IT-96-23/2-PT
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19 AUGUST 2005

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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-96-23/2-PT

Date: 19 August 2005

Original: English

IN TRIAL CHAMBER I

Before: **Judge Daqun Liu, presiding**
Judge Amin El Mahdi
Judge Alphons Orie

Registrar: **Mr Hans Holthuis**

Decision of: **19 August 2005**

PROSECUTOR

v.

GOJKO JANKOVIĆ &
RADOVAN STANKOVIĆ

DECISION FOLLOWING REGISTRAR'S NOTIFICATION OF RADOVAN STANKOVIĆ'S REQUEST FOR SELF-REPRESENTATION

Counsel for the Prosecutor:
Hildegard Uertz-Retzlaff

Counsel for the accused:
Victor Koppe

1. **TRIAL CHAMBER I** 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 ("Chamber") is seized of the "Registrar's notification made pursuant to Rule 33(B) of the Rules of Procedure and Evidence" ("Rules") filed on 1 June 2005 in which the Registrar informs the Chamber that Radovan Stanković ("Accused") elected to represent himself in person ("Notification").

I.

2. The Accused is charged with various crimes committed in the municipality of Foča, Bosnia and Herzegovina.[1] The Indictment against the Accused is comprised of eight counts. Counts 1, 2, 5 and 6 charge him with enslavement and rape as crimes against humanity punishable under Article 5 of the Statute of the International Tribunal ("Statute"). Counts 3, 4 and 7 charge the Accused with rape and outrages upon personal dignity as violations of the laws or customs of war punishable under Article 3 of the Statute.

3. Upon his arrival at the United Nations Detention Unit on 10 July 2002, the Accused informed the Registrar that he lacked the financial means to remunerate counsel. On 18 July 2002, the Registrar, acting pursuant to Rule 45 of the Rules, assigned Mr Milenko Radović, an attorney-at-law from Foča, Bosnia and Herzegovina, as counsel to the Accused. On 31 March 2005, upon information suggesting that Mr Radović engaged in professional misconduct, the Deputy Registrar suspended Mr Radović's assignment as counsel to the Accused pursuant to Article 19(B)(i) of the Directive on Assignment of Defence Counsel ("Directive").[2]

4. In his Notification, the Registrar explains that before Mr Radović's suspension came into force, both Mr Radović and the Accused were informed by letter on 18 March 2005 that Mr Radović's suspension was imminent. The letter gave the Accused until 29 March 2005 to choose replacement counsel from the Tribunal's list of counsel eligible for assignment to indigent accused and informed him that in the absence of a response, replacement counsel would be assigned to him. In addition, a Registry representative met with the Accused at the United Nations Detention Unit on 18 March 2005 to explain the situation to him.

5. The Registrar further explains in its Notification that on 29 March 2005, because the Accused failed to indicate his preference of counsel or that he wished to conduct his own defence, the

[1] The third amended indictment against Radovan Stanković is dated 8 December 2003 ("Indictment").
[2] Decision of the Deputy Registrar dated 31 March 2005.

Registry assigned replacement counsel to the Accused during Mr Radović's suspension.[3] On 31 March 2005, acting pursuant to Pursuant to Articles 11(C) and 19(B)(i) of the Directive, the Deputy Registrar suspended Mr Radović's assignment and assigned Mr Victor Koppe, an attorney-at-law from the Netherlands, as counsel to the Accused.

6. On 17 May 2005, the bench of judges appointed to dispose of the Prosecution's motion for referral of the Accused's case (which is ready for trial) rendered a decision under Rule 11bis referring the case (hence the trial) to a court in Bosnia and Herzegovina. Mr Koppe appealed the decision on behalf of the Accused.[4]

7. The Registrar submits in its Notification that following Mr Radović's suspension and his replacement by Mr Koppe, the Accused indicated that he wished to represent himself in person during Mr Radović's suspension. On 23 May 2005, the Accused filed a "Written Statement-Notification Pursuant to Your Rule 45(G)" (sic) which is attached to the Notification as Annex I. The Registrar considered that this statement constituted notification pursuant to Rule 45(F) that the Accused has elected to conduct his own defence.

II.

8. The right to a defence, in person or through legal assistance, is a prerequisite for a fair trial enshrined in Articles 20 and 21 of the Tribunal's Statute. The Tribunal's Appeals Chamber affirmed that an accused has a presumptive right to self-representation.[5]

9. The exercise of the right to self-representation in Article 21 of the Statute is not unqualified however. First, the election of such a right must be made by an accused who is literate and competent. This right must be exercised voluntarily, unequivocally and intelligently.[6] The rationale behind this qualified exercise is to ensure that a defendant is protected to the fullest extent possible.

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[3] On or about 5 April 2005, the Registry received the Accused's response. Although the Accused's response is dated 27 March 2005, it was not received by the Registry until 5 April due to the time needed to translate the letter from BCS.

[4] The Prosecution and the Defence appealed the decision on 30 May 2005 and 16 June 2005 respectively. No hearings are scheduled before the Appeals Chamber rendered its decision. If the decision of the specially appointed bench is affirmed the trial of the Accused will be conducted in Bosnia and Herzegovina.

[5] *Prosecutor v. Slobodan Milošević*, Case No. IT-"Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence Counsel", 1 November 2004 ("*Milošević* Appeals Chamber Decision"), para. 11.

[6] See e.g., *Faretta v California,* 422 U.S. 806 (1975). In the Joint Opinion of Judge McDonald and Judge Vohrah attached to the Appeals Chamber's Judgement in *Prosecutor v. Dražen Erdemović*, Case No. IT-96-22-A, 7 October 1997, and in the context of the validity of a guilty plea, the judges construed the word "voluntary" for a statement if made by an accused whose mental state allows him to understand the consequences of his choice and who is not making a choice forcefully. In relation to "not equivocal", the judges considered a statement not equivocal if not accompanied by contrary words (para. 8). In *US v. Denno*, (1965) 348 F.2d 12, 16, the court found equivocation where an accused had failed to "unmistakably commit himself" to the alternative of conducting his own defence. In *Faretta v California,* 422 U.S. 806 (1975), the court said that a statement is intelligently made if made in full awareness of the possible consequences of waiving the opportunity for skilled legal representation.

10. Secondly, this Tribunal as well as other international courts have consistently held that there may be circumstances where it is appropriate and the Chamber is competent to insist that the defence is presented by counsel and not by the accused in person[7] in order to ensure that the exercise of the right to self-representation does not in effect obstruct the conduct of a fair trial.[8] Circumstances in which such a course may be appropriate have to be determined on a case-by-case basis, having regard to the particular circumstances of the case as a whole, including such factors as the ability of the accused to conduct his own defence, as well as his attitude and actions.[9]

11. In relation to the attitude and actions of an accused as a factor for insisting on professional legal assistance, Trial Chamber II in the *Šešelj* case recalled the United States Supreme Court's statement in *Faretta v. California*[10] that "the trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct",[11] and "a State may – even over objection by the accused – appoint 'standby counsel' to aid the accused if and when the accused requests help, and to be able to represent the accused in the event that termination of the defendant's self-representation is necessary".[12] The United States Supreme Court summarised its position by stating that "[t]he right of self-representation is not a license to

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[7] In *Prosecutor v. Šešelj*, Case No. IT-03-67-PT, Decision on Prosecution's Motion for Order Appointing Counsel to Assist Vojislav Šešelj with His Defence, 9 May 2003 ("*Šešelj* Decision") para. 20, the Trial Chamber recognised that the wording of Article 21 of the Statute "leave[s] open the possibility of assigning counsel to an accused on a case by case basis in the interests of justice". Although the accused in that case made it clear that he intended to represent himself, the Trial Chamber considered the right to self-representation as articulated in the Statute as a starting point, but noted that according to international and national jurisprudence "this right is not absolute", and decided that "standby counsel" should be appointed with various responsibilities, including the possibility of taking over the conduct of the defence case against the will of the accused. In *Prosecutor v. Barayagwiza* before the ICTR, assigned defence counsel asked to withdraw from the case on the basis that the accused had instructed counsel not to represent him at the trial and refused to attend the trial. Finding the attitude of the accused to be obstructing the course of justice, the Trial Chamber concluded that withdrawal of counsel was not warranted. The Chamber further noted that counsel in that case had been assigned, and not appointed, which "does not only entail obligations towards the client, but also implies that he represents the interest of the Tribunal to ensure that the Accused receives a fair trial", *Prosecutor v. Barayagwiza*, Case No. ICTR-97-19-T, "Decision on Defence Counsel Motion to Withdraw", 2 November 2000, para. 21. In a Sierra Leone Special Court case, the Trial Chamber denied a request of the accused to defend himself, holding that the right to self-representation enshrined in its Statute "is not absolute but rather, a qualified right", *Prosecutor v. Norman, et al.*, Case No. SCSL-04-14-T, "Decision on the Application of Samuel Hinga Norman for Self Representation Under Article 17(4)(d) of the Statute of the Special Court", 8 June 2004, para. 8.

[8] In this regard, the court's statement in Barker v. Wingo U.S. 514, 519, (1972) that "there is a societal interest in providing a speedy trial which exists separate from, and at times in opposition to, the interests of the accused" is particularly relevant.

[9] *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Reasons for Decision on the prosecution Motion Concerning Assignment of Counsel, 4 April 2003 ("*Milošević* Decision"), para. 40.

[10] 422 U.S. 806 (1975).

[11] *Ibid* at 834, note 46 (citing *Illinois v. Allen*, 397 U.S. 337, 343 (1970)).

[12] *Ibid* at 834, note 46 (citing *United States v. Dougherty*, 473 F. 2d 1113, 1124-1126 (D.C. Cir. 1972)); *see also McKaskle v. Wiggins*, 465 U.S. 168, 184 (1984) ("Accordingly, we make explicit today what is already implicit in *Faretta*: defendant's Sixth Amendment rights are not violated when a trial judge appoints standby counsel – even over the defendant's objection – to relieve the judge of the need to explain and enforce basic rules of courtroom protocol or to assist the defendant in overcoming routine obstacles that stand in the way of the defendant's achievement of his own clearly indicated goals. Participation by counsel to steer a defendant through the basic procedures of trial is permissible even in the unlikely event that it somewhat undermines the *pro se* defendant's appearance of control over his own defence".).

abuse the dignity of the courtroom. Neither is it a license not to comply with relevant rules of procedural and substantive law."[13]

12. In relation to appellate proceedings, the United States Supreme Court in *Martinez v. Court of Appeal of California*, (which confined its holding in *Faretta* to a defendant's self-representation at trial) held that an accused does not have a constitutional right to represent himself on appeal,[14] because "the government's interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant's interest in acting as his own lawyer."[15]

13. Trial Chamber III in the *Milošević* case recalled relevant domestic case-law which qualifies the right of an accused to defend himself in person because of the nature of the crimes he is charged with.[16] In England and Wales, the Youth Justice and Criminal Evidence Act provides that an accused charged with a sexual offence may not cross-examine in person certain protected witnesses.[17] Similarly, in Scotland, the Criminal Procedure Act, as amended by the Sexual Offences Act of 2002, provides that an accused charged with a sexual offence is prohibited from conducting his defence in person at trial.[18] In Canada,[19] Australia[20] and New Zealand[21] the Criminal Codes provide that an accused charged with a sexual offence shall not personally cross-examine a witness under 18 years of age, unless the court decides that the proper administration of justice so requires. Where such an accused is prevented from cross-examining the witness, the court shall appoint counsel for the purpose of conducting the cross-examination.[22]

14. Trial Chamber III in the *Milošević* case also recalled that in civil law systems, for instance in France, Germany, Belgium, Austria and Switzerland, representation by counsel is often mandatory in serious criminal cases.[23] Similarly, the Code of Criminal Procedure of the Federal Republic of Yugoslavia (2001) provides that an accused may elect to defend himself in person but that imposition of defence counsel is mandatory in proceedings relating to offences which

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[13] *United States v. Faretta*, 422 U.S. 806, 834, note 46 (1975).
[14] *Martinez v. Court of Appeal of California, Fourth Appellate District*, 528 U.S. 152, 154 (2000).
[15] *Ibid* at 161-162.
[16] *Milošević* Decision, paras 46-48.
[17] Youth Justice and Criminal Evidence Act (England) 1999, secs. 34-35. Protected witnesses in the Act include complainants, witnesses to the crime and children.
[18] Criminal Procedure (Scotland) Act 1995, sec. 288C(1), as amended by the Sexual Offences (Procedure and Evidence) (Scotland) Act 2002.
[19] Criminal Code, RS 1985, sec. 486(2.3).
[20] Crimes Act 1914 (Cth), secs. 15YF, 15YG, 15YH; Evidence Act 1906 (Cth), sec. 106G; Criminal Procedure Act 1986 (NSW), sec. 294A; Sexual Offences (Evidence and Procedure) Act 1983 (NT), sec. 5; Evidence Act 1977 (Qld), sec. 21(L)-(S).
[21] Evidence Act 1908 (NZ), sec. 23F.
[22] Criminal Code, RS 1985, sec. 486(2.3).
[23] As recalled by Trial Chamber III in *Milošević* Decision, para. 49.

carry in excess of ten years imprisonment.[24] In such cases, where the accused fails to retain counsel, the presiding judge appoints counsel and notifies the defendant of the appointment.[25]

III.

15. The Accused is literate; he appears able to defend himself in person.[26] The Chamber is also satisfied that the Accused's waiver of professional legal assistance appears informed. The waiver was made in full awareness of the possible consequences of waiving the opportunity for skilled legal representation. The Registry notified the Accused that it was a mistake not to accept assistance of counsel.[27] It also appears that the Accused is aware that he is required to follow all Rules of Procedure and Evidence.[28]

16. As to whether the Accused unequivocally and voluntarily elected to represent himself in person, the Chamber notes the following submissions of the Accused. In the "Written Statement-Notification Pursuant to Your Rule 45(G)" made by the Accused on 3 May 2005 (attached as annex 1 to the Notification), the Accused requested that the Registry "reinstate my Defence Counsel, Mr Radović, or confirm my statement on conducting my own defence". In another Accused's statement written on 20 May 2005 (filed on 6 June 2005), the Accused complained – *inter alia* - that he could not appeal the Registrar's decision to suspend Mr Radović because of lack of legal assistance and affirmed that in case he could not obtain counsel of his choice he would have to defend himself in person.[29] The Accused's request for self-representation is an alternative position, advanced as a fall-back to a primary request for different counsel. As such it is not equivocal.

17. The Chamber examine now whether the Accused's alternative choice to represent himself in person is made freely. The Accused seemed to have made such a choice by default because of his "inability" to obtain the assignment of counsel of his choice, hence forced down by the circumstances. Accordingly, on 4 August 2005, the Chamber orally directed the Registry to address the issue with the Accused. On 5 August 2005, the Accused wrote in response a statement whereby he "demand the return of my attorney, Mr Radović, whom you illegally suspended in order to undermine and destroy my defence that had been prepared a long time

[24] See Articles 13 and 71(1) of the Code of Criminal Procedure of the Federal Republic of Yugoslavia.
[25] Article 71(4) of the Code of Criminal Procedure of the Federal Republic of Yugoslavia.
[26] This statement does not take into consideration the issue of his misbehaviour which is examined below.
[27] The Accused was informed in person and in writing. For instance, he received a letter from OLAD dated 1 April 2005 which inform him that "The issues in your case at this stage largely revolve around the Prosecutor's motion for referral of your case to the jurisdiction of Bosnia and Herzegovina under Rule 11 *bis* of the Rules of Procedure and Evidence. The legal issues relating to this motion must be addressed by a person with legal training and expertise".
[28] The Chamber notes the efforts of the Accused to make submissions pursuant to the Rules of Procedure and Evidence of the Tribunal.

ago. I want the same team that has prepared my defence to bring it to its completion, or else I will be forced to defend myself, the way I have been doing since my attorney, Mr Radović, was illegally suspended."

18. The Accused's choice of counsel, Mr Radović, is not permitted because Mr Radović was barred by the Registry, in accordance with the provisions of the Directive and the Code of Professional Conduct for Defence Conduct Appearing before the International Tribunal, from representing an accused before the Tribunal.[30] The Registrar's submission that the Accused refused to choose another counsel from the list of defence counsel or to indicate whether he wished to defend himself in person by 29 March 2005 and that the Accused elected to defend himself in person after Mr Koppe was assigned may cast doubt on whether the Accused's application for self-representation is considered the result of his free will. The Chamber notes in this regard that the Accused had actually already responded in the imparted deadline to the Registry's request that he make a choice in relation to his defence by 29 March 2005. On 22 March 2005, the Accused had made a submission whereby he requested that his choice of counsel be Mr Radović or that he would defend himself in person. The Registrar's Notification acknowledges that on or about 5 April 2005, the Registry had received the Accused's response dated 27 March 2005 (sic) but that it was not received by the Registry until 5 April 2005 due to the time needed to translate the letter from BCS. This is regrettable. The Accused's persistence from the very beginning to elect self-representation as a fall back choice cannot be denied. The Chamber is persuaded that the Accused actually desires the outcome of his request for self-representation and did not make the choice of self-representation forcefully. Accordingly it finds the Accused's request clear in intention.

19. The Chamber turns now to examine whether there exist circumstances under which the exercise by the Accused of his right to self-representation would obstruct the fair conduct of the proceedings in this case and which would call for an exception and require the Chamber to insist on legal assistance.

20. The Accused is charged with serious crimes which require particular legal skills. Rule 44 of the Rules requires that counsels appearing before this Tribunal are particularly competent. The accused before this Tribunal should not be placed at a disadvantageous position compared to the Prosecution which enjoys the assistance of skilled and competent legal expertise. Nevertheless, the Chamber considers that the right of self-representation should not be disregarded solely on

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[29] See "Submission Pursuant to your Rule 73(A) and your Rule 5(A): an appeal on the grounds of a violation of your Article 21 of your statute and your Rule 45(A) of your Rules of Procedure and Evidence" (sic), filed on 6 June 2005.
[30] See IT/125. Mr Radović appealed the Registrar's decision to suspend him before the President of the Tribunal who affirmed the impugned decision on 3 April 2005.

the basis of the negative effect on the Accused's position caused by his inferior knowledge or skills compared to those of a professional legal counsel.

21. The Accused is also charged with crimes of a sexual nature (rape, enslavement, outrages upon personal dignity). The Chamber doubts that it would be appropriate for the Accused to cross-examine at trial witnesses who are also alleged victims of those crimes. The list of witnesses provided by the Prosecution with its pre-trial brief shows that most witnesses are alleged vulnerable victims. Yet, the imposition of standby counsel in order to cross-examine those witnesses may be an appropriate measure which would not touch upon the right of the Accused to defend himself in person.

22. As mentioned *supra*, the United States Supreme Court stated (which Trial Chamber III and the Appeals Chamber in the *Milošević* case agreed to consider as a classical statement), the right of self-representation is not a license to obstruct the dignity of the court proceedings.[31] Until now, the Accused's behaviour has been deliberately disrespectful and inappropriate to say the least. At all hearings in this case, the Accused deliberately obstructed the smooth and effective functioning of the proceedings with inflammatory and abusive language. Such language is also contained in all his written submissions and demonstrates without any doubt the Accused's intention to disrupt the conduct of the proceedings. To give few examples, at the last status conference held in this case on 5 July 2005 pursuant to Rule 65*ter*, the Chamber (represented by Judge Orie) was informed by counsel that the Accused refused to attend the hearing because he deemed that he was entitled to have a status conference for him alone and not one with the accused Janković.[32] Judge Orie requested that the Accused appear before him to give explanations in person and the Accused refused to comply with the request. At the motion hearing held on 4 March 2005 and presided by Judge Orie, the Accused was reminded "not to use offensive language and not to insult anyone"[33] and was subsequently expelled from the courtroom. To give a last example, at the status conference of 19 March 2004, because the Accused had not been allowed to read a letter he had prepared for more than ten minutes (he claimed he needed an hour), the Accused went on a four day hunger strike.[34]

23. In relation to the Accused's written submissions before the Chamber, the Chamber does not wish to reproduce here more than few examples of the extremely abusive language used by the Accused and related to his anger at having Mr Koppe assigned to him. In his last submission,

[31] *Milošević* Appeals Chamber Decision.
[32] Transcript of hearing, p. ("T") 346, 347. The Accused further explained in his last submission dated 5 August 2005 that he believed that Mr. Janković is not his co-accused because the Third Amended Indictment (see para. 2 supra) does not concern the accused Janković.
[33] T. 225.
[34] On 23 March 2005, the Accused sent a letter to the United Nations Commanding Officer to inform him of the reasons of his hunger strike.

the Accused starts his submission as follows: "To the Registry of the Monstrous Fascist Hague Tribunal". In his submission dated 20 May 2005 and filed on 6 June 2005, the Accused qualifies his counsel as "an immoral bastard who works for this grotesque Hague Tribunal", his counsel and Carla Del Ponte are then said to be "fascist spies and complete bastards". In his submission dated 3 May 2005 and filed on 23 May 2005, the Accused again qualifies Mr Koppe as "a notorious scumbag". The disruptions caused by the Accused as well as the language he uses suffice to convince the Chamber that the obstructive behaviour of the Accused would disrupt the conduct of the proceedings and seriously impair the effective and fair defence of the Accused if he were to defend himself in person.

24. The Chamber further notes that the Accused is restricted from having contacts with any persons other than his family, legal counsel and diplomatic or consular representatives because he threatened to reveal the identities and whereabouts of protected Prosecution's witnesses.[35] The disrespect for protective measures ordered by the Chamber does not only disqualify the Accused from representing himself in person but also brings him in a position where he practically relinquished the vital facilities required for the preparation of what could be called even by the lowest standards a defence.

25. In sum, the Chamber finds that at this stage of the proceedings[36] it is not in the interests of justice, in particular that of a fair trial, to allow the Accused to waive his right of legal assistance. The Accused's deliberate and serious misbehaviour before this Tribunal, in itself, requires that the Chamber insists on legal assistance to be imposed on the Accused.

[35] At the status conference of 20 November 2003, the Accused threatened to disclose the identity and addresses of prosecution's witnesses and victims. The same day, the Prosecution requested pursuant to Rule 66 of the Rules of Detention that the Registrar institute specific regulatory measures against the Accused. On 25 November 2003, the Registrar prohibited contact with any persons other than his family, legal counsel and diplomatic or consular representatives, for a period of 30 days. In a letter filed before the Trial Chamber on 28 November 2003, the Accused reiterated his intention to disclose the identity of prosecution's witnesses and complained about the restrictions imposed by the Registrar. Since then, the Registrar renewed the decision restricting contacts with the outside world every 30 days.

[36] The Chamber suggests that the Registrar reconsider the Accused's choice of counsel in case the trial is conducted before this Tribunal.

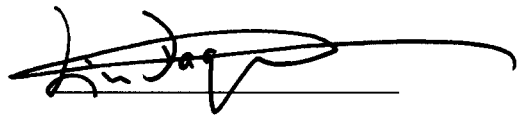
FOR THE AFOREMENTIONED REASONS,

PURSUANT to Articles 20 and 21 of the Tribunal's Statute and Rules 44, 45 and 54 of the Rules,

HEREBY DENIES the Accused's request for self-representation.

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

Dated this 19th Day of August 2005,
At The Hague,
The Netherlands.



Judge Daqun Liu
Presiding

[Seal of the Tribunal]