



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: 30 October 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: 30 October 2008

PROSECUTOR

v.

MOMČILO KRAJIŠNIK

PUBLIC

**DECISION ON MOMČILO KRAJIŠNIK'S "NOTIFICATION
OF THE SUMMARY OF FACTS UPON WHICH RADOVAN
KARADŽIĆ MAY GIVE EVIDENCE AND URGENT REQUEST
FOR ADDITIONAL RESOURCES"**

Counsel for the Prosecution:

Mr. Peter Kremer QC

The Appellant:

Mr. Momčilo Krajišnik

Amicus Curiae:

Mr. Colin Nicholls QC

Counsel for the Appellant on the matter of JCE:

Mr. Alan M. Dershowitz

Mr. Nathan Z. Dershowitz

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);

BEING SEIZED of the “Notification of the Summary of Facts upon Which Radovan Karadžić May Give Evidence and Urgent Request for Additional Resources”, filed on 27 October 2008 by Mr. Momčilo Krajišnik (“Notification” and “Appellant”, respectively), wherein the Appellant files a summary of facts on which “he hopes” Radovan Karadžić will testify¹ and (i) seeks leave to expand the scope of Mr. Radovan Karadžić’s proposed evidence under Rule 115 of the Rules of Procedure and Evidence (“Rules”) as set out in paragraphs 22 to 34 of the Notification, while reserving the right to further supplement the summary of facts subject to the approval of the Appeals Chamber; (ii) urges the Appeals Chamber to instruct the Registry to provide him with at least two additional support staff; and (iii) requests the Appeals Chamber to grant him sufficient time to properly and adequately prepare the presentation of Mr. Radovan Karadžić’s evidence;²

BEING FURTHER SEIZED of the Appellant’s “Submission Relating to Further Appeals Proceedings”, filed by the Appellant on 23 October 2008 (“Submission”), in which the Appellant requests “the Appeals Chamber to take a reasonable approach in relation to his position” and argues that “it is essential to provide [him] with more resources”;³

NOTING “JCE Counsel’s Response to Urgent Prosecution Motion Dated October 29, 2008”, filed by Counsel on the matter of JCE for the Appellant (“JCE Counsel”) on 30 October 2008, in which JCE Counsel joins the Appellant’s argument that he needs additional time to prepare the summary of facts;⁴

NOTING the “Urgent Prosecution Motion for Filing a Proper Summary of Facts and Prosecution’s Consolidated Response to Krajišnik’s ‘Submission Relating to Further Appeals Proceedings’ and ‘Notification of the Summary of Facts’”, filed by the Prosecution on 29 October 2008 (“Prosecution Request”), wherein it objects to the requests in the Notification and the Submission,⁵ and further claims that the summary of facts filed by the Appellant does not comply with the Appeals Chamber’s “Decision on Appellant Momčilo Krajišnik’s Motion to Call Radovan Karadžić Pursuant to Rule 115” of 16 October 2008 (“Rule 115 Decision”) and the “Decision on Urgent Prosecution Motion for Clarification of the Appeals Chamber Decision on Appellant Momčilo

¹ Notification, paras 10-21.

² Notification, paras 46-48.

³ Submission, paras 13-14.

⁴ JCE Counsel’s Response to Urgent Prosecution Motion Dated October 29, 2008, 30 October 2008, paras 9-10.

⁵ Prosecution Request, paras 2-4, 12-14, 19-23.

Krajišnik's Motion to Call Radovan Karadžić Pursuant to Rule 115" of 23 October 2008 ("Clarification Decision");⁶

NOTING that, in the Prosecution Request, the Prosecution urgently requests the Appeals Chamber to direct the Appellant to file a summary of facts in compliance with the Clarification Decision;⁷

NOTING the "Response to Urgent Prosecution Motion and Reply to Prosecution's Consolidated Response", filed by the Appellant on 30 October 2008 ("Appellant's Reply"), in which the Appellant (i) argues that his request for expanding the scope of Mr. Radovan Karadžić's testimony directly follows from the Rule 115 Decision, and that the Prosecution is aware of the expanded topics; and (ii) reiterates his request for additional resources;

RECALLING that the Appeals Chamber ordered the Appellant to file a summary of facts upon which Mr. Radovan Karadžić will testify in order to give the Prosecution an adequate opportunity to prepare for its cross-examination of Mr. Radovan Karadžić during the evidentiary hearing on 5 November 2008 ("Evidentiary Hearing"),⁸ and that the Appeals Chamber clarified that this summary of facts shall include (i) specific factual findings in explicitly enumerated paragraphs of the Trial Judgement,⁹ and (ii) "the main content of Mr. Radovan Karadžić's anticipated testimony in relation to those factual findings, in particular indicating the new facts and additional evidence he is anticipated to give which could have an impact on the verdict";¹⁰

FINDING that the summary of facts submitted by the Appellant in his Notification does not comply with the second requirement above;

CONSIDERING that the Appellant's request to expand the scope of Mr. Radovan Karadžić's proposed evidence under Rule 115 of the Rules constitutes a new request to admit *viva voce* evidence on appeal and, as such, must meet the requirements of Rule 115 of the Rules;

RECALLING that in the Rule 115 Decision, the Appeals Chamber allowed the Appellant to call Mr. Radovan Karadžić as a witness to give evidence related to a number of specifically enumerated paragraphs of the Trial Judgement, and that by granting the Appellant's request to have further meetings with Mr. Radovan Karadžić "to determine the precise scope of his proposed evidence", the Appeals Chamber did not allow the Appellant to expand the previously authorized scope of Mr. Radovan Karadžić's proposed testimony;

⁶ Prosecution Request, paras 1, 7-11.

⁷ Prosecution Request, para. 11.

⁸ Rule 115 Decision, para. 21.

FINDING that the Appellant fails to demonstrate that his request to expand the scope of Mr. Radovan Karadžić's proposed evidence meets the requirements of Rule 115 of the Rules;

CONSIDERING, with respect to the Appellant's request for the Appeals Chamber to instruct the Registry to provide him with at least two additional support staff,¹¹ that requests for the appointment of support staff have to be directed to the Registrar,¹² and that a decision of the Registrar on such request may be subject to judicial review by the Appeals Chamber if it affects, or is likely to affect, the right of an accused to a fair and expeditious trial or the integrity of the proceedings;¹³

FINDING therefore that the Appellant's request for additional support staff is not properly directed to the Appeals Chamber;

NOTING, with regard to the Appellant's request for sufficient time to properly and adequately prepare the presentation of Mr. Radovan Karadžić's evidence, his claim that he "reserves the right to supplement the summary of facts", alleging that the Prosecution has failed to disclose *inter alia* 14 CDs containing documents "that were confiscated by the Serb authorities upon the arrest of Mr. Radovan Karadžić" and which "[appear] to [be] significant and relevant" for the preparation of Mr. Radovan Karadžić's testimony and for filing a complete summary of facts;¹⁴

NOTING that the Appellant received the 14 CDs with material seized from Mr. Radovan Karadžić on 27 October 2008;¹⁵

CONSIDERING that the fact that the Appellant was not in possession of these electronic files did not cause any prejudice to the Appellant's preparation of Mr. Radovan Karadžić's testimony and

⁹ *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-T, Judgement, 27 September 2006 ("Trial Judgement"), paras 176-182; 188-189; 893; 994; 1001-1005; 1013; 1078-1119; 1121, and 1123-1124.

¹⁰ Clarification Decision, p. 2.

¹¹ Notification, paras 45, 47. Submission, paras 2-14.

¹² Cf. Decision on Krajišnik Request and on Prosecution Motion, 11 September 2007, para. 13; Registry Submission on Momčilo Krajišnik's Request to Reverse the Decision of the Registry of 7 June 2007, 19 July 2007 ("Registry Submission"), paras 7, 13, 22.

¹³; See *Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30/1-A, Decision on Review of Registrar's Decision to Withdraw Legal Aid from Zoran Žigić, 7 February 2003, para. 13; Decision on Krajišnik Request and Prosecution Motion, 11 September 2007, para. 30. *Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Decision on Appellant Jean-Bosco Barayagwiza's Motion Contesting the Decision of the President Refusing to Review and Reverse the Decision of the Registrar Relating to the Withdrawal of Co-Counsel, 23 November 2006, para. 9 and sources cited in footnote 36.

¹⁴ Notification, paras 36, 38.

¹⁵ Appellant's Response and Reply, para. 8; Prosecution Request, para. 18.

the summary of facts, because the Appellant has repeatedly met with Mr. Radovan Karadžić¹⁶ since 20 August 2008¹⁷ and is in a position to elicit this information directly from him;

CONSIDERING that the Appellant further argues that prejudice has been caused to him by the fact that the Clarification Decision was filed absent a response by him, and that as a result he has to produce a much larger summary of facts than the one originally ordered;¹⁸

RECALLING that the Appeals Chamber has already considered that the Appellant was not prejudiced by the Clarification Decision which was filed absent his response, as it merely served to clarify the Rule 115 Decision;¹⁹

NOTING the Appellant's argument that Mr. Radovan Karadžić's counsel for his testimony during the Evidentiary Hearing ("Karadžić's Counsel") has requested the Appellant not to make any representations to the Appeals Chamber concerning the scope and content of Mr. Radovan Karadžić's testimony until Karadžić's Counsel has had a chance to consult with Mr. Radovan Karadžić and review the proposed summary of facts;²⁰

CONSIDERING that Mr. Radovan Karadžić has indicated that he is willing to testify at the Evidentiary Hearing,²¹ that the summary of facts does not in and of itself constitute evidence, and that Karadžić's Counsel will be present during the Evidentiary Hearing to prevent any prejudice potentially arising from Mr. Radovan Karadžić's testimony;

CONSIDERING therefore that the Appellant does not show a legal basis for the request of Karadžić's Counsel's to review the proposed summary of facts before it is filed, and that, as a result, said request does not constitute an impediment for the timely preparation of the summary of facts in compliance with the Clarification Decision;

¹⁶ See Submission, paras 12-13. The Registry has communicated to the Appeals Chamber that the Appellant and Mr. Radovan Karadžić met on five occasions between 2 September 2008 and 15 October 2008, and have continued to meet since then.

¹⁷ See Order on "Motion to Interview Radovan Karadžić with a View to then Calling him as a Witness Pursuant to Rule 115", 20 August 2008, in which the Appeals Chamber allowed the Appellant to speak to Mr. Radovan Karadžić in order to determine whether or not he wants to call him as a witness pursuant to Rule 115 of the Rules (*ibid.*, p. 3). Furthermore, on 16 October 2008, the Appeals Chamber granted the Appellant's request to have further meetings with Mr. Radovan Karadžić to determine the precise scope of Mr. Radovan Karadžić's proposed evidence, Decision on Appellant Momčilo Krajišnik's Motion to Call Radovan Karadžić Pursuant to Rule 115, 16 October 2008, para. 22.

¹⁸ Notification, paras 41-44.

¹⁹ Clarification Decision, p. 1.

²⁰ Notification, paras 8-9, and Annex 1.

²¹ See Motion by JCE Counsel to Join Momčilo Krajišnik's Motion for Leave to Call Radovan Karadžić as a Witness Pursuant to Rule 115, and, if Said Motion is Granted, for JCE Counsel to be Allowed to Participate in Such Proceeding, 15 September 2008, para. 4. See also Decision of the Deputy Registrar of 23 October 2008, assigning Mr. Peter Robinson as counsel for the purposes of the Evidentiary Hearing for Mr. Radovan Karadžić.

FINDING for the above reasons that the Appellant has not shown good cause for his request for further time to prepare the presentation of Mr. Radovan Karadžić's evidence;²²

DENIES the requests in the Notification;

GRANTS the Prosecution Request and **ORDERS** the Appellant to submit a summary of facts on which Mr. Radovan Karadžić will testify during the Evidentiary Hearing in compliance with the Clarification Decision no later than 17:30 on 31 October 2008.

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



Judge Fausto Pocar
Presiding

Dated this thirtieth day of October 2008,
At The Hague,
The Netherlands.

[Seal of the Tribunal]

²² Notification, para. 48.