



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: 20 July 2007
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: 20 July 2007

PROSECUTOR

v.

MOMČILO KRAJIŠNIK

PUBLIC

**DECISION ON MOTION OF *AMICUS CURIAE*
REGARDING APPELLATE GROUND OF
INEFFECTIVE ASSISTANCE OF COUNSEL**

The Office of the Prosecutor:

Mr. Peter Kremer QC

The Accused

Mr. Momčilo Krajišnik

Amicus Curiae

Mr. Colin Nicholls QC

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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 Regarding Appellate Ground of Ineffective Assistance of Counsel”, filed confidentially on 28 June 2007 by *amicus curiae* (“Motion”).¹

I. BACKGROUND

2. In the “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”, filed on 11 May 2007 (“11 May Decision”), the Appeals Chamber ordered the appointment of *amicus curiae* to “assist the Appeals Chamber by arguing in favour of Mr. Krajišnik’s interests”.² The Appeals Chamber specified that *amicus curiae* “is not requested to conduct any new factual investigations” but rather “in light of the evidence at issue in the trial record, *amicus curiae* is to put forth grounds of appeal seeking reversal of convictions or reduction in sentence and to argue against grounds of appeal advanced by the Prosecution.”³

3. In the Motion, *amicus curiae* makes two requests. First, *amicus curiae* observes that in his previous role as assigned counsel for Mr. Krajišnik, he “conducted certain investigations into the alleged ineffective assistance of former counsel” for Mr. Krajišnik, including “accessing and utilising documents which were generated by the Appellant’s pre-trial, trial and appeal defence teams which do not form part of the trial record.”⁴ *Amicus curiae* notes that his notice of appeal includes a ground of ineffective assistance of counsel in relation to the conduct of two prior counsel for Mr. Krajišnik,⁵ and that Mr. Krajišnik’s notice of appeal includes a ground of ineffective assistance of counsel in relation to one of these individuals.⁶ *Amicus curiae* suggests that the mandate given to *amicus curiae* in the 11 May Decision does not adequately address “the unique difficulties associated with an ineffective assistance of counsel ground of appeal”⁷ and requests that he be allowed to use the documents mentioned above (namely, those generated by earlier defence teams that are not part of the trial record) in preparing his appeal brief. *Amicus curiae* notes that these documents are now in the hands of Mr. Krajišnik, but expresses concerns that Mr. Krajišnik

¹ Although this Motion was filed confidentially, the Appeals Chamber lifts confidentiality with regard to it. See *infra* para. 7.

² 11 May Decision, para. 19.

³ 11 May Decision, para. 19.

⁴ *Amicus* Motion, para. 7.

⁵ *Amicus* Motion, para. 2.

⁶ *Amicus* Motion, para. 1.

⁷ *Amicus* Motion, para. 5.

“may have difficulty accessing and utilising this information in his Appeal Brief because the documents are in English and [Mr. Krajišnik] is currently without translation facilities.”⁸

4. As to the second request in the Motion, *amicus curiae* states that “[i]f, after considering *amicus curiae*’s appellate brief, the Appeals Chamber considers that it is in the interests of justice to address the ineffective assistance ground of appeal raised by *amicus curiae*, the Appeals Chamber is invited to appoint an independent person to conduct a limited factual investigation into the issue.”⁹ *Amicus curiae* suggests that such an investigation could involve the taking of witness statements and the preparation of a report regarding information that could not be determined from the trial record.¹⁰

5. In the “Prosecution Response to Motion by Amicus Curiae Regarding Appellate Ground of Ineffective Assistance of Counsel,” filed confidentially on 9 July 2007 (“Response”), the Prosecution opposes both requests made in the Motion. As to the request that *amicus curiae* be able to access and use the documents of prior defence teams for Mr. Krajišnik that did not become part of the trial record, the Prosecution objects to this request for several reasons. First, the Prosecution claims that these materials are privileged and should not be disclosed to *amicus curiae* without the consent of Mr. Krajišnik.¹¹ Second, the Prosecution considers that “[n]othing to date indicates that [Mr.] Krajišnik is unable to safeguard his own interests in respect of the ground of appeal of ineffective representation by his former counsel”, that concerns about Mr. Krajišnik’s access to translation facilities are premature, and that in any event the Motion does not clarify why materials outside the trial record are needed to support *amicus curiae*’s ground of appeal dealing with ineffective assistance of counsel.¹² Third, the Prosecution argues that *amicus curiae*’s request is in any event too broad and amounts to a fishing expedition.¹³ As to the request that the Appeals Chamber appoint an independent person to conduct further investigations upon receiving *amicus curiae*’s appeal brief, the Prosecution considers that this request should be dismissed as “premature” and notes that such an appointment “would be a novel course of action” and might in any event be “entirely unnecessary”.¹⁴ Finally, the Prosecution notes that while it filed its Response confidentially because the Motion was filed confidentially, the “Prosecution is not aware of any

⁸ *Amicus* Motion, para. 8.

⁹ *Amicus* Motion, para. 11.

¹⁰ *Amicus* Motion, para. 11.

¹¹ Response, paras 6-8.

¹² Response, paras 9-13.

¹³ Response, paras 2, 14-16.

¹⁴ Response, paras 17-18.

reasons for these filings to be confidential and is content for them to be made public, provided the *Amicus* consents.”¹⁵

6. On 13 July 2007, *amicus curiae* confidentially filed a “Reply to Prosecution Response to Motion by Amicus Curiae Regarding Appellate Ground of Ineffective Assistance of Counsel” (“Reply”). *Amicus curiae* states that with regard to documents protected by legal privilege, a waiver of privilege could be sought from Mr. Krajišnik upon the Appeals Chamber ruling in favour of *amicus curiae*’s request for an expanded mandate.¹⁶ *Amicus curiae* adds that “[u]se of this material is absolutely vital to the Appeals Chamber being adequately briefed on [Mr. Krajišnik’s] own ineffective assistance of counsel ground of appeal against [one prior counsel], as well as the *amicus curiae*’s grounds” with regard to ineffective assistance, since “[r]eferences from the trial record in isolation are simply not representative of the quality of the legal assistance rendered to the Appellant by these persons.”¹⁷ *Amicus curiae* also suggests that Mr. Krajišnik “does not have the facilities to review and incorporate these materials in the time presently allowed for his Appellate Brief” and that without expanding the mandate of *amicus curiae*, “it is almost certain that they will not be considered in these appellate proceedings at all” which would “in effect amount to a denial of the Appellant’s right to a full and fair appeal.”¹⁸ *Amicus curiae* further rejects the Prosecution’s characterization of the request as a fishing expedition.¹⁹ On the question of appointing an independent investigator after reviewing *amicus curiae*’s brief, *amicus curiae* disputes the submission that the request is premature and explains that the request was made now “in order to avoid any additional hold-ups in the briefing schedule.”²⁰ With regard to confidentiality, *amicus curiae* suggests confidentiality is appropriate “in order to fully uphold established principles of due process in respect of the as yet unparticularised allegations against” the two prior counsel; that confidentiality should currently be lifted as to only these two individuals; that they should be given a chance to respond to the allegations made against them; and that only after they have had a chance to respond should all filings on this issue be made public.²¹ *Amicus curiae* also attaches as Annex A a guidance approved by the Lord Chief Justice and the Bar Council in England & Wales on “Criticism of Former Counsel in Criminal Cases” and invites the Appeals Chamber to consider adopting a similar protocol.

¹⁵ Response, para. 21.

¹⁶ Reply, paras 6-7. *Amicus curiae* further suggests that he be provided with access to these documents in the interim, while consent is being sought, “so that it may be included in *amicus curiae*’s Appellate Brief”.

¹⁷ Reply, para. 12.

¹⁸ Reply, para. 13.

¹⁹ Reply, para. 17.

²⁰ Reply, para. 19.

²¹ Reply, paras 20-24.

II. DISCUSSION

7. As a preliminary matter, the Appeals Chamber will consider the issue of whether the filings in relation to the ground of ineffective assistance of counsel – namely, the Motion, the Response, the Reply, and a portion of “Amicus Curiae’s Notice of Appeal”²² – should be kept confidential. Pursuant to Rules 78 and 107 of the Rules of Procedure and Evidence of the Tribunal (“Rules”), “all proceedings before an Appeals Chamber shall be public unless there are exceptional reasons for keeping them confidential.”²³ As noted earlier, the only justification offered by *amicus curiae* in favour of confidentiality is that somehow this confidentiality is necessary “to fully uphold established principles of due process” with respect to the two attorneys whose alleged conduct forms the basis for these grounds of appeal.²⁴ *Amicus curiae* fails to explain, however, how confidentiality in this regard advances principles of due process, and the Appeals Chamber sees no such exceptional reasons. Indeed, the Appeals Chamber notes that in the past, ineffective-assistance-of-counsel claims have been made and considered publicly in this Tribunal.²⁵ Accordingly, the Appeals Chamber requests the Registry to lift confidentiality on the above-mentioned filings.²⁶

8. Turning to the merits of *amicus curiae*’s request for an expanded mandate, the Appeals Chamber declines to grant such request. In the 11 May Decision, the Appeals Chamber set out a carefully calibrated mandate for *amicus curiae*. Recognizing that Mr. Krajišnik had chosen to self-represent and “must accept responsibility for the disadvantages this choice may bring,”²⁷ the Appeals Chamber did not vest *amicus curiae* with the full responsibilities that the counsel for defendants normally possess. Instead, recognizing that the role of *amicus curiae* was largely to help the Appeals Chamber to assess “whether the interest of justice requires the Appeals Chamber to consider, *proprio motu*, issues not raised in Mr. Krajišnik’s appeal or in his responses to the

²² Amicus Curiae’s Notice of Appeal, 8 June 2007, paras 10-14 (confidential filing). Only this portion of Amicus Curiae’s Notice of Appeal was redacted from the public version of Amicus Curiae’s Notice of Appeal that was filed the same day. See generally Amicus Curiae’s Notice of Appeal, 8 June 2007 (public and redacted version).

²³ *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-AR65.1, Decision on Defence Appeal Against Trial Chamber’s Decision on Sredoje Lukić’s Motion for Provisional Release, 16 April 2007, fn. 2.

²⁴ Reply, para. 20.

²⁵ See, e.g., *Prosecution v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-A, Defence of Mr. Vidoje Blagojević Brief on Appeal, 20 October 2005, paras 2.14-2.20; *Prosecution v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-A, Appeals Judgement, 9 May 2007, paras 22-25.

²⁶ The Appeals Chamber declines at this time to consider *amicus curiae*’s suggestions with regard to giving former counsel a right of response where an ineffective-assistance claim with regard to their conduct is included as a ground of appeal and with regard to adopting a protocol similar to the one set out in Annex A of the Reply. The Appeals Chamber notes that these suggestions occur in *amicus curiae*’s Reply rather than in the original Motion. The Appeals Chamber also notes that while ineffective-assistance-of-counsel claims have been raised on appeal in past cases of this Tribunal and of the International Criminal Tribunal for Rwanda, *amicus curiae* neither suggests that a right of response for prior counsel has been granted in these past cases nor shows in the alternative why, if this is not the case, a departure from past practice is required.

²⁷ 11 May Decision, para. 18 (internal quotation marks and brackets omitted).

Prosecution's appeal," the Appeals Chamber limited *amicus curiae* to consulting "the evidence at issue in the trial record" rather than "conduct[ing] any new factual investigations."²⁸ Although *amicus curiae* frames his current request for an extension of the mandate as involving "unique difficulties associated with an ineffective assistance of counsel ground of appeal", the Appeals Chamber considers that the reasoning of *amicus curiae* would apply to any ground of appeal where *amicus curiae* had reason to think that evidence outside the trial record would assist him in promoting this ground of appeal. Under this reasoning, *amicus curiae*'s role would become essentially equivalent to that of a defence counsel rather than limited to helping the Appeals Chamber assess whether the Trial Judgement and other relevant rulings of the Trial Chamber are fair to Mr. Krajišnik in light of the evidence at trial and the applicable law. While arguments with regard to evidence outside the trial record may thus go unmade (should Mr. Krajišnik fail to make these arguments himself), the Appeals Chamber considers that fairness does not require it to mitigate this further potential consequence of Mr. Krajišnik's own choice to self-represent.

9. The Appeals Chamber thus denies *amicus curiae*'s request for an expanded mandate. Accordingly, the Appeals Chamber declines to address the further arguments of the parties in relation to issues of privilege and to the breadth of *amicus curiae*'s request.

10. With regard to *amicus curiae*'s request that the Appeals Chamber appoint an independent person to conduct further investigations into the ineffective-assistance-of-counsel ground of appeal upon receiving *amicus curiae*'s appeal brief, the Appeals Chamber agrees with the Prosecution that this request is at least premature. The Appeals Chamber could of course address this concern by taking the issue under advisement and delaying a ruling until after the appeal brief of *amicus curiae* is filed. With the interests of judicial economy in mind, however, the Appeals Chamber instead denies the request as premature while retaining the power to revisit this issue *proprio motu* if it deems this necessary after reviewing the briefs of the parties and *amicus curiae*.

²⁸ 11 May Decision, paras 19-20.

III. DISPOSITION

11. For the foregoing reasons, the Appeals Chamber **DENIES** the Motion in its entirety. The Appeals Chamber also **REQUESTS** the Registry to lift the confidentiality of the Motion, Response, and Reply, and the currently confidential portion of Amicus Curiae's Notice of Appeal.

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

Dated this 20th day of July 2007,
At The Hague, The Netherlands.



Fausto Pocar
Presiding Judge

[Seal of the Tribunal]