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: IT-00-39-T

Date: 18 August 2005

Original: English

IN TRIAL CHAMBER I

Before: Judge Alphons Orie, presiding
Judge Joaquín Martín Canivell
Judge Claude Hanoteau

Registrar: Mr Hans Holthuis

Date: 18 August 2005

PROSECUTOR

v.

MOMČILO KRAJIŠNIK

REASONS FOR ORAL DECISION DENYING MR KRAJIŠNIK'S REQUEST TO PROCEED UNREPRESENTED BY COUNSEL

Office of the Prosecutor

Mr Mark Harmon
Mr Alan Tieger

Counsel for the Defence

Mr Nicholas Stewart, QC
Mr David Josse

1. On 24 May 2005,[1] Mr Krajišnik sent a letter to the Registrar of the Tribunal stating:

> I have decided to conduct my own defence in future proceedings. As the provisions of paragraph [(F) of Rule 45 of the Rules of Procedure and Evidence] state that: "A suspect or an accused electing to conduct his or her own defence shall so notify the Registrar in writing", I do so hereby. Since you represent the institution whose function is to assist all parties in the trial proceedings impartially, I would like to request that you inform me of the rights of a defendant who is not represented by counsel but is conducting his own defence, because Rule [45] contains no such explanation (or any addendum dealing with such a situation is not available to me). I would also request that you inform the Trial Chamber of my decision as expeditiously as possible, so that my decision may be implemented within the shortest possible time.

2. The Registrar in due course notified the Chamber of this,[2] but on 25 May the Accused also had the opportunity to address the Chamber directly:

> First of all, I'd like to thank the Trial Chamber, and I've made a decision very unwillingly to take care of my own defence and to participate in this trial in an active, rather than a passive way, as I'm doing now. And I do hope I'll have further opportunity to explain to you why all this has happened. And for the time being, all I want to say is two sentences, no more. Your Honours, at the very start, I said I was not guilty, and I said I do not ask you to believe me I'm not guilty but to make it possible for me to establish the truth. My Defence team at the moment is unable to assist me in establishing the truth, I am convinced of that, because of the situation and the conditions. And if you wish me to provide any more detailed explanation at any point in time, I will be more than glad to do so. Thank you very much once again.[3]

3. The train of events set in motion by this request grew long and complex. The major aspects of it are referred to in the body of these reasons. Suffice to say, in this introduction, that the trial continued with little disruption, and the Prosecution's case closed on schedule on 22 July 2005. A provisional decision by the Chamber, on 26 May, ensured that Mr Krajišnik was represented by counsel without interruption. He was allowed, as an exception to the usual regime, to supplement counsel's cross-examination with his own questions.[4]

4. On 22 July, the Chamber substituted its provisional decision with a final one, denying the Accused's request.[5] The reasons for that decision are set out below.

I.

5. Before a request such as that of Mr Krajišnik's may be addressed on its own terms, both the law and common sense indicate a preliminary inquiry to determine whether the request is unequivocal, informed, and intelligent.[6]

6. "Equivocal" means "unclear in meaning or intention; ambiguous."[7] In the case-law of the Tribunal equivocation has been found where there has been self-contradiction – an extreme case, one might say, of being "unclear in meaning".[8] A United States federal appellate court has held that "A request to proceed pro se is not equivocal merely because it is

an alternative position, advanced as a fall-back to a primary request for different counsel."[9] The appellant in that case had "steadfastly" and "persistently" sought to represent himself, even though his request was conditional in form.[10] The present Chamber accepts the above proposition as plainly correct: a request which is formulated conditionally, or in the alternative, may lack nothing in clarity. But where a court is not persuaded that the applicant actually desires the alternative of self-representation (because, for example, the applicant fails to "unmistakably commit himself"[11] or "vacillates in his resolve to continue without representation"[12]), the court has little choice but to find the request unclear in meaning or intention, ambiguous, and therefore equivocal.

7. As explained in detail further below in this section of the reasons, the Chamber is not persuaded that Mr Krajišnik unequivocally decided to proceed with the trial unrepresented. Our view relies on a general appreciation of what was said by the Accused in connection with this issue, and takes into account the circumstances of the defence team at the time of the oral decision we gave on 22 July.

8. Initially, the Chamber was also of the view that the Accused's request was both uninformed – especially as to the financial and practical consequences of such a decision – and "unintelligent" – in the sense that the Accused had not made a rational appreciation of the burden of conducting a large criminal case from the confines of the UN detention centre, and of the salient and hidden dangers of such a choice. However, in the ensuing days and weeks, Mr Krajišnik undoubtedly became properly informed. He received, for example, a memorandum from the Registrar, clarifying that "if the Accused is to represent himself, the Registrar will not be in a position to provide any funding for the costs of his defence, or to assign Tribunal-paid support staff to assist the Accused."[13] (The Accused at that point was receiving around US$36,500 per month in legal aid from the Tribunal, as a result of having been assessed partially indigent.) Mr Krajišnik undoubtedly also gained new insight into the rigours of running a case in court, as a consequence of his active participation in the cross-examination of witnesses. He did so only after being warned by the Chamber that "your lack of legal experience means that there is a serious risk that you'll damage your position."[14] So the "intelligently" test has been satisfied.

9. Nevertheless, the problem of equivocation evident already in Mr Krajišnik's first address to the Chamber (paragraph 2, above) never went away. It was present in his second address, on 26 May.[15] (The endnotes reproduce the Accused's submissions.) He made clear then that he was frustrated with what he saw as the poor performance of his defence,[16] the

partial cause of which, in his assessment, was that he himself was not actively involved in the questioning of witnesses.[17] Another cause, he said, was insufficient resources for defence investigators.[18] His request was being formulated, it seemed to us, in the conditional. The various resource-related or organizational issues identified by the Accused[19] implied solutions less drastic than self-representation.

10. Early on, then, it became plain to the Chamber that the self-representation request was really a drive on the part of Mr Krajišnik for financial and structural improvements to be made to the defence team. The situation, as it was, was so unsatisfactory, Mr Krajišnik seemed to be saying, that self-representation could not make it any worse.[20] In the Chamber's view, this does not evince a steadfast and persistent desire to proceed without representation. Certain other remarks also seemed to call into question the very desirability, for Mr Krajišnik, of self-representation.

11. At a hearing on the question of self-representation on 31 May 2005, the Accused read out a letter he had sent the Registrar the same day, making reference to a meeting he had had with Registry staff:

> The Registry representatives on that occasion informed me that they were not ready to provide answers to my questions. They needed more time to consider the matter, and they were expecting to be able to answer those questions soon. However, I would just like to clarify that I do need this information now as [a] consequence of my decision and not in order for me to be able to make this decision. I also explained to them that my decision is not conditional in any way and that since last Wednesday I was indeed in a position to consider my position from every point of view, and this is my firm and well-considered decision.[21]

Mr Krajišnik then told the Chamber, no longer reading from the letter:

> But my decision, believe me, is a fully pondered and considered decision, because it is quite clear I can conduct my defence much better than a Defence counsel who has, himself, admitted that he was unable to do so. But ... the Registry is not making anything available to me.[22]

12. If these passages suggest an unconditional decision free of equivocation, such an interpretation cannot be sustained in the context of the ongoing submissions. The day after the above remarks, Mr Krajišnik asked for the Chamber's Senior Legal Officer to mediate with the Registry to resolve practical matters affecting defence operations.[23] The morning after that, the Chamber asked the Accused to particularize, in writing, the items he had in mind for discussion.[24] The issue of self-representation and its connection with the proposed mediated talks was explored by the Chamber on 3 June. The Accused said:

> I'm not somebody who wants to make trouble. Throughout my life I've always looked for compromises, and that's why in my own decision I indicated that reluctantly or unwillingly I made that decision. It is my job to analyse certain events, and I have seen that the path taken by

> the Defence team is certainly leading to no good. And that's why I've made my decision, not because I want to play at being a lawyer. And I suppose you will be able to judge this. In as far as the Rules and regulations are concerned, there are no conditions there. People drafting those Rules did not say that only lawyers would be allowed to be granted the right to conduct their own defence. But what about ordinary men and women? How are they going to make sure that their rights are respected? Let me just conclude on this note: I would like to say that any compromise would be a good solution, but it is not only about me. I was forced to make this decision. I didn't make it because I wanted to disrupt proceedings halfway through the trial. And something else: It is not my aim to prolong this trial. I would like for this trial to be over as soon as possible because it is all quite exhausting and tiring and it's a hassle for all of us, especially for me, and I have a deep-seated belief in truth. And let me assure you that it was not my aim when making this decision to try and prolong proceedings and all that. It has been an imposed decision, so to say, and I believe you've seen this. And thank you for having given me the opportunity to speak out once again. And before I conclude, just one more point: In whatever combination or structure ... I believe that it would be useful if I'm going to be asking questions [of witnesses].[25]

13. When Mr Krajišnik was asked to clarify whether the above comments qualified his request to proceed unrepresented, he did not answer directly.[26] He proceeded to give non-committal answers in another three rounds of questioning[27] – until this final exchange:

> JUDGE ORIE: Judge Hanoteau suggests that I even put the question more direct to you. Your decision that you want to represent yourself and not be represented — and not be represented by counsel, is that, in view of the talks you suggested should take place, is that a irrevocable decision, or would it still depend on the outcome of such talks, compromises to be reached, whether you — whether you would consider to come back to that position?
>
> THE ACCUSED: I really do feel uncomfortable if you keep failing to understand what I mean. I believe that after such negotiations we might find a solution whereby I could be happy to say, My decision is revoked. I believe that Judge Hanoteau has judged the situation properly.[28]

14. This of course leaves no doubt as to the conditional form of the request. However, elements of what the Accused said on that day suggest moreover that self-representation was an avenue that he was being forced down by the circumstances, against his will.

15. On 9 June 2005, the Chamber granted the talks requested by Mr Krajišnik and sent its Senior Legal Officer to join the talks in a supervisory role. The concluding words of the decision were: "If by the end of that series of meetings self-representation continues to be an actual wish of Mr. Krajisnik's, the Chamber will deliver a final decision on the matter at the appropriate time."[29] Six meetings were held between 14 June (the date of the first and only meeting attended by the Senior Legal Officer) and 8 July. The progress reports received by the Chamber were generally positive. On 29 June, the Accused said:

> I did have a meeting with the representative of the registry. This meeting was successful. We're supposed to continue tomorrow, and we — I believe that we will deal with all the issues that are still pending. One of the issues was Mr. Josse, and what Mr. Stewart has just said is correct. I hope that I will see a positive outcome and that's why I said that I would be glad if Mr. Josse could examine the witness. I would like to commend the representative of the registry, who has

> been very flexible in seeking solutions, and that's why we have been able to deal with a number of issues so fast.[30]

16. Mr David Josse, referred to in this passage, is now Mr Krajišnik's co-counsel. The Registrar appointed him to the position on 22 July 2005, in place of Ms Chrissa Loukas.

17. On 5 July Mr Krajišnik followed up with a letter to the Senior Legal Officer, which again gave a generally positive account of the talks, although one point, important in the Accused's view, remained unresolved: "we have either agreed on all questions or there is a way of resolving all except one – the question of paying investigators". Mr Krajišnik wrote that while he was "willing to find a compromise ... I cannot understand how money can be found for two new investigators and a coordinating lawyer while the Registry cannot find a flexible solution to meet the expenses of the existing investigators."

18. The sticking point concerning investigators was detailed in a memorandum of the Registrar to the Chamber on 19 July 2005. It is worth reproducing the relevant paragraphs in order to illustrate the extent to which Mr Krajišnik's concerns had, by that point in time, been accommodated:

> Mr Krajišnik wishes the Registry to make additional funding available to pay the Pale-based investigators. The Registry considers that it is unable to do so. The investigators are family members, friends and associates of Mr Krajišnik. They appear to be unwilling or unable to work directly for Mr Stewart, preferring instead to receive instructions from Mr Krajišnik himself. This often renders the work performed by the Pale-based investigators unusable for Mr Krajišnik's Hague-based defence team. In addition, the Registry has found that Mr Krajišnik has sufficient financial means to contribute US$9,589 per month to the costs of his defence. ... Because Mr Krajišnik does not pay this contribution to his Hague-based defence team, Mr Stewart expects him, at a minimum, to pay the Pale-based investigators. If Tribunal funds are used to pay the Pale-based investigators, the Registry's determination that Mr Krajišnik is able to contribute to the costs of his defence will be rendered null and void.
>
> Although the Registry considers that paying the Pale-based investigators with Tribunal resources is inappropriate, it became clear during the consultations that the funding of the Pale-based investigators would be the "deal breaker" for Mr Krajišnik. In this light, the Registry indicated to Mr Krajišnik that it was willing to consider covering some of the *costs* of the Pale-based investigators upon submission of office-costs related invoices. The Registry indicated to Mr Krajišnik that it would be willing to grant up to US$1,000 per month for this purpose. Mr Krajišnik's position is that €3,800 is a more appropriate figure. The Registry is of the view that paying such a sum would be tantamount to funding the investigators in full – a course of action that is unacceptable for the reasons outlined above.

19. As we have indicated, Mr Krajišnik's equivocal stance in relation to his request to proceed without representation continued until the very end. The end came on 20 July, when the Chamber pressed the Accused to clarify whether he considered that the Chamber remained seized of his request. Mr Krajišnik declined to answer yes or no. The Chamber informed him that a non-answer would be interpreted by the Chamber as an affirmative answer.[31]

20. That the Accused has not expressed himself clearly on his application to represent himself means that his request fails on the equivocation test and must be denied. We cannot sensibly consider his request for an outcome we believe he does not, or most probably does not, want. It is evident that what Mr Krajišnik does want is a more effective defence. In his exasperation to bring his issues and proposals to the forefront, he took drastic action. Resources made available by the Registrar to the defence, as well as the composition and organization of the defence team, have increased or improved (also in the Accused's estimation) since the Accused raised the issue of self-representation on 24 May. His action quickened the implementation of changes already under consideration prior to that date.

21. In sum, the dissonance between Mr Krajišnik's request to represent himself and the material situation of the defence team on the ground has only grown since 24 May. The Chamber has taken it upon itself to decide an application that the Accused maintained at first half-heartedly, and finally by default. Another Chamber might just as well have determined the application withdrawn or moot and laid the matter to rest. As it happens, the present Chamber has chosen to recognize an application, but upon reflection denies it for being persistently equivocal. It was equivocal because in reality it was a means to another end, this being the root cause of the ambiguity surrounding Mr Krajišnik's request. No criticism of the Accused is intended by this remark.

II.

22. Having decided Mr Krajišnik's application on the above grounds, the Chamber is wary of going into other areas of principle. Nevertheless, we have considered what our decision would have been had the Accused not been equivocal in his request, and have found that the result would have been the same. Thus the application would be denied also for the reasons given in this second section.

23. Article 21 of the Tribunal's Statute provides that an accused is entitled to represent himself or herself in trial proceedings. The Appeals Chamber has held that an accused has a presumptive right to self-representation.[32] The right is not to be treated lightly. It is on a par with other fundamental due-process rights, such as the right to remain silent, to confront witnesses, and to a trial without undue delay.[33] In reaching this conclusion, the Appeals Chamber relied not only on the words of the Tribunal's Statute but also on the US case of *Faretta v. California*.[34] This case had been relied on also by the Trial Chamber from which the appeal originated.[35] *Faretta* was hailed by the Trial Chamber as "the classical statement of

the right to self-representation," and the Appeals Chamber agreed. The effect of those remarks is that US case-law must feature unusually prominently in any derogation by this Tribunal from the right to self-representation. If *Faretta* is highly persuasive authority, a line of US case-law which derogates from *Faretta* may also be treated as persuasive in this Tribunal's understanding of the limits to the right to self-representation, as long as the derogation is not inconsistent with any other due-process rights.

24. It is already clear from Tribunal case-law that the assertion of a right to self-representation will succeed or fail depending on the factual context. *Milošević* was a case in which the accused insisted from the start on his right to represent himself. The Trial Chamber in that case gave full effect to that right, while also characterizing it as "not absolute".[36] The reservation was of no practical significance at the time it was made – it mostly reflected remarks of the US Supreme Court[37] on the limits of *Faretta* – but it was given life in a later decision of the same Trial Chamber, which changed the status of the accused from that of being unrepresented, to that of being represented by counsel. The Trial Chamber said that "the prospects that the trial would continue to be severely disrupted [due to the accused's medical condition] were so great as to be likely to undermine the integrity of the trial process."[38] The Appeals Chamber did not disagree with this assessment, and allowed a change in status,[39] even as it disagreed with the modalities of case presentation ordered by the Trial Chamber.[40] What is relevant to the present decision is that both Trial Chamber and Appeals Chamber considered potential disruption to proceedings a reason to deny self-representation.[41]

25. In *Prosecutor v. Norman et al.*, a case of the Special Court for Sierra Leone, the accused's application to represent himself, made immediately after the Prosecution's opening statement, was denied because it had the "potential" to impact negatively upon the right of the two co-accused in the case to a trial without undue delay. Long adjournments would have been required, in the Court's assessment, to enable the applicant "to make any meaning out of the numerous and intricate documents" in that case.[42] The Court did not say whether it would have decided the application differently had it been made at some earlier point, but "asserting [the self-representation] right as lately [sic] as on the first day of his trial after over a year in pre-trial detention" was considered too late for effective assertion of the right, as it would have led to "unnecessary prolongation" of the proceedings.[43]

26. Courts in the United States recognize that the effect to be given to the right to self-representation in criminal proceedings depends upon the timing of the request. There is a presumption that, if the right is asserted prior to the beginning of trial, it will be given effect.

In *Faretta* the defendant made the request "well before" trial.[44] Certain minimal conditions (including those referred to in the first part of the present reasons) need to be fulfilled, but once that is done a trial court's violation of the constitutional right to self-representation requires automatic reversal of a criminal conviction and is not subject to a "harmless error" analysis.[45] However, *Faretta*'s affirmation of the right as constitutional, and the Supreme Court's application of that principle to the facts of that case, did not affect a line of US authorities, which pre-date and post-date *Faretta*, denying self-representation requests made post-commencement. The US position is that when a defendant applies to exercise his or her right after a trial has got underway, the court will consider what effect to give to that right in light of the interest against disruption of court proceedings.

27. An early authority in that line is *US v. Denno*, which gives the classical statement of the approach to post-commencement requests:

> Once the trial has begun with the defendant represented by counsel ... his right thereafter to discharge his lawyer and to represent himself is sharply curtailed. There must be a showing that the prejudice to the legitimate interests of the defendant overbalances the potential disruption of proceedings already in progress, with considerable weight being given to the trial judge's assessment of this balance.[46]

28. In *Robards v. Rees*,[47] post-dating *Faretta*, the US Court of Appeals held that the trial judge had properly exercised his discretion in dismissing the defendant's request for self-representation, since it was made after the roll of jurors had been called. If given effect, the request would have delayed the commencement of the trial "for an extended period of time" in order to allow the defendant a sufficient amount of time to prepare his defence.[48] In another US case, where the defendant asked to proceed pro se on the second day of trial, the judge's denial of the request on the basis that it would, if granted, "have a tendency to disrupt the proceedings" was not disturbed on appeal.[49]

29. Lastly, in this respect, we shall mention two cases from the United Kingdom. *R. v. Woodward*,[50] represents the UK position, where the general rule is recognized that counsel cannot be forced upon a defendant against his or her will. But timeliness is a limiting factor also in the UK. *Woodward* is a case in which the appellant succeeded because he had expressed his desire to represent himself immediately prior to the scheduled commencement of the trial, when his legal-aid counsel withdrew from the case.[51] In the later case of *R. v. Lyons*,[52] Lord Justice Waller wrote for the Court of Appeal that an application to dispense with counsel half-way through a simple perjury case may well be allowed, but that the question is a matter entirely for the discretion of the trial judge, to the extent that "it is quite

impossible to say that the fact that he did not allow the appellant to give his reasons [for wishing to dispense with counsel] invalidates the exercise of his discretion."[53]

30. For the purposes of the present reasons, the Chamber is not inclined to look much further than the cases already cited, both for the reason given above, when introducing *Faretta*, and for the reason that neither the Defence nor the Prosecution have cast any relevant doubt on the applicability of those cases. If there are trends in other jurisdictions which give greater effect to the right of self-representation than may be derived from the cases cited above, such trends have not been brought to the Chamber's attention.[54] We note that in many civil-law jurisdictions,[55] including the Federal Republic of Yugoslavia,[56] the Federation of Bosnia and Herzegovina,[57] and Republika Srpska,[58] a defendant may not appear unassisted by counsel in serious criminal cases, and while it would be inaccurate to say that that displaces the right to self-representation (for a degree of active contribution by the defendant is still allowed),[59] civil-law practice is not very likely to give rise to a situation like the present one, in which Mr Krajišnik is requesting a mid-way switch from one model of defence to another quite different model.

31. In sum, a defendant who asserts the right to self-representation prior to the commencement of trial has a strong case. When, however, the request is made during trial, the discretion of the trial judge to dismiss the request is much broader because a new, factual assessment enters the calculation, namely the extent to which the requested change in status will disrupt trial proceedings.[60] Having made the factual assessment, the trial judge must make a legal determination as to the acceptability of any disruption, taking into account the general interest in an expeditious trial and the accused's right to self-representation.

32. It is entirely proper that the question of disruption to proceedings looms large. Once a trial gets underway, significant resources are tied up, including in the case of this Tribunal one of the six Trial Chambers, which means that disruptions at a per-diem rate are very expensive and cause knock-on delays in the hearing of other cases waiting in line. There is no necessary incompatibility between the self-representation right and the orderly administration of justice, except that in practical terms a late assertion of the right tends to undermine the integrity of trial proceedings.

33. A considerable disruption of the proceedings would be the effect of the Accused's taking over the conduct of his defence. Since he is in detention, he must rely on others to perform much of the preparation, and those others would have to be hired and organized into

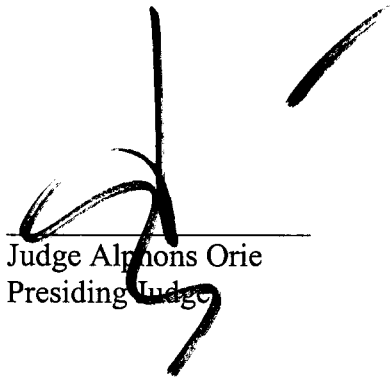
a team. Even if the Chamber were to appoint stand-by counsel to assist Mr Krajišnik, considering that present counsel might not accept this position, a very long adjournment would be necessary for a new team to be operational. The Registrar has made it clear that no legal-aid disbursements will be made under the self-representational model, which means that Mr Krajišnik would have to self-fund the bulk, if not all, of his expenses. The Chamber does not know how long the Accused might need to organize new sources of funding, but we anticipate that eight months' worth of defence costs (closing arguments are due in April 2006) cannot be raised from one week to the next. These brief observations are sufficient to explain our conclusion that considerable disruption to proceedings is inevitable.

34. The Chamber should also not fail to remark upon the fact that a criminal case of the present magnitude, which has been experienced as a great strain even by learned defence counsel, would certainly collapse if put into the hands of Mr Krajišnik, who in his limited cross-examination of witnesses between May and July inadvertently revealed details of protected witnesses and was frequently cautioned by the bench for his improper questions and misunderstandings of procedure; and this is to say no more, and no less, than that the Accused does not know, and has no reason to know, how to run a criminal defence case. If his request were honoured, he would end up receiving a very poor defence, which would only serve to bring the international criminal process into disrepute. However, since it has been said that an accused may to his detriment waive his right to be represented by counsel, we have avoided going into this area and will say no more. Our silence on this point is not to be taken as a concession that the integrity of international criminal proceedings should not be given greater weight than in certain domestic jurisdictions.

35. In considering whether the expected disruption is outweighed by some benefit in granting the request, we note, first of all, that this is not a case of an existing dysfunctional defence team, or of a complete breakdown in the client-attorney relationship. On the contrary, the current defence team is competent, dedicated, functioning, and working with the Accused. There is no public interest in dismantling such a team. As to the Accused's subsisting right to defend himself in person, the Chamber has found in the first section of these reasons that Mr Krajišnik's request is properly understood as an attempt to deal with the shortcomings – in his view – of his defence, problems which were amenable to piecemeal solution and which have, by now, largely been solved. There is no other reason that the Accused has given, or that the Chamber can see, why the request should be granted. The assertion of the self-representation right in these circumstances does not outweigh the interest in an undisrupted trial.

36. The Chamber consequently **DENIES** the application, for the reasons stated in the first or, alternatively, the second section herein. The decision returns the situation to that which it was prior to the Accused's request, when counsel paid for by the Tribunal's legal-aid fund represented Mr Krajišnik, pursuant to his choice, subject to the conditions regulating disbursements from that fund. Under those conditions, the Accused is expected to contribute US$9,589 per month from his own sources to his defence fund.[61]

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



Judge Alphons Orie
Presiding Judge

Dated this 18th day of August 2005
At The Hague,
The Netherlands

[Seal of the Tribunal]

Notes

[1] The letter is inaccurately dated 7 April 2004.
[2] The Registrar informally forwarded Mr Krajišnik's letter to the Chamber on 25 May. The official notification came in the Registrar's "Notification Pursuant to Rule 33(B) of the Rules of Procedure and Evidence Regarding Momčilo Krajišnik's Legal Representation", 31 May 2005.
[3] T. 13399, 25 May 2005.
[4] T. 13415-7, 13439-40, 26 May 2005.
[5] T. 17048, 22 July 2005.
[6] There is full agreement about the need for such an inquiry: "Prosecution's Submissions on Self-Representation", 31 May 2005, para. 3; "Defence Submissions: Summary of Current Position on Self-Representation by Mr Krajišnik", 8 June 2005, paras 3-4. The inquiry is also a staple of the case-law referred to in the second section of these reasons. The non-equivocation requirement is particularly significant in United States law, where (as is explained below) the case of *Faretta v. California*, (1975) 422 U.S. 806, dominates. A post-*Faretta* federal case, *Williams v. Bartlett*, (1994) 44 F.3d 95, 100-101, reasons that, among other concerns, "unless the request is unambiguous and unequivocal, a convicted defendant could have a colorable Sixth Amendment appeal regardless of how the trial judge rules: if his request is denied, he will assert the denial of his right to self-representation; if it is granted, he will assert the denial of his right to counsel."
[7] *Concise Oxford English Dictionary*.
[8] *Prosecutor v. Drazen Erdemović*, Joint Separate Opinion of Judge McDonald and Judge Vohrah, 7 October 1997, para. 8 ("The guilty plea must not be equivocal. It must not be accompanied by words amounting to a defence contradicting an admission of criminal responsibility").
[9] *Johnstone v. Kelly*, (1986) 808 F.2d 214, 216 n. 2.
[10] Ibid.
[11] *US v. Denno*, (1965) 348 F.2d 12, 16.
[12] *Williams v. Bartlett*, (1994) 44 F.3d 95, 100.
[13] Registrar's "Submission Pursuant to Rule 33(B) of the Rules of Procedure and Evidence Regarding the Resources that can be Made Available to Momčilo Krajišnik if He is to Represent Himself", 3 June 2005. Prior to that, the Accused was proceeding on the assumption that the Registry would hire for him a legal adviser: T. 13426, 26 May 2005.
[14] T. 13440, 26 May 2005.
[15] "I've made the decision to conduct my own defence, and you know that it is always somehow an imposed decision. I've reached that decision unwillingly, but I'm very firm in my intention. And therefore I would really like to appeal to you to organise a Status Conference so that I can come up with all the arguments. It's a very complex situation, but it can be explained within a short period of time." (T. 13418, 26 May 2005)
[16] "From the very start, I've only asked you to do one thing: I've entered a not guilty plea, and I've asked you not to believe me, to take my word for it, but to make it possible for me to establish the truth, and what I've seen here is that we're on the wrong path. We're not moving towards the truth here, and that's the main explanation. And I do apologise for causing inconvenience, but you will have to understand my concerns as well. I am fully aware of my indictment, and of course I need to use all the means available to defend myself. I'm not in favour of drawing too much attention, and I only want to use the legal means available. And I'm sorry to have to use such means. I mean, as to my Defence team, I did not try to pass a value judgement of any sort. They are good lawyers, no doubt, but they don't conduct my defence well enough. So that's what I have to say at the moment." (T. 13418-9, 26 May 2005)
[17] "I just want to submit the documents to them. And most of these people are, no doubt, honest and they will say, No, no, no, I didn't know about this. I'm sorry. So my problem is I don't want to take over my defence, but I want to be able to put to you the information that I have in my possession and things that I have participated in." (T. 13420, 26 May 2005)
[18] T. 13422-3, 26 May 2005.
[19] T. 13423, 26 May 2005; T. 13722-8, 31 May 2005.
[20] "I believe that in this situation it is much better for me to represent myself than to be represented by anybody else under the conditions as they are now." (T. 13429, 26 May 2005)
[21] T. 13694, 31 May 2005.
[22] T. 13728-9, 31 May 2005.
[23] T. 13851, 1 June 2005.
[24] T. 13854, 2 June 2005. The particulars, numbering around eleven items in total, were set forth by Mr Krajišnik in a letter to the Chamber dated 5 June 2005.
[25] T. 14036-38, 3 June 2005.
[26] "Any repetition when it comes to comments regarding my Defence team would be redundant. I've said many things about my Defence team. But the end result for the moment is negative. And what I'd like to explain — it

might be rather difficult — is this: The Prosecution has an interest, and my Defence team has an interest. We all have an interest of some sort. I can tell you what I would like to happen, and I would like for all of these interests to converge and for things to move forward as fast as possible and not to concentrate on money and money only. So my point was that I'm not only making a request on my own behalf but we have different interests which are at play here in order for things to move forward. If it were all up to me, we would find an easy solution, but I'm the one who has least rights here. But if my Defence says we can't prepare, there is a deadline, we can't extend or postpone that deadline, well, my proposal was even before for them to sit down with the Registry and decide what can be done in order to speed things up and complete the entire process as soon as possible. So that's about the Defence team. I did get the letter from the Registry. Believe me, had I not been in the courtroom — I mean, they've made me so mad. They said, "Oh, Krajisnik has some resources," et cetera. I'm not an emotional person. I don't need their money. I only need the truth and I want to get the possibility to defend myself. And there's something else that I would like to say which might be inappropriate, but allow me to say that: The Registry will never be able to impose it upon myself to be defended in a way that they feel I should be defended or anyone else. I mean, do please allow us to listen to everybody's problems and for those problems to maybe be voiced and solved outside this courtroom and, if possible, for us to finish the first part of the trial by the 22nd and the second part next year. That's my goal. It is not my goal to sit here and create problems. And when I said that lawyers are better at going a lawyer's job, I mean, it is only natural for me to say so. It would be ridiculous for me to say that I am better than any lawyer. I do hope I've made myself clear. And I'm just trying to show you that there are more interests at play here." (T. 14038-40, 3 June 2005)

[27] Marked (A) to (C) below:

(A) "I believe that there are certain technical difficulties, quite a few of them in fact, which must be solved so as not to talk at cross-purposes. And for the Registry, rather, and my team to sit down together and see how these difficulties, technical difficulties, can be solved in order for them to listen to my problems as well. And we're not talking about money only. Everything can be solved on the basis of a compromise in order for us to reach the goal as soon as possible. That was my explanation." (T. 14040)

(B) "Your Honours, I'm afraid that my good intentions are being misunderstood. I've reached my decision because I couldn't help it. I made that decision because I realised that the way things were going so far were just not satisfactory. It would be great if it could be improved and if things could go the way I imagine they could go to begin with. But as to my decision, it is quite clear and it is based on the fact that I saw how things were going, and I realised that in the last analysis I will be declared guilty. And I know I am not guilty. And when I mentioned compromises, I saw and I've encountered hundreds and hundreds of problems in my career in the past, and things seem to be impossible to solve, but then when people sat down together and analysed things and then they went to the decision-makers - in this case you are the decision-maker — and then they ended up with two or three problems that are easy to solve. So that's the whole gist of my problem. And do believe me, when he had problems and negotiations and problems were really, really difficult. And that's the way in which we tried to solve them. I can't really just get up and say I accept for my Defence team to continue to conduct my defence, and they themselves are saying, We can't continue to do a proper job. I mean, they can continue with what they're doing but it is good quality work." (T. 14041-2)

(C) JUDGE ORIE: "... If you meet with people, if you seek solutions for whatever problem, could the outcome of such meetings and such conversations be that you say, well, under these and these and these conditions, with these people, et cetera, I am — I would agree to be represented by counsel, whatever role you would play yourself in your defence? Is that possible as — at all in your view as the outcome of such meetings? I hesitate to call it negotiations, but talks, conversations to see whether you can resolve the problems? Is that a possible outcome; yes or no?" THE ACCUSED: "I thought I perhaps did understand. But let me say something: It is not up to me to negotiate that. It is up to Mr. Stewart. And I can give my opinion on certain points. But yeah, that would be my proposal. And as to what the outcome could be and whether it could be along the lines of what you have just said, I believe that it might be. And that's why I said that perhaps we could come up with a compromise in order to, in the end, get a positive result. It would only make me happy." (T. 14042-3)

[28] T. 14044-5, 3 June 2005.

[29] T. 14238, 9 June 2005.

[30] T. 15479, 29 June 2005.

[31] JUDGE ORIE: "... Could you tell the Chamber whether you still — whether your request to represent yourself is still standing." THE ACCUSED: "Your Honour, I'd have to provide you with some detailed explanations." JUDGE ORIE: "No." THE ACCUSED: "It wouldn't take very long." JUDGE ORIE: "No, Mr. Krajisnik. The Chamber wants to know whether your request for self-representation still stands, because then the Chamber will decide. If it doesn't stand any more, there's nothing to decide. We do not want explanations. We just want to know what we have to do at this moment, and that is whether we have to give a decision, yes or no. If you say, 'I need another three hours to — to think about whether it's a yes or no,' please do that, but we are not going into any discussions. ..." THE ACCUSED: "I can't answer a question phrased in such a manner. That's why I would

like to have at least half a minute." JUDGE ORIE: "No. The Chamber is not going to allow you to give further explanations. If you say, 'I can't give an answer,' it's quite simple. We — you have requested to represent yourself. We did not give a decision until now because there were ongoing conversations with the Registry and perhaps with counsel as well. ... We want to know whether this request is there to be decided upon. ... Mr. Krajisnik, did you want to think for 30 seconds or did you want to explain? Because we want a yes or a no." THE ACCUSED: "I wanted to spend half a minute to say that we have agreed on certain issues. There is one matter that is outstanding and nothing else." JUDGE ORIE: "Mr. Krajisnik, whether you agreed or everything, I did understand — but if I'm wrong, it doesn't make any difference. If you have full agreement, fine; if you have 95 per cent of agreement, fine; if you have 60 per cent of agreement — everything's fine. The only thing the Chamber wants to know is whether at this moment your request to represent yourself is still a pending request or whether it's — it has to be struck off the record. That's the only thing the Chamber wants to know. And it's — yes, please." THE ACCUSED: "If only I could receive a response from the Registry, we can strike this item from the agenda. But I've done everything that was necessary in my contacts with the Registry. The task was" JUDGE ORIE: "Mr. Krajisnik, you are again doing what you did before, that is, to start negotiating; if I would get this, then perhaps — there's no way of that. The Chamber wants to know — and if you don't give an answer, then there's no clear withdrawal. We offered our good services. We told you that we would wait to decide. So if you do not give a clear answer, a yes or a no, then it's quite clear; then the Chamber will give a decision. The Chamber will then give a decision on a matter which has been dealt with in this court in quite some depth, that is, the right to represent yourself or the circumstances or the case law, et cetera. It has been fully discussed. We then decided just to postpone our decision in order to give an opportunity to have further talks. Now we want to know whether that request is still pending, in which case the Chamber will give a decision." THE ACCUSED: "Your Honours, could I have just half a minute? If you can't grant me half a minute, do as you please." JUDGE ORIE: "It may have been clear to you, Mr. Krajisnik, that the Chamber wanted a yes or a no and that if it doesn't get it, it will take it to be that the matter is pending and the Chamber will then give a decision on your request. So therefore you are at this moment in a position to tell us whether it's still pending or not. If you don't do it, the Chamber will consider the matter still to be pending, since there's no clear withdrawal." ... THE ACCUSED: "Very well. Thank you." (T. 16847-53, 20 July 2005)

[32] *Prosecutor v. Slobodan Milošević*, "Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence Counsel", 1 November 2004, para. 11.

[33] Ibid.

[34] *Faretta v. California*, (1975) 422 U.S. 806.

[35] E.g., *Prosecutor v. Slobodan Milošević*, "Reasons for Decision on the Prosecution Motion Concerning Assignment of Counsel", 4 April 2003, paras 22-3, 39; *Prosecutor v. Slobodan Milošević*, "Reasons for Decision on Assignment of Defence Counsel", 22 September 2004, para. 45.

[36] *Prosecutor v. Slobodan Milošević*, "Reasons for Decision on the Prosecution Motion Concerning Assignment of Counsel", 4 April 2003, paras 36, 40.

[37] *Martinez v. California*, (2000) 528 U.S. 152, 162.

[38] *Prosecutor v. Slobodan Milošević*, "Reasons for Decision on Assignment of Defence Counsel", 22 September 2004, para. 65.

[39] *Prosecutor v. Slobodan Milošević*, "Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence Counsel", 1 November 2004, paras 15, 19.

[40] Ibid., paras 16-18.

[41] Ibid., paras 13-14.

[42] *Prosecutor v. Norman et al.*, "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, paras 14-15, 19.

[43] Ibid., paras 17, 19-20. For reasons it did not explain (ibid., para. 32), the Court delegated to the Registrar the decision as to the resulting status of the applicant's counsel ("stand-by or otherwise"). In the end, the counsel were given standby status: *Prosecutor v. Norman et al.*, "Consequential Order on Assignment and Role of Standby Counsel", 14 June 2004. A decision of another Trial Chamber of the Special Court was found on appeal to have misconstrued the defendant's submissions as amounting to an application for self-representation when in fact they only expressed non-recognition of the legitimacy of the Court: *Prosecutor v. Sesay et al.*, "Gbao – Decision on Appeal Against Decision on Withdrawal of Counsel", 23 November 2004, para. 49.

[44] *Faretta v. California*, (1975) 422 U.S. 806, 807. In *Williams v. Bartlett*, (1994) 44 F.3d 95, 101, the fact that the application was made "substantially in advance of trial" favoured the appellant considerably.

[45] *Johnstone v. Kelly*, (1986) 808 F.2d 214, 218; favourably cited in *Williams v. Bartlett*, (1994) 44 F.3d 95, 99.

[46] *US v. Denno*, (1965) 348 F.2d 12, 15.

[47] (1986) 789 F.2d 379.

[48] Ibid., 384.

[49] *Zuppo v. Delaware*, (2002) 807 A.2d 545, 547. See also, in this line of cases, *US v. Dougherty*, (1972) 473 F.2d 1113, 1124 (the court "may weigh the inconvenience threatened by defendant's belated request against the possible prejudice from denial of defendant's request"); *US v. Dunlap*, (1978) 577 F.2d 867, 868-9 (right to self-representation must be raised in "timely" fashion, due to the "need to minimize disruptions, to avoid inconvenience and delay, to maintain continuity, and to avoid confusing the jury"; *Faretta* does not change "the rule that once trial has begun, it is within the trial court's discretion whether to allow the defendant to dismiss counsel and proceed pro se"); *US v. Lawrence*, (1979) 605 F.2d 1321 (applying *Denno*, *Dougherty*, and *Dunlap*); and *Minnesota v. Christian*, (2003) 657 N.W.2d 186, 193 (a self-representation motion made after the jury voir dire begins invites the court to exercise its discretion to balance "the defendant's legitimate interests in representing himself and the potential disruption and possible delay of proceedings already in progress"). As rightly noted by the Defence (see "Defence Submissions: Summary of Current Position on Self-Representation by Mr Krajišnik", 8 June 2005, annex B), "confusion of the jury" is not an issue in the present circumstances; a bench of professional judges is not likely to suffer any confusion from a change in the mode of representation.

[50] [1944] K.B. 118.

[51] The Chamber accepts the Defence's cautionary remarks on this point: "Defence Submissions: Summary of Current Position on Self-Representation by Mr Krajišnik", 8 June 2005, annex A.

[52] (1979) 68 Cr. App. R. 104.

[53] Ibid., 108. The Chamber does not accept the Defence's comment about there being "no significant information in [*Lyons*, as reported] indicating the reasons for discretion having been exercised the other way by the trial judge in that case" ("Defence Submissions: Summary of Current Position on Self-Representation by Mr Krajišnik", 8 June 2005, annex A). The point is that the trial judge was not required to give reasons.

[54] In *Hill v. Spain*, UN Human Rights Committee, 2 April 1997 (UN Doc. CCPR/C/59/D/526/1993), para. 14.2, the Committee criticized the respondent Spain for "its legislation [which] does not allow an accused person to defend himself in person" and found, apparently on that ground alone, that the applicant's right to defend himself had not been respected in accordance with the Covenant on Civil and Political Rights. The applicant had been denied self-representation soon after the trial had commenced (ibid., paras 2.11-3.3). It is not possible to tell from the Committee's decision whether the Committee would have still found a violation had the denial been made in conscious derogation from a right to self-representation judicially recognized in Spain.

[55] Article 140 of the German Code of Criminal Procedure, which makes "necessary" the assistance of defence counsel in first-instance trials at the level of the Regional Court and Court of Appeal, drew comment in the European Court of Human Rights case of *Croissant v. Germany*, 25 September 1992, para. 27, where the Court, after noting that the provision finds parallels in the legislation of other contracting states, said that it could not be deemed incompatible with Article 6(3)(c) of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The Prosecution in the present case cites the statutes mandating assignment of defence counsel in France, Austria, Switzerland, Sweden, Belgium, Italy, Spain, Norway, Argentina, and Colombia: "Prosecution's Submissions on Self-Representation", 31 May 2005, annex, paras 43-45. A finding as to usual practice in civil-law countries was made in *Prosecutor v. Vojislav Šešelj*, "Decision on Prosecution's Motion for Order Appointing Counsel to Assist Vojislav Šešelj with his Defence", 9 May 2003, paras 16-17. For the situation in Scotland see *Prosecutor v. Slobodan Milošević*, "Reasons for Decision on Assignment of Defence Counsel", 22 September 2004, para. 47.

[56] Criminal Procedure Code of the Federal Republic of Yugoslavia, Articles 13 and 71 (FRY *Official Gazette* no. 70/2001 and 68/2002).

[57] Criminal Procedure Code of the Federation of Bosnia and Herzegovina, Articles 13 and 59 (FBH *Official Gazette* no. 35/03).

[58] Criminal Procedure Code of Republika Srpska, Articles 12 and 53 (RS *Official Gazette* no. 50/03).

[59] For example, in Italy, which is still in the civil-law tradition but which has moved to an adversarial criminal procedure, the Constitutional Court has said that a "technical defence", that is, a defence assisted by counsel, is to be distinguished from the right to defend oneself in person, the latter being assured by the fact that the "technically assisted" defendant is allowed to speak his or her mind at every stage of the proceedings. In other words, imposition of counsel is meant to ensure an effective defence, not to derogate from the right to self-representation: Corte Constituzionale, 18 December 1997, Ordinanza no. 421.

[60] The Defence would seem to accept this principle: "Defence Submissions: Summary of Current Position on Self-Representation by Mr Krajišnik", 8 June 2005, paras 8, 10.

[61] If this were not so, an accused assessed partially indigent could move for self-representation and, by that manoeuvre alone, hope to transform the status of his counsel from Registry-assigned to court-imposed counsel, and thus, arguably, to avoid the obligation of a financial contribution to his defence. That would be an absurd result. The Defence's argument to the contrary (see "Defence Submissions: Summary of Current Position on Self-Representation by Mr Krajišnik", 8 June 2005, paras 5-6) is therefore rejected.