

IT-00-39-T  
D 13462 - D 13455  
16 JUNE 2006

13462

Aj

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: 16 June 2006

Original: English

---

**IN TRIAL CHAMBER I**

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

**Registrar:** Mr Hans Holthuis

**Decision of:** 16 June 2006

**PROSECUTOR**

v.

**MOMČILO KRAJIŠNIK**

---

**DECISION ON DEFENCE MOTION FOR A RULING THAT HIS HONOUR JUDGE  
CANIVELL IS UNABLE TO CONTINUE SITTING IN THIS CASE**

---

**Office of the Prosecutor**

Mr Mark Harmon  
Mr Alan Tieger

**Counsel for the Defence**

Mr Nicholas Stewart, QC  
Mr David Josse

### *Introduction*

1. On 16 May 2006, the Defence filed the “Defence Motion for a Ruling that His Honour Judge Canivell is Unable to Continue Sitting in This Case” ( “Motion”) pursuant to Rule 73(A) of the Rules of Procedure and Evidence (“Rules”).
2. The Motion seeks a ruling from this Chamber that Judge Canivell is unable to continue lawfully sitting in this case.<sup>1</sup> The Defence alleges a breach of the Statute of the Tribunal (“Statute”) and of the right of the Accused to be prosecuted only in accordance with the provisions of the Statute.<sup>2</sup>
3. The Statute was adopted by the UN Security Council, acting under Chapter VII of the UN Charter, through Resolution 827/1993. Various Security Council resolutions have since amended the Statute. One such Resolution was 1329/2000, which established a pool of *ad litem* judges to be elected for a term of four years. This Resolution added Article 13 *ter* to the Statute. It now reads:

1. The *ad litem* judges of the International Tribunal shall be elected by the General Assembly from a list submitted by the Security Council, in the following manner:

- (a) The Secretary-General shall invite nominations for *ad litem* judges of the International Tribunal from States Members of the United Nations and non-member States maintaining permanent observer missions at United Nations Headquarters.
- (b) Within sixty days of the date of the invitation of the Secretary-General, each State may nominate up to four candidates meeting the qualifications set out in article 13 of the Statute, taking into account the importance of a fair representation of female and male candidates.
- (c) The Secretary-General shall forward the nominations received to the Security Council. From the nominations received the Security Council shall establish a list of not less than fifty-four candidates, taking due account of the adequate representation of the principal legal systems of the world and bearing in mind the importance of equitable geographical distribution.
- (d) The President of the Security Council shall transmit the list of candidates to the President of the General Assembly. From that list the General Assembly shall elect the twenty-seven *ad litem* judges of the International Tribunal. The candidates who receive an absolute majority of the votes of the States Members of the United Nations and of the non-member States maintaining permanent observer missions at United Nations Headquarters shall be declared elected.
- (e) The *ad litem* judges shall be elected for a term of four years. They shall be eligible for re-election.

2. During any term, *ad litem* judges will be appointed by the Secretary-General, upon request of the President of the International Tribunal, to serve in the Trial Chambers for one or more trials, for a cumulative period of up to, but not including, three years. When requesting the appointment of any particular *ad litem* judge, the President of the International Tribunal shall bear in mind the criteria set out in article 13 of the Statute regarding the composition of the Chambers and sections of the Trial Chambers, the considerations set out in paragraphs 1 (b) and (c) above and the number of votes the *ad litem* judge received in the General Assembly.

<sup>1</sup> Motion, para. 25.

<sup>2</sup> Motion, para. 7.

4. On 14 April 2003, the UN Secretary-General appointed Judge Joaquín Martín Canivell as *ad litem* Judge to the Tribunal so that he could join the bench in the case of *Prosecutor v. Momčilo Krajišnik*. On 8 May 2003, the President of the Tribunal appointed Judge Canivell to this case.<sup>3</sup> On 6 January 2005, the President wrote to the Secretary-General about the fact that seven *ad litem* judges, including Judge Canivell, were appointed to cases that would continue beyond the date of expiration of their mandate (i.e., 11 June 2005). The President expressed his view that the approval of the Security Council and of the General Assembly was needed for these judges to continue sitting in their cases beyond that date.<sup>4</sup> On 18 January 2005, the Security Council passed Resolution 1581/2005, allowing Judge Canivell to finish the *Krajišnik* case. The Security Council took note that the expected end of the trial was April 2006. The mandates of the other six judges were also extended by this Resolution.<sup>5</sup> The issue of the terms of office of judges and of the role of the Security Council was raised in Court in different contexts on three separate occasions.<sup>6</sup>

5. On 22 March 2006, the President informed the Secretary-General that the anticipated end-date of the *Krajišnik* case had been postponed to August or September 2006. He sought confirmation from the Security Council and the General Assembly that Judge Canivell “can continue to sit in this case beyond [April 2006] and see the case through to its completion, notwithstanding the fact that the cumulative period of his service would then attain and exceed three years”, the limit imposed by Article 13 *ter* (2) of the Statute.<sup>7</sup> On 10 April 2006, the Security Council unanimously adopted Resolution 1668/2006, in which it decided that Judge Canivell “can continue to sit in the *Krajišnik* case beyond April 2006 and see the case through to its completion, notwithstanding the fact that the cumulative period of his service in the International Criminal Tribunal for the former Yugoslavia would then attain and exceed three years.” On 13 April 2006, the General Assembly confirmed this decision.<sup>8</sup>

#### *Submissions of the parties*

6. The Defence bases its challenge on the legal effect of resolutions by the Security Council and the General Assembly on the operations of the Tribunal.

<sup>3</sup> Order Assigning *Ad Litem* Judge to a Case Before a Trial Chamber, 8 May 2003. See also Presiding Judge’s Decision on Chamber’s Composition, 15 May 2003.

<sup>4</sup> UN Doc. A/59/666 – S/2005/9.

<sup>5</sup> United Nations S/RES/1581 (2005).

<sup>6</sup> See T. 9516-17 (15 December 2004); T. 9576 (28 February 2005); T. 17055 (22 July 2005).

<sup>7</sup> UN Doc. A/60-741 – S/2006/199.

<sup>8</sup> Journal of the United Nations, No. 2006/72 (14 April 2006), p. 9.

7. The Defence observes that the Tribunal was established as a subsidiary organ of the Security Council.<sup>9</sup> It submits that, according to the International Court of Justice, the functions and responsibilities of an intergovernmental organization depend on its constituent documents as well as subsequent practice.<sup>10</sup> The Defence argues that the extent of the powers, express or implied, that the Tribunal may exercise as a subsidiary organ of the United Nations is determined by reference to its Statute.<sup>11</sup>

8. The Motion proceeds to make reference to Article 15 of the Statute, through which the Security Council delegated to the judges the authority to “adopt rules of procedure and evidence”, thus giving them “ultimate control over the conduct of trials”.<sup>12</sup> The Defence also contends that, under international law, the Security Council retains the competence to determine the membership, structure, mandate, and duration of existence of its subsidiary organ, but that, at the same time, it may not adopt *ad hoc* “directives,” for it would be a subversion of the proper legal process to issue executive orders in violation of the subsidiary organ’s establishing instrument.<sup>13</sup> The principle of legality requires, according to the Defence, that the Security Council does not “usurp” the jurisdiction of the Tribunal.<sup>14</sup> Since the Tribunal has been lawfully established as an independent judicial body to exercise judicial functions, the Defence contends, other organs of the United Nations should not be allowed to review or interfere with its individual judicial decisions.<sup>15</sup> Thus, according to the Defence, unless the Security Council amends the Statute,<sup>16</sup> or gives express or implied permission to take action contrary to the Statute,<sup>17</sup> the Tribunal is legally bound to follow the provisions of the Statute.<sup>18</sup> The Defence therefore argues that the determination whether a judge may continue to hear a case in accordance with the Statute at the expiry of his or her assignment period in an ongoing trial is a judicial function. A resolution on such a matter by a principal organ of the United Nations, even if validly passed, would not have any binding effect upon the Tribunal.<sup>19</sup>

<sup>9</sup> Motion, para. 8.

<sup>10</sup> Motion, para. 9.

<sup>11</sup> Motion, para. 10.

<sup>12</sup> Motion, para. 11.

<sup>13</sup> Motion, paras 12-13.

<sup>14</sup> Motion, para. 16.

<sup>15</sup> Motion, paras 17-21.

<sup>16</sup> Motion, para. 14.

<sup>17</sup> Motion, para. 16, fn. 17.

<sup>18</sup> Motion, para. 14.

<sup>19</sup> Motion, paras 22-24.

9. On 22 May 2006, the Prosecution filed the “Prosecution’s Response to ‘Defence Motion for a Ruling that His Honour Judge Canivell is Unable to Continue Sitting in This Case’” (“Response”) requesting that the Motion be dismissed.<sup>20</sup>

10. The Prosecution argues that the Security Council, in the Statute, explicitly reserves for itself, the General Assembly, and the Secretary-General certain functions related to the nomination, election, and appointment of judges of the Tribunal; the President of the Tribunal is entrusted with the assignment of *ad litem* judges to specific cases.<sup>21</sup> The Prosecution maintains that the wording of Security Council Resolution 1668/2006, enabling Judge Canivell to sit beyond April 2006, has removed any ambiguity that may have existed with respect to the terms of reference of Judge Canivell’s appointment.<sup>22</sup> That is to say, the Security Council intended by Resolution 1668/2006 to allow Judge Canivell to sit until the completion of this case.<sup>23</sup> According to the Prosecution, since Resolution 1668/2006 was validly passed, the Defence should have identified a restriction, in the UN Charter or elsewhere, on the authority of the Security Council to issue a resolution modifying the three-year limit for *ad litem* judges set in a previous resolution.<sup>24</sup>

11. The Prosecution suggests that the determination of the term of appointment is a non-judicial function.<sup>25</sup> It submits that the Security Council, as a matter of practice, issues resolutions on the conditions of service of judges of the Tribunal.<sup>26</sup>

12. Having been granted leave under Rule 126 *bis* of the Rules on 23 May 2006,<sup>27</sup> the Defence filed a reply to the Response (“Reply”) on 24 May 2006. In the Reply, the Defence states that it is the Secretary-General who has the authority to appoint *ad litem* judges to the Tribunal, while the President of the Tribunal assigns them to specific cases. In the Defence’s view, this joint control over appointment and assignment of *ad litem* judges ought to be exercised strictly in accordance with the Statute.<sup>28</sup> The Defence also submits that, despite the clarity of language of Security Council Resolution 1668/2006<sup>29</sup> and the fact that this Resolution was validly passed,<sup>30</sup> it would be unlawful for the judges to implement it by

<sup>20</sup> Response, paras 1, 24.

<sup>21</sup> Response, para. 11.

<sup>22</sup> Response, para. 13.

<sup>23</sup> Response, para. 14.

<sup>24</sup> Response, paras 15-16.

<sup>25</sup> Response, paras 17-18.

<sup>26</sup> Response, paras 19-20.

<sup>27</sup> T. 24588-90.

<sup>28</sup> Reply, paras 4-5.

<sup>29</sup> Reply, para. 6.

<sup>30</sup> Reply, paras 8, 12.

allowing Judge Canivell to remain in office, as this would be contrary to the wording of the Statute. According to the Defence, only an amendment of the Statute by the Security Council could maintain the present composition of the bench.<sup>31</sup>

13. With respect to the Prosecution argument that the Security Council possesses the authority to regulate matters relating to the general administration of the Tribunal, the Defence submits that an issue that might affect the trial, such as the continuing validity of a judicial appointment, must be decided by the judges themselves.<sup>32</sup>

#### *Discussion*

14. As a preliminary matter, the Chamber determines that the three-member bench as a whole may decide on the Motion, since the Motion raises a question of jurisdiction rather than of disqualification of a Judge under Rule 15 of the Rules.

15. The Tribunal is a subsidiary organ of the Security Council, established under Chapter VII of the UN Charter, and, by virtue of its composition and functions it performs, exercises its judicial role in full independence.<sup>33</sup>

16. The Motion, in essence, seeks the removal of Judge Canivell on the basis that the Security Council, by extending his mandate, usurped a judicial function it does not possess.

17. The independence and impartiality of a Court of law are among the fundamental guarantees necessary for a fair trial. When outside authorities deal with matters related to the composition of a Chamber, there is a possibility that they interfere with its independence and impartiality. However, this is not the case under the present circumstances. Judge Canivell was appointed to hear this case. Nothing in Security Council Resolution 1668/2006 can be understood as interfering with the independence or impartiality of the Chamber. The extension of Judge Canivell's mandate serves the purpose of allowing the Judge to complete the task assigned to him in the first place. The Defence has not suggested in its filings that the right of the Accused to receive a fair trial would be breached by the implementation of this Resolution. The right of an accused to be "presumed innocent until proven guilty according to the provisions of the present Statute", invoked by the Defence,<sup>34</sup> is not infringed by the extension of Judge Canivell's mandate. On the contrary, the Tribunal's duty to exercise its

<sup>31</sup> Reply, paras 7-8, 10-11.

<sup>32</sup> Reply, para. 9.

<sup>33</sup> See, for example, the Appeals' Chamber's Judgement on the request of the Republic of Croatia for review of the decision of Trial Chamber II of 18 July 1997, *Prosecutor v. Tihomir Blaškić*, 29 October 1997, para. 33.

<sup>34</sup> Reply, para. 5.

judicial functions in the interests of justice would have been significantly hampered had the President not requested the intervention of the Security Council and the General Assembly.

18. The Chamber finds that Security Council Resolution 1668/2006 is a mere administrative act, allowing the Chamber to complete the case in its present composition without further undue delay. The Resolution in question was passed in response to the Tribunal's concern that a fair and expeditious trial be ensured for the Accused.

19. In relation to the objection that the Security Council usurped functions of the Tribunal, the Chamber observes that the Security Council (the organ which established the Tribunal), and the General Assembly (the organ that elects the judges<sup>35</sup> and oversees the financing of the United Nations<sup>36</sup>) intervened in this matter at the explicit request of the President of the Tribunal. It is thus inaccurate to suggest that the Security Council and the General Assembly usurped the Tribunal's functions in this case.

20. The assertion of the Defence that the Security Council may amend the Statute by resolution, but that it is not allowed to act with *ad hoc* resolutions which do not modify the text of the Statute, is unjustified. Security Council resolutions under Chapter VII, as well as resolutions implementing previous resolutions under Chapter VII, are binding when they comply with international law. Security Council resolutions should be implemented by the Tribunal if they do not interfere with the Tribunal's judicial function, and in the present case they do not.

<sup>35</sup> Articles 13 *bis* and 13 *ter* of the Statute.

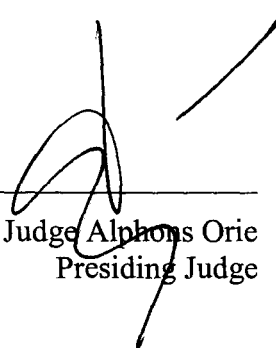
<sup>36</sup> Article 17(1) of the UN Charter.

**FOR THE FOREGOING REASONS,**

**THE CHAMBER**, pursuant Rule 54 of the Rules,

**DISMISSES** the Motion.

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



Judge Alphons Orie  
Presiding Judge

Dated this 16th day of June 2006  
At The Hague  
The Netherlands

**[Seal of the Tribunal]**