



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-95-5/18-T

Date: 6 January 2012

Original: English

IN THE TRIAL CHAMBER

Before: Judge O-Gon Kwon, Presiding Judge
Judge Howard Morrison
Judge Melville Baird
Judge Flavia Lattanzi, Reserve Judge

Registrar: Mr. John Hocking

Decision of: 6 January 2012

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON MOTION FOR ASSIGNMENT OF COUNSEL TO
DRAGOMIR MILOŠEVIĆ**

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused

Mr. Radovan Karadžić

Standby Counsel

Mr. Richard Harvey

THIS TRIAL 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 (“Tribunal”) is seised of the “Motion for Assignment of Counsel to Witness General Dragomir Milošević”, filed by the Accused on 23 November 2011 (“Motion”), and hereby issues its decision thereon.

I. Background and Submissions

1. The Accused requests the Chamber to direct the Registrar to assign counsel to General Dragomir Milošević (“Milošević”) who he is interested in calling as a witness during his defence case.¹ The Accused notes that Milošević is willing to testify but requires the assistance of counsel to “protect his rights during the proofing and testimony”.² The Accused then submits that the Registrar has declined his request to assign counsel to Milošević on the basis that counsel cannot be assigned until Milošević is included in the Rule 65 *ter* list of witnesses (“Witness List”) which he is yet to file.³ The Accused argues that this decision is delaying the preparation of his defence case as he needs to meet and interview potential witnesses before deciding whether to add them to the Witness List.⁴ The correspondence attached to the Motion indicates that Milošević is already being represented on a *pro bono* basis and that the proposed interview is not possible unless the lawyer’s travel expenses to Milošević’s place of detention are covered by the Tribunal or by the Accused.⁵

2. On 7 December 2011, the Registrar filed the “Registry Submission Pursuant to Rule 33(B) on the Accused’s Motion for Assignment of Counsel to Dragomir Milošević” (“Response”). The Registrar submits that the Motion should be dismissed on the basis that the Accused does not have *locus standi* to request assignment of counsel to a third party.⁶ In addition, the Registrar observes that the Accused has failed to identify the legal basis on which counsel can be assigned to Milošević or in what capacity Milošević “would be entitled to assignment of counsel for the purpose of a meeting with the Accused’s legal associate”.⁷ The Registrar also contends that neither the Tribunal’s Rules of Procedure and Evidence (“Rules”) nor its Statute afford an ongoing right to legal representation for a convicted person following the final conclusion of appeal proceedings

¹ Motion, paras. 1–2.

² Motion, para. 2, Annex A.

³ Motion, para. 3, Annex A.

⁴ Motion, para. 4.

⁵ Motion, Annex A.

⁶ Response, para. 4.

⁷ Response, para. 6.

with the exception of specific post-conviction proceedings before the Tribunal.⁸ In addition, the Registrar observes, relying on the Tribunal's Statute, Rules, and the Directive on the Assignment of Defence Counsel ("Directive") that witnesses, let alone potential witnesses, are not entitled *per se* to legal representation or to Tribunal-funded counsel.⁹ The Registrar further explains that he has no authority to assign publicly-funded counsel to a witness, unless the witness is a suspect or an accused, or where a Chamber has ordered the provision of counsel.¹⁰ In addition, if the witness is placed on the Witness List and transferred to the Tribunal pursuant to Rule 90 *bis* of the Rules, he would be entitled to Tribunal-paid counsel under Article 5(iii) of the Directive as a detained witness, so long as he or she continues to satisfy the indigence requirements.¹¹

3. The Registrar also disputes the Accused's argument that his decision is delaying the preparation of the Accused's defence case given that the Accused has the ability to use alternative means of communication with Milošević to determine whether he can be called as a defence witness.¹²

II. Applicable Law

4. Rule 45 of the Rules states that "[w]henever the interests of justice so demand, counsel shall be assigned to suspects or accused who lack the means to remunerate such counsel. Such assignments shall be treated in accordance with the procedure established in a Directive set out by the Registrar and approved by the permanent Judges".

5. The Directive is intended to codify the system of assignment of counsel at the Tribunal in order to provide legal assistance to indigent suspects or accused persons.¹³ Under Article 5 of the Directive, the right to be assisted by counsel extends to:

- (i) a suspect who is to be questioned by the Prosecutor during an investigation;
- (ii) an accused upon whom personal service of the indictment has been effected; and
- (iii) any person detained on the authority of the Tribunal, including any person detained in accordance with Rule 90 *bis*.¹⁴

⁸ Response, para. 8.

⁹ Response, paras. 9–10.

¹⁰ Response, para. 10.

¹¹ Response, para. 12.

¹² Response, paras. 13–14.

¹³ Directive, Article 1.

¹⁴ Rule 90 *bis* (A) provides that "[a]ny detained person whose personal appearance as a witness has been requested by the Tribunal shall be transferred temporarily to the detention unit of the Tribunal, conditional on the person's return within the period decided by the Tribunal".

6. Article 6(A) of the Directive provides that a “suspect or accused who lacks the means to remunerate counsel shall have the right to have counsel assigned to him and paid for by the Tribunal in accordance with this Directive”.

III. Discussion

7. The decision whether or not to assign counsel to a suspect or an accused is a decision to be made by the Registrar by reference to the Rules and the Directive. Under Article 7(A) of the Directive, “a suspect or accused who wishes to have counsel assigned to him shall make a request to the Registrar”. This request needs to be lodged with the Registrar or transmitted to him “by the suspect or accused himself or by a person authorised by him to do so on his behalf.”¹⁵ The Chamber does not have any information to suggest that a formal request has actually been made by Dragomir Milošević to the Registry for the assignment of counsel. The correspondence attached to the Motion merely indicates that the Office of Legal Aid and Detention Matters (OLAD) declined to pay the travel expenses for Milošević’s *pro bono* lawyer.¹⁶ In addition, there is nothing to suggest that the Accused has been authorised to make this request on behalf of Milošević nor does the Accused cite any legal basis upon which he could request that counsel be assigned to a potential witness in this case.

8. In any event, whether or not the Accused has standing to request the assignment of counsel to Milošević, the Chamber notes that in general neither the Rules nor the Directive invest a convicted and detained person, such as Milošević, with the right to ongoing legal representation following the completion of appeal proceedings. There are limited post-appeal proceedings in which a convicted person may seek legal representation, such as to assist in a request for review of final judgement. However, even in that situation, to be assigned counsel at the Tribunal’s expense requires the Appeals Chamber to authorise the review or to deem it “necessary in order to ensure the fairness of the proceedings”.¹⁷

¹⁵ Directive, Article 7(A).

¹⁶ Motion, Annex A.

¹⁷ *Prosecutor v. Musema*, Case No. ICTR-96-13-R, Decision on Request for Assignment of Counsel, 27 February 2009, p. 2; *Prosecutor v. Barayagwiza*, Case No. ICTR-99-52A-R, Decision on Jean-Bosco Barayagwiza’s Motion of 6 March 2008, 11 April 2008, p. 3; *Prosecutor v. Ngeze*, Case No. ICTR-99-52-R, Decision on Hassan Ngeze’s Motion to Obtain Assistance from Counsel, 28 February 2008, p. 2; *Prosecutor v. Ndindabahizi*, Case No. ICTR-01-71-R, Decision on Emmanuel Ndindabahizi’s Motion for Assignment of Counsel and the Prosecution’s Request to Place the Motion under Seal, 24 February 2008, p. 2; *Prosecutor v. Niyitegeka*, Case No. ICTR-96-14-R, Decision on Third Request for Review, paras. 11–12.

9. Furthermore, as pointed out by the Registrar, a potential witness is not automatically entitled to legal representation as the Tribunal's Statute, its Rules and the Directive do not provide for this entitlement unless that potential witness is a suspect or an accused in an ongoing case.¹⁸

10. While potential witnesses are not entitled to legal representation *per se*, Article 5(iii) of the Directive does provide that any person detained on the authority of the Tribunal, including any person detained in accordance with Rule 90 *bis* of the Rules, is entitled to legal counsel. This would include persons who are present at the seat of the Tribunal in order to give evidence and detained under the authority of the Tribunal for such purpose. Accordingly, if and when Milošević is required to appear as a witness before the Tribunal, his transfer and detention would, as a detained person, be subject to the provisions of Rule 90 *bis* (A) of the Rules. In those circumstances, if indigent, he would have the right to be assisted by Tribunal-funded counsel. The assignment of counsel to a witness can also be ordered by the Chamber to protect this witness's rights in connection with incriminating testimony under Rule 90(E) of the Rules.¹⁹

11. However, in the instant case, the Motion relates to Milošević being interviewed by the Accused's legal adviser at his place of detention outside of the Tribunal and for the purpose of determining his suitability as a potential witness. Accordingly, it does not carry a corresponding right to be assigned legal counsel at the Tribunal's expense. If Milošević maintains that the interview cannot be conducted without the presence of his *pro bono* lawyer, the Accused and his team retain the option of communicating proposed questions to Milošević's *pro bono* lawyer who can then advise his client whether or not the questions could be answered without compromising his interests.

¹⁸ See Article 21(4)(b) and (d) of the Tribunal's Statute; Rule 42 of the Rules and Article 5 of the Directive.

¹⁹ *Prosecutor v. Tolimir*, Case No. IT-05-88/2-T, Decision on Prosecution's Motion for an Order Assigning Counsel for Witness Zoran Čarkić, 5 April 2011, p. 1.

IV. Disposition

12. Accordingly, the Chamber, pursuant to Rule 54 of the Rules, hereby **DENIES** the Motion.

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



Judge O-Gon Kwon
Presiding

Dated this sixth day of January 2012
At The Hague
The Netherlands

[Seal of the Tribunal]