

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-05-87-A
Date: 2 March 2010
Original: English

IN THE APPEALS CHAMBER

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

Registrar: Mr. John Hocking

Decision: 2 March 2010

PROSECUTOR

v.

NIKOLA ŠAINOVIĆ
DRAGOLJUB OJDANIĆ
NEBOJŠA PAVKOVIĆ
VLADIMIR LAZAREVIĆ
SRETEN LUKIĆ

PUBLIC

**DECISION ON NEBOJŠA PAVKOVIĆ'S MOTION FOR STAY
OF PROCEEDINGS**

The Office of the Prosecutor:

Mr. Peter Kremer QC

Counsel for the Defence:

Mr. Toma Fila and Mr. Vladimir Petrović for Mr. Nikola Šainović
Mr. Tomislav Višnjić and Mr. Peter Robinson for Mr. Dragoljub Ojdanić
Mr. John Ackerman and Mr. Aleksandar Aleksić for Mr. Nebojša Pavković
Mr. Mihajlo Bakrač and Mr. Đuro Čepić for Mr. Vladimir Lazarević
Mr. Branko Lukić and Mr. Dragan Ivetić for Mr. Sreten Lukić

1. The Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ("Appeals Chamber" and "Tribunal", respectively) is seised of "General Pavković's Motion for Stay of Proceedings Pending Action by the Registrar" filed by Counsel for Nebojša Pavković ("Pavković") on 19 February 2010 ("Motion"). The Office of the Prosecutor ("Prosecution") filed its response on the same day.¹ Pavković did not file a reply.

2. On 26 February 2010, the Registry of the Tribunal ("Registry") confidentially filed the "Registry Submission Pursuant to Rule 33 (B) Concerning General Pavković's Motion for Stay of Proceedings Pending Action by the Registrar" ("Registry's Submission") confirming that a request for additional funding from Pavković's Counsel is pending before it and suggesting that the Appeals Chamber is not competent to review this matter at the present stage.² Pavković filed his submissions in response on the same day, clarifying that his Motion does not seek the Appeals Chamber's determination on this request for additional hours pending before the Registry, but only concerns the filing deadlines.³

I. BACKGROUND

3. On 26 February 2009, Trial Chamber III ("Trial Chamber") convicted Pavković pursuant to Article 7(1) of the Statute of the Tribunal ("Statute") for committing, through participation in a joint criminal enterprise, the crimes of deportation, other inhumane acts (forcible transfer), murder and persecutions as crimes against humanity under Article 5 of the Statute, and the crime of murder as a violation of the laws or customs of war under Article 3 of the Statute.⁴ The Trial Chamber sentenced Pavković to 22 years of imprisonment.⁵

4. Pavković filed his notice of appeal on 27 May 2009, challenging the Trial Judgement on a number of grounds.⁶ Subsequently, the Appeals Chamber granted Pavković's two requests for amendment of his grounds of appeal pursuant to Rule 108 of the Tribunal's Rules of Procedure and Evidence ("Rules").⁷ The most recent version of Pavković's amended appeal brief was filed on

¹ Prosecution's Response to General Pavković's Motion for Stay of Proceedings Pending Action by the Registrar, 19 February 2010 ("Response").

² Registry's Submission, paras 17-28.

³ General Pavković's Reply to Registry Submission Pursuant to Rule 33(B) Concerning General Pavković's Motion for Stay of Proceedings Pending Action by the Registrar, 26 February 2010 ("Reply to the Registry's Submission"), paras 2, 8-9.

⁴ *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Judgement, 26 February 2009 ("Trial Judgement"), vol. 3, paras 788, 790, 1210.

⁵ *Ibid.*, para. 1210.

⁶ Notice of Appeal from the Judgement of 26 February 2009, 27 May 2009.

⁷ Decision on Nebojša Pavković's Motion to Amend his Notice of Appeal, 9 September 2009; Decision on Nebojša Pavković's Second Motion to Amend his Notice of Appeal, 22 September 2009; Notice of Appeal from the Judgement

30 September 2009.⁸ The Prosecution's response brief was filed on 15 January 2010.⁹ Pavković filed his reply brief on 15 February 2010.¹⁰

5. The Trial Judgement has also been appealed by Nikola Šainović, Dragoljub Ojdanić, Vladimir Lazarević, Sreten Lukić and the Prosecution.¹¹ The briefing with respect to all the appeals in this case has been completed.

6. On 12 February 2010, the Appeals Chamber granted in part Pavković's motion seeking admission of additional evidence on appeal,¹² admitting 24 of the 36 tendered documents as confidential Exhibits 4DA1 through 4DA24.¹³ As a result, and pursuant to Rule 115 of the Rules, the Appeals Chamber recalled that Pavković was entitled to file a supplemental brief on the impact of the admitted additional evidence within 22 days of the Decision of 12 February 2010 (*i.e.* no later than 8 March 2010), if no rebuttal material is filed by the Prosecution; or, if rebuttal material is filed, within 15 days of the Appeals Chamber's decision on the admissibility of such material. The Prosecution then will then have ten days to file a response to the supplemental brief and Pavković may reply within four days thereafter. The Appeals Chamber further ordered that the supplemental brief and the response be limited to 2,500 words each, and the reply be limited to 1,000 words.¹⁴

7. On 16 February 2010, the Appeals Chamber granted in part "Vlastimir Đorđević's Motion for Access to Transcripts, Exhibits and Documents" filed on 29 December 2009, ordering, *inter alia*, that all parties in the present case (i) identify to the Appeals Chamber and the Registry, within 10 working days from the date of the said decision "what, if any, documents or exhibits contain

of 26 February 2009, 29 September 2009 (filed as Annex A to General Pavković Submission of his Amended Notice of Appeal, 29 September 2009).

⁸ General Pavković's Submission of his Amended Appeal Brief, 30 September 2009.

⁹ Prosecution Response to General Pavković's Amended Appeal Brief, 15 January 2010 (confidential; public redacted version filed on 26 February 2010, with a confidential corrigendum of 26 February 2010 and a public corrigendum of 1 March 2010).

¹⁰ General Pavković's Reply to Prosecution Response to Amended Appeal Brief, 15 February 2010.

¹¹ Defence Submission Notice of Appeal, 27 May 2009, and Defence Appeal Brief, 23 September 2009 (filed by Counsel for Nikola Šainović); General Ojdanić's [*sic*] Second Amended Notice of Appeal, 16 October 2009 (filed as Annex C to General Ojdanić's [*sic*] Motion to Amend his Amended Notice of Appeal of 29 July 2009, 16 October 2009), and General Ojdanić's Amended Appeal Brief, 11 December 2009 (filed as Annex B to General Ojdanić's [*sic*] Motion Submitting Amended Appeal Brief, 11 December 2009); Vladimir Lazarević's [*sic*] Defence Notice of Appeal, 27 May 2009 (confidential), Defence Submission: Lifting Confidential Status of the Notice of Appeal, 29 May 2009, and General Vladimir Lazarević's Refiled Appeal Brief, 2 October 2009 (confidential; public redacted version filed on 20 October 2009); Sreten Lukić's [*sic*] Notice of Appeal from Judgement and Request for Leave to Exceed the Page Limit, 27 May 2009, and Defense Appellant's [*sic*] Brief Refiled, 7 October 2009 (public with confidential annexes) (filed by Counsel for Sreten Lukić); Prosecution Notice of Appeal, 27 May 2009, Prosecution Appeal Brief, 10 August 2009 (confidential; the public redacted version was filed on 21 August 2009), and Corrigenda to Prosecution Appeal Brief of 24 August 2009 and 15 January 2010.

¹² General Pavković Motion to Admit Additional Evidence Before the Appeals Chamber Pursuant to Rule 115, with Annexes A, B, C and Request to Exceed the Word Limit, 14 October 2009 (confidential) ("Motion for Additional Evidence").

¹³ Decision on Nebojša Pavković's Motion to Admit Additional Evidence, 12 February 2010 (public redacted version) ("Decision of 12 February 2010"), para. 60.

material that has been provided to them subject to Rule 70 of the Rules, or to do so within 10 working days of their admission into evidence hereafter”; (ii) “seek leave from the Rule 70 providers to disclose this material to Đorđević within 15 working days from the date of this decision or within 15 working days of their admission into evidence under Rule 115 of the Rules hereafter”; and (iii) “apply to the Appeals Chamber for additional protective measures or redactions, if required, within 10 working days from the date of this decision or, where appropriate, within 10 working days of the admission of additional evidence under Rule 115 of the Rules hereafter”.¹⁵ Only the Prosecution has to date complied with this order.¹⁶

II. DISCUSSION

1. Arguments of the parties

8. Pavković requests that “all pending filing deadlines respecting his defence be suspended and stayed” until a decision by the Registry is issued on his request to have additional hours allocated to his Defence team under the Tribunal’s Legal Aid System.¹⁷ Referring specifically to the Decision of 12 February 2010, Pavković argues that his team “clearly faces significant additional work on this matter”, whereas all hours allocated for the remuneration of their services have already been used.¹⁸ He claims that the “allotment granted by the Registry is insufficient for completing all the work necessary in this Appeal” and refers the Appeals Chamber to his correspondence with the Tribunal’s Office for Legal Aid and Detention Matters (“OLAD”) pointing out that his requests in this regard have not yet been adequately dealt with.¹⁹ Pavković stresses that the current situation is unacceptable for his Defence team and, unless sufficient additional hours are allocated to them by the Registry, new counsel should be assigned to continue Pavković’s representation.²⁰

9. The Prosecution opposes Pavković’s request for stay in the filing deadlines and takes no position on the matter concerning the allocation of additional hours to his Defence team.²¹

¹⁴ *Ibid.*, para. 61.

¹⁵ Decision on Vlastimir Đorđević’s Motion for Access to Transcripts, Exhibits and Documents, 16 February 2010 (“Decision of 16 February 2010”), para. 22.

¹⁶ Prosecution’s Notice of Compliance with Decision Granting Vlastimir Đorđević’s Motion for Access to Transcripts, Exhibits and Documents, 19 February 2010.

¹⁷ Motion, para. 1.

¹⁸ *Ibid.*, paras 2-4.

¹⁹ *Ibid.*, paras 7-9.

²⁰ *Ibid.*, para. 11.

²¹ Response, para. 1.

2. Analysis

10. Pursuant to Article 24(C) of the Directive on Assignment of Defence Counsel²² (“Directive”),

[d]uring appellate proceedings, assigned counsel and assigned members of the defence team shall be remunerated on the basis of a maximum allotment of working hours paid at a fixed hourly rate as established in Annex I to this Directive, for the work reasonable and necessary to the preparation and presentation of the defence case.

The amount of such maximum allotment depends principally on the phase of the case and its complexity.²³ In determining the latter, the Registry generally takes into account a number of factors, including: the number and nature of the grounds of appeal; whether there is a cross-appeal; whether the appeal raises any novel legal issues; the complexity of the legal and factual issues involved; the number of documents that have to be reviewed; and the sentence imposed by the Trial Chamber. At present, different allocations of hours are as follows: Level 1 (difficult) with 1050 counsel hours and 450 support staff hours; Level 2 (very difficult) with 1400 counsel hours and 600 support staff hours; and Level 3 (extremely difficult) with 2100 counsel hours and 900 support staff hours.²⁴ In addition, all appeals hearing hours for counsel are reimbursed.

11. On 21 October 2009, Pavković’s appeal case was upgraded to Level 2.²⁵ It is the Appeals Chamber’s understanding that Pavković is not precluded from applying for additional remunerated hours for his Defence team at any stage of the appellate proceedings if the funds provided for under the said allotment are insufficient and valid reasons are demonstrated in support of such a request.²⁶

12. The Appeals Chamber confirms, however, that the present decision will not address the issue of allocating additional hours to Pavković’s Defence team given that it is the Registry which has the primary responsibility in the determination of matters relating to remuneration of counsel.²⁷ The Appeals Chamber further recalls that

where the Directive expressly provides for a review of the Registrar’s decision, the Trial Chamber cannot interfere in the Registrar’s decision, and its only option is to stay the trial until that procedure has been completed. Where, however, the Directive does not expressly provide for a review of the Registrar’s decision, the Trial Chamber, pursuant to its statutory obligation to ensure

²² IT/73/Rev.11, 11 July 2006.

²³ The Appeals Chamber notes that Pavković’s statement that payment on appeal is made on an hourly basis (Reply to the Registry’s Submission, para. 5) is therefore not entirely correct, as the applicable system implies the remuneration for validly billed hours of work *within* a maximum allotment (see Registry’s Submission, Annex VI).

²⁴ The Appeals Chamber notes that in the history of the Tribunal, only two cases on appeal were considered to be “Level 2” and none has so far been qualified as “Level 3”.

²⁵ Registry’s Submission, paras 11-12; Annex IV.

²⁶ *Ibid.*

²⁷ *E.g. Prosecutor v. Milan Milutinović et al.*, Case No. IT-99-37-AR73.2, Decision on Interlocutory Appeal on Motion for Additional Funds, 13 November 2003 (“Decision of 13 November 2003”), para. 19.

the fairness of the trial, is competent to review the Registrar's decision in the light of its effect upon the fairness of the trial.²⁸

In the present case, as Pavković himself points out, no definitive decision has yet been rendered by the Registry on the merits of his request for additional hours.²⁹ Therefore, the Appeals Chamber can only intervene in the matter once a decision is rendered by the Registry and the review procedure in relation to such a decision under Article 31 of the Directive is completed, and if it is satisfied that the matter affects the fairness of the appeal proceedings.

13. Consequently, the only question before the Appeals Chamber at this stage is whether Pavković should be exempt from complying with the applicable deadlines imposed by the Decisions of 12 and 16 February 2010, or by any forthcoming decisions until such time as the matter of allocating additional hours to his Defence team is resolved. In the present circumstances, the Appeals Chamber is not convinced that Pavković has demonstrated good cause for such an exemption, or that a stay in proceedings is required to ensure the fairness thereof.

14. In this regard, the Appeals Chamber reiterates that Pavković's Counsel agreed to represent him in full awareness of the system of remuneration for assigned counsel and is bound thereby.³⁰ In a letter addressed to the then Acting Head of OLAD and attached to the Motion ("Letter to OLAD"), Pavković's Counsel argues that the understanding that he "accepted this appeal assignment with full understanding that resources were limited and that [he] could not be paid for each hour worked is incorrect". He asserts that he was in fact "never formally assigned to handle this appeal [which] just carried over from the trial".³¹ The Appeals Chamber finds these claims untenable.³² Pavković's Counsel is therefore under the obligation to continue working in his client's best interests until the representation is terminated (with the completion of the proceedings or an approved withdrawal).

²⁸ *Ibid.* (footnotes omitted).

²⁹ Motion, paras 8-9. The Appeals Chamber further notes the background provided in the Registry's Submission, including the fact that the first request for additional hours submitted by Pavković's Counsel on 2 February 2010 was denied by the Registry on 10 February 2010 as it lacked sufficient detail and that his second request submitted on 17 February 2010 is currently under consideration (Registry's Submission, paras 8-16, 21, 23; Annex VI).

³⁰ Cf. Decision of 13 November 2003, para. 22, referring to Article 9(C) of the Code of Professional Conduct for Counsel Appearing Before the International Tribunal, IT/125 Rev. 1, 12 July 2002. The Appeals Chamber notes that the current version of the said document as amended on 22 July 2009 and promulgated on 6 August 2009, IT/125 Rev. 3 ("Code of Conduct") contains the same provision.

³¹ Letter to OLAD. See also, Reply to the Registry's Submission, paras 3-5.

³² See Registry's Submission substantiating the assignment procedure of Pavković's Counsel, including the appeal proceedings and the fact he was expressly notified that "in the event [Pavković] (or the Prosecution) wished to file an appeal, the appeal phase would be preliminary ranked at level 1 complexity pending further information from Mr. Ackerman and consultation with the Appeals Chamber" (para. 7). Having represented Pavković for almost a year in these appeal proceedings on this basis and with an upgraded level of complexity, and accepted full payment for counsel and support staff hours, Pavković's Counsel cannot plausibly argue that he has never been assigned to represent his client on appeal in full awareness of the remuneration schemes (paras 4-16; Annex I-IV). See also, Directive, Articles 16(B) and 16(C).

15. Moreover, the Appeals Chamber notes that Pavković filed his Motion for Additional Evidence on 14 October 2009 and should have been aware of the subsequent procedure pursuant to Rule 115 of the Rules, including the fact that in case his motion were to be granted, rebuttal evidence could be presented by the Prosecution and both parties would have the possibility to submit supplementary briefs regarding the alleged impact of the admitted evidence. Pavković's Counsel should have taken this into account at the time he was processing the funds available to him and made the necessary arrangements. The Appeals Chamber is thus unable to ascertain why Pavković waited until February 2010 to apply for additional hours in relation to his Defence team's work on the said supplementary briefs, and then applied for stay of proceedings a week after his Motion for Additional Evidence was granted in part.

III. DISPOSITION

16. For the foregoing reasons, the Appeals Chamber **DISMISSES** the Motion and **ORDERS** Pavković to comply with the applicable deadlines provided for in the Decisions of 12 and 16 February 2010, or any forthcoming decisions that may be rendered pending the resolution of his application for additional funding.

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

Done this second day of March 2010,
At The Hague, The Netherlands.



Judge Liu Daqun, Presiding

[Seal of the Tribunal]