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**UNITED
NATIONS**



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: IT-03-67-AR73.4

Date: 8 December 2006

Original: English

BEFORE THE APPEALS CHAMBER

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

Registrar: Mr. Hans Holthuis

Decision of: 8 December 2006

PROSECUTOR

v.

VOJISLAV ŠEŠELJ

**DECISION ON APPEAL AGAINST THE TRIAL CHAMBER'S DECISION (NO.2) ON
ASSIGNMENT OF COUNSEL**

Office of the Prosecutor

Ms. Hildegard Uertz-Retzlaff
Mr. Daniel Saxon
Mr. Ulrich Müssemer
Ms. Melissa Pack

Assigned Counsel

Mr. David Hooper
Mr. Andreas O'Shea

The Accused

Mr. Vojislav Šešelj

Independent Counsel

Mr. Tjarda Van der Spoel

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1. The Appeals Chamber of the International Criminal 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 with an appeal filed by Mr. Vojislav Šešelj (“Šešelj”) on 7 December 2006, Mr. Vojislav Šešelj (“Šešelj”) filed an appeal before the Appeals Chamber¹ against the second decision of the Trial Chamber to assign Counsel.² The Impugned Decision was certified for appeal by the Trial Chamber on 5 December 2006.³

Background

2. To understand fully the nature of this appeal, it is necessary for the Appeals Chamber to revisit the background to the Impugned Decision. On 20 October 2006, the Appeals Chamber issued a decision⁴ overturning a decision of the Trial Chamber of 21 August 2006, by which it assigned Counsel to represent Šešelj.⁵ The decision of the Trial Chamber was based on its finding that “[t]he conduct of the Accused as a whole – obstructionist and disruptive behaviour; deliberate disrespect for the rules; intimidation of, and slanderous comments about, witnesses” provided “a strong indication that his self-representation may substantially and persistently obstruct the proper and expeditious conduct of a fair trial”.⁶ The Appeals Chamber overturned the 21 August Decision, finding that the Trial Chamber failed to issue a specific warning to Šešelj before assigning him counsel. However, it explicitly warned Šešelj “that, should his self-representation subsequent to this Decision substantially obstruct the proper and expeditious proceedings in his case, the Trial Chamber will be justified in promptly assigning him counsel after allowing Šešelj the right to be heard with respect to his subsequent behaviour”.⁷

3. Following the Appeals Chamber Decision, on 25 October 2006, the Trial Chamber issued a decision appointing standby counsel to Šešelj and delaying the commencement of his trial scheduled to commence on 2 November 2006.⁸ In its Decision to Appoint Standby Counsel, the Trial Chamber identified the role of standby counsel to be:

¹ Submission for Motion 226, 7 December 2006 (“Appeal”).

² Reasons for Decision (No.2) on Assignment of Counsel, 27 November 2006 (“Impugned Decision”).

³ Decision on Request for Certification to Appeal Decision (No.2) on Assignment of Counsel, 5 December 2006.

⁴ Decision on Appeal Against the Trial Chamber’s Decision on Assignment of Counsel, 20 October 2006 (“Appeal Decision”).

⁵ Decision on Assignment of Counsel, 21 August 2006 (“21 August Decision”).

⁶ *Ibid.*, paras. 79.

⁷ Appeal Decision, para. 52.

⁸ Order Concerning Appointment of Standby Counsel and Delayed Commencement of Trial, 25 October 2006 (“Decision to Appoint Standby Counsel”).

- (a) to assist the Accused in the preparation and presentation of his case during the pre-trial and trial phases whenever so requested by the Accused;
- (b) to offer advice or to make suggestions to the Accused as standby counsel sees fit, in particular on evidential and procedural issues;
- (c) to address the court whenever so requested by the Accused or the Trial Chamber;
- (d) to receive copies of all court documents, filings and disclosed materials that are received by or sent to the Accused;
- (e) to be present in the courtroom during proceedings;
- (f) to be prepared to take over the conduct of the defence from the Accused and effectively bring the defence case to conclusion;
- (g) in the event of abusive conduct by the Accused, and if so ordered by the Trial Chamber, to put questions to witnesses, in particular sensitive or protected witnesses, on behalf of the Accused, without depriving the Accused of his right to control the strategy of the defence case;
- (h) to temporarily take over the conduct of the defence from the Accused should the Trial Chamber find, following a warning, that the Accused is engaged in disruptive conduct or conduct requiring his removal from the courtroom under Rule 80 (B) of the Tribunal's Rules of Procedure and Evidence;
- (i) to permanently take over the conduct of the defence from the Accused should the Trial Chamber find that the Accused's conduct is substantially obstructing the proper and expeditious proceedings, having allowed the Accused the right to be heard with respect of the conduct in question.⁹

In its Decision to Appoint Standby Counsel, the Trial Chamber also determined that a new start date for the trial would be made at the status conference scheduled to be held on 1 November 2006.¹⁰

4. At the Status Conference held on 1 November 2006, Šešelj made clear his objections to the Decision to Appoint Standby Counsel, repeatedly disrupted the proceedings, and refused to remain in court in the presence of standby counsel. Šešelj was advised by the Trial Chamber that there were legal avenues available to him to challenge its decision. Eventually, the Trial Chamber ordered the removal of Šešelj from the courtroom and instructed standby counsel to temporarily take over the conduct of the defence in accordance with subparagraph (h) of paragraph 5 of its Decision to Appoint Standby Counsel.¹¹

5. On 7 November 2006, Šešelj applied for certification to appeal the Trial Chamber's Decision to Appoint Standby Counsel.¹² In that Motion, Šešelj argued that "the issue involved has a significant impact on the fair and expeditious conduct of the proceedings, trial and the outcome of the proceedings, and a decision by the Appeals Chamber would materially advance the proceedings

⁹ Decision to Appoint Standby Counsel, para. 5.

¹⁰ *Ibid.*, para. 4.

¹¹ Status Conference, 1 November 2006, T 627-628, 633-635, 636.

¹² Motion for Certification to File an Interlocutory Appeal Against the Order of Trial Chamber I Issued on 25 October 2006, 7 November 2006 ("Motion for Certification").

and render them relatively lawful”.¹³ The Trial Chamber did not agree and refused the Motion for Certification.¹⁴

6. In refusing the Motion for Certification, the Trial Chamber claimed that its Decision to Assign Standby Counsel merely “reinstated the situation to how it was prior to the Chamber’s Decision on Assignment of Counsel of 21 August 2006, and it did not affect the Accused’s self-represented status and freedom to represent himself”.¹⁵ It reasoned that the exact role to be played by standby counsel “would, to a large extent, be for the Accused to determine” and that any assistance in “the preparation and presentation of the case, would be solely at the request of the Accused. Also, the temporary or permanent take over of the conduct of the defence by standby counsel would be as a result of the conduct of the Accused” and that “[t]he Chamber could only order standby counsel to put questions to witnesses ‘in the event of abusive conduct by the Accused’”.¹⁶ The Chamber also noted that standby counsel would only be permitted to temporarily take over the conduct of the case “if the Accused is engaging in disruptive conduct or conduct requiring his removal from the courtroom [...] and to permanently take over if the Accused’s conduct is substantially obstructing the proper and expeditious proceedings.”¹⁷ An exception to the rule that the role of standby counsel would be determined by the Accused is that standby counsel would be allowed to address the court, either upon the request of the Accused, or the Chamber. However, the Trial Chamber noted that this exception would be of “limited practical significance” and that the existence of standby counsel as defined by the Decision to Appoint Standby Counsel, “would not, in itself, affect the conduct of the proceedings”.¹⁸

7. On 8 November 2006, the Trial Chamber held a further Status Conference, in which it confirmed a finding against Šešelj that he had deliberately disclosed confidential information to a third party. Šešelj refused to accept the finding of the Trial Chamber. The Trial Chamber determined this refusal to be unacceptable and issued Šešelj a formal warning that if there was any further breach it could lead the Trial Chamber to impose Counsel upon him and take other measures to ensure the protection of witnesses.¹⁹

8. At a further Status Conference, held on 22 November 2006, Šešelj failed to attend. The Deputy Registrar informed the Trial Chamber that Šešelj felt too weak to attend the Status

¹³ Motion for Certification, p.1.

¹⁴ Decision on Application for Certification to Appeal Order of 25 October 2006, 30 November 2006 (“Certification Decision”).

¹⁵ *Ibid.*, para. 6.

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ *Ibid.*

Conference because of a decision he had taken on 11 November 2006 not to take any food or medicine.²⁰ In response, the Trial Chamber issued a warning to be delivered to Šešelj in the United Nations Detention Unit (“UNDU”) stating as follows:

The Chamber has been informed that Mr. Šešelj is on a hunger strike. The Chamber has also been informed that Mr. Šešelj felt too weak to attend the Status Conference. And on the basis of this information this Chamber received and in the absence of any direct message from the accused addressed to the Chamber, the Chamber cannot but conclude that the physical condition of Mr. Šešelj is related to his hunger strike. The Chambers consider that whether this self induced physical condition prevents Mr. Šešelj from attending today’s hearing, or whether Mr. Šešelj has wilfully decided not to attend the hearing. Mr. Šešelj’s absence, not further explained by him, constitutes disruptive conduct. The Chamber hereby warns Mr. Šešelj that his behaviour may result in the temporary takeover of the defence by stand-by counsel during today’s Status Conference, in accordance with the Chamber’s order of the 25th of October, paragraph 5(h).²¹

So that the warning could be immediately issued to Šešelj, the Trial Chamber adjourned the Status Conference while the warning was communicated to Šešelj at the UNDU.²²

9. Following the issuing of the warning to Šešelj in the UNDU, the Status Conference was resumed. The Deputy Registrar informed the Trial Chamber that he had delivered the warning of the Chamber and that Šešelj maintained his refusal to attend. In response, the Trial Chamber ordered standby counsel to temporarily take over the conduct of Šešelj’s defence in accordance with its Decision to Assign Standby Counsel, subparagraph (h) of paragraph 5.²³

10. During the Status Conference, the Trial Chamber issued a further warning to the Accused, which it directed be delivered to him via a video tape of the Status Conference proceedings. This warning was in relation to filings made by Šešelj on 6 November 2006, which were returned to him on the basis that they exceeded the word limit or failed to include a word count. These failings were in violation of a Trial Chamber decision of 19 June 2006.²⁴ The Trial Chamber warned Šešelj that “persistent non-compliance with the Chamber’s decision on word limits is a form of obstructionist conduct” and that if he continued to submit oversized filings, the Chamber may consider imposing counsel, after having given an opportunity for him to be heard.²⁵

11. Following the 22 November Status Conference, the Trial Chamber issued an invitation to Šešelj to make submissions.²⁶ In that Invitation, the Trial Chamber noted the Appeals Chamber Decision, “that persistence in his disruptive behaviour may warrant termination of his self-

¹⁹ Status Conference, 8 November 2006, Closed Session T. 766.

²⁰ Status Conference, 22 November 2006, T.777.

²¹ *Ibid.*, T.782.

²² *Ibid.*, T.783.

²³ *Ibid.*, T. 784.

²⁴ Decision on Filing of Motions, 19 June 2006.

²⁵ Status Conference, 22 November 2006, T. 804

represented status and the assignment of counsel to represent him, after he is given an opportunity to be heard” and warned Šešelj that it found his conduct to have been “substantially obstructive” and warranting the imposition of counsel. Recognising his right to be heard, the Trial Chamber invited Šešelj to make written submissions to be filed with the Registry no later than Friday, 24 November 2006 and if he wished to make further submissions, he could do so at the Pre-Trial Conference scheduled to be held on Monday, 27 November 2006.²⁷

12. Šešelj submitted no response to the Invitation of the Trial Chamber in writing, nor did he appear at the Pre-Trial Conference on 27 November 2006. After hearing the reasons for his absence from the Registry, the Trial Chamber issued an oral decision imposing counsel on Šešelj. Following that oral decision, it issued a reasoned written decision that same day, which forms the Impugned Decision for the purposes of this Appeal.

13. In the Impugned Decision, the Trial Chamber requested the Registry to appoint Mr. Tjarda Eduard van der Spoel “as independent counsel to take any necessary action in relation to an appeal.” No appeal has yet been filed by Mr. van der Spoel on behalf of Šešelj.²⁸ Rather, an Appeal has been filed by Šešelj before the Appeals Chamber on his own behalf. The Appeals Chamber does not find that there is any reason why Šešelj should not be permitted to file the Appeal despite the fact that it does not conform with the Practice Direction on filing of appeals before the Appeals Chamber.²⁹ In this instance, Šešelj has sought to appeal by filing a letter before the Appeals Chamber requesting that it take into account all arguments he has made in prior submissions filed before the Appeals Chamber, the President and the Bureau with respect to his right to self-representation and his opposition to standby counsel and counsel as forming the grounds of his appeal.³⁰

²⁶ Invitation to Accused to Make Submissions, 22 November 2006 (“Invitation”).

²⁷ *Ibid.*, p. 3.

²⁸ On 4 December 2006, Mr. van der Spoel requested certification to appeal the Trial Chamber Decision of 27 November 2006. Certification was granted by the Trial Chamber on 5 December 2006 in its “Decision on Request for Certification to Appeal Decision (No.2) on Assignment of Counsel”.

²⁹ In accordance with Paragraph 9 of the on Procedure for the Filing of Written Submissions in Appeal Proceedings Before the International Tribunal, IT/155/Rev.3, 16 September 2005 (“Practice Direction”) a certified appeal should be filed within seven days of the decision of certification so the time for the filing of an appeal by independent counsel will expire on 12 December 2006. Is the time expiration the reason or is it a question of form?

³⁰ The Appeals Chamber sought clarification from the Commanding Officer of the UNDU as to the scope of Šešelj’s appeal. It was advised upon instruction from Šešelj that he wished the Appeals Chamber to consider the arguments he made in various filings with respect to the assignment of counsel and standby counsel. In determining this appeal the Appeals Chamber will consider arguments made by Šešelj in his “Request for Certification Pursuant to Rule 73(B) to Appeal A gainst the Trial Chamber Oral Decision to Assign Counsel to the Accused, 4 December 2006; Motion to Disqualify Judges Alphonsus Orié, Patrick Robinson and Frank Höpfel from the Trial and Appeals Proceedings in the Case Against Professor Vojislav Šešelj, 5 December 2006; Request by Professor Vojislav Šešelj for Approval to File Interlocutory Appeal Against Eight Oral Decisions of Trial Chamber I of 8 November 2006, 13 November 2006; Motion for Certification to File an Interlocutory Appeal Against the Order of Trial Chamber I Issued on 25 October 2006, 13 November 2006; Appeal by Professor Vojislav Šešelj Against the Decision of the Deputy Registrar of 30 October 2006 to Assign David Hooper as Standby Defence Counsel, 3 November 2006; Initiative on the Part of Dr Vojislav Šešelj for

14. In determining that it is appropriate for the Appeals Chamber to accept Šešelj's filing of an appeal before it in this way, the Appeals Chamber recognises that there are extraordinary circumstances justifying its departure from the requirements of its own Practice Direction. Šešelj has persisted in his refusal to take food or medicine since 11 November 2006. He has also since that time refused to be medically assessed by doctors assigned to his care. The only doctors that have been able to make any assessment of Šešelj's condition could only make a rudimentary assessment. However, it is abundantly clear to the Appeals Chamber that the action taken by Šešelj is seriously damaging his health and could have grave consequences. Šešelj has made a choice to undertake this action, and he has purportedly done so because of his opposition to the decision of the Trial Chamber to impose standby counsel following the Appeal Decision. That opposition of Šešelj caused the Trial Chamber to take the further step of assigning counsel, but Šešelj's opposition leading to that decision of the Trial Chamber was based in the first instance on his strong belief that the Appeal Decision, which reinstated his right to self-representation, left no room for the imposition of standby counsel by the Trial Chamber as an immediate response to the Appeal Decision, without establishing any obstructionist behaviour on his part. Upon that basis, and in light of the fact that the Trial Chamber certified its decision to assign counsel for appeal, the Appeals Chamber will consider the Appeal on the merits.

15. The Appeals Chamber decision to do so should in no way be construed as evidence of the Appeals Chamber rewarding Šešelj's behaviour, rather it is recognising that he does have a right to appeal the Impugned Decision and that resolution of this issue is of utmost importance to Šešelj and to the interests of the Tribunal. It is also recognition of the fact that after 28 days of refusing to take food and medicine, Šešelj's condition is such that he is simply unable to do more to comply with the Practice Direction, albeit due to his own actions.

Standard of Review

16. A decision of a Trial Chamber to assign counsel is a discretionary decision of the Trial Chamber, which draws upon the Trial Chamber's familiarity with the conduct of the parties and the

Dismissal Proceedings to be Initiated by the Bureau Against Judges Alphonsus Orié, Patrick Robinson and Bakone Moloto, 4 October 2006; Appeal Against the Registrar's Decision to Assign David Hooper as Defence Counsel in the Proceedings Against Dr Vojislav Šešelj, 18 September 2006; Reply to the Prosecution's Response to Appeal Against the Trial Chamber's Decision on Assignment of Counsel, 2 October 2006; Appeal Against the Registrar's Decision to Assign David Hooper as Defence Counsel in the Proceedings Against Dr Vojislav Šešelj, 4 September 2006; Appeal Against the Trial Chamber's Decision on Assignment of Counsel, 25 August 2006.

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demands of the case.³¹ In this Appeal, 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”.³² When challenging a discretionary decision the moving party must establish that the Trial Chamber committed a “discernible error” resulting in prejudice to that party.³³ The Appeals Chamber will overturn a Trial Chamber’s exercise of its discretion where it is found to be “(1) based on an incorrect interpretation of governing law; (2) based on a patently incorrect conclusion of fact; or (3) so unfair or unreasonable as to constitute an abuse of the Trial Chamber’s discretion.”³⁴

Applicable Law

19. An accused appearing before this Tribunal is entitled to certain minimum guarantees pursuant to Article 21(4) of the Statute of the International Tribunal. Article 21(4)(d) of the Statute grants the right of an accused “to defend himself in person or through legal assistance of his own choosing” The jurisprudence of this Tribunal has interpreted this provision of Article 21 as providing an accused with “the presumptive right to self-representation”.³⁵ However, a presumptive right to self-representation does not translate into an absolute right and there are circumstances in which this right may be curtailed. Of relevance to this appeal, a Trial Chamber may place restrictions on the right of an accused to self-representation where “a defendant’s self-representation is substantially and persistently obstructing the proper and expeditious conduct of his trial”.³⁶ A Trial Chamber has the discretionary power to do so whether the conduct of the Accused is intentional or unintentional. All that matters is that the disruptive behaviour of the Accused “is substantially and persistently obstructing the proper and expeditious conduct of his trial”.³⁷

The Appeal

³¹ *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 on Defence Counsel”), para. 9.

³² *Ibid.*, para. 10 citing *Prosecutor v. Slobodan Milošević*, Case Nos. IT-99-37-AR73, IT-01-50-AR73, IT-01-51-AR73, Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder, 18 April 2002 (“*Milošević* Decision on Joinder”), para. 4.

³³ *Prosecutor v. Mico Stanišić*, Case No. IT-04-79-AR65.1, Decision on Prosecution’s Interlocutory Appeal of Mićo Stanišić’s Provisional Release, 17 October 2005 (“*Stanišić* Provisional Release Decision”), para. 6.

³⁴ *Milošević* Decision on Defence Counsel, para. 10. The Appeals Chamber will also consider whether the Trial Chamber “[gave] weight to extraneous or irrelevant considerations” or “failed to give weight or sufficient weight to relevant considerations [. . .]”. *Ibid.*, citing the *Milošević* Decision on Joinder, paras. 5-6.

³⁵ *Milošević* Decision on Defence Counsel, para. 11.

³⁶ *Ibid.*, paras. 12-13.

³⁷ *Ibid.*, para. 14 (holding that “it cannot be that the only disruption legitimately cognizable by a Trial Chamber is the intentional variety.”).

20. The Appeals Chamber has already indicated that in determining this Appeal it is relying upon submissions made by Šešelj in various filings before different bodies of this Tribunal and it has already identified what it considers to be the real issue for it to determine. That is, whether the Appeal Decision, wherein Šešelj's right to self-representation was re-instated, allowed the Trial Chamber to immediately order the assignment of standby counsel without establishing any persistent or obstructionist behaviour on his part. Šešelj's view is that it did not and it is in light of that view that Šešelj has undertaken action, which resulted in the Trial Chamber determining that it had the right to impose Counsel in the Impugned Decision. While the decision of the Trial Chamber to assign standby counsel was not certified for appeal by the Trial Chamber, the two decisions are inextricably linked.³⁸ It was because of the decision of the Trial Chamber to immediately impose standby counsel and Šešelj's inability to find an avenue to legally challenge that decision before the Trial Chamber that he was placed on a collision course with the Trial Chamber leading to the Trial Chamber's issuing of the Impugned Decision. In this respect, while the Tribunal's jurisprudence limits the Appeals Chamber to examining whether the Trial Chamber erred in issuing the Impugned Decision, such a review in this appeal would not resolve the real issue of dispute between Šešelj and the Trial Chamber. That dispute concerns the scope of the Appeal Decision reinstating Šešelj's right to self-representation.

21. The Appeal Decision reinstating Šešelj's right to self-representation addressed the argument of Acting Counsel that the Trial Chamber failed to take into account the practical difficulties of assigning counsel to represent Šešelj because Šešelj had, since the imposition of standby counsel by the Trial Chamber in its decision of 9 May 2003,³⁹ refused to communicate with standby counsel at all.⁴⁰ While the Appeals Chamber did not find that the Trial Chamber erred in not taking into account this consideration, it also found that the Trial Chamber was "undoubtedly aware that such potential problems could arise given that it knew of the history of Šešelj's objection to counsel and refusal to communicate or cooperate with Standby Counsel during the pre-trial proceedings".⁴¹ While this issue was raised by Acting Counsel before the Appeals Chamber, it was not addressed any further by the Appeals Chamber in its decision because it was not the issue before it.

22. Nonetheless, upon reflection, it would have been better if the Appeals Chamber in returning to Šešelj the right to self-representation would have made clearer what it considered that to mean

³⁸ Cf. *United States v. Philip Morris USA Inc.*, 396 F.3d 1190, 1196 (D.C. Cir. 2005) (observing that "questions logically antecedent and essential to the order under review" fall within the jurisdiction of a court of appeals in reviewing an order certified for interlocutory appeal).

³⁹ Decision on Prosecution's Motion for Order Appointing Counsel to Assist Vojislav Šešelj with his Defence, 9 May 2003.

⁴⁰ Appeal Decision, para. 44.

⁴¹ *Ibid.*, para. 45.

with respect to the discretion on the part of the Trial Chamber to immediately impose standby counsel with a right to jump in and take over the proceedings in the circumstances identified by the Trial Chamber in its Decision to Assign Standby Counsel. This is particularly so given that the Appeals Chamber was made abundantly aware of Šešelj's opposition to standby counsel during his pre-trial proceedings.

23. From the objections made by Šešelj, it is clear that in his view, the decision of the Trial Chamber to impose standby counsel was a provocative move, which he interpreted as a violation of the Appeal Decision. This was a less than ideal situation for Šešelj to take up his restored right to self-representation and placed the Trial Chamber in an untenable position. Having just had its decision on the assignment of counsel overturned on appeal the Trial Chamber viewed it as a necessary move to preserve Šešelj's right to a fair and expeditious trial in light of the history of proceedings in his case pre-trial.

24. While the Appeals Chamber has acknowledged that the Decision to Assign Standby Counsel is not the Impugned Decision before it, it must also acknowledge that its decision restoring the right of Šešelj to self-representation was not clear as to whether the restoration of that right to self-representation allowed the Trial Chamber to restore the status quo by immediately reassigning standby counsel, following the Appeal Decision without establishing any obstructionist conduct on the part of Šešelj. The Appeals Chamber notes that standby counsel is not assigned counsel, and there are clear limits on the ability of standby counsel to participate in the proceedings, including that such participation did depend upon the conduct of Šešelj. However, the fact that the Registry appointed former assigned counsel to act as standby counsel following the Appeal Decision, and then following the protest by Šešelj to that appointment, the Trial Chamber ordered the reassignment of standby counsel to act as assigned counsel in the Impugned Decision⁴² further entrenched Šešelj's belief that the Trial Chamber had not respected the right restored to him by the Appeals Chamber. He was not given a clean slate by the Trial Chamber following the Appeal Decision.

25. If 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. As the test makes clear, all that must be established is that the disruptive behaviour of the Accused "is substantially and persistently obstructing the proper and expeditious conduct of his trial" and it does not matter

⁴² *Ibid.*

whether that conduct is intentional or unintentional. In the Impugned Decision, the Trial Chamber after citing the legal test stated that:

Aside from the facts already established in the Trial Chamber's decision of 21 August 2006, which were not disturbed in appeal, the Trial Chamber has considered the conduct of the Accused onwards from the date of the Appeals Chamber's decision reinstating the Accused's self-represented status. The Trial Chamber finds that the Accused has continued to deliberately disregard decisions by the Trial Chamber, in particular its Decision on Filing of Motions, submitting motions that are often tens of thousands of words over the limit set by the Trial Chamber. The Trial Chamber finds that the Accused has repeatedly disrupted court hearings he deliberately and unreasonably interrupting the proceedings and by refusing to appear in court to represent himself. The Accused has been put on notice, and specifically warned by the Trial Chamber, that should his disruptive and obstructionist conduct continue, the Trial Chamber will consider imposing counsel on the Accused. In its warning arising from the Accused's failure to attend the 22 November 2006 status conference, the Trial Chamber informed the Accused that his conduct amounted to substantial obstruction and warranted the imposition of counsel. The Trial Chamber gave the Accused an opportunity to challenge this conclusion, but the Accused not only passed up the opportunity, he once again failed to appear in court to represent himself at the pre-trial conference on 27 November 2006, causing further obstruction to the proceedings.⁴³

There is no doubt that in light of the behaviour exhibited by Šešelj that the Trial Chamber was entitled by the terms of the Appeal Decision to impose assigned counsel upon him. However, the matter does not end there. In this particular case, what must and also can be considered by the Appeals Chamber is whether the Trial Chamber erred in the interpretation of its decision restoring Šešelj's right to self-representation. The Appeals Chamber is satisfied that it did so.

26. In the Appeal Decision, Šešelj's right to self-representation was fully restored. That restoration occurred in the context of a situation where the only obstacle to the full exercise of that right was assigned counsel, standby counsel had been removed by the Registrar following that assignment. While the Appeals Chamber did not explicitly state that the Trial Chamber was prohibited from imposing standby counsel, the Appeals Chamber finds that the Trial Chamber decision to do so, immediately upon the issuing of its decision and without establishing any additional obstruction by Šešelj, did have the practical effect of undermining the practical implementation of that decision. The Trial Chamber was fully aware of Šešelj's opposition to standby counsel throughout the pre-trial proceedings in his case, and its decision to order the immediate imposition of standby counsel and the Registry decision to appoint the assigned counsel removed by the Appeals Chamber Decision to the position of standby counsel created a situation where to all intents and purposes Counsel removed by the Appeals Chamber were still permitted to be part of the proceedings. In this circumstance, Šešelj's objection that his right to self-representation restored by the Appeals Chamber was not being respected by the Trial Chamber has merit.

⁴³ Impugned Decision, para. 13.

27. While the Appeals Chamber well appreciates the efforts of the Trial Chamber to ensure the fair and expeditious conduct of this trial, it finds that the Trial Chamber abused its discretion by immediately ordering the imposition of standby counsel, without first establishing additional obstructionist behaviour on the part of Šešelj warranting that imposition, with the clear possibility to take over the proceedings. By so doing, the Trial Chamber failed to give Šešelj a real opportunity to show to the Trial Chamber that despite his conduct pre-trial, and the conduct leading up to the imposition of assigned counsel, he now understood that in order to be permitted to conduct his defence, he would have to comply with the Rules of Procedure and Evidence of the Tribunal and that he was willing to do so. It was this opportunity that the Appeal Decision intended to accord to Šešelj.

28. On the basis of the foregoing, the Impugned Decision assigning counsel to Šešelj is reversed and the Trial Chamber is directed not to impose standby counsel unless Šešelj exhibits obstructionist behaviour fully satisfying the Trial Chamber that, in order to ensure a fair and expeditious trial, Šešelj requires the assistance of standby counsel. Should a time come when the Trial Chamber feels justified to make such a decision, 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.


29. In light of the decision of the Appeals Chamber, and in interests of fairness to Šešelj, the Appeals Chamber nullifies the opening of the proceeding in this case and orders that the trial restart. Due to the current health condition of Šešelj, the Appeals Chamber orders that his trial should not open until such time as he is fully able to participate in the proceeding as a self-represented accused.

Disposition

30. The Appeal of Šešelj against the Impugned Decision is **ALLOWED**. All trial proceedings in this case following the order of the Trial Chamber directing the Registry to appoint standby counsel are set aside. The trial of Šešelj is suspended until such time as he is fit enough to fully participate in the proceeding as a self-represented accused.

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

Dated this 8th day of December 2006,
At The Hague,
The Netherlands.



Judge Fausto Pocar
Presiding Judge

[Seal of the International Tribunal]