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: 5 September 2008

Original: English

IN THE APPEALS CHAMBER

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

Registrar: **Mr. Hans Holthuis**

Decision of: **5 September 2008**

PROSECUTOR

v.

MOMČILO KRAJIŠNIK

PUBLIC

DECISION ON MOMČILO KRAJIŠNIK'S MOTION FOR PERMISSION FOR NATHAN Z. DERSHOWITZ TO ACT AS COUNSEL WITH ALAN M. DERSHOWITZ AND FOR EXTENSION OF TIME

Counsel for the Prosecution:
Mr. Peter Kremer QC

The Appellant:
Mr. Momčilo Krajišnik

Amicus Curiae:
Mr. Colin Nicholls

Counsel for the Appellant on the matter of JCE:
Mr. Alan M. Dershowitz

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 A) for Permission for Nathan Z. Dershowitz to act as Counsel with Alan M. Dershowitz on Behalf of Mr. Momčilo Krajišnik on the Issue of JCE and to Conduct the Interview of Radovan Karadzic as Allowed by Order Dated August 20, 2008 and B) to Extend the Deadline of September 15, 2008 Contained in Said Order to September 29, 2008" ("Motion"), filed by Momčilo Krajišnik ("Appellant") on 2 September 2008.

1. The Motion

2. By "Order on 'Motion to Interview Radovan Karadžić with a View to then Calling him as a Witness Pursuant to Rule 115'", issued publicly by the Appeals Chamber on 20 August 2008 ("Order on Motion to Interview Radovan Karadžić"), the Appeals Chamber *inter alia* allowed the Appellant "to speak to Radovan Karadžić in order to determine whether or not he wants to call him as a witness pursuant to Rule 115 of the Rules" of Procedure and Evidence ("Rules").[1]

3. In the Motion, the Appellant, through undersigned counsel on the matter of Joint Criminal Enterprise ("JCE") Mr. Alan M. Dershowitz,[2] states that "[a]fter consultation with Mr. Krajišnik, it was decided that Nathan Z. Dershowitz would conduct the interview with Radovan Karadžić on Mr. Krajisnik behalf".[3] The Appellant provides the following reasons for this decision:

a) Mr. Krajišnik's conviction was solely pursuant to JCE, so the interview should properly be focused on matters relevant to JCE;

b) Mr. Alan M. Dershowitz, counsel on the matter of JCE, is commencing his teaching responsibilities at Harvard Law School on 2 September 2008;

c) Mr. Nathan Z. Dershowitz is fully familiar with the issue as he has been working with Mr. Alan M. Dershowitz as "of counsel" in the matter, and was granted permission to share the argument time on JCE during the appeal hearing on 21 August 2008; and

d) the deadline for the Appellant to file any motion seeking leave to call Radovan Karadžić as a witness pursuant to Rule 115 of the Rules was set for no later than 15 September 2008.[4]

[1] Motion, para. 2, with reference to Order on Motion to Interview Radovan Karadžić, p. 3.
[2] *See* 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] Motion, para. 3.
[4] Motion, para. 3.

4. The Appellant attaches two letters as annexes to the Motion. In the first letter, Mr. Nathan Z. Dershowitz requested the Registry to authorize him to interview Mr. Karadžić on the Appellant's behalf on 5 September 2008.[5] In the second letter, Mr. Martin Petrov, Head, Office for Legal Aid and Detention Matters, informed Mr. Nathan Z. Dershowitz that the Registrar was unable to grant his request for authorization to interview Mr. Karadžić on the Appellant's behalf. According to Mr. Petrov, the Registry understands that the Order on Motion to Interview Radovan Karadžić allowed the Appellant himself to speak to Mr. Karadžić. Furthermore, Mr. Petrov recalls that if JCE-related matters were to be discussed with Mr. Karadžić, Mr. Alan M. Dershowitz is the appointed counsel to represent the Appellant on this distinct legal issue.[6] He advised, however, that for Mr. Nathan Z. Dershowitz to be permitted to meet with the Appellant and Mr. Karadžić without the presence of Mr. Alan M. Dershowitz, he could consider acquiring the status of counsel for the Appellant, for which he would need the authorisation of the Appeals Chamber.[7]

5. In the Motion, the Appellant now requests that Mr. Nathan Z. Dershowitz be granted the status of counsel on the matter of JCE together with Mr. Alan M. Dershowitz so that "the problem raised by Mr. Martin Petrov can be resolved".[8] The Appellant further states that Mr. Nathan Z. Dershowitz' next available time to conduct this interview would be on 19, 20, 21 or 22 September 2008, and he therefore requests that the deadline of 15 September 2008 for filing a motion pursuant to Rule 115 of the Rules, as set out in the Order on Motion to Interview Radovan Karadžić, be extended to 29 September 2008.[9]

6. The Prosecution has communicated to the Appeals Chamber that it will not respond to the Motion.

7. *Amicus Curiae* makes the following submissions with respect to the Motion:

a) the impending interview with Mr. Karadžić is rightly focussed on JCE;

b) the interview with Mr. Karadžić should be conducted by experienced counsel;

c) the Order on Motion to Interview Radovan Karadžić should be interpreted as facilitating the Appellant's access to legal assistance at the interview;

[5] Letter of Mr. Nathan Z. Dershowitz, 27 August 2008, as attached to Motion.
[6] Letter of Mr. Martin Petrov, 29 August 2008, as attached to Motion.
[7] *Ibid.*
[8] Motion, para. 5.
[9] Motion, para. 6.

d) there does not appear to be a material impediment to the Appellant engaging the services of Mr. Nathan Z. Dershowitz on the matter of JCE in addition to those of Mr. Alan M. Dershowitz; and

e) the extension of time for the submission of any further motion pursuant to Rule 115 of the Rules should be granted.[10]

2. Discussion

8. When considering the Motion, the Appeals Chamber finds it appropriate to recall that it permitted Mr. Alan M. Dershowitz to advance arguments regarding the issue of JCE on behalf of the Appellant, because this issue "might be too complex for a non-lawyer to master".[11] Furthermore, the Appeals Chamber "recognized the existence of heightened concerns regarding the basic fairness of proceedings when a defendant has chosen to self-represent".[12] In light of this reasoning, the Appeals Chamber is satisfied that the Appellant should be granted the assistance of counsel on the matter of JCE in conducting the interview with Mr. Karadžić whose potential evidence will be primarily relevant for this issue. This is demonstrated *inter alia* by the numerous references to the relationship between the Appellant and Mr. Karadžić in the Trial Judgement of 27 September 2006.[13] The Appeals Chamber also finds that the conduct of the said interview by counsel on the matter of JCE is within the scope of the Order on Motion to Interview Radovan Karadžić in which it allowed the Appellant to speak to Mr. Karadžić in order to determine whether or not he wants to call him as a witness pursuant to Rule 115 of the Rules.[14] Such procedure is consistent with the Appeals Chamber's heightened concerns for the fairness of proceedings against a self-represented accused.[15]

9. Having thus found that counsel on the matter of JCE can conduct the interview with Mr. Karadžić on behalf of the Appellant, the Appeals Chamber will now turn to the Appellant's request to grant Mr. Nathan Z. Dershowitz status of counsel. The Appeals Chamber is mindful of the fact that to date, he is registered as legal consultant to Mr. Alan M. Dershowitz, and not as co-counsel.[16] However, during the appeals hearing on 21 August 2008, Mr. Nathan Z. Dershowitz made oral submissions on the matter of JCE together with Mr. Alan M. Dershowitz, using part of the time

[10] Submission in Relation to Defence Counsel's Motion regarding Interview of Radovan Karadžić, 3 September 2008.
[11] Decision of 28 February 2008, para. 9.
[12] Decision of 28 February 2008, para. 6.
[13] *See* for instance Trial Judgement, paras 1087, 1099, 1105, 1107, 1110, 1112, 1115, 1116, 1121, 1123 and 1124.
[14] Order on Motion to Interview Radovan Karadžić, p. 3.
[15] Decision of 28 February 2008, para. 6.
[16] *See* Correspondence from the Registry to counsel Mr. Alan M. Dershowitz by which the Registry accredited Mr. Nathan Z. Dershowitz to Mr. Alan M. Deshowitz as his legal consultant, 15 August 2008, with reference to Request for Accreditation of Nathan Z. Dershowitz as a Member of Momčilo Krajišnik's Defence Team, 13 August 2008.

allocated to the Appellant for submission of his oral presentation.[17] Consequently, the Appeals Chamber finds that it has already implicitly authorized Mr. Nathan Z. Dershowitz to act as *de facto* co-counsel on the matter of JCE together with Mr. Alan M. Dershowitz. Furthermore, the Appeals Chamber is satisfied that the Appellant has shown that Mr. Nathan Z. Dershowitz is sufficiently familiar with the matters related to JCE to conduct the interview with Mr. Karadžić on this issue,[18] having already made oral submissions on the matter of JCE during the appeals hearing and having worked together with Mr. Alan M. Dershowitz on the matter.[19]

10. With respect to the request for an extension of time, the Appellant argues that Mr. Alan M. Dershowitz has commenced teaching responsibilities at Harvard Law School on 2 September 2008.[20] The Appeals Chamber gathers from this submission that the Appellant is arguing that due to these teaching responsibilities, Mr. Alan M. Dershowitz will not be able to participate in the interview with Radovan Karadžić at a time that would allow the Appellant to file a motion pursuant to Rule 115 of the Rules by 15 September 2008. The Appeals Chamber recalls that a counsel in a case before the Tribunal is under an obligation to give absolute priority to his commitments to the Tribunal and to observe the time limits in the Rules[21] or in an order of a Chamber. Furthermore, the Appeals Chamber recalls that "other professional commitments of counsel should not have any bearing on the responsibilities of counsel towards their client and the International Tribunal".[22] In these circumstances, the Appellant has not shown good cause for the extension of time sought.

3. Disposition

11. For the foregoing reasons, the Appeals Chamber **GRANTS** the Motion in part and **ALLOWS** Mr. Nathan Z. Dershowitz to approach the Registry at the earliest opportunity with a view to be appointed as co-counsel on the matter of JCE in compliance with Rule 44 of the Rules.

12. The Appellant's request for an extension of time is **DISMISSED**.

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[17] *See* AT 191 *et seq.* *See* also Notice of Appearance, 12 August 2008, with reference to Scheduling Order for Appeals Hearing, 18 July 2008.
[18] This is of course subject to the fulfillment of all prerequisites under Rule 44 of the Rules by Mr. Nathan Z. Dershowitz.
[19] Motion, para. 3.
[20] Motion, para. 3.
[21] *Cf. Emmanuel Ndindabahizi v. The Prosecutor*, ICTR-01-71-A, Decision on "*Requête urgente aux fins de prorogation de délai pour le dépôt du mémoire en appel*", 1 April 2005, p. 3.
[22] *Prosecutor v. Momir Nikolić*, IT-02-60/1-A, Decision on Second Defence Motion to Enlarge Time for Filing of Replies, 1 April 2005, p. 4.

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

Judge Fausto Pocar
Presiding

Dated this fifth day of September 2008,
At The Hague,
The Netherlands.

[Seal of the Tribunal]