



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-T

Date: 23 December 2009

Original: English

**IN THE TRIAL CHAMBER**

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

**Registrar:** Mr. John Hocking

**Decision of:** 23 December 2009

**PROSECUTOR**

v.

**RADOVAN KARADŽIĆ**

***PUBLIC***

**DECISION ON THE ACCUSED'S MOTION TO VACATE APPOINTMENT  
OF RICHARD HARVEY**

**Office of the Prosecutor**

Mr. Alan Tieger  
Ms. Hildegard Uertz-Retzlaff

**The Accused**

Mr. Radovan Karadžić

**Appointed Counsel**

Mr. Richard Harvey

**THIS TRIAL 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 (“Tribunal”) is seised of the Accused’s “Motion to Vacate Appointment of Richard Harvey”, filed on 4 December 2009 (“Motion”), and hereby issues its decision thereon.

### **I. Background**

1. On 5 November 2009, this Trial Chamber issued its “Decision on the Appointment of Counsel and Order on Further Trial Proceedings” (“Decision Appointing Counsel”), finding that the Accused had substantially and persistently obstructed the proper and expeditious conduct of his trial by refusing to attend the proceedings until such time as he considered himself to be ready. This was despite this Chamber’s decision, upheld by the Appeals Chamber, that he had had sufficient time to prepare, and despite the warnings that were given to him by the Chamber.<sup>1</sup> As a result, the Chamber found it necessary to instruct the Registrar to appoint counsel, who would begin immediately to prepare him or herself to represent the interests of the Accused when the trial resumes, if that should be required. The Chamber reiterated that the Accused would continue to represent himself, including by dealing with the day-to-day matters that arise, such as the filing of motions and responses to motions filed by the Prosecution, and by further preparing himself for the trial.<sup>2</sup> In light of the fact that the appointed counsel is to focus solely on preparation for trial, the Chamber considered that an appropriate preparation period was three and a half months, and ordered that the trial shall resume on 1 March 2010.<sup>3</sup> The Chamber then stated that, should the Accused continue to absent himself from the resumed trial proceedings in March, or should he engage in any other conduct that obstructs the proper and expeditious conduct of the trial, he would forfeit his right to self-representation, no longer be entitled to assistance from his assigned defence team, and the appointed counsel would take over as an assigned counsel to represent him. Should he not engage in such conduct, the trial would proceed with the Accused continuing to represent himself and the appointed counsel would attend the proceedings and remain available to step in at any time the Chamber determines it to be necessary.<sup>4</sup>

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<sup>1</sup> Decision Appointing Counsel, para. 21. The Chamber recalls that this Decision contains a detailed background section (paragraphs 1 through 12), that deal with the relevant procedural history. The Chamber is of the view that it is not necessary to repeat that procedural history here.

<sup>2</sup> Decision Appointing Counsel, para. 25.

<sup>3</sup> Decision Appointing Counsel, para. 26.

<sup>4</sup> Decision Appointing Counsel, para. 27.

2. On 11 November 2009, the Accused applied for certification to appeal the Decision Appointing Counsel, noting in his application:

It is well established that an application for certification to appeal is not concerned with the merits of the impugned decision, but only with whether the criteria for an interlocutory appeal is satisfied. However, Dr. Karadzic cannot help but note that the Trial Chamber's decision is flawed in several respects, including [...] its failure to direct the Registrar to provide [the Accused] with the Rule 44 list [*sic*] from which he can select the standby counsel as required by Appeals Chamber jurisprudence.<sup>5</sup>

The application for certification was denied on 23 November 2009, on the basis that the Decision Appointing Counsel did not involve an issue which significantly affected the fair and expeditious conduct of the proceedings or the outcome of the Accused's trial at that point in time, and on the basis that it was premature. In denying certification, the Chamber noted that its decision to instruct the Registrar to appoint counsel was distinct from the procedure followed by the Registrar in doing so.<sup>6</sup>

3. In the meantime, on 19 November 2009, as instructed in the Decision Appointing Counsel, the Registrar selected Richard Harvey as "counsel to prepare to represent the interests of the Accused at trial" ("Registrar's Decision").<sup>7</sup> In doing so, the Registrar considered: (i) Articles 20 and 21 of the Statute of the Tribunal ("Statute") and Articles 14, 16, and 23 of the Directive on the Assignment of Counsel ("Directive"); (ii) the fact that "representatives from the Registry met with the Accused in order to inform him of the practical consequences of the [Decision Appointing Counsel] and to solicit his preference from a number of counsel established by the Registry to be both eligible for appointment before the Tribunal and available"; (iii) the Accused's request to meet with the counsel established to be eligible by the Registry; and (iv) the Accused's failure to indicate preference for any of the counsel he met with.<sup>8</sup> The Registrar also noted Richard Harvey's former engagement as co-counsel to Haradin Bala in the *Limaj* case and his current engagement as lead counsel for Lahi Brahimaj in the *Haradinaj* case, which is pending final judgement before the Appeals Chamber. The Registrar ascertained that no conflict of interest existed between Richard Harvey's representation of Haradin Bala and Lahi Brahimaj and his appointment as counsel in this case. He also noted that Lahi Brahimaj had consented in writing to Richard Harvey's appointment in this case.<sup>9</sup>

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<sup>5</sup> Application for Certification to Appeal Decision on Appointment of Counsel and Order on Further Trial Proceedings, 11 November 2009 (footnotes omitted).

<sup>6</sup> Decision on Accused's Application for Certification to Appeal Decision on Appointment of Counsel and Order on Further Trial Proceedings, 23 November 2009, paras. 7–8.

<sup>7</sup> Registrar's Decision, p. 3.

## II. Submissions

4. The Accused now moves the Trial Chamber to issue an order, pursuant to Article 13(B) of the Directive and its duty to ensure a fair trial, vacating the appointment of Richard Harvey.<sup>10</sup> The Accused claims that the procedure used by the Registrar to appoint Richard Harvey violated: (i) Article 21(4)(b) and (d) of the Statute; (ii) the Appeals Chamber decision in the *Šešelj* case (“*Šešelj* Decision”);<sup>11</sup> and (iii) Articles 11 and 16(G) of the Directive.<sup>12</sup>

5. In support of his argument, the Accused notes that the Registry representatives failed to provide him with the list of counsel, kept by the Registry pursuant to Rule 45(B) of the Rules of Procedure and Evidence (“Rules”), thereby denying him the opportunity to select “his stand by counsel”.<sup>13</sup> Instead, the Accused claims that he was presented with the names of five people selected by the Registrar from the Rule 45(B) list, none of whom was a lawyer from Serbia or Bosnia and Herzegovina. Rather, “all [were] from countries which had conducted air-strikes against the Republika Srpska, and four [...] had previously represented Kosovo Liberation Army leaders.”<sup>14</sup> The Accused attaches to the Motion the letter he sent to the Registrar on 13 November 2009, following his meetings with the five lawyers in question, stating as follows:

Also, none of [the five lawyers] has any prior knowledge about the events in Bosnia [...] so we can not count on their prior experience to help us in shortening the time for the preparation. *I wish to stress that, except from this limitation, which is the crucial one, all of them made an excellent impression on me, including their extraordinary high ethical standards in relation to the possibility to be sufficiently prepared for the case by the 1 March 2010.*

Because of this, I kindly request that you send me the Rule 44 list [*sic*], so I could search for the person with the adequate prior knowledge. I believe that all the lawyers from the region where I come from should be included on this list, because my communication with them would be much faster and smoother, and because all of them already have a lot of prior information.<sup>15</sup>

6. The Accused also submits that he never consented, and will not consent in the future, to the appointment of Richard Harvey because of the statements made in his closing brief for Lahi Brahimaj, in which he, in the opinion of the Accused, attacked Serbs. The Accused avers that he does not believe that Richard Harvey “can attack Serbs in one trial and turn around and

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<sup>8</sup> Registrar’s Decision, pp. 1–2.

<sup>9</sup> Registrar’s Decision, pp. 2–3.

<sup>10</sup> Motion, para. 1.

<sup>11</sup> *Prosecutor v. Šešelj*, Case No. IT-03-67-AR73.4, Decision on Appeal Against the Trial Chamber’s Decision (No. 2) on Assignment of Counsel, 8 December 2006.

<sup>12</sup> Motion, paras. 2, 6–7.

<sup>13</sup> Motion, paras. 2–4.

<sup>14</sup> Motion, para. 4.

<sup>15</sup> Motion, Annex A (emphasis added).

defend them in another.”<sup>16</sup> According to the Accused, because he did not consent to Richard Harvey’s simultaneous representation of him and Lahi Brahimaj, the Registrar’s Decision violated Article 16(G) of the Directive.<sup>17</sup>

7. The Accused concludes by saying that he will not receive a fair trial if the Trial Chamber “countenances this illegal action by the Registrar.”<sup>18</sup>

8. Both the Office of the Prosecutor (“Prosecution”) and the Registrar accepted the Trial Chamber’s invitation to respond to the Motion.<sup>19</sup> In the “Prosecution Response to Karadžić’s Motion to Vacate Appointment of Richard Harvey”, filed on 14 December 2009 (“Prosecution Response”), the Prosecution takes no position on the particulars of the Registrar’s Decision and simply addresses the issues relating to the jurisdiction of the Chamber to review the Decision and the Motion’s “general assumption that the Registrar cannot limit Karadžić’s preference of court-appointed counsel.”<sup>20</sup> With respect to the latter, the Prosecution notes that no legally aided accused has the absolute right to choose counsel but may express a preference which may or may not be accepted by the Registrar. The Prosecution further argues that Article 11(D) of the Directive does not apply to the Accused who is self-represented and is in a situation where counsel was appointed against his will as a safeguard should he continue not to co-operate. Accordingly, the Registrar is entitled to exert more control over the selection process than is normal practice in order to ensure the expeditious conduct of the trial.<sup>21</sup> With respect to the Accused’s arguments relating to Article 16(G), the Prosecution argues that his consent to the appointment of Harvey is not required as that provision only applies in cases where there is potential or actual conflict of interest; otherwise, the appointment process could be obstructed by the Accused’s continued non-co-operation. Finally, the Prosecution distinguishes the *Šešelj* Decision from the circumstances here on the basis that it dealt with an improper imposition of a stand-by counsel who had previously been removed by the Appeals Chamber.<sup>22</sup>

9. The “Registrar’s Submission Pursuant to Rule 33(B) Regarding Radovan Karadžić’s Motion to Vacate Appointment of Richard Harvey” was filed on 14 December 2009 (“Registrar’s Submission”). The Registrar argues that (i) he complied with the standard for

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<sup>16</sup> Motion, paras. 11–16.

<sup>17</sup> Motion, para. 16.

<sup>18</sup> Motion, para. 18.

<sup>19</sup> Order Setting a Deadline for Registry Submission on Accused’s Motion to Vacate Appointment of Richard Harvey, 4 December 2009.

<sup>20</sup> Prosecution’s Response, para. 1.

<sup>21</sup> Prosecution’s Response, paras. 3–4.

<sup>22</sup> Prosecution’s Response, paras. 5–6.

proper administrative decision-making by appointing Richard Harvey in this case;<sup>23</sup> and (ii) that the issues raised in the Motion may have an impact on the Accused's right to a fair and expeditious trial and thus should be considered by the Trial Chamber.<sup>24</sup>

10. With respect to (i) above, the Registrar states that neither the Directive nor Rule 45 of the Rules "directly apply" to the facts of the present case, and that in making his Decision he respected the general rules on the appointment of counsel.<sup>25</sup> He avers that he did not violate Article 21(4) of the Statute since the Accused has already exercised his right to choose whether to defend himself or through legal assistance of his own choosing, and is still exercising that right. The Registrar notes in this respect that the Accused's right to a counsel of own choosing is unrelated to the appointment of Richard Harvey as the latter was a measure taken by the Registrar pursuant to an order of the Trial Chamber and as a consequence of the Accused's abuse of his self-represented status. Although the Trial Chamber's Decision Appointing Counsel did not have the effect of creating a "cumulative and contemporaneous right to both self-representation and to choose counsel", the Registry, out of procedural fairness, accorded the Accused the opportunity to be heard on selection of counsel.<sup>26</sup>

11. The Registrar further states that, for the same reasons, it cannot be said that he violated Articles 11(D) and 16(G) of the Directive. He submits that the provisions regarding the assignment and choice of counsel in the Directive are not applicable to the appointment of counsel pursuant to a Chamber's order and against an accused's will, as in the instant case. Even if Articles 11(D) and 16(G) were applicable, the Registrar argues that he did not violate them as: (i) the five candidates presented to the Accused were the only candidates with no impediment to their appointment; and (ii) it would be unreasonable to assume that an obstructive accused, who has made clear that he does not wish to be represented by counsel, would provide his consent pursuant to Article 16(G) to any appointment of counsel pursuant to a Chamber's order; requiring consent in such circumstances would effectively provide such accused with the ability to block any further proceedings.<sup>27</sup>

12. The Registrar then argues that he complied with the Tribunal's jurisprudence, including the *Šešelj* Decision. As a preliminary matter he explains that the Rule 45(B) list consists of lawyers who fulfil the qualification requirements of both Rules 44 and 45 of the Rules. He states that Rule 45 does not apply to the selection of court-appointed counsel imposed on a self-

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<sup>23</sup> Registrar's Submission, para. 26.

<sup>24</sup> Registrar's Submission, para. 22.

<sup>25</sup> Registrar's Submission, para. 27.

<sup>26</sup> Registrar's Submission, paras. 28–31.

<sup>27</sup> Registrar's Submission, paras. 32–35.

represented accused since lawyers admitted to the Rule 45(B) list have not indicated their willingness to be imposed as counsel pursuant to Rule 45 *ter* of the Rules. Instead, it is Rule 44 of the Rules that establishes the basic qualification requirements that all defence counsel appearing before this Tribunal need to possess, including those imposed pursuant to Rule 45 *ter*. Thus, although the “Rule 44 list of counsel” as referred to in the *Šešelj* Decision does not exist, the Registrar interprets it to be a reference to a list of counsel who meet the qualification requirements of Rule 44 and who have indicated their willingness and availability to be imposed as counsel to a self-represented and obstructive accused.<sup>28</sup> The Registrar claims that he prepared such a list, using criteria additional to those provided for in Rule 44, namely that counsel has experience before the Tribunal, that there is no conflict of interest, that he is proficient in one of the official languages of the Tribunal, and that he is geographically proximate to the Tribunal. The Registrar then used the Rule 45(B) list as the starting point for sourcing such counsel. Since only three candidates from the Rule 45(B) list were found to be suitable for an appointment, the Registrar added two more who, while not on the Rule 45(B) list, had previously represented accused persons before the Tribunal and met the above criteria.<sup>29</sup> According to the Registrar, this procedure was a proper exercise of his discretionary power and it was reasonable to limit the pool of candidates to those who were both eligible and available. Once the Accused failed to select the counsel from this pool, the Registrar was able to appoint Richard Harvey, in accordance with the *Šešelj* Decision.<sup>30</sup>

13. The Registrar also defends Richard Harvey’s specific appointment, noting that he fulfils all of the criteria referred to above and is a distinguished defence lawyer with over 35 years of experience in national and international criminal law. The Registrar observes that the Accused’s position that Richard Harvey is unsuitable because he has defended Kosovo Albanians and is not of a certain ethnic background himself is both unfounded and runs counter to the spirit behind the establishment of the Tribunal.<sup>31</sup>

14. The Registrar then submits that he acted with procedural fairness towards the Accused by giving him an opportunity to meet with the five candidates deemed eligible, and to express a preference. Having met them, the Accused requested to see the “Rule 44 list”, which the Registrar did not provide as (i) it did not exist, and (ii) providing any list containing names of candidates who could not be appointed would not have been of benefit to the Accused or the

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<sup>28</sup> Registrar’s Submission, paras. 36–44, 47.

<sup>29</sup> Registrar’s Submission, paras. 44–49.

<sup>30</sup> Registrar’s Submission, paras. 50–51.

<sup>31</sup> Registrar’s Submission, paras. 52–53.

Chamber, and would have only wasted time.<sup>32</sup> Thus, the Registrar concludes, by devising the procedure that led to the appointment of Richard Harvey, he complied with all the relevant requirements, acted with procedural fairness towards the Accused, only considered relevant criteria in finding Richard Harvey suitable for appointment, and acted reasonably in balancing the Accused's interests against the need to ensure a proper implementation of the Decision Appointing Counsel.<sup>33</sup>

15. Having been given leave to do so,<sup>34</sup> the Accused filed his "Reply Brief: Motion to Vacate Appointment of Richard Harvey" on 18 December 2009 ("Reply"). He reiterates his argument that the Registrar violated the precedent set by the *Šešelj* Decision arguing that the Appeals Chamber must have been aware that the "Rule 44 list" of counsel contained names of persons who, *inter alia*, may decline the position of a stand-by counsel and have a potential conflict of interest, but nevertheless provided Vojislav Šešelj the right to choose his stand-by counsel from that list.<sup>35</sup> The Accused argues that the procedure undertaken by the Registrar in the present case and the Registrar's refusal to provide the said list precluded a review of any decision he made to reject that choice on grounds of conflict of interest and/or other reasons. In support, the Accused refers to this Trial Chamber's decision reversing the Registrar's decision not to appoint one of the Accused's legal advisers, Marko Sladojević, on the basis of a conflict of interest.<sup>36</sup> The Accused then claims that the Registrar disqualified "all Serbian lawyers" because they represented persons accused of crimes that are also the subject of the Third Amended Indictment ("Indictment") and that this was a serious misinterpretation of Article 14(D) and (E) of the Code of Professional Conduct for Counsel Appearing before the International Tribunal ("Code of Conduct"). The Accused argues that the Registrar applied his own criteria inconsistently as one of the counsel offered to him, namely Colleen Rohan, used to be counsel for Milorad Trbić in the *Popović* case, which concerns the events in Srebrenica that are also a part of the Indictment.<sup>37</sup> The Accused disputes the criteria devised by the Registrar to eliminate suitable candidates, including his current "American Legal Advisor".<sup>38</sup> He reiterates that the Registrar ignored Article 16(G) of the Directive and argues that the Registrar's decision

<sup>32</sup> Registrar's Submission, paras. 54–57.

<sup>33</sup> Registrar's Submission, paras. 50–59.

<sup>34</sup> Decision on the Accused's Motion for Leave to Reply: Motion to Vacate Appointment of Richard Harvey, filed on 17 December 2009.

<sup>35</sup> Reply, paras. 2–5.

<sup>36</sup> Reply, paras. 7–9. See Decision on Accused Request for Judicial Review of the Registry Decision on the Assignment of Mr. Marko Sladojević as Legal Associate, 20 April 2009.

<sup>37</sup> Reply, paras. 10–15.

<sup>38</sup> Reply, paras. 16–19.



to pick and choose which sections of the Directive to apply is without justification.<sup>39</sup> Finally, the Accused states that he is willing to promptly select a stand-by counsel.<sup>40</sup>

### III. Applicable Law

16. It is established that a Trial Chamber may intervene in a matter that is within the primary competence of the Registry where that matter goes to the fairness of the trial, and where the power to review a decision by the Registrar is not specifically conferred on the President.<sup>41</sup>

17. In *Prosecutor v. Kvočka et al.*, the Appeals Chamber set out the standard, derived from “general principles of law”, for review by a Trial Chamber of a decision of the Registry:

A judicial review of [...] an administrative decision is not a rehearing. Nor is it an appeal [...] A judicial review of an administrative decision made by the Registrar in relation to legal aid is concerned initially with the propriety of the procedure by which the Registrar reached the particular decision and the manner in which he reached it.<sup>42</sup>

18. According to this standard, an administrative decision will be quashed if the Registry, in making the decision:

- (a) has failed to comply with the requirements of the relevant legal authorities; or
- (b) has failed to observe the basic rules of natural justice and procedural fairness towards the person affected by the decision; or
- (c) has taken into account irrelevant material or failed to take into account relevant material; or
- (d) has reached a conclusion that is unreasonable, in the sense that it is a conclusion which no sensible person who has properly applied his mind to the issue could have reached.<sup>43</sup>

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<sup>39</sup> Reply, paras. 20–23.

<sup>40</sup> Reply, para. 25.

<sup>41</sup> *Prosecutor v. Delalić et al.*, Case No. IT-96-21-A, Order on Esad Landžo’s Motion for Expedited Consideration, 15 September 1999, cited by the Appeals Chamber in *Prosecutor v. Blagojević*, Public and Redacted Reason for Decision on Appeal by Vidoje Blagojević to Replace his Defence Team, Case No. IT-02-60-AR73.4, 7 November 2004 (“*Blagojević Decision*”), para. 7; see also *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Order Concerning Court-Assigned Counsel’s Terms of Engagement, 8 April 2005, p. 4.

<sup>42</sup> *Prosecutor v. 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 Decision*”), para. 13.

<sup>43</sup> *Kvočka Appeal Decision*, para. 13. See also *Nahimana et al. v. Prosecutor*, Case No. ICTR-99-52-A, Decision on Appellant Jean-Bosco Barayagwiza’s Motion Contesting the Decision of the President Refusing to Review and Reverse the Decision of the Registrar Relating to the Withdrawal of Counsel, 23 November 2006 (“*Barayagwiza Decision*”), para. 9.

19. The Appeals Chamber found that “in the absence of established unreasonableness there can be no interference with the margin of appreciation of the facts or merits of that case to which the maker of such an administrative decision is entitled”,<sup>44</sup> and that the accused bears the onus of persuading the Trial Chamber conducting the review both “(a) that an error of the nature described has occurred, and (b) that such error has significantly affected the Registrar’s decision to his detriment”.<sup>45</sup>

#### **IV. Discussion**

20. Looking at the standard for review, the Accused alleges that the Registrar has failed to comply with the requirements of a number of relevant authorities, namely, the Statute, the Directive, and the *Šešelj* Decision. In his Reply, the Accused formulates his challenge to the Registrar’s Decision in terms of the standard set out in the case-law, and argues that the Registrar failed to: (i) comply with the requirements of the relevant legal authorities, in particular the *Šešelj* Decision; (ii) observe procedural fairness towards the Accused by refusing access to the “Rule 44 list” and disqualifying potential counsel arbitrarily; (iii) take into account relevant material (the Accused’s choice of counsel); and (iv) reach a reasonable conclusion.<sup>46</sup>

21. As a preliminary matter, the Chamber needs to address whether it has the power to review the Registrar’s Decision. The Directive provides different procedures, which are to be followed by the Registrar when making decisions either to assign or withdraw defence counsel to or from accused and/or suspects. Importantly for present purposes, the Directive also contains provisions dealing with a review of these decisions, in some cases by the President of the Tribunal,<sup>47</sup> and, in others, by the Trial Chamber seized of the case.<sup>48</sup> The Chamber here recalls the Appeals Chamber’s jurisprudence to the effect that a Trial Chamber may intervene in a matter that is within the primary competence of the Registry where that matter goes to the fairness of the trial, *and* where the power to review a decision by the Registrar is not specifically conferred on the President.<sup>49</sup>

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<sup>44</sup> *Kvočka* Decision, para. 13.

<sup>45</sup> *Kvočka* Decision, para. 14.

<sup>46</sup> Reply, para. 24.

<sup>47</sup> See e.g. Article 20 of the Directive.

<sup>48</sup> See e.g. Article 13(B) of the Directive.

<sup>49</sup> *Prosecutor v. Delalić et al*, Order on Esad Landžo’s Motion for Expedited Consideration, Case No. IT-96-21-A, 15 September 1999, cited by the Appeals Chamber in *Prosecutor v. Blagojević*, Public and Redacted Reason for Decision on Appeal by Vidoje Blagojević to Replace his Defence Team, Case No. IT-02-60-AR73.4, 7 November 2004 (“*Blagojević* Decision”), para. 7. See also *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Order Concerning Court-Assigned Counsel’s Terms of Engagement, 8 April 2005, p. 4.

22. None of the provisions outlining the procedure for review of Registrar's decisions, including Article 13(B), which is relied upon by the Accused,<sup>50</sup> seem to apply to the present situation. This is primarily because it appears that the Directive as a whole is concerned with indigent accused and/or suspects who wish to have a counsel representing them, or who seek the withdrawal of already assigned counsel. In the present case, however, the Accused is a self-represented accused who has, from the moment he was transferred to this Tribunal, insisted on his right to self-representation, and has not since relinquished that right. The Directive does not expressly provide for circumstances like the present where a self-represented accused is challenging the procedure by which the Registrar has appointed a counsel to prepare to represent that accused in case of further obstruction. Accordingly, it cannot be said that the power to review the Registrar's Decision in this case has been specifically conferred on the President, thereby removing that power from the Trial Chamber.<sup>51</sup>

23. Given that there is also no provision explicitly delegating to the Trial Chamber the power to review the Registrar's Decision, the Chamber needs to consider whether it should nevertheless do so, in order to ensure a fair and expeditious trial. In this regard, the Chamber is of the view that the question of whether or not the Accused in this case had the right to be shown the entire Rule 45(B) list (or what he refers to as the "Rule 44 list"), and should have been provided an opportunity to consent to Richard Harvey's appointment, all before that appointment took place, is a matter that goes to the Accused's fair trial rights. The propriety of the procedure by which the Registrar reached his Decision to appoint Richard Harvey is inevitably a matter that goes to the fairness of the trial in this case. In other words, if the Accused's allegation that the Registrar's Decision is somehow flawed and/or illegal because the Registrar did not follow the proper procedure in making that Decision is correct, it is evident that this will affect the fairness of his trial. Accordingly, the Chamber considers that it has the power to review the Registrar's Decision.

24. The relevant parts of Article 21(4) of the Statute, which are relied upon by the Accused, provide as follows:

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<sup>50</sup> See Motion, para. 1

<sup>51</sup> *Blagojević* Decision, para. 7. See also *Prosecutor v. Krajišnik*, Case No. IT-00-39-A, Decision on "Motion Seeking Review of the Decisions of the Registry in Relation to Assignment of Counsel", 29 January 2007, pp. 2–3. The Chamber has considered whether Article 20(A) of the Directive could potentially apply to the present case, but is of the view that this Article is concerned with cases where the accused's request that the Registrar withdraw the assignment of counsel is denied. As there was no assignment of Richard Harvey in this case, nor was there a request for his withdrawal by the Accused or a decision denying that request, the Chamber is of the view that the Article does not apply here and, therefore, cannot, as it did in the *Blagojević* case, confer the power of review on the President. By the same token, the procedure outlined in Article 13 does not apply to the present case either, as this Article is concerned with the Registrar's refusal to assign counsel.

**Article 21**  
**Rights of the Accused**

4. In the determination of the charge against him, the accused shall be entitled to a fair and public hearing, subject to Article 22 of the Statute:

(b) to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

[...]

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

The Accused relies also on Article 11(D) of the Directive, which states:

**Article 11**  
**Decision by the Registrar**

(D) Where the Registrar decides to assign counsel in accordance with this Article, the Registrar shall:

(i) assign the counsel selected by the suspect or accused from the list drawn up in accordance with Rule 45(B), provided that there is no impediment to the assignment of that counsel; or

(ii) if the suspect or accused fails to select a counsel from the list drawn up in accordance with Rule 45(B) or if the Registrar determines that there is an impediment to the assignment of the counsel selected, assign other counsel from that list after hearing the suspect or accused.

25. The Chamber recalls that in his Decision the Registrar specifically notes Article 21 of the Statute. In addition, while making no mention of Article 11 of the Directive, he does refer to Articles 14, 16, and 23 of that Directive. Notwithstanding the Accused's reliance on Article 21(4)(b) and (d) of the Statute and Article 11(D) of the Directive, the Chamber is of the view that neither is applicable to the situation at issue here.

26. Article 21(4)(b) and (d) establishes rights for an accused who either wishes to be self-represented or chooses to be fully represented by counsel.<sup>52</sup> A plain reading of Article 21(4)(d) demonstrates that only when an accused is represented by counsel, he will be entitled to a counsel of his or her own choosing. This is not the present situation. Rather, the Accused chose to represent himself and is currently still self-represented. He has persistently refused to be represented by defence counsel and has instead opted for a large team of legal advisers and assistants, some of whom are remunerated by the Registry. At the same time as exercising his

<sup>52</sup> *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 Counsel, 1 November 2004 ("*Milošević Decision*"), para. 11.

right to self-representation, the Accused cannot also rely upon Article 21(4)(b) and (d) to argue that the Registrar should have allowed him to choose counsel, whom he has not requested and who is not assigned to him at this point, from the Rule 45(B) list or “Rule 44 list”. Indeed, accepting the Accused’s argument would mean that the Accused is simultaneously entitled to exercise both the right to self-representation and the right to have counsel of his own choosing. As noted by the Registrar, this was not the Trial Chamber’s intention. Indeed, the Decision Appointing Counsel clearly states that the Accused retains his right to be self-represented for now.<sup>53</sup>

27. Furthermore, even in cases where an accused is to be fully represented by counsel, the right to counsel of one’s own choosing is not absolute. It has been repeatedly emphasised by the Appeals Chamber that the right to legal assistance financed by the Tribunal does not confer the right to counsel of one’s own choosing, and that, in legally-aided cases, while some weight would be accorded to the accused’s preference, such preference may be overridden if it is in the interests of justice to do so.<sup>54</sup> Therefore, Article 21(4) does not create a right by which the Accused is entitled to select appointed counsel from the Rule 45(B) list or the “Rule 44 list”. The Trial Chamber recalls here that Richard Harvey is not, at this point, assigned as counsel to the Accused, is remunerated by the Registry, and will continue to be so remunerated after 1 March 2010.

28. Accordingly, the Chamber is of the view that the Accused’s rights as provided for under Article 21(4)(b) and (d) have not been violated. On the contrary, the manner in which the Registrar made his Decision, and the Decision itself, do not affect the Accused’s continuing exercise of his right to self-representation. The Chamber notes in this regard that whether Richard Harvey is ever assigned to represent the Accused is entirely dependent on the Accused’s behaviour and, in particular, his attendance at his trial on 1 March 2010. In light of the Registrar’s explicit reference to Article 21 in his Decision, the Chamber is satisfied that the Registrar properly considered and complied with Article 21, as applicable.

29. As for Article 11 of the Directive, again, it is clear on its plain reading that it is meant to apply in cases where an accused wishes to have counsel assigned to him<sup>55</sup> or where he has failed to take any action in respect of his representation or self-representation.<sup>56</sup> This is evidently not the situation here. Even though he refers to other Articles from the Directive, the Registrar, in

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<sup>53</sup> Decision Appointing Counsel, para. 25.

<sup>54</sup> *Barayagwiza* Decision, para. 10; *Blagojević* Decision, para. 22.

<sup>55</sup> See Article 7 of the Directive, entitled “Request for assignment of counsel”, which is referred to throughout Article 11 of the Directive and, in particular, in Article 11(A).

<sup>56</sup> See Article 11(C) and (D) of the Directive.

his Decision, makes no reference to Article 11 whatsoever, thereby indicating that he did not consider it applicable to the Accused's situation. Indeed, the Registrar states the same in his Submission.<sup>57</sup> Thus, since Article 11 as a whole is not applicable to the Accused, the Chamber finds that the Registrar could not have failed to comply with the requirements of Article 11(D). In fact, as submitted by the Registrar, and contrary to the Accused's assertions, it is questionable whether the Directive as a whole applies to the assignment of counsel under Rule 45 *ter*.<sup>58</sup> In this regard, the Chamber notes that the Registrar appears to believe that the Chamber's instruction to the Registrar was issued pursuant to Rule 45 *ter*, which allows the Trial Chambers to assign counsel to accused. However, while issued by the Trial Chamber and dealing with appointment of counsel, the Decision Appointing Counsel did not assign counsel pursuant to Rule 45 *ter* to represent the interests of the Accused but was made pursuant to Rule 54 of the Rules. This notwithstanding, the Chamber further notes that Rule 45 of the Rules explicitly provides that assignment of counsel pursuant to its provisions shall be governed by the Directive, but that Rule 45 *ter*, and Rule 54, make no mention of the mechanism by which the Registrar should proceed to comply with Trial Chamber's order to assign or appoint counsel. Thus, the Registrar had no choice but to go to the Directive in search of at least some of the general principles applicable to the present circumstances.

30. Furthermore, contrary to the Accused's argument, the Chamber is of the view that, in light of this gap in the procedural guidelines for the selection of court-appointed counsel, the Registrar's approach of using only those provisions of the Directive that are applicable to the factual scenario before him is the only possible way in which the Registrar could have proceeded in order to appoint counsel as ordered by this Trial Chamber. While unfortunate that there exists no specific set of guidelines to be followed by the Registrar in relation to the indigent self-represented accused for whom a Trial Chamber orders counsel to be appointed, the Registrar's approach was preferable to the alternative of creating an entirely new procedure not based on any established legal framework. In contrast, accepting the Accused's argument that the Registrar had to apply all the provisions of the Directive, including those clearly not applicable to the situation here, would have had incongruous results.

31. The Chamber notes the Registrar's argument that, even if Article 11(D) did apply here, it could not be said that he failed to comply with it. The Chamber disagrees. While Article 11(D) allows the Registrar to override an accused's preference for certain counsel on the basis that there are impediments to that counsel's appointment, it is clear from the language of Article

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<sup>57</sup> Registrar's Submission, para. 33.

<sup>58</sup> See e.g. Articles 7 and 8 of the Directive.

11(D) that this power arises only after the accused has been provided with the Rule 45(B) list and has made a selection.<sup>59</sup> Ultimately, however, this is irrelevant as Article 11 does not apply to the Accused's situation.

32. The Accused also relies on Article 16(G) of the Directive which states:

**Article 16**  
**Basic Principles**

(G) No counsel shall be assigned to more than one suspect or accused at a time, unless:

(i) each accused has received independent legal advice from the Registrar and both have consented in writing and

(ii) the Registrar is satisfied that there is no potential or actual conflict of interest or a scheduling conflict, and that the assignment would not otherwise prejudice the defence or either accused, or the integrity of the proceedings.

33. The Chamber recalls the Registrar's and the Prosecution's positions that Article 16(G) does not apply to the Accused as strict compliance with it in cases of obstructive self-represented accused would lead to further obstruction and would halt the proceedings.<sup>60</sup> The Chamber agrees with this position. As noted above, it is clear that the Directive as a whole was designed primarily with an indigent accused who wishes to be represented in mind.<sup>61</sup> By the same token, Article 16(G) is meant to deal with situations where the accused requests an assignment of a counsel who is already engaged by another client. According to the Article, even if the accused and the first client of that counsel consent to the assignment, the Registrar retains the discretion to deny it on the basis of potential or actual conflict of interest, a scheduling conflict, and/or prejudice being caused to the defence of either accused or the integrity of the proceedings.

34. The fact that the Registrar obtained consent from Richard Harvey's other client does not change the Chamber's view that Article 16(G) does not apply to the Accused in the present circumstances, but rather reinforces it. In his attempt to use the Directive to the greatest extent

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<sup>59</sup> See Article 11(D)(i) and the reference to "counsel selected by suspect or accused from the list drawn up in accordance with Rule 45(B)".

<sup>60</sup> Registrar's Submission, para. 35.

<sup>61</sup> The Chamber notes the Accused's argument in footnote 7 of his Reply that this cannot be so as "Article 12(D)" of the Directive authorises the Registrar to "assign a counsel to an accused who refuses to nominate one". The Directive does not contain Article 12(D) and the Chamber presumes that the Accused meant to refer to Article 11(D)(ii) here. That provision, however, deals with accused who "fail" to select counsel from the Rule 45(B) list and in fact reinforces the Registrar's argument. As stated above, Article 11 is concerned with accused who wish to have counsel assigned to them. Article 11(D)(ii) then concerns a situation where such accused fail to select counsel from the Rule 45(B) list because, for example, they wish to have counsel who is not on the list or are not

possible in the present circumstances, the Registrar asked Lahi Brahimaj, an accused who wanted to be represented by Richard Harvey and to whom the provisions of the Directive apply, for consent to the appointment. Once again, given that there is no special directive that would apply to assignments or appointments of counsel by Trial Chambers mandated by either Rule 45 *ter* or Rule 54, the Registrar was left with no alternative but to go to the Directive and consider at least those provisions or parts of provisions applicable to the present facts.<sup>62</sup> The Chamber is satisfied that the Registrar acted within the bounds of his discretion in applying Article 16(G) as he did in this case.

35. Finally, the Accused refers to the Appeals Chamber's decision in the *Šešelj* case, where the main issue was one of the right to self-representation and the validity of the Trial Chamber's decision in that case to impose counsel on the accused, Vojislav Šešelj. Having determined that the Trial Chamber had erred in ordering the imposition of assigned counsel to Vojislav Šešelj, the Appeals Chamber observed in a final paragraph of the decision as follows:

Should a time come when the Trial Chamber feels justified to make such a decision [imposing stand-by counsel], the Rule 44 list of Counsel [*sic*] 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 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 [*sic*] 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.<sup>63</sup>

36. Aside from the fact that this statement was clearly *obiter*, the Chamber notes that it was based on the very specific facts of the *Šešelj* case, which differ considerably from those of the present case. The background to that decision was complex, not the least because both stand-by counsel and regular counsel had been assigned to Vojislav Šešelj on two separate occasions. The *Šešelj* Trial Chamber first appointed stand-by counsel in May 2003, and then, on 21 August 2006, decided to assign independent counsel because of strong indications, from the pre-trial phase of the case, that Vojislav Šešelj's self-representation would obstruct his trial. This decision was reversed by the Appeals Chamber on 20 October 2006 on the basis that Vojislav Šešelj was not given enough warning that his right to self-representation would be removed if he

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satisfied with any of the counsel named on that list. Either way, once it is established that they are not willing to co-operate, the Registrar retains discretion to essentially choose a counsel for them.

<sup>62</sup> The Registrar also noted in his Submission Articles 14 and 23 of the Directive. The former deals with qualifications and standing of counsel admitted to the Rule 45(B) list, while the latter deals with the Tribunal's responsibility to cover the costs of legal representation of indigent accused.

<sup>63</sup> *Šešelj* Decision, para. 28.



continued acting in the obstructive manner in which he was acting.<sup>64</sup> The Trial Chamber proceeded immediately to restore the earlier *status quo* and, five days later, imposed stand-by counsel again – the same person that was appointed as stand-by counsel in 2003 – without encountering any obstructive behaviour on Vojislav Šešelj’s part. In protest, Vojislav Šešelj boycotted the proceedings and the Chamber, having warned him it would do so, proceeded to assign the stand-by counsel as regular counsel.<sup>65</sup> The complex background to this assignment of counsel to Vojislav Šešelj was clearly one of the major concerns of the Appeals Chamber, as can be seen from the following:

[T]he fact that the Registry appointed former assigned counsel to act as standby counsel following the Appeal Decision [restoring Vojislav Šešelj’s right to self-representation], 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 Decision further entrenched Šešelj’s belief that the Trial Chamber had not respected the right restored to him by the Appeals Chamber. [...]

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.*<sup>66</sup>

37. Not only are the facts and issues in this case different to what transpired in *Šešelj*, it is apparent from the Appeals Chamber’s Decision that Vojislav Šešelj had a troubled history with the assigned/stand-by counsel and had expressed animosity towards him and his appointment in both capacities throughout the proceedings. This is not the case here. Other than referring to the fact that he never represented Serbs but had supposedly criticised them, an argument the Chamber will address later, the Accused appears to have been impressed by Richard Harvey and his “ethical standards”.<sup>67</sup>

38. Further indication that the *Šešelj* Decision was fact-specific is an earlier decision of the Appeals Chamber in the *Slobodan Milošević* case. The Appeals Chamber there confirmed the assignment of two counsel who were chosen not by the accused, but by the Trial Chamber. The manner in which that choice was made was also heavily dependent on the prevailing facts, in particular the fact that the trial was well advanced and the fact that the two counsel in question had been acting as *amici curiae* from its beginning. Having confirmed the Trial Chamber’s choice of counsel and the assignment itself, the Appeals Chamber reversed the modalities of it and, essentially, converted the assigned counsel into stand-by counsel. The effect of that

<sup>64</sup> *Prosecutor v. Šešelj*, Case No. IT-03-67-AR73.3, Decision on Appeal Against the Trial Chamber’s Decision on Assignment of Counsel, 20 October 2006, paras. 2–5, 22–26.

<sup>65</sup> *Šešelj* Decision, paras. 2–13.

<sup>66</sup> *Šešelj* Decision, paras. 24–26 (emphasis added).

<sup>67</sup> Motion, Annex A.

decision was that Slobodan Milošević was provided with two lawyers in a stand-by counsel role, without having been shown any list of counsel or given any opportunity to choose somebody else.<sup>68</sup> In fact, as with Vojislav Šešelj, it is doubtful whether, having insisted on his right to self-representation, Slobodan Milošević would have expressed a preference for any stand-by counsel. The logic of a pre-condition to any appointment of counsel to a self-represented accused intent on preserving his right to self-representation that he must be able to choose his counsel (or stand-by counsel) from Rule 45(B) list (or “Rule 44 list”) is somewhat wanting. That logic is even less compelling when the counsel in question has been appointed simply to prepare himself to represent the interests of an accused sometime in the future, if that should be required.

39. The fact that the Accused now states, for the first time, that he is willing “promptly” to choose stand-by counsel from the “Rule 44 list” does not change the Trial Chamber’s view. Furthermore, this statement by the Accused also does not lead to the conclusion that, at the time the Registrar was establishing the procedure by which he would select counsel, his determination that, in the circumstances of this case, the *Šešelj* Decision did not apply was unreasonable. In this regard, the Chamber notes the Registrar’s submission that there would have been no point in providing the Accused with names of lawyers who were clearly ineligible or unwilling to perform the task that they would be required to perform. This would only have the effect of significantly delaying the Registrar’s final decision.

40. Even if the *Šešelj* Decision were as applicable here as the Accused claims it to be, the Chamber considers that the Registrar has complied with its direction to the extent required by the circumstances of this case. First, nothing in Rules 44 and 45 of the Rules leads the Chamber to the conclusion that there is such a thing as a “Rule 44 list”. Instead, these Rules clearly provide that a list of counsel is to be kept in accordance with Rule 45(B). This view is also held by the Registrar.<sup>69</sup> Second, the *Šešelj* Decision cannot be considered in a vacuum and must be read bearing in mind the Appeals Chamber’s jurisprudence that the right to counsel of one’s own choosing is not absolute, and that there may be impediments, such as conflicts of interest or unavailability, to the assignment of preferred counsel. Indeed, the Accused’s case is one of the last cases before the Tribunal, encompassing a large crime base, much of which has already been litigated before the Tribunal. As noted by the Registrar, many defence counsel on the Rule 45(B) list have been involved in those cases and are thus conflicted.<sup>70</sup> In addition, the Registrar established additional criteria such as (i) availability of counsel for this specific appointment; (ii)

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<sup>68</sup> *Milošević* Decision, paras. 15–20.

<sup>69</sup> Registrar’s Submission, para. 57.

<sup>70</sup> Registrar’s Submission, paras. 46–47.

counsel having no reservations about possibly being imposed on the Accused; (iii) high level of experience in light of the complexity of the present case; and (iv) counsel's geographical proximity to the Tribunal.<sup>71</sup> In the Chamber's opinion, all these criteria are perfectly reasonable in the circumstances of this case and reflect the careful scrutiny with which the Registrar undertook his task of appointing counsel as ordered by this Trial Chamber. They meant, however, that only three candidates from the Rule 45(B) list were eligible, as explained by the Registrar. Acknowledging that this was a small number, the Registrar then added two more candidates to his list providing the Accused with more choice. In so doing, the Registrar fulfilled what must be said to be the purpose of showing a self-represented accused the list of eligible counsel, namely that the accused is provided a means by which he may participate in a co-operative manner in the assignment of counsel to him. In fact, in this particular situation, the Registrar not only fulfilled this purpose but went beyond it by setting up and facilitating meetings between the Accused and the five counsel deemed to be eligible and available to prepare themselves for the Accused's trial.

41. The Chamber recalls the Accused's argument that, using this criteria, the Registrar has disqualified "all Serbian lawyers" because they had at one time or another represented persons accused of crimes which are also the subject of the Indictment in this case. However, the Chamber notes that this is not the only basis on which the Registrar disqualified the Serbian lawyers on the Rule 45(B) list. The Registrar specifically mentions that some were disqualified because they were not proficient in one of the official languages of the Tribunal, or because they had a scheduling conflict.<sup>72</sup> Accordingly, the Accused's argument is misleading, not in the least because the Registrar does not name each individual counsel and explain how he or she was disqualified. In respect of the fact that Colleen Rohan was one of the five lawyers who were offered to, and met with, the Accused despite her previous involvement in the *Trbić* case, the Chamber notes that in selecting counsel for appointment in the present case, the Registrar has a certain discretion. In reviewing the Registrar's Decision, the Chamber is concerned with the procedural propriety with which he made his Decision, and it cannot enter into an analysis of every aspect of the Decision. As discussed above, the Chamber is satisfied that the Registrar established and followed a process that was both reasonable and fair in the circumstances of the case. Furthermore, on the basis of the submissions made in the Reply, the Chamber is not persuaded that the decision to include Colleen Rohan was unreasonable or improper. In this regard, it should be pointed out that Colleen Rohan was involved in the *Trbić* case only briefly,

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<sup>71</sup> Registrar's Submission, paras. 46–47.

<sup>72</sup> Registrar's Submission, footnotes 25 and 26. With respect to language proficiency, the Chamber notes that the Registrar is the one who has the discretion to waive it, usually at the request of the accused. See Rule 44(A)(ii) and (B).

as Milorad Trbić was transferred to Bosnia and Herzegovina pursuant to Rule 11 *bis* of the Rules and was, thus, not tried before the Tribunal.

42. The Chamber also wishes to address the Accused's argument that the Registrar's use of the geographical proximity criteria meant that the Accused had been prevented from choosing his "American Legal Advisor" who has worked on his case for over a year, "had he wanted to do so."<sup>73</sup> The Chamber does not see any validity in this argument. First, there is nothing in the Registrar's Decision or his Submission that indicates that this adviser was not placed on the list because of the requirement of geographical proximity. Second, as stated in the Decision Appointing Counsel, the Accused is still self-represented and thus is allowed to retain his defence team, including his "American Legal Advisor" in order to prepare for the resumption of his trial in March 2010. It would have made no sense to provide the Accused with a list of lawyers containing names of persons who are already advising and/or assisting him in those preparations, especially given his persistent claims that he is not ready for trial because he does not have enough resources to prepare. In other words, putting any of the members of the Accused's defence team on that list would have meant that the Registry was depriving the Accused of valuable resources.

43. The Chamber also notes its view that the Accused's position that he does not (and will not) consent to Richard Harvey's appointment because the latter has represented Kosovo Albanians, has never represented Serbs, and has made statements that the Accused regards as critical of Serbs lacks any persuasive force and is, in fact, untenable. According to Articles 10 and 11 of the Code of Conduct, counsel shall represent his or her client diligently and promptly in order to protect the client's best interests, and shall exercise independent professional judgement and render open and honest advice. There has been no suggestion that Richard Harvey would be unable to comply with these provisions. Indeed, on the basis of his past considerable experience, the Chamber has no doubt that Richard Harvey, despite having represented Kosovo Albanians and having never represented Serbs, would be able to provide effective and professional legal assistance without any divided loyalties. The Accused's reference to a closing brief prepared by Richard Harvey in which he allegedly criticises the Serbs in Kosovo does not change the Chamber's view, not in the least because that brief was written on the instructions of Richard Harvey's client, was concerned with a different time period, and dealt with a different conflict, on a different territory. Moreover, the Accused's argument that he should have been given an opportunity to choose a lawyer with whom he shares common heritage, language, and trust, rather than a lawyer from a NATO country is, at

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<sup>73</sup> Reply, para. 16.

best, suspicious: his senior legal adviser, Peter Robinson, comes from the United States of America, the country widely recognised as the leading NATO power. In addition, a number of his *pro bono* legal advisers also come from NATO countries.

44. Finally, the Chamber wishes to address the Accused's argument that the Registrar, by refusing to provide the "Rule 44 list" of counsel to the Accused, precluded review of any decision he might make to reject that choice on the grounds of, for example, conflict of interest. The Chamber notes, first, that the Accused has not lost his right to request a review of the Registrar's selection of counsel.<sup>74</sup> As stated above, the Chamber will have the right to review any decision taken by the Registrar provided that the power to do so does not rest with the President and provided the Registrar's decision affects the fair trial rights of the Accused.

45. However, the Chamber will not review a decision where the basis for the challenge is erroneous, which is the case here. In this regard, the Chamber has previously concluded that the Registrar was not under an obligation to show the Accused either the Rule 45(B) list (or the "Rule 44 list") of counsel. Furthermore, the Chamber notes that the Accused does not allege that Richard Harvey is actually conflicted or that there are scheduling conflicts. The only arguments the Accused provides against the selection of Richard Harvey are those already considered untenable by the Trial Chamber.

46. Accordingly, for all the reasons outlined above, the Accused has not persuaded the Chamber that the Registrar committed an error or acted unreasonably when he decided to select Richard Harvey to prepare for trial in this case. The Chamber is satisfied that the process followed by the Registrar met the requirements both established in the Tribunal's case-law, and of procedural fairness. In addition, the Chamber is of the view that, in following this process, the Registrar took into account all the relevant material, including the applicable legal framework *and* the particular circumstances of this case. The Chamber further considers that the Registrar went out of his way to provide an opportunity whereby the Accused could have some input into the Registrar's Decision.

47. In the absence of any error, it is clear that it is unnecessary to make a finding on the second limb that must be met for a decision of the Registrar to be set aside, that is, "that such error has significantly affected the Registrar's decision to [the Accused's] detriment".

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<sup>74</sup> See Reply, para. 9.

**V. Disposition**

48. Accordingly, the Trial Chamber, pursuant to Article 21 of the Statute and Rule 54 of the Rules, hereby **DENIES** the Motion.

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



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Judge O-Gon Kwon  
Presiding

Dated this twenty-third day of December 2009  
At The Hague  
The Netherlands

**[Seal of the Tribunal]**