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29 January 2007

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**UNITED
NATIONS**



International Tribunal for the
Prosecution of Persons
Responsible for Serious Violations of
International Humanitarian Law
Committed in the Territory of the
Former Yugoslavia since 1991

Case No. IT-00-39-A
Date: 29 January 2007
Original: English

IN THE APPEALS CHAMBER

Before: Judge Fausto Pocar, Presiding
Judge Mohamed Shahabuddeen
Judge Andréia Vaz
Judge Theodor Meron
Judge Wolfgang Schomburg

Registrar: Mr. Hans Holthuis

Order of: 29 January 2007

PROSECUTOR

v.

MOMČILO KRAJIŠNIK

**DECISION ON "MOTION SEEKING REVIEW OF THE
DECISIONS OF THE REGISTRY IN RELATION TO
ASSIGNMENT OF COUNSEL"**

The Office of the Prosecutor:

Mr. Peter Kremer
Ms. Christine Dahl

Counsel for the Applicant:

Mr. Colin Nicholls

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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 “International Tribunal”, respectively),

BEING SEIZED of the “Motion Seeking Review of the Decisions of the Registry in Relation to Assignment of Counsel” filed on 27 December 2006 (“Motion”) by Counsel assigned on behalf of Momčilo Krajišnik (“Applicant”);¹

NOTING the “Corrigendum to ‘Motion Seeking Review of the Decisions of the Registry in Relation to Assignment of Counsel’” filed on 5 January 2007;²

NOTING that the Prosecution has indicated by e-mail to a Senior Legal Officer of the Appeals Chamber that it will not file a response to the Motion;

NOTING the “Registrar’s Submission on Counsel’s Request for Review of the Registrar’s Decisions on Assignment of Counsel” filed on 16 January 2007 (“Registrar’s Submission”);

NOTING the Applicant’s “Response to ‘Registrar’s Submission on Counsel’s Request for Review of the Registrar’s Decisions on Assignment of Counsel’” filed on 26 January 2007;

NOTING that in the Motion, the Applicant requests the Appeals Chamber to

- (a) review and quash the Decision of the Registry appointing [Mr. Nicholls] as permanent lead counsel for Mr. Krajišnik; and
- (b) rule that the Registry appoint Mr. Alan Dershowitz as lead counsel for Mr. Krajišnik subject to a satisfactory response from Mr. Dershowitz that he is prepared to so act; and
- (c) rule that if there is good cause as to why Mr. Dershowitz is unable to be so appointed, Mr. Krajišnik’s right to self-representation on appeal should be fully respected; and
- (d) give appropriate consideration to [Mr. Nicholls’s] request for the appointment of independent counsel and/or the provision of additional time for presently assigned counsel to prepare Mr. Krajišnik’s Notice of Appeal and Sentencing Response Brief.³

¹ The Appeals Chamber notes that the Motion is in excess of the word limitation as set out in paragraph (C)(5) of the Practice Direction on the Length of Briefs and Motions, IT/184/Rev. 2, 16 September 2005 (“Practice Direction”). Counsel for the Applicant requests leave for filing the oversized Motion on grounds that “the complex procedural history to this motion and the number of issues that need to be addressed necessitate the oversized filing.” Motion, para. 1. The Appeals Chamber notes that Counsel for the Applicant failed to make this request prior to filing the Motion as required by the Practice Direction. *See* Practice Direction, para. (C)(7). Furthermore, it does not consider that Counsel for the Applicant has sufficiently demonstrated exceptional circumstances warranting the oversized Motion. *Cf. Prosecutor v. Šešelj*, Case No. IT-03-67-AR73.3, Decision on Extension of Word Limits, 27 September 2006, p. 3. Nevertheless, in light of the need for fair and expeditious proceedings, the Appeals Chamber does not consider it necessary to order Counsel for the Applicant to re-file the Motion in accordance with paragraph (C)(5) of the Practice Direction.

² The Appeals Chamber notes that this Corrigendum was actually filed before the President of the International Tribunal. However, because it clearly refers to the Motion at issue here, which was filed before the Appeals Chamber, the Appeals Chamber considers that the Corrigendum to that Motion is before it as well.

NOTING the Decision of the Registrar of the International Tribunal of 8 December 2006 (“Registrar’s Decision”), by which Mr. Colin Nicholls was assigned as permanent Counsel to the Applicant;⁴

CONSIDERING that, with respect to the request in sub-paragraph (d) of the Motion, this was also raised before the Pre-Appeal Judge who, in his “Order on Extension of Time for Filing the Notice of Appeal” issued on 11 January 2007, granted Counsel for the Applicant an extension of the time limit for the filing of his Notice of Appeal and response to the Prosecution Appeal Brief to 12 February 2007 and therefore the request is moot;

CONSIDERING that the Applicant filed an identical “Request for Review by the President of the Decisions of the Registry in Relation to Assignment of Counsel” before the President of the International Tribunal on 27 December 2006;

RECALLING that under Article 21(4)(d) of the Statute of the International Tribunal, an accused before the Tribunal has the right to have legal assistance assigned without payment by him where that accused does not have sufficient means to pay for it;

CONSIDERING that in the Registrar’s Decision, the Registrar assigned counsel to the Applicant from the list of counsel qualified to represent indigent suspects and accused pursuant to Rule 45 of the Rules of Procedure and Evidence of the International Tribunal (“Rules”);

CONSIDERING that under Rule 45(A), such assignments are made by the Registrar in accordance with the procedure established in the Directive on the Assignment of Defence Counsel (“Directive”),⁵ but that Rule 45 does not specify who has competence to review a decision by the Registrar under that Rule;

CONSIDERING that pursuant to Article 13(B) of the Directive, an “accused whose request for assignment of counsel has been denied or who has been found to have sufficient means to remunerate counsel in part, may [. . .] file a motion to the Chamber before which he is due to appear for review of the Registrar’s decision”;

CONSIDERING however that, Article 13(B) of the Directive applies to a decision by the Registrar whether or not to assign counsel on the basis of an accused’s alleged indigency;⁶

³ Motion, para. 49.

⁴ Registrar’s Decision, p. 2.

⁵ IT/73/Rev. 11, 29 June 2006.

⁶ *Prosecutor v. Šljivančanin*, Case No. IT-95-13/1-PT, Decision on Assignment of Defence Counsel, 20 August 2003 (“*Šljivančanin* Decision”), para. 16.

CONSIDERING that in this case before the Appeals Chamber, the Registrar's Decision did not deny assignment of counsel to the Applicant on the basis of non-indigency or find that the Applicant is only partially indigent; rather, it assigned counsel to the Applicant from the Rule 45 list of counsel and refused to assign the Applicant's preferred counsel because, in its view, that counsel did not fulfill the qualification requirements for admission to the Rule 45 list,⁷ which, under Rule 45(B)(i), expressly incorporates all of the qualification requirements found under Rule 44 of the Rules for counsel who appear before the International Tribunal;⁸

CONSIDERING that under Rule 44(A) and (B) of the Rules, power to review a decision by the Registrar as to whether a proposed counsel meets the required qualifications therein for representing an accused before the International Tribunal lies with the President of the International Tribunal;⁹

CONSIDERING further that, just as a Chamber may not review the Registrar's decision as to whether a proposed counsel meets the qualification requirements under Rule 44(A) and (B) of the Rules, neither may a Chamber review the Registrar's decision as to whether a proposed counsel meets the qualification requirements for assignment of counsel under Rule 45(B) of the Rules as that power is vested in the President of the International Tribunal, and a Chamber may only step in thereafter under its inherent power to ensure that its proceedings are fair;¹⁰

FINDING therefore that the Appeals Chamber is not competent to consider the requests raised in sub-paragraphs (a) and (b) of the Motion and that the authority for reviewing the Registrar's Decision lies with the President of the International Tribunal;

FINDING that the remaining request in sub-paragraph (c) can be decided only by the Appeals Chamber on the basis of the decision by the President of the International Tribunal in relation to requests (a) and (b) which, by their nature, have priority;¹¹

⁷ See Registrar's Decision, p. 1; see also Registrar's Submission, paras. 9-23.

⁸ This is with the exception of the language requirement of Rule 44(A)(ii), which may be waived by the Registrar as provided for in the Directive. See also Article 14(A) of the Directive.

⁹ Rule 44(B) provides that "A suspect or accused may seek the President's review of the Registrar's decision." The Appeals Chamber agrees with the *Šljivančanin* Decision in that while the text of this Rule is not clear as to what exactly is the "decision of the Registrar" referred to, "it would seem to include *at least* decisions by the Registrar under paragraph (B) of Rule 44 itself, that is, decisions either i) not to permit appointment of counsel under the interests of justice exception to the working languages requirement or ii) to impose conditions on such an appointment." *Ibid.*, para. 13 (emphasis added). The Appeals Chamber considers that a reasonable interpretation of Rule 44(B) is that the President's power to review extends to all conditions placed by the Registrar on the assignment of counsel under that Rule, including the conditions found in Rule 44(A). As reasoned in the *Šljivančanin* Decision, unless the Rules provide expressly to the contrary, they should be read as affording some form of review for administrative decisions taken by the Registrar. *Ibid.*, para. 18.

¹⁰ Cf. *Prosecutor v. Blagojević*, Case No. IT-02-60-AR73.4, Public and Redacted Reasons for Decision on Appeal by Vidoje Blagojević to Replace His Defence Team, 7 November 2003, para. 7. Cf. also *Šljivančanin* Decision, para. 18.

¹¹ Whether an accused may exercise the right to self-representation under the Statute of the International Tribunal is for the Chamber to decide in light of its duty to ensure the fair and expeditious management of its proceedings. See e.g.

HEREBY DISMISSES the Motion in relation to sub-paragraphs (a) and (b);

DECLARES the Motion **MOOT** in relation to sub-paragraph (d); and

REMAINS SEIZED of the request in sub-paragraph (c).

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

Dated this 29th day of January 2007,
At The Hague, The Netherlands.



Judge Fausto Pocar
Presiding Judge

[Seal of the International Tribunal]

Prosecutor v. Šešelj, Case No. IT-03-67-AR73.3, Decision on Appeal Against the Trial Chamber's Decision on Assignment of Counsel, 20 October 2006, para. 16.