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D 29979

CASE/AFFAIRE NO. IT-95-5/18-T (R. KARADŽIĆ)		DATE 15 December 2009
FROM/DE RAM DORAISWAMY, COURT OFFICER		
TO/A		
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<input type="checkbox"/> Appeals Chamber/ Chambre d'appel	<input checked="" type="checkbox"/> Case Manager/ Commis aux affaires	<input checked="" type="checkbox"/> Self-representing Accused MR. R. KARADŽIĆ (1)
<input type="checkbox"/> Trial Chamber I/ Chambre de 1ère instance I	<input type="checkbox"/> Chief of Investigations/ Chef des enquêtes	<input checked="" type="checkbox"/> Legal Advisers MR. G. PETRONJEVIĆ MR. P. ROBINSON MR. M. SLADOJEVIĆ
<input type="checkbox"/> Trial Chamber II/ Chambre de 1ère instance II		
<input checked="" type="checkbox"/> Trial Chamber III/ Chambre de 1ère instance III		<input checked="" type="checkbox"/> Court Appointed Counsel MR. R. HARVEY
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<input checked="" type="checkbox"/> Pro Se Legal Liaison Officer/Juriste chargé de la liaison avec l'accusé MS. J. GUDURIĆ		
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<input type="checkbox"/> Order/Warrant/decision issued by Appeals Chamber or Trial Chamber or a Judge on/ Ordonnance/Mandat/Décision émis(e) par la Chambre d'appel ou les Chambres de 1ère instance ou un Juge le ___/___/___		
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<input checked="" type="checkbox"/> Decision of the Registrar on/Décision du Greffier le 14 / 12 / 2009 RULE 33 (B) SUBMISSION		
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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 No.: IT-95-5/18-T
Date: 14 December 2009
Original: English

IN TRIAL CHAMBER III

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

Registrar: Mr. John Hocking

Submission date: 14 December 2009

THE PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**REGISTRAR'S SUBMISSION PURSUANT TO RULE 33 (B) REGARDING RADOVAN
KARADŽIĆ'S MOTION TO VACATE APPOINTMENT OF RICHARD HARVEY**

The Office of the Prosecutor:

Mr. Alan Tieger
Mr. Hildegard Uertz-Retzlaff

The Accused:

Mr. Radovan Karadžić

A. INTRODUCTION

1. Pursuant to Rule 33(B) of the Rules of Procedure and Evidence (“Rules”) of the International Criminal Tribunal for the Former Yugoslavia (“Tribunal”) and the Trial Chamber’s “Order Setting a Deadline for Registry Submission on Accused’s Motion to Vacate Appointment of Richard Harvey”, dated 4 December 2009, the Registrar respectfully makes the following submission regarding the “Motion to Vacate Appointment of Richard Harvey”, filed by Radovan Karadžić (“Accused”) on 4 December 2009 (“Motion”).

B. RELEVANT PROCEDURAL BACKGROUND

2. On 30 July 2008, the Accused was transferred to the Seat of the Tribunal. On this occasion, he was provided with the list of counsel willing to be assigned to represent indigent suspects and accused before this Tribunal pursuant to Rule 45 of the Rules (“Rule 45 List”).
3. In a letter to the Registry of 4 August 2008, the Accused elected to represent himself in proceedings before the Tribunal. This letter was filed by the Registrar on 6 August 2008 as “Registry Submission Pursuant to Rule 33(B) Regarding the Accused’s Representation and the Transmission of Court Documents.”
4. Between 30 July and 29 September 2008, Registry representatives met with the Accused on several occasions to discuss the organisation of his defence and the options available to him both if represented by counsel and if self-represented.
5. On 29 September 2008, the Accused confirmed his election to represent himself and submitted a declaration of means to the Registry, thereby applying for Tribunal funding for his defence as a self-represented accused on the basis that he did not have sufficient means to pay for his defence team.
6. Between 16 October 2008 and 21 July 2009, eight assistants were assigned to the Accused’s defence team pursuant to the Remuneration Scheme for Persons Assisting Self-Represented Accused.

7. At a status conference held on 8 September 2009, the pre-trial Judge announced that the trial proceedings would commence on 19 October 2009 (“Decision on Start of Trial”).¹
8. The Accused was granted certification to appeal the Decision on Start of Trial and subsequently did appeal, stating that he was not prepared for trial. However, in a decision of 13 October 2009, the Appeals Chamber upheld the Decision on Start of Trial.²
9. On 14 October 2009, the Trial Chamber issued a Scheduling Order, ordering the commencement of trial on 26 October 2009.³
10. On 21 October 2009 the Accused filed a “Submission on the Commencement of Trial” in which he informed the Trial Chamber that he would not appear on 26 October 2009 for the start of trial.⁴
11. On 26 October 2009, the trial proceedings opened in the absence of the Accused.
12. On 27 October 2009 and on 2 November 2009, the Accused again failed to attend the proceedings. On both occasions, the Trial Chamber warned him that his choice not to attend the proceedings, thereby obstructing the trial, could lead to the limitation of his status as a self-represented Accused and the “assignment of counsel.”
13. On 3 November 2009, the Accused attended the administrative hearing held that day and reiterated that he was not prepared for the trial.
14. On 5 November 2009, the Trial Chamber issued its “Decision on Appointment of Counsel and Order on Further Trial Proceedings” (“5 November 2009 Decision”) in which it ordered the Registrar “to appoint a counsel to prepare to represent the interests of the Accused at trial, subject to further order of the Chamber” and further ordered that the trial would resume on 1 March 2010. The 5 November 2009 Decision further determined 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

¹ Status Conference, 8 September 2009, T. 456.

² Decision of Radovan Karadžić’s Appeal on the Decision on Commencement of Trial, 13 October 2009.

³ Scheduling Order for the Commencement of Trial, 14 October 2009. It is noted that the delay of one week in comparison to the Decision on Start of Trial of 8 September 2009 was due to the filing of the Prosecution’s marked-up version of the Indictment on 19 October 2009.

⁴ Submission on the Commencement of Trial, 21 October 2009.

- proper and expeditious conduct of the trial [...] the appointed counsel would take over as an assigned counsel to represent him.”⁵
15. Pursuant to the 5 November 2009 Decision, the Registrar immediately started to identify possible candidates for appointment.
 16. On 9 November 2009, Registry representatives met with the Accused at the UN Detention Unit (UNDU) and informed him of the steps taken to identify a suitable candidate who met specific criteria, which were explained to him, and was provided an opportunity to indicate a preferred candidate from a list of counsel.
 17. The Accused requested Registry representatives to facilitate in-person meetings with each of the candidates in order for him to interview them. In the following days, the Registry made arrangements for each counsel to travel to The Hague to meet with the Accused. The Registry requested the Accused to indicate his preferred candidate by 13 November 2009, noting that the Registrar was under a duty to comply with the 5 November 2009 Decision and would therefore proceed to appoint counsel during the following week. Despite stating that all the candidates were indeed distinguished lawyers, the Accused did not express his preference for any of the candidates.
 18. On 11 November 2009, the Accused applied for certification to appeal the 5 November 2009 Decision.
 19. By decision of 19 November 2009, the Registrar appointed Mr Richard Harvey as counsel to prepare to represent the interests of the Accused at trial (“Impugned Decision”).
 20. On 23 November 2009, the Trial Chamber denied the Accused’s request for certification to appeal the 5 November 2009 Decision (“23 November 2009 Decision”). The Trial Chamber stated however, that the Chamber’s decision to instruct the Registrar to appoint counsel was separate from the procedure of the Registrar in doing so.⁶
 21. On 4 December 2009, the Accused filed the Motion.

⁵ 5 November 2009 Decision, at para. 27.

⁶ 23 November 2009 Decision, at para. 7.

C. LAW ON JUDICIAL REVIEW

22. The jurisprudence of this Tribunal has held that it is inherent in the judicial function of the Tribunal that a decision of the Registrar which affects, or is likely to affect, the right of an accused to a fair and expeditious trial or the integrity of the proceedings, may be reviewed by the Trial Chamber before which the trial is to be held, or is being held.⁷ The Registrar concurs with the Accused's assertion that the Registrar's implementation of the 5 November 2009 Decision may have an impact on the right to a fair and expeditious trial of the Accused.

23. The Tribunal's leading statement concerning the scope of judicial review of an administrative decision of the Registry is found in the *Prosecutor v. Kvočka et al.*:

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.⁸

The Appeals Chamber's statement in *Kvočka* envisions a four-part test for proper administrative decision-making and judicial review of such decisions: (1) compliance with the relevant legal requirements; (2) observance of basic rules of natural justice and procedural fairness; (3) consideration of relevant material and non-consideration of irrelevant material; and (4) reasonableness of the conclusion reached.⁹

24. The Registrar submits that in issuing the Impugned Decision, and appointing Mr. Richard Harvey, Barrister from the United Kingdom, as counsel to prepare to represent

⁷ *Prosecutor v. Popović et al.*, "Decision on the Request for Review of the Registry Decision on the Assignment of Co-Counsel for Radivoje Miletić" of 16 November 2006, at para. 16; *Prosecutor v. Enver Hadžihasanović and Amir Kubura*, "Decision on the Prosecution's Motion for Review of the Decision of the Registrar to Assign Mr. Rodney Dixon as Co-Counsel to the Accused Kubura" of 26 March 2002, at para. 14

⁸ *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" ("Žigić Decision"), 7 February 2003 at para. 13. Subsequently cited in the *Prosecutor v. Šljivančanin*, Case No. IT-95-13/1-PT, "Decision on Assignment of Defence Counsel", 20 August 2003 at para. 22; *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-PT, "Decision on the Defence's Motion for an Order Setting Aside the Registrar's Decision Declaring Momčilo Krajišnik Partially Indigent for Legal Aid Purposes", 20 January 2004 at para. 16; *Prosecutor v. Mrkšić*, Case No. IT-95-13/1-PT, "Decision on Defence Request for Review of the Registrar's Decision on Partial Indigence of Mile Mrkšić", 9 March 2004 at page 3; and *Prosecutor v. Mrkšić et al.*, Case No. IT-95-13/1-PT, "Decision on Appointment of Co-Counsel for Mrkšić", 7 October 2005 at para. 9.

⁹ Paragraph 13 of the Žigić Decision provides: "[t]he administrative decision will be quashed if the Registrar has failed to comply with the legal requirements of the Directive. This issue may in the particular case involve a consideration of the proper interpretation of the Directive. The administrative decision will also be quashed if the Registrar has failed to observe any basic rules of natural justice or to act with procedural fairness towards the person affected by the decision, or if he has taken into account irrelevant material or failed to take into account relevant material, or if he has reached a conclusion which no sensible person who has properly applied his mind to the issue could have reached (the "unreasonableness" test). These issues may in the particular case involve, at least in part, a consideration of the sufficiency of the material before the Registrar, but (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."

the interests of the Accused, he complied with the standard for proper administrative decision-making.

D. DISCUSSION

Submission of the Accused

25. The Accused moves the Trial Chamber to vacate the assignment of Mr. Harvey as counsel in his case. He argues that the Impugned Decision violates Article 21(4) of the Statute, the Appeals Chamber's "Decision on Appeal Against the Trial Chamber's Decision (No. 2) on Assignment of Counsel"¹⁰ and Articles 11(D) and 16(G) of the Directive on the Assignment of Counsel. In his view, the Registrar was obliged to provide him with the Rule 45 List in order that he could choose his standby counsel. He criticises that instead the Registrar only provided him with five candidates, all of them "from countries which had conducted air-strikes against the Republika Srpska."¹¹ He argues that he would have never consented to the assignment of Mr. Harvey, because he currently represents the Kosovo-Albanian accused Mr. Lahi Brahimaj, and he does not believe that Mr Harvey "can attack Serbs in one trial and turn around and defend them in another."¹² In the Accused's view, the Registrar's actions deprived him of the right to select a lawyer with whom he shares a common heritage, language and trust and who has familiarity with the conflict in Bosnia.¹³

Submission of the Registrar

26. In the following submission, the Registrar will show that he complied with the standard for proper administrative decision-making by appointing Mr Harvey as counsel to prepare to represent the interests of the Accused.

i. Compliance with legal requirements

27. As will be seen below, the Registrar complied with all legal requirements when issuing the Impugned Decision. Contrary to the Accused's suggestion, neither Rule 45 of the Rules, nor the Directive on the Assignment of Defence Counsel ("Directive") directly apply to the present case. The implementation of the 5 November 2009 Decision required the Registrar to respect the general rules on the appointment of counsel, in

¹⁰ *Prosecutor v Vojislav Šešelj*, Case No. It-03-67-AR73.4, 6 December 2006, ("Šešelj Decision").

¹¹ Motion at para. 4.

¹² Motion at para. 15.

¹³ Motion at para.18.

particular Rule 44 of the Rules, the jurisprudence rendered in this respect and considerations of natural justice and procedural fairness.

No Violation of Article 21(4) of the Statute

28. The Registrar respectfully submits that the Impugned Decision did not violate the Accused's rights under Article 21(4) of the Statute.
29. The Registrar submits that the Accused has already duly exercised his right to choose whether "to defend himself or through legal assistance of his own choosing"¹⁴ pursuant to Article 21(4)(d) of the Statute upon his transfer to the Tribunal, by electing to represent himself after being offered the opportunity to choose counsel from the Rule 45 List.¹⁵ It is noted that the Accused has not altered this choice and has clearly and unambiguously repeated his decision to be self-represented on several occasions thereafter.¹⁶
30. It is accordingly respectfully submitted that the present appointment of counsel to prepare to represent the interests of the Accused is unrelated to the Accused's right to choose his legal representation. Rather, it is a measure taken by the Registrar pursuant to an order of the Trial Chamber as a consequence of the Accused's abuse of his self-represented status, by obstructing the trial process by not attending the trial proceedings. It is the Registrar's submission that the 5 November 2009 Decision does not have the effect of creating a cumulative and contemporaneous right to both self-representation and to choose counsel. However, out of procedural fairness, the Registry did afford the Accused the opportunity to be heard on selection of counsel.
31. Furthermore, the Registrar notes that the 5 November 2009 Decision does not terminate or even limit the self-represented status of the Accused at this point, but rather orders the Registrar to appoint counsel to "prepare to represent the interests of the Accused". The Accused is still expected to deal with the day-to-day work on his defence, such as filing of motions and responses to motions filed by the Prosecution,¹⁷ and is therefore still exercising his choice to be self-represented as guaranteed under Article 21(4) of the Statute.

¹⁴ Emphasis added.

¹⁵ See para. 3 above.

¹⁶ See, for example, Pre-Trial Conference, 6 October 2009, T. 471; Hearing of 3 November 2009, T. 700.

¹⁷ Para. 25 of the 5 November 2009 Decision.

No Violation of the Directive on the Assignment of Counsel

32. For the same reasons the Registrar objects to the Accused's statement that he has violated Article 11(D) and 16(G) of the Directive on the Assignment of Counsel.
33. As a preliminary matter, the Registrar submits that the provisions regarding the assignment and choice of counsel in the Directive are applicable to assignments of counsel pursuant to Rule 45 of the Rules, which is not the case here. These provisions are not applicable to the appointment of counsel against an accused's will pursuant to a Chamber's order, as in the instant case. This conclusion is drawn from the fact that the Directive has its origins in Rule 45(A) of the Rules and expressly applies to assignments under that Rule.
34. However, even if the Directive were applicable, the Registrar would not have violated its provisions. With respect to Article 11(D)(i), the five candidates provided to the Accused were the only candidates with "no impediment to their assignment", as outlined below.¹⁸ In addition, as the Accused failed to select any of the five eligible candidates, the Registrar acted in accordance with Article 11(D)(ii) by appointing Mr Harvey after hearing the Accused.
35. Furthermore, the Registrar submits that it would be unreasonable to assume that an accused who has been found to obstruct the proceedings and who has made clear on several occasions 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.¹⁹ Requiring consent in such circumstances would effectively provide such accused with the ability to block any further proceedings.

No Violation of Tribunal Jurisprudence

36. The Registrar respectfully submits that, contrary to the Accused's allegation, he complied with the Tribunal's jurisprudence, and in particular the Šešelj Decision.
37. The Registrar recalls that in the present case, the Trial Chamber ruled that "should the accused continue to absent himself from the resumed trial proceedings in March 2010

¹⁸ See paragraphs 45ff.

¹⁹ The Registrar notes that in the present case, Article 16(G) of the Directive was consulted due to Mr Harvey's continuing assignment pursuant to Rule 45 of the Rules as counsel representing Mr Brahimaj...

or engage in other conduct that obstructs the proper and expeditious conduct of trial....the appointed counsel will take over as assigned counsel to represent him;”²⁰

38. The Registrar accordingly understands that while the present appointment of counsel to prepare to represent the Accused does not at this time terminate the Accused’s status as a self-represented Accused, the situation may yet change in March 2010. Therefore, the Registrar is satisfied that it is reasonable to apply the standards established by the Šešelj Decision already at this point.
39. The Accused alleges that in accordance with the Šešelj Decision he should have been provided with the Rule 45 List in order for him to select stand-by counsel. The Accused bases this on the Appeals Chamber’s finding in that decision that a “Rule 44 list of counsel” should be provided to an accused whose self-represented status is terminated, to give him or her the opportunity to choose a candidate before counsel is actually imposed.²¹ The Registrar submits that the Accused has misinterpreted the Šešelj Decision on this point.
40. As a preliminary matter, the Registrar recalls that the Rule 45 List consists of lawyers who fulfill the qualification requirements of Rules 44 and 45 of the Rules and have indicated their willingness and availability to be assigned to indigent or partially indigent accused upon their request.
41. The Registrar submits that Rule 45 of the Rules does not apply to the present case. Rule 45 of the Rules applies where an indigent accused requests assignment of counsel and not to the selection of court-appointed counsel. Although the Registrar may look to Rule 45 for guidance, he is not obliged to consult all lawyers present on the Rule 45 List or limit himself to said lawyers.
42. In requesting to be given the Rule 45 List, the Accused fails to recognise that in the instant case counsel is being appointed in preparation for possible future imposition by the Trial Chamber. The Registrar submits that the lawyers admitted to the Rule 45 List have not indicated their willingness to be imposed as counsel to an accused pursuant to Rule 45*ter* of the Rules. Indeed, some lawyers have expressed concerns about representing an accused without instructions. In such circumstances, the Registrar would clearly not be able to appoint counsel against their will.

²⁰9 November 2009 Decision, at paragraph 27.

²¹ Para. 28 of the Šešelj Decision.

43. The Registrar submits that it is Rule 44 of the Rules that establishes the basic qualification requirements that all defence counsel appearing before this Tribunal need to possess, whether they are assigned under the legal aid system, retained by non-indigent accused or imposed pursuant to Rule 45^{ter} of the Rules.
44. In this context, the Registrar has interpreted the Šešelj Decision's reference to a Rule 44 List to represent 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 an obstructive self-represented accused. The Registrar therefore prepared a list of such counsel as potential candidates for appointment.

ii. Proper exercise of discretionary power

45. The Registrar submits that the steps taken to implement the 5 November 2009 Decision are in compliance with the legal requirements and reflect the proper exercise of his discretionary power.
46. In particular, the Registrar considered the following criteria in identifying candidates for appointment under the 5 November 2009 Decision:
- Counsel meets all the qualification requirements of Rule 44.²²
 - Counsel has no conflict of interest with a previous representation of a client before the Tribunal in terms of Article 14(D) of the Code of Professional Conduct.²³
 - Counsel has previous experience before the Tribunal.²⁴
 - Counsel is interested in and available for this specific appointment and has no reservations about the possibility of being imposed as counsel at a later stage.

²² All counsel on the Rule 45 List meet the requirements of Rule 44. Other counsel who have been retained by non-indigent accused in cases before this Tribunal and appointed under Rule 44 were also considered.

²³ Article 14(D) of the Code of Conduct reads as follows: "Counsel shall not represent a client with respect of a matter if:

- (i) such representation will be, or may reasonably be expected to be, adversely affected by representation of another client;
- (ii) representation of another client will be, or may reasonably be expected to be, adversely affected by such representation;
- (iii) the matter is the same or substantially related to another matter in which counsel [...] had formerly represented another client ("former client"), and the interests of the client are materially adverse to the interests of the former client; [...]"

²⁴ Based on previous experience in appointing counsel new to this jurisdiction, the Registrar deemed this necessary on the basis that it would be extremely difficult for counsel without knowledge of the jurisprudence and procedure of this Tribunal to be prepared for trial in this case within 3.5 months.

- Counsel is proficient in either working language of the Tribunal (English or French).²⁵
- Counsel's geographic location is in close proximity to the Seat of the Tribunal, as counsel would not be living in The Hague during the period before resumption of trial on 1 March 2010, but would need to travel in and out of The Hague on short notice to obtain documents and reconstruct the case file.

47. Having established these criteria, the Registrar consulted as a first step the entire Rule 45 List, given that there is no readily available "Rule 44 List". Those candidates on the Rule 45 List that did not meet the criteria were eliminated, as follows:

- 31 lawyers had a conflict of interest due to their previous or current representation of accused in related cases;²⁶
- 38 lawyers had no experience before the Tribunal, and four had insufficient experience as they had only represented accused in contempt cases or for a very short period in cases on pre-trial;
- 23 lawyers were currently engaged in other cases before the Tribunal and were not available for appointment due to scheduling conflicts;
- Four lawyers on the Rule 45 List speak neither working language of the Tribunal and were therefore unsuitable as they could only be assigned as co-counsel;
- Six lawyers currently reside on a different continent, which would significantly complicate their task to prepare for trial;
- Six lawyers were unsuitable for a variety of other reasons such as health problems and conduct issues.

48. Therefore, only three lawyers admitted to Rule 45 List were found suitable for appointment.

²⁵ Certain counsel on the Rule 45 List are not proficient in one of the working languages of the Tribunal and can therefore only be assigned as co-counsel. Such counsel would not be suitable for appointment in the present case.

²⁶ In this respect it is noted that all the Serbian counsel who otherwise fulfil the criteria outlined in paragraph 44 are, or have been, assigned to substantially related cases and/or accused who were allegedly members of the same joint criminal enterprise as the Accused, or have a scheduling conflict.

49. The Registrar then identified two more candidates who had previously represented accused persons before the Tribunal. While both met the qualification requirements under Rule 44 of the Rules, neither was on the Rule 45 List at the time of the appointment decision.
50. In light of the above, it is respectfully submitted that the procedure that was established by the Registrar to reach the Impugned Decision was drawn up in a proper exercise of his discretionary power. It was reasonable for the Registrar to limit the pool of candidates to those that were actually available for appointment and for whom there would be no impediment to appointment. In so doing, the Registrar balanced the interests of the Accused against the need to ensure a proper implementation of the 5 November 2009 Decision.
51. Turning to the actual appointment of counsel, the Šešelj Decision clearly established that should the accused not select a counsel from the list provided to him, the Registrar may choose counsel at his discretion.²⁷ Because the Accused failed to select a counsel, the Registrar proceeded to select and appoint counsel following the Accused's failure to indicate a preferred candidate.
52. Furthermore, the Registrar submits that the specific appointment of Mr. Harvey was also a proper exercise of discretionary power. Mr. Harvey fulfills all the criteria outlined in paragraph 46 above, and was accordingly an eligible candidate to be appointed pursuant to the 5 November 2009 Decision. He is a distinguished defence lawyer with over 35 years of experience in national and international criminal law, and an established knowledge of the law and procedure applied before this Tribunal. In addition, the Registrar satisfied himself that there is no conflict of interest or scheduling conflict with any current or previous assignment.²⁸
53. The Registrar further submits that the Accused's assertion that a counsel cannot "attack Serbs in one trial and turn around and defend them in another" is unfounded, misinterprets the role of defence counsel, and ignores both the Code of Professional Ethics and Conduct by which defence counsel are bound and the duty of loyalty owed to their respective clients. The fact that a professional lawyer has vigorously defended a client of one specific ethnic or political background does not have an impact on his

²⁷ Para. 28 of the Šešelj-Decision.

²⁸ In this respect, it is noted that Mr Brahimaj's case is currently awaiting judgement on appeal. Furthermore, there is no substantial relation between the cases against Mr Brahimaj and the Accused.

ability to defend the interests of another client with a different ethnic or political background. In this respect, it is also noted that the trials before this Tribunal are concerned with the guilt or innocence of individuals and not of ethnic or political groups. Moreover, it is submitted that it would run counter to the spirit behind the establishment of the Tribunal if it were to be accepted that an accused may only be properly represented by counsel of the same ethnic background.

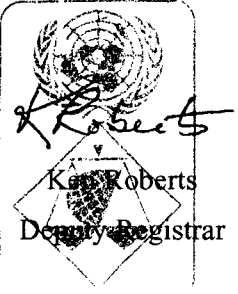
iii. Procedural Fairness

54. The Registrar further submits that he acted with procedural fairness towards the Accused, by giving him an opportunity to meet with all eligible candidates and to express a preference.
55. In accordance with the Šešelj Decision's requirements, Registry representatives met with the Accused and provided him with the names and *curricula vitae* of the five identified candidates. The Accused was informed that he was being provided an opportunity to indicate a preferred candidate in case he should decide to cooperate with the lawyer.
56. Thereafter, the Accused requested to meet with each of the five lawyers, within the same week, which was immediately facilitated, organized and paid for by the Registrar.
57. After the Accused had met with all the candidates, he stated that they were all very distinguished lawyers, but declined to indicate any preference, asking instead to see a Rule 44 list. As stated above, there is no such thing as a Rule 44 list. Further, the Registrar respectfully submits that providing any list containing names of candidates who could not in any event be appointed for the reasons indicated above, would not have benefited either the Accused or the Trial Chamber, and would only have wasted time and delayed the Registrar's ability to comply with the 5 November 2009 Decision.

E. CONCLUSION

58. In light of the above submissions, the Registrar submits that the Impugned Decision complied with standard for proper administrative decision-making as outlined in *Kvočka* and should therefore be upheld.
59. The Registrar submits that in reaching the Impugned Decision, he adhered to the four-pronged test for administrative decision-making referred to in paragraph 23 *supra*. In particular: (1) the Registrar complied with the requirements of the 5 November 2009 Decision, and applied a proper interpretation of the International Tribunal's legislation and jurisprudence; (2) the Registrar acted with procedural fairness towards the Accused, by informing him fully of the steps taken, discussing with him the selected candidates, and providing him with an opportunity to be heard on the issue and to meet with all the candidates that were found suitable for this specific appointment; (3) the Registrar only considered relevant criteria in finding Mr Harvey suitable for appointment; and as such (4) in particular in light of paragraphs 45 – 57 *supra*, the Registrar submits that the Impugned Decision is reasonable.
60. In addition, the Registrar respectfully notes that under the standard set forth by the Appeals Chamber in *Kvočka et al.*, in the absence of established unreasonableness, there can be no interference with the Impugned Decision.
61. For the foregoing reasons, the Registrar respectfully submits that the Trial Chamber deny the Motion.

Respectfully submitted,



Kar Roberts
Deputy Registrar

Dated this 14th day of December 2009
At The Hague,
The Netherlands.