



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: 11 March 2008
Original: English

IN THE APPEALS CHAMBER

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

Registrar: Mr. Hans Holthuis

Decision of: 11 March 2008

PROSECUTOR

v.

MOMČILO KRAJIŠNIK

PUBLIC

**DECISION ON PROSECUTION'S MOTION FOR
CLARIFICATION AND RECONSIDERATION OF THE
DECISION OF 28 FEBRUARY 2008**

The Office of the Prosecutor

Mr. Peter Kremer, QC
Ms. Shelagh McCall

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 the “Prosecution Motion for Clarification and Reconsideration of the Appeals Chamber’s ‘Decision on Momčilo Krajišnik’s Motion to Reschedule Status Conference and Permit Alan Dershowitz to Appear’” (“Motion”), filed on 29 February 2008.

I. BACKGROUND

2. On 21 February 2008, Momčilo Krajišnik (“Mr. Krajišnik”) filed a motion seeking postponement of the next status conference in this case until 31 March 2008 in order to accommodate the schedule of Mr. Alan Dershowitz (“Mr. Dershowitz”), whom Mr. Krajišnik seeks to engage as counsel.¹

3. In the Decision of 28 February 2008,² the Appeals Chamber granted Mr. Krajišnik’s motion of 21 February and scheduled the status conference for 31 March 2008.³ It also articulated parameters for Mr. Dershowitz’s involvement in the case, allowing Mr. Dershowitz to submit a supplementary brief of no more than 8000 words on behalf of Mr. Krajišnik regarding the issue of Joint Criminal Enterprise (JCE).⁴ The Appeals Chamber also provided for a response by the Prosecution of not more than 4000 words.⁵

4. In its Motion, the Prosecution seeks clarification regarding the content of the supplementary brief and the extent of Mr. Krajišnik’s continued self-representation. It also seeks reconsideration of the applicable word and time limits. The Appeals Chamber considers that clarification of the scope of Mr. Dershowitz’s involvement and a slight alteration of the briefing schedule is appropriate.

II. WORD LIMITS

5. In the Motion, the Prosecution argues that the briefing schedule envisaged by the Decision of 28 February 2008 “breaches the principle of equality of arms” because it gives the Prosecution “only 4000 words to respond” to an 8000-word brief.⁶ It notes that “it was granted the same word

¹ Motion of Momčilo Krajišnik to Reschedule the Date of Status Conference and for Permission for Alan Dershowitz to Make a Special Appearance, 21 February 2008.

² Decision on Momčilo Krajišnik’s Motion to Reschedule Status Conference and Permit Alan Dershowitz to Appear, 28 February 2008 (“Decision of 28 February 2008”).

³ *Id.* at paras 4, 13.

⁴ *Id.* at paras 11-12.

⁵ *Id.* at para. 12.

⁶ Motion, para. 30.

limit in responding to *amicus curiae* as *amicus curiae* had for his submissions.”⁷ Finally, the Prosecution claims that it faces an unfair disadvantage because, in the course of the entire appeal proceeding, Mr. Krajišnik will have 38,000 words to argue his case whereas the Prosecution will have only 34,000 words.⁸

6. This argument is without merit because the principle of “equality of arms” is not predicated on the idea that both sides of a case are entitled to exactly the same number of words in which to make their arguments. The fact that the Appeals Chamber has allotted more words to Mr. Dershowitz is far from anomalous. For example, on an appeal from judgement, an appellant is entitled to file a brief in reply and, accordingly, enjoys a larger total word limit.⁹ Consequently, the Appeals Chamber dismisses this argument.

III. NATURE OF MR. DERSHOWITZ’S REPRESENTATION

7. The Prosecution essentially makes two arguments with respect to Mr. Dershowitz’s involvement at this stage in the proceedings. First, it seeks clarification regarding the extent of Mr. Krajišnik’s continued self-representation.¹⁰ Without such clarification, the Prosecution faces a moving target—*i.e.*, the arguments that Mr. Krajišnik has already made in his appeal brief as well as the arguments that Mr. Dershowitz’s brief will marshal.¹¹ Second, the Prosecution petitions the Appeals Chamber for a revised briefing schedule that will allow them to respond more fully to any new arguments advanced on Mr. Krajišnik’s behalf.¹²

8. The request to clarify the scope of Mr. Krajišnik’s continuing self-representation takes different shapes. On the one hand, the Prosecution argues that “the current Decision results in an appellant who insisted on his right to represent himself, not only being able to do so with the benefit of full briefing rights, but with the additional benefit of briefs submitted by *amicus curiae* whose remit is to work exclusively in favour of Krajišnik’s interests, and now also with the benefit of representation by counsel with additional briefing on the issue of JCE.”¹³ The Appeals Chamber is not convinced by this argument. As the Appeals Chamber has previously stated, *amicus curiae* has a mandate to assist the Tribunal, not Mr. Krajišnik.¹⁴ In addition, the Prosecution has always had a

⁷ *Ibid.*

⁸ *Ibid.*

⁹ See Practice Direction on the Length of Briefs and Motions, IT/184/Rev.2, I.C.1, 16 September 2005.

¹⁰ Motion, para. 28.

¹¹ *Id.* at paras 22, 27.

¹² *Id.* at paras 20, 22.

¹³ *Id.* at para. 26.

¹⁴ Decision on Momčilo Krajišnik’s Request to Self-Represent, on Counsel’s Motions in Relation to Appointment of *Amicus Curiae*, and on the Prosecution Motion of 16 February 2007, 11 May 2007 (“Decision of 11 May”), paras 19-20.

full and fair opportunity to respond to any arguments by Mr. Krajišnik or *amicus curiae*.¹⁵ On the other hand, the Prosecution raises valid concerns that it does not know whether it should still respond to certain arguments in Mr. Krajišnik's brief or only to those advanced on his behalf by Mr. Dershowitz. The Appeals Chamber considers that this point warrants clarification.

9. The Appeals Chamber has already described the purview of Mr. Dershowitz's representation, which is limited to the question of JCE.¹⁶ Additionally, in the Decision of 28 February 2008, the Appeals Chamber directed Mr. Dershowitz "to state with precision which arguments of *amicus curiae* he embraces and which arguments he rejects."¹⁷ The Appeals Chamber orders Mr. Dershowitz to do the same with respect to the arguments that Mr. Krajišnik has already made in his appeal brief. Mr. Dershowitz must be clear as to which of the arguments are new and the extent to which they complement or supersede those arguments made by Mr. Krajišnik. In short, because Mr. Dershowitz will be acting as counsel for Mr. Krajišnik, at least in a limited capacity, the two must speak with a single voice. The arguments that Mr. Dershowitz advances will thus make clear the issues on which Mr. Krajišnik is represented by counsel.

10. The Appeals Chamber considers that this directive should suffice to ensure that the Prosecution will not have to respond to potentially contradictory or irrelevant arguments. Although the Prosecution requests that the Appeals Chamber also order Mr. Dershowitz to file a supplementary notice of appeal, the Appeals Chamber finds that such a step is unnecessary. Mr. Krajišnik's notice of appeal is clear in preserving the JCE issue.¹⁸ A notice of appeal need not enumerate the precise contours that an argument will take. The Appeals Chamber will remind Mr. Dershowitz, however, that the arguments he advances must be within the ambit of issues that Mr. Krajišnik set forth in his notice of appeal.

11. Finally, the Prosecution seeks a revised briefing schedule to avoid a situation whereby it will have to "respond to [Mr.] Krajišnik's JCE arguments while remaining 'blind' as to the JCE issues to be raised in the supplementary brief."¹⁹ Such a concern is premature as the Prosecution has not demonstrated actual prejudice. Essentially, the Prosecution hypothesizes a scenario in which Mr. Dershowitz will make arguments inconsistent with those that Mr. Krajišnik has already made, hence the supposed problem of a moving target. Despite this theoretical possibility, the Appeals Chamber notes that Mr. Krajišnik's appeal brief devotes only fifteen paragraphs to the purely legal aspects of

¹⁵ See, e.g., The Prosecution's Response to *Amicus Curiae's* Appellate Brief, 12 September 2007.

¹⁶ Decision of 28 February 2008, paras 5, 11.

¹⁷ Decision of 28 February 2008, para. 11.

¹⁸ The Accused, Momčilo Krajišnik: Notice of Appeal, 27 February 2007, paras 14-20.

¹⁹ Motion, para. 22.

the JCE issue.²⁰ Consequently, Mr. Dershowitz's brief appears to be an opportunity to flesh out arguments that Mr. Krajišnik did not fully develop rather than to do an about-face and advance a contradictory theory. In the absence of any actual prejudice to the Prosecution, the Appeals Chamber is unwilling to disturb the present briefing schedule. Accordingly, the Prosecution's response to Mr. Krajišnik's appeal brief is still due on 12 March 2008. Admittedly, Mr. Dershowitz will then be able to take the Prosecution's arguments into account before submitting his supplementary brief; however, the Prosecution still has an adequate opportunity to address those issues in the response provided for in the Decision of 28 February 2008. If at a later date the Prosecution can demonstrate actual prejudice, it may request appropriate relief from the Appeals Chamber.

IV. DISPOSITION

12. Accordingly, the Appeals Chamber **GRANTS** the Motion **IN PART** and **ORDERS** that Mr. Dershowitz abide by the additional directions in paragraphs 9-10 of this Decision. The Motion is **DISMISSED** in all other respects.

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

Dated this 11th day of March 2008,
At The Hague, The Netherlands.



Fausto Pocar
Presiding Judge

[Seal of the Tribunal]

²⁰ See Appeal by Momčilo Krajišnik to the ICTY Judgement of 27 September 2006 (Public Filing), 28 February 2008, paras 9-24.