *Id.*, paras 67-71.

⁴¹ *Id.*, paras 72, 74.

that the Trial Chamber's holding "vitiates the purpose of Article 16(G)" of the Directive by failing to safeguard the right of an accused to diligent and loyal representation by qualified counsel.⁴²

12. With regard to the *Šešelj* Decision, Karadžić maintains that "a Trial Chamber is bound by the decisions of the Appeals Chamber".⁴³ In particular, he contends that the Trial Chamber erred in classifying pertinent parts of the decision as "*obiter*", and in any event was bound by all of the decision even if relevant portions of it are *obiter*.⁴⁴ Additionally, Karadžić maintains that by not adhering to the *Šešelj* Decision, the Trial Chamber effectively privileged "disruptive accused", entitling them to choose their own standby counsel while refusing the same choice to "cooperative accused".⁴⁵

13. Finally, Karadžić asserts that the Registrar erred in pre-screening the list of available lawyers provided to him, rather than assessing any impediments to representation after Karadžić indicated his preference. Karadžić asserts that this error prevented meaningful review of the Registrar's methods.⁴⁶ In addition, Karadžić maintains that the Registrar inappropriately applied certain screening criteria, resulting in the "disqualification of all lawyers from the [Balkan] region".⁴⁷ More specifically, Karadžić asserts that the Registrar incorrectly, and/or arbitrarily applied criteria relating to conflict of interest;⁴⁸ scheduling availability;⁴⁹ geographic proximity;⁵⁰ experience;⁵¹ and misconduct.⁵²

14. The Prosecution responds that the Impugned Decision correctly interpreted both the Statute and the Rules, as well as the Appeals Chamber's jurisprudence concerning standby counsel.⁵³ More specifically, the Prosecution contends that Article 21(4)(d) of the Statute is written in the disjunctive, providing the accused with the minimum guarantee of being able "to defend himself in person *or* through legal assistance of his own choosing".⁵⁴ It reasons that since Karadžić elected to defend himself in person from the beginning of the trial, and since he continues to do so, the minimum guarantees of Article 21(4)(d) of the Statute regarding counsel of his own choosing do

⁴² *Id.*, para. 76.

⁴³ *Id.*, para. 32 and fn. 32, citing *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-A, Judgement, 24 March 2000 ("*Aleksovski* Appeal Judgement"), paras 112-113.

⁴⁴ Appeal, paras 34-37.

⁴⁵ *Id.*, para. 41. See also *id.*, paras 39-40, 42-44.

⁴⁶ *Id.*, paras 81-84.

⁴⁷ *Id.*, paras 84. See also *id.*, paras 85-104.

⁴⁸ *Id.*, paras 85-96.

⁴⁹ *Id.*, paras 97-98.

⁵⁰ *Id.*, para. 101.

⁵¹ *Id.*, para. 99.

⁵² *Id.*, para. 100.

⁵³ Response, paras 7, 16. The Prosecution limits its Response to Grounds A and B of Karadžić's Appeal, which relate to the Trial Chamber's interpretation of the Statute and Rules, as well as its interpretation of the relevant jurisprudence, concluding "as the Registrar is in the best position to address issues related to the exercise of his own discretion", the Prosecution does not respond to Karadžić's contentions concerning the application of the Directive and the procedure undertaken by the Registrar. *Id.*, para. 1.

not apply.⁵⁵ The Prosecution maintains that any choices regarding standby counsel allowed to accused who are self-represented are provided on a discretionary basis, rather than as of right.⁵⁶

15. The Prosecution also contends that further misconduct by Karadžić resulting in standby counsel being assigned should be qualified as “an imposed limitation of [his] right to self-represent” rather than a decision to forgo self-representation and opt instead for representation by counsel pursuant to Article 21(4)(d) of the Statute.⁵⁷ Quoting the Decision on Appointment of Counsel, and its reference to Article 20(1) of the Statute and Rule 54 of the Rules, as well as the differences between Rules 45 and 45*ter* of the Rules, the Prosecution concludes that appointment of standby counsel does not implicate the procedures outlined in the Directive or the rights set forth in Article 21(4)(d) of the Statute.⁵⁸ It also maintains that, in any event, the Registrar’s actions effectively met the requirements of Article 21(4)(d) of the Statute.⁵⁹

16. The Prosecution asserts that the *Šešelj* Decision does not set a precedent requiring that Karadžić be provided the right to choose standby counsel.⁶⁰ Instead, the Prosecution maintains that the *Šešelj* Decision’s instruction that “the Rule 44 list of Counsel should be provided to Šešelj and he should be permitted to select standby counsel from that list” was “an example of a chamber providing an accused with more than the required minimum guarantees provided for in Article 21(4) [of the Statute]”.⁶¹ The Prosecution contends that the instructions concerning the process for selecting standby counsel for Šešelj were *obiter dicta*, as they were “a statement regarding a related procedural matter that would follow the Trial Chamber’s order assigning counsel, should such an order” become necessary.⁶² The Prosecution also maintains that limiting the *Šešelj* Decision to its facts would not reward obstruction and penalise cooperation.⁶³

17. Lastly, the Prosecution asserts that even if the *Šešelj* Decision’s instructions on assigning counsel were binding, there now exist “cogent reasons in the interests of justice” for the Appeals Chamber to depart from that precedent.⁶⁴ Specifically, it notes that Rule 45*ter* of the Rules now governs the assignment of counsel to represent the interests of the accused when a self-represented accused obstructs proceedings, and that Rule 45*ter* of the Rules does not include the requirement of Rule 45 of the Rules that the procedure of the Directive be used by the Registrar in the assignment

⁵⁴ *Id.*, para. 7, quoting Article 21(4)(d) of the Statute.

⁵⁵ *Id.*, paras 8-9.

⁵⁶ *Id.*, para. 10.

⁵⁷ *Id.*, para. 11, citing *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-A, Decision on Krajišnik Request and on Prosecution Motion, 11 September 2007 (“*Krajišnik Decision*”), fn. 100 (internal citations omitted).

⁵⁸ Response, para. 12.

⁵⁹ *Id.*, para. 15.

⁶⁰ *Id.*, para. 16.

⁶¹ *Id.*, para. 17, quoting *Šešelj* Decision, para. 28.

⁶² *Id.*, para. 21.

⁶³ *Id.*, para. 18.

of counsel.⁶⁵ Noting further that the *Šešelj* Decision predates Rule 45*ter* of the Rules and thus that the Chamber could not have considered it when determining that Šešelj should be provided with a list of available counsel,⁶⁶ the Prosecution reasons that the enactment of Rule 45*ter* of the Rules provides cogent reasons in the interests of justice for departing from any precedent regarding selection of standby counsel from a list that may have been created by the *Šešelj* Decision.⁶⁷

18. The Registrar submits, as a preliminary matter, that “whether a judicial decision on review can be subject to appellate scrutiny is not free of doubt”.⁶⁸ He contends that the Appeals Chamber is not necessarily bound to review the merits of Karadžić’s appeal if it decides that to do so would amount to an impermissible second review of an administrative decision.⁶⁹ Moreover, the Registrar submits that many of Karadžić’s contentions on appeal merely repeat arguments he made in his original Motion to Vacate, and thus constitute an attempt to seek “a *de novo* review of the decision of the Trial Chamber”.⁷⁰ Accordingly, he submits that “the Appeal should be dismissed on this ground alone” as a *de novo* review would undermine the standard of review of an administrative decision set out by the Appeals Chamber in the *Kvočka et al.* Appeal Decision.⁷¹

19. The Registrar further submits that the Directive is inapplicable to his selection of standby counsel with regard to Karadžić.⁷² He notes that the Trial Chamber’s order to select standby counsel was made pursuant to Rule 54 of the Rules, while the Directive is only applicable to assignments of counsel pursuant to Rule 45 of the Rules.⁷³ Additionally, he underscores that the purpose of the Directive is “to ensure that an accused’s right to choose counsel pursuant to Article 21(4)(d) of the Statute is implemented effectively”, and that as Karadžić “has opted not to make use of his right to have counsel assigned”, it would be unreasonable to apply the Directive in full.⁷⁴ The Registrar further maintains that the Trial Chamber correctly concluded that he appropriately acted within his discretion in referencing the general principles of the Directive in the absence of explicit procedural guidelines for the selection of standby counsel.⁷⁵

⁶⁴ *Id.*, para. 23, citing *Aleksovski* Appeal Judgement, para. 107.

⁶⁵ *Id.*

⁶⁶ *Id.*, paras 24-26.

⁶⁷ *Id.*, paras 26-27.

⁶⁸ Registrar’s Response, para. 9.

⁶⁹ *Id.*

⁷⁰ *Id.*, para. 13.

⁷¹ *Id.* (discussing *Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30/1-A, Decision on Review of Registrar’s Decision to Withdraw Legal Aid from Zoran Žigić, 7 February 2003 (“*Kvočka et al.* Appeal Decision”), para. 13).

⁷² Registrar’s Response, paras 18-21.

⁷³ *Id.*, para. 18.

⁷⁴ *Id.*

⁷⁵ *Id.*, paras 18, 20, 22.

20. The Registrar asserts that the Trial Chamber correctly upheld his specific exercise of discretion in selecting counsel for this case.⁷⁶ He contends that the Trial Chamber correctly concluded that he acted appropriately beyond the minimum legally required in attempting to accommodate Karadžić's preferences,⁷⁷ and maintains that his pre-screening of various counsel prior to allowing Karadžić to indicate his preferences was undertaken in a non-arbitrary manner in accordance with the appropriate criteria and procedures.⁷⁸

21. Karadžić replies that the Prosecution is mistaken in contending that Article 21(4) of the Statute grants the right to self-represent or to be represented by counsel of one's own choosing "in binary opposition".⁷⁹ Karadžić maintains that this logic would mean that a self-represented accused could never change his mind and be represented by counsel of his own choosing,⁸⁰ and notes that there will never be a time when he concurrently exercises his right to self-representation and his right to be represented by counsel of his own choosing.⁸¹ Karadžić also reiterates that the Registrar's pre-screening of potential counsel was not consonant with the protections of the Statute.⁸²

22. Karadžić also contests the Prosecution's characterization of the *Šešelj* Decision as inapplicable to his case.⁸³ He reiterates his claim that the complex factual background of the *Šešelj* Decision provides no reason for departing from the approaches it adopts.⁸⁴ Further, he restates that the *Šešelj* Decision created a broader right to select standby counsel than was afforded to him, and disputes the Prosecution's claim that this was a right to which he was not entitled.⁸⁵ Even if the *Šešelj* Decision in fact did not establish such a right, Karadžić contends that it would be "grossly unfair" to provide *Šešelj* with the ability to select standby counsel while denying it to him.⁸⁶

23. Additionally, Karadžić asserts that the Prosecution's contention that Rule 45ter of the Rules "effectively overruled" the *Šešelj* Decision is incorrect.⁸⁷ Karadžić reasons that since Rule 45ter of the Rules does not explicitly authorize the appointment of standby counsel, its omission of a

⁷⁶ *Id.*, para. 22.

⁷⁷ *Id.*, para. 24.

⁷⁸ *Id.*, paras 27-30.

⁷⁹ Reply, para. 17, quoting Response, para. 9.

⁸⁰ Reply, para. 17.

⁸¹ *Id.*, para. 18.

⁸² *Id.*, para. 22.

⁸³ *Id.*, para. 3.

⁸⁴ *Id.*, paras 3-5.

⁸⁵ *Id.*, paras 6-12.

⁸⁶ *Id.*, para. 7.

⁸⁷ *Id.*, para. 13.

procedure for appointing counsel in the interests of justice is unsurprising, and should not be taken as a departure from “existing Appeals Chamber precedent”.⁸⁸

24. With regard to the Registrar’s Response, Karadžić replies that the Registrar is mistaken in asserting that the Directive does not apply to the imposition of counsel.⁸⁹ He reiterates that the Registrar failed to follow the required procedures for appointing counsel set out in Article 11(C) and (D) of the Directive,⁹⁰ and maintains that the Registrar further breached the Directive by failing to obtain his consent to Harvey’s dual representation under Article 16(G) of the Directive.⁹¹ Karadžić also repeats his contention that the Registrar erred in disqualifying a number of lawyers on the basis of conflicts of interests and Karadžić’s own perceived desires,⁹² and asserts that the Registrar’s procedure of pre-screening the list of available counsel made “a reasoned review of his decision to disqualify” various counsel impossible.⁹³ Lastly Karadžić maintains that the Registrar shows “hostility and paranoia” in opposing cooperation between standby counsel and Karadžić.⁹⁴

B. Analysis

1. Preliminary Issues

25. The Appeals Chamber notes that the Registrar’s Response questions “whether a judicial decision on review can be subject to appellate scrutiny”.⁹⁵ The Appeals Chamber underscores that in instances where this power of review has not been explicitly conferred on another organ of the Tribunal, the Appeals Chamber has exercised its authority to hear appeals of reviews of administrative decisions rendered by the Registrar.⁹⁶ Thus, in the present instance, where there is no explicit conferral of review power to another organ of the Tribunal, the Appeals Chamber has the authority to hear the Appeal.⁹⁷

⁸⁸ *Id.*, para. 13. *See also id.*, para. 14.

⁸⁹ Second Reply, para. 3.

⁹⁰ *Id.*, paras 3-6.

⁹¹ *Id.*, paras 7-8.

⁹² *Id.*, paras 10, 16.

⁹³ *Id.*, para. 12. *See also* paras 11, 13-14.

⁹⁴ *Id.*, para. 18.

⁹⁵ Registrar’s Response, para. 9.

⁹⁶ *See, e.g., Karadžić Facilities Decision*, para. 11; *Milutinović Decision*, paras 21, 24-26.

⁹⁷ The Appeals Chamber notes that a Trial Chamber does not have the power to review an administrative decision where that review function has been explicitly assigned to another organ of the Tribunal. *See Prosecutor v. Vidoje Blagojević*, IT-02-60-AR73.4, Public and Redacted Reasons for Decision on Appeal by Vidoje Blagojević to Replace his Defence Team, 7 November 2003, para. 7. Additionally, the Appeals Chamber notes the Registrar’s assertion that many of Karadžić’s arguments on appeal merely repeat arguments that were unsuccessful before the Trial Chamber. Registrar’s Response, para. 13. The Registrar’s submission in this respect misapprehends the standard of review in the current appeal, which requires an appellant to demonstrate that the Trial Chamber based its conclusions either on an error of law or a patent error of fact, or was so unfair or unreasonable as to constitute an abuse of discretion. *See supra*, para. 9. Karadžić’s submissions in his Appeal, while touching on many of the points made before the Trial Chamber, are appropriately tailored to a review of the Trial Chamber’s discretionary decision.

2. The Requirements of Article 21(4) of the Statute and of the Directive

26. The fundamental issue underlying the Appeal is the relation between Article 21(4)(d) of the Statute and the Trial Chamber's appointment of standby counsel to Karadžić. Article 21(4) of the Statute reads, in relevant part:

In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:

(d) [...] to defend himself in person or through legal assistance of his own choosing [...]

By their ordinary meaning, the rights provided for in Article 21(4)(d) of the Statute "stand in binary opposition".⁹⁸ Accordingly, Article 21(4)(d) of the Statute does not provide an accused with the minimum guarantee of *both* the right to self-represent *and* the right to counsel of his own choosing; only the right to one *or* the other. Karadžić has elected to remain self-represented⁹⁹ and thus does not enjoy any rights that are derived from choosing to be represented by legal counsel.¹⁰⁰

27. Karadžić's contention that he should be accorded the rights of those who choose to be represented by legal counsel because the Trial Chamber has signalled its intention to override his election to self-represent is unpersuasive. The jurisprudence of the Tribunal establishes that the right to self-represent is not absolute and may be subject to certain limitations.¹⁰¹ A Trial Chamber may restrict the right to self-representation in appropriate circumstances where "a defendant's self-representation is substantially and persistently obstructing the proper and expeditious conduct of his trial".¹⁰² It is under this rubric of curtailing Karadžić's right to self-representation that the Trial Chamber issued its Decision on Appointment of Counsel.¹⁰³ If the Trial Chamber ultimately decides to assign counsel to represent Karadžić's interests at trial, it will not be because the Trial Chamber is recognizing a voluntary decision on behalf of Karadžić to cease his self-representation. Instead, it will be because the Trial Chamber has found that Karadžić's persistent obstructive behaviour has made it necessary, in the interests of justice, to limit his right to self-representation by assigning counsel to represent his interests.

⁹⁸ *Krajišnik* Decision, para. 40 (internal quotation omitted). See also *Milošević* Decision, para. 11. Cf. *Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Scheduling Order for Appeals Hearing and Decision on Hassan Ngeze's Motion of 24 January 2006, 16 November 2006, p. 3 (addressing Article 20(4)(d) of the Statute of the International Criminal Tribunal for Rwanda, which tracks Article 21(4)(d) of the Statute).

⁹⁹ Karadžić was provided the opportunity to choose whether to represent himself or be represented by counsel and chose to represent himself. Status Conference, T. 43, 17 September 2008. Karadžić currently retains and is exercising his right to self-representation. See Decision on Appointment of Counsel, para. 25.

¹⁰⁰ See *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR73.6, Decision on the Interlocutory Appeal by the *Amici Curiae* Against the Trial Chamber Order Concerning the Presentation and Preparation of the Defence Case, 20 January 2004, para. 19. Rights Karadžić does not enjoy include, *inter alia*, the right to communicate with counsel of one's own choosing guaranteed under Article 21(4)(b) of the Statute.

¹⁰¹ *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-AR73.3, Decision on Appeal Against the Trial Chamber's Decision on Assignment of Counsel, 20 October 2006, para. 8, citing *Milošević* Decision, paras 12-13.

¹⁰² *Milošević* Decision, para. 13.

¹⁰³ Decision on Appointment of Counsel, paras 21, 25, 28.

28. Karadžić is also unpersuasive insofar as he maintains that the appointment of standby counsel is governed by the Directive. The text and structure of the Directive, Rules and Article 21 of the Statute confirm that the Directive does not apply to individuals who have chosen to self-represent. The Preamble of the Directive explicitly references Article 21 of the Statute, which encompasses the binary opposition of self-representation and appointment of counsel.¹⁰⁴ In addition, the Directive's text emphasizes that its focus is on the process of providing "legal assistance to indigent suspects or accused".¹⁰⁵ It also references Rule 45 of the Rules,¹⁰⁶ which again focuses on the assignment of counsel to indigent suspects and accused. Self-represented individuals, whose ability to pay for counsel is by definition irrelevant, do not fall within its compass. By contrast, assignment of counsel to self-represented individuals is addressed by Rule 45*ter* of the Rules,¹⁰⁷ which is not within the Directive's scope.¹⁰⁸

29. Insofar as the Registrar took guidance from certain provisions of the Directive, his exercise of discretion did not render the Directive's procedures binding on him with regard to the appointment of standby counsel for Karadžić.¹⁰⁹ As the Trial Chamber correctly noted, "there exists no specific set of guidelines to be followed by the Registrar" in relation to the appointment of counsel to represent the interests of an obstructive self-represented accused.¹¹⁰ Considering related legal authorities in developing a procedure to select standby counsel, where such procedures were not outlined in any binding manner *ex ante*, was well within the Registrar's discretion, and did not render those legal authorities binding. Accordingly, as the Directive was not binding on the Registrar's decision to appoint standby counsel for Karadžić, the Appeals Chamber need not address Karadžić's specific contentions regarding Articles 11(D) and 16(G) of the Directive.

3. The Šešelj Decision

30. Karadžić places significant emphasis on the Šešelj Decision's instruction that the Trial Chamber provide Šešelj with a list from which he could select his standby counsel, rather than

¹⁰⁴ Directive, p. 4. *See also supra*, para. 26.

¹⁰⁵ Directive, Article 1(A).

¹⁰⁶ *Id.*

¹⁰⁷ Rule 45*ter* of the Rules 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".

¹⁰⁸ Article 2 of the Directive defines "Counsel" as "a person representing or eligible to represent a suspect or accused pursuant to Rules 44, 45 and 45 *bis* of the Rules". Further evidence that Karadžić's situation does not fall under the purview of the Directive is found in the Decision on Appointment of Counsel. This decision to order the Registrar to appoint standby counsel was rendered not pursuant to Rule 45 of the Rules and the Directive, but instead pursuant to Rule 54 of the Rules, which allows Trial Chambers to issue various orders related to the preparation and conduct of a trial. *See* Decision on Appointment of Counsel, para. 28.

¹⁰⁹ *Cf. Krajišnik Decision*, fn. 100, *quoting Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-A, Decision on Momčilo Krajišnik's Request to Self-Represent, on Counsel's Motions in Relation to Appointment of *Amicus Curiae*, and on the Prosecution Motion of 16 February 2007, 11 May 2007, para. 18 (finding that although Krajišnik was not entitled as of right to *amicus curiae* counsel, such appointment was warranted under the circumstances).

¹¹⁰ Impugned Decision, para. 30.

impose one directly, as the Trial Chamber had chosen to do.¹¹¹ More specifically, the Appeals Chamber instructed 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 Šešelj and he should be permitted to select standby counsel from that list. Alternatively, should the full restoration of Šešelj's right to self-representation fail to curb his obstructionist behaviour, the Trial Chamber would be permitted to proceed to assign counsel to Šešelj. Again, such a decision may only be taken once Šešelj has been given a real chance to effectively exercise the right to self-representation and if the Trial Chamber feels justified in making such a decision, the Rule 44 list of Counsel should be provided to Šešelj, and he should be permitted to select counsel from that list. Should Šešelj refuse to cooperate in selecting counsel from the list, the Registry may choose counsel at its discretion.¹¹²

31. The Appeals Chamber notes that the *Šešelj* Decision was rendered in a unique factual and procedural context very different from Karadžić's. The *Šešelj* Decision explained that:

If the Appeals Chamber was to ignore the background [of the Trial Chamber decision being appealed] and apply the applicable law and the standard of review to the [Trial Chamber decision being appealed], it would find no error on the part of the Trial Chamber in ordering the imposition of assigned counsel.¹¹³

Taking into account the context of the *Šešelj* trial, the *Šešelj* Decision concluded that the provision of opportunities to participate in the selection of standby counsel beyond those required by the Rules or Article 21(4) of the Statute was necessary in order to ensure the *Šešelj* trial's fair and expeditious conduct under Article 20(1) of the Statute.¹¹⁴ The Appeals Chamber reiterates that a Chamber's context-limited decision to provide for processes beyond those guaranteed by the Statute and the Rules does not create an automatic right to these processes.¹¹⁵

32. Karadžić's situation is markedly different from that addressed by the *Šešelj* Decision. In the latter case, the Appeals Chamber was acting to ensure an orderly and careful restart of trial proceedings, after having previously found that the Trial Chamber violated Šešelj's right to self-representation guaranteed under Article 21(4)(d) of the Statute by failing to warn him that his behaviour might result in the curtailment of that right.¹¹⁶ By contrast, Karadžić has been warned on numerous occasions that his behaviour obstructs the expeditious conduct of the proceedings and that, should it continue, he risks curtailment of his right to self-representation.¹¹⁷ Given the flexibility exhibited by the Registrar in the provision of standby counsel to Karadžić, the Appeals Chamber sees no basis for requiring that he be provided with greater opportunities to select personally between individuals available to serve as standby counsel.

¹¹¹ *Šešelj* Decision, para. 3.

¹¹² *Id.*, para. 28.

¹¹³ *Id.*, para. 25 (emphasis added).

¹¹⁴ *Id.*, para. 27.

¹¹⁵ *Cf. supra*, fn. 109.

¹¹⁶ *Šešelj* Decision, paras 26, 29-30.

¹¹⁷ *See supra*, para. 5.

4. The Registrar's Selection of Standby Counsel

33. In determining whether to uphold the Registrar's decision to select standby counsel, the Trial Chamber appropriately applied the *Kvočka et al.* Appeal Decision criteria.¹¹⁸ These allow the reversal of an administrative decision only if that decision: (i) failed to comply with the relevant legal requirements; (ii) failed to observe the basic rules of natural justice and procedural fairness towards the person affected by the decision; (iii) took into account irrelevant material, or failed to take into account relevant material; or (iv) reached a conclusion which no sensible person who has properly applied his mind to the issue could reach.¹¹⁹

34. Karadžić fails to establish that the Trial Chamber inappropriately applied the *Kvočka* test. In selecting Harvey as standby counsel, the Registrar considered a number of factors, including: (i) conflicts of interest; (ii) availability for appointment as standby counsel; (iii) counsel having no reservations about being imposed; (iv) previous experience before the Tribunal; and (v) geographic proximity.¹²⁰ None of the specific examples of allegedly unfair or arbitrary reasoning Karadžić raises demonstrate that the Trial Chamber abused its discretion in finding that the Registrar appropriately exercised his discretion. More specifically, the Appeals Chamber is satisfied that the Trial Chamber acted within its discretion in concluding that the Registrar's application of pre-screening criteria neither contravened any legal requirement nor was unfair or nonsensical.¹²¹

5. Conclusion

35. The Appeals Chamber underscores that limitations on the right to self-representation are a rare occurrence, and that their details are necessarily context-specific. More particularly, the appointment of standby counsel is not subject to more formalized procedures designed to regularize the assignment of counsel to indigent suspects and accused who do not choose to self-represent. In assigning standby counsel, the Registrar or a Chamber may, but are not required to, make reference to procedures used in the assignment of counsel in other contexts. This more fluid and individualized approach to the appointment of standby counsel in cases of self-representation is amply justified by the fact that the reasons for and specific parameters of each appointment will vary considerably.

¹¹⁸ Impugned Decision, paras 17-18.

¹¹⁹ *Kvočka et al.* Appeal Decision, para. 13. In addition, the *Kvočka* test requires that the error significantly affected the Registrar's decision to the detriment of the Applicant. *Id.*, para. 14.

¹²⁰ *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Registrar's Submission Pursuant to Rule 33(B) Regarding Radovan Karadžić's Motion to Vacate Appointment of Richard Harvey, 14 December 2009, para. 46.

¹²¹ *See* Impugned Decision, para. 46.

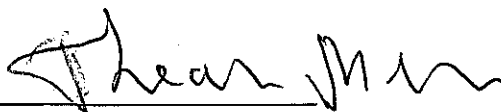
DISPOSITION

36. For the foregoing reasons, the Appeals Chamber **DISMISSES** the Appeal in its entirety.

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

Done this 12th day of February 2010

At The Hague, The Netherlands.



Judge Theodor Meron, Presiding

[Seal of the Tribunal]