



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-00-39-A
Date: 28 February 2008
Original: English

IN THE APPEALS CHAMBER

Before: Judge Fausto Pocar, Presiding
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Andréia Vaz
Judge Theodor Meron

Registrar: Mr. Hans Holthuis

Decision of: 28 February 2008

PROSECUTOR

v.

MOMČILO KRAJIŠNIK

PUBLIC

**DECISION ON MOMČILO KRAJIŠNIK'S MOTION TO
RESCHEDULE STATUS CONFERENCE AND PERMIT ALAN
DERSHOWITZ TO APPEAR**

The Office of the Prosecutor

Ms. Shelagh McCall

The Accused

Mr. Momčilo Krajišnik

Amicus Curiae

Mr. Colin Nicholls QC

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 seized of a “Motion of Momčilo Krajišnik to Reschedule the Date of Status Conference and for Permission for Alan Dershowitz to Make a Special Appearance” (“Motion”), filed by Momčilo Krajišnik (“Mr. Krajišnik”) on 21 February 2008.

I. STATUS CONFERENCE

2. Under Rule 65*bis*(B) of the Rules of Procedure and Evidence (“Rules”), the Appeals Chamber must hold a status conference every 120 days in order for the Tribunal to inquire into the mental and physical well-being of the accused and to give the accused an opportunity to raise pertinent issues. The last status conference in this case took place on 5 November 2007;¹ therefore, Rule 65*bis*(B) requires that the next status conference should take place by 1 March 2008.

3. In the Motion, Mr. Krajišnik requests that the status conference be postponed until 31 March 2008 so that Alan Dershowitz (“Mr. Dershowitz”), whom Mr. Krajišnik intends to employ, might attend the status conference. In an e-mail accompanying Mr. Krajišnik’s submission, Mr. Dershowitz has confirmed his availability on 31 March 2008. The Prosecution indicated, in an informal communication, that it had no objection to the requested postponement.

4. Given the unobjectionable nature of the request to postpone the status conference and the Appeals Chamber’s interest in a full airing of any issues possibly arising from Mr. Dershowitz’s involvement in the case, the Appeals Chamber agrees that prudence counsels the postponement of the next status conference until 31 March 2008.

II. REPRESENTATION BY ALAN DERSHOWITZ

5. In the Motion, Mr. Krajišnik notes that he “intends to engage the services of attorney Alan Dershowitz to assist him in the remaining phases of the appellate process, specifically limited to a brief on the subject of Joint Criminal Enterprise.”² The Appeals Chamber gathers that, unlike the legal advisors who have simply assisted Mr. Krajišnik in preparing his appeal, Mr. Dershowitz will actually serve as counsel for Mr. Krajišnik, albeit on a limited basis. Although the Prosecution has not yet taken a position on Mr. Krajišnik’s request, the Appeals Chamber considers that it should address the present question immediately, particularly since the briefing of this appeal is nearly complete.

A. Permissibility of Engaging a Lawyer at this Stage

6. In the Appeals Chamber's opinion, the situation presents something of a conundrum. On the one hand, Mr. Krajišnik has already elected to represent himself pursuant to the Appeals Chamber Decision permitting him to do so,³ and as noted by the Appeals Chamber at the time, he "must accept responsibility for the disadvantages this choice may bring."⁴ On the other hand, the Appeals Chamber has recognized the existence of heightened concerns regarding the basic fairness of proceedings when a defendant has chosen to self-represent.⁵ For this reason, *amicus curiae* was appointed "to assist the Appeals Chamber by arguing in favour of Mr. Krajišnik's interests."⁶

7. In the past the Tribunal has wrestled with the appropriateness of certain restrictions on the right to self-representation.⁷ Here, the converse question arises: are there legitimate restrictions on the right of a self-represented defendant to hire a lawyer? The Appeals Chamber has held that the right of self-representation "may be curtailed on the grounds that a defendant's self-representation is substantially and persistently obstructing the proper and expeditious conduct of his trial."⁸ Such a standard is also apt in resolving the present issue. In this case, the Appeals Chamber notes that Mr. Krajišnik has long sought to engage the services of Mr. Dershowitz, and there is no reason to believe that Mr. Krajišnik has deliberately manipulated the situation in order to create unnecessary delays. Furthermore, the Appeals Chamber has discretion to call for an expedited briefing schedule and thereby avoid protracted proceedings.

8. There is also no incongruity in allowing partial self-representation, even though the Appeals Chamber has referred to self-representation and legal assistance as standing in "binary opposition".⁹ What the Appeals Chamber has prohibited is a situation whereby defendants can mix-and-match various *elements* of self-representation and legal assistance—*e.g.*, when a self-represented accused has attempted to partake of legal aid funding.¹⁰ A defendant must take the bitter with the sweet when making this choice, but only with respect to each issue. There is no fundamental reason why a

¹ Scheduling Order, 29 October 2007; Scheduling Order, 25 October 2007.

² Motion, para. 1.

³ Decision on Momčilo Krajišnik's Request to Self-Represent, on Counsel's Motions in Relation to Appointment of *Amicus Curiae*, and on the Prosecution Motion of 16 February 2007, 11 May 2007 ("Decision of 11 May 2007").

⁴ Decision on Krajišnik Request and on Prosecution Motion, 11 September 2007 ("Decision of 11 September 2007"), para. 41 (internal quotation marks omitted).

⁵ Decision of 11 May 2007, para. 16.

⁶ *Id.* at para. 19.

⁷ *See, e.g.*, Decision of 11 September 2007, paras 26-46; *Slobodan Milošević v. Prosecutor*, 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"), paras 11-21. *See also Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-PT, Decision on the Financing of the Defence of the Accused, 30 July 2007, paras 49-65.

⁸ *Milošević* Decision, para. 13.

⁹ Decision of 11 September 2007, para. 40. *See also Milošević* Decision, para. 11.

¹⁰ *See, e.g.*, Decision of 11 September 2007, para. 41.

defendant may not make different choices—self-representing or engaging legal counsel—with regard to different issues.

9. Although the Appeals Chamber has already benefited from the legal arguments advanced by Mr. Colin Nicholls as *amicus curiae*, Mr. Nicholls is not a party to the current proceedings and does not represent Mr. Krajišnik.¹¹ By contrast, Mr. Dershowitz can present Mr. Krajišnik's own arguments regarding a complex issue, Joint Criminal Enterprise ("JCE"), which the Appeals Chamber acknowledges might be too complex for a non-lawyer to master. Consequently, there is a strong presumption that, despite the late date, Mr. Krajišnik should be afforded the opportunity to present the most compelling case that he can. As long as Mr. Dershowitz's involvement at this stage will not cause substantial or persistent obstruction or delays of the appeal proceedings, and provided he meets the requirements set out in Rule 44 of the Rules, the Appeals Chamber recognizes that Mr. Krajišnik may engage Mr. Dershowitz's legal assistance regarding a discrete issue.

B. Parameters of Mr. Dershowitz's Representation

10. The Appeals Chamber appreciates that there might be a risk of redundancy and complication since *amicus curiae* has already advanced arguments regarding JCE, the issue that Mr. Dershowitz also intends to brief. Furthermore, there is a legitimate concern about not delaying proceedings that have already proved extremely time-consuming. The Appeals Chamber considers that these concerns can be allayed.

11. As to the risk that Mr. Dershowitz's brief might add unnecessary confusion, it should go without saying that in the event of a contradiction between the submissions of *amicus curiae* and Mr. Dershowitz, the Appeals Chamber will treat only Mr. Dershowitz's arguments as representing his client's views. To avoid unhelpful complication, the Appeals Chamber directs Mr. Dershowitz to state with precision which arguments of *amicus curiae* he embraces and which arguments he rejects. Although Mr. Krajišnik has addressed the JCE issue in his Appeal Brief,¹² the Appeals Chamber will regard Mr. Dershowitz's submission as a supplementary brief on behalf of Mr. Krajišnik.

12. Furthermore, the Appeals Chamber imposes a strict briefing schedule in order to prevent unnecessarily long or time-consuming submissions and thereby foster expeditious appeal proceedings. Mr. Dershowitz must submit his brief on behalf of Mr. Krajišnik no later than 30 days after the filing of this Decision, and the brief may not exceed 8000 words in length. The Prosecution

¹¹ Decision of 11 May 2007, paras 19-20.

¹² Appeal by Momčilo Krajišnik to the ICTY Judgement of 27 September 2006 (Public Filing), 28 February 2008, paras 9-24.

may submit a response within 15 days after the filing of Mr. Dershowitz's brief, and the response may not exceed 4000 words in length. There will be no opportunity for a reply. Furthermore, there shall be no allowance for any time to translate the submissions, which shall all be in an official language of the Tribunal. Given these parameters, the Appeals Chamber is convinced that Mr. Dershowitz can advance fully any additional arguments that Mr. Krajišnik wishes to make without causing undue delay in the appeal proceedings. The Appeals Chamber must emphasize that the current scheduling for the filing of briefs shall remain unaffected.

III. DISPOSITION

13. In light of the foregoing, the Appeals Chamber **ORDERS** that the next status conference in this case shall be held before the Pre-Appeal Judge on 31 March at 15:00 in Courtroom 1. In addition to the parties, *amicus curiae* is invited to participate either in person or via tele-conference.

14. The Appeals Chamber **FURTHER ORDERS** additional briefing consistent with Paragraphs 11-12 of this Decision and, in accordance with Rule 44 of the Rules, **DIRECTS** Alan Dershowitz to file a power of attorney with the Registrar at the earliest possible time and no later than the date on which he submits a brief on behalf of Mr. Krajišnik.

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

Dated this 28th day of February 2008,
At The Hague, The Netherlands.



Fausto Pocar
Presiding Judge

[Seal of the Tribunal]

DECLARATION OF JUDGE SHAHABUDEEN

I agree with the substance of the decision, but, with respect to paragraph 12, would have allowed a right of reply to Mr. Dershowitz.

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

Dated this 28th day of February 2008,
At The Hague, The Netherlands.



Mohamed Shahabuddeen

[Seal of the Tribunal]