



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: 29 October 2013

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: 29 October 2013

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON ACCUSED'S APPEAL OF REGISTRAR'S DENIAL OF IN-PERSON
WITNESS INTERVIEW: MOMČILO KRAJIŠNIK**

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 Accused’s “Appeal of Registrar’s Denial of In-person Witness Interview: Momcilo Krajisnik”, filed on 16 October 2013 (“Motion”), and hereby issues its decision thereon.

I. Background and Submissions

1. On 26 February 2013, the Accused filed, pursuant to Rule 65 *ter* of the Tribunal’s Rules of Procedure and Evidence (“Rules”), the “Defence Further Revised Rule 65 *ter* Witness List” which contained the list of witnesses he intends to call and/or has called during the duration of his defence case, and which included Momčilo Krajišnik’s name.¹ Krajišnik is due to start testifying before this Chamber in the first week of November 2013.²

2. On 11 October 2013, the Accused was informed, in a letter by the legal co-ordinator for detention matters in the Registry of the Tribunal (“Letter”), that his request for an in-person meeting with Krajišnik at the United Nations Detention Unit (“UNDU”) was rejected on the basis that Krajišnik is a former detainee of the UNDU, which raises “security related concerns” (“Decision”). He was further informed that, for the same reason, he would not be permitted to meet Krajišnik in-person at the Tribunal’s main building but that the Registry was willing to organise for proofing via a video-conference link set up between the UNDU and the witness-accessible areas in the Tribunal’s main building.³

3. In the Motion, the Accused “appeals from the decision of the Registrar denying an in-person interview” with Krajišnik, arguing that the Registrar provided no reasons for the Decision, and instead simply informed him that his request was denied following “security related concerns raised by the UNDU”.⁴ According to the Accused, this failure precludes a determination as to the reasonableness of the Decision and does not allow him to determine whether the Registrar failed to take into account relevant material or took into account irrelevant material. The Accused submits that the Registrar has therefore failed to comply with the

¹ Defence Further Revised Rule 65 *ter* Witness List, 26 February 2013, Confidential Annex G. This list was later superseded by the Accused’s fifth revised witness list, filed on 18 October 2013, which also includes Krajišnik as a witness. See Defence Supplemental Submission Pursuant to Rule 65 *ter*, 18 October 2013, Confidential Annex H.

² See Defence Witnesses for November 2013, 18 October 2013, Annex A. This filing was originally filed publicly but was then reclassified as confidential at the request of the Accused.

³ Motion, para. 2, Annex A.

⁴ Motion, para. 3.

requirements of the Tribunal's jurisprudence and has failed to observe basic rules of natural justice.⁵

4. The Accused also claims that he has an important interest in meeting Krajišnik in person, in order to prepare for Krajišnik's *viva voce* testimony. Further, according to the Accused, the need to review various documents, photographs, and videos makes a video-link interview an inadequate substitute for an in-person interview.⁶ The Accused finally submits that it is unclear why Krajišnik would create a security concern at the UNDU, given that he spent almost ten years there as a model prisoner.⁷ On the basis of arguments above, the Accused requests that the Decision be summarily reversed.⁸

5. On 16 October 2013, the Office of the Prosecutor ("Prosecution") informed the Chamber and the Accused, via email, that it would not respond to the Motion.

6. On 17 October 2013, the Chamber invited the Registrar to file, pursuant to Rule 33(B) of the Rules, a submission on the Motion, by no later than 25 October 2013.⁹ Thus, on 23 October, he filed confidentially the "Registrar's Submission Regarding the Accused's 'Appeal of Registrar's Denial of In-person Witness Interview: Momcilo Krajisnik [sic]'" ("Submission"),¹⁰ arguing that the Motion should be dismissed.¹¹

7. In the Submission, the Registrar states that, in reaching the Decision, he fully complied with the four-prong standard for proper administrative decision-making as set out in the jurisprudence of the Tribunal.¹² First, he argues that he has complied with the applicable legal framework in that he considered the "Rules Governing the Detention of Persons Awaiting Trial or Appeal Before the Tribunal or Otherwise Detained on the Authority of the Tribunal" promulgated on 7 October 2005 ("Rules of Detention"), the relevant jurisprudence of the Tribunal, and the confidential "Protocol for Contact Between a Self-represented Accused and Witnesses" of 31 October 2011 ("Witness Proofing Protocol"), which then led to him issuing the Decision pursuant to Rule 61(E) of the Rules of Detention.¹³ The Registrar also submits that Rule 61(E) of the Rules of Detention provides him with discretion to refuse to allow, in the

⁵ Motion, paras. 5–8.

⁶ Motion, para. 9.

⁷ Motion, para. 10.

⁸ Motion, para. 11.

⁹ The Chamber's invitation was communicated to the Registry and the parties *via* email by the Chamber's Legal Officer.

¹⁰ The Registrar explains that the Submission is filed confidentially due to the fact that matters of the Tribunal's security and safety are discussed therein. *See* Submission, para. 1.

¹¹ Submission, paras. 25–26.

¹² Submission, para. 25.

interests of security and good order of the UNDU, a former detainee of the UNDU to visit another detainee, the underlying rationale being that “former detainees are aware of the UNDU security mechanisms” and if allowed access “under the same regime applied to visitors, they would have the privilege of having all round knowledge of the UNDU security regime”.¹⁴ According to the Registrar, Krajišnik, who had spent almost ten years in detention at the UNDU, has acquired an in-depth knowledge of the UNDU security procedures which, when complemented with information on the security regime for visitors, may be used to compromise the security of the UNDU. If now allowed into the UNDU as a visitor, Krajišnik may “potentially expose to third parties his comprehensive knowledge of the UNDU security regime” whereas a “global view of the security regime of the UNDU is not within the public domain”.¹⁵

8. The Registrar also argues that he observed the basic rules of natural justice and procedural fairness by considering the Accused’s request for an in-person interview and offering alternative means for proofing Krajišnik.¹⁶ In addition, the Decision was issued in a timely manner and was reasoned given that the Accused was informed that the Decision was made on the basis of Rule 61(E) of the Rules of Detention.¹⁷

9. Finally, the Registrar argues that in reaching the Decision he considered only relevant material and that his Decision is reasonable and proportionate in that it offers a “suitable alternative to achieve the aim of the in-person interview” and “strikes a balance between the Accused’s preferred method of contact with [Krajišnik], and a need to apply extra vigilance to safeguard a secure detention environment”.¹⁸

10. On 28 October 2013, the Accused filed his “Request for Summary Reversal or Order for Disclosure and Leave to Reply: Interview of Witness Momčilo Krajisnik” (“Request”), in which he repeats that the Chamber should summarily reverse the Decision as the Registrar failed to provide a reasoned Decision and then did not explain in the Submission why he failed to do so.¹⁹ He also objects to the Chamber now considering the Registrar’s reasons advanced in the Submission, on the basis that the latter has waived his right to assert arguments not raised in a timely fashion.²⁰ If the Chamber is minded to nevertheless consider them, the Accused requests that it order the Registrar to disclose to him the UNDU security assessment upon which he made

¹³ Submission, paras. 8–9, .

¹⁴ Submission, paras. 10–11.

¹⁵ Submission, paras. 12–13.

¹⁶ Submission, paras. 16–19.

¹⁷ Submission, para. 20.

¹⁸ Submission, paras. 21–24.

¹⁹ Request, paras. 2–3.

²⁰ Request, para. 4.

the Decision.²¹ Finally, the Accused submits that if his request for summary dismissal is denied, he should be granted a leave to reply to the Submission in order to address the Registrar's reasons set out therein.²²

11. Also on 28 October 2013, the Prosecution informed the Chamber and the Accused, via email, that it would not respond to the Request.

II. Applicable Law

12. It is established that a Trial Chamber may intervene in a matter that is within the primary competence of the Registry where that matter goes to the fairness of the trial.²³

13. In *Prosecutor v. Kvočka et al.*, the Appeals Chamber set out the standard, deriving from “general principles of law”, for review by a Trial Chamber of a decision of the Registry:

A judicial review of [...] an administrative decision is not a rehearing. Nor is it an appeal ... A judicial review of an administrative decision made by the Registrar in relation to legal aid is concerned initially with the propriety of the procedure by which the Registrar reached the particular decision and the manner in which he reached it.²⁴

14. According to this standard, an administrative decision will be quashed if the Registry, in making the decision:

- (a) has failed to comply with the requirements of the relevant legal authorities; or
- (b) has failed to observe the basic rules of natural justice and procedural fairness towards the person affected by the decision; or
- (c) has taken into account irrelevant material or failed to take into account relevant material; or

²¹ Request, para. 5.

²² Request, para. 6.

²³ *Prosecutor v. Delalić et al.*, Order on Esad Landžo's Motion for Expedited Consideration, Case No. IT-96-21-A, 15 September 1999, cited by the Appeals Chamber in *Prosecutor v. Blagojević*, Public and Redacted Reason for Decision on Appeal by Vidoje Blagojević to Replace his Defence Team, Case No. IT-02-60-AR73.4, 7 November 2004; *see also* *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Order Concerning Court-Assigned Counsel's Terms of Engagement, 8 April 2005, p. 4.

²⁴ *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1-A, Decision on Review of Registrar's Decision to Withdraw Legal Aid from Zoran Žigic", 7 February 2003 (“*Kvočka* Appeal Decision”), para. 13.

(d) has reached a conclusion that is unreasonable, in the sense that it is a conclusion which no sensible person who has properly applied his mind to the issue could have reached.²⁵

15. The Appeals Chamber found that “in the absence of established unreasonableness there can be no interference with the margin of appreciation of the facts or merits of that case to which the maker of such an administrative decision is entitled”,²⁶ and that the accused bears the onus of persuading the Trial Chamber conducting the review both “(a) that an error of the nature described has occurred, and (b) that such error has significantly affected the Registrar’s decision to his detriment”.²⁷

III. Discussion

16. As noted above, the Accused challenges the Decision on the basis that the Registrar has provided no reasons for it, and thus has failed to observe the basic rules of natural justice.²⁸ The Chamber has reviewed the Decision, as communicated to the Accused in the Letter. The Letter simply states that the Decision was made “following security related concerns raised by the UNDU” and pursuant to Rule 61(E) of the Rules of Detention. Aside from noting Krajišnik’s status as a former detainee, it contains no further explanation as to what those security concerns might be and why Krajišnik, aside from being a former detainee, would raise them. Rule 61(E) itself does not provide any further guidance as it is general in its terms and simply states that “[i]n the interests of security and good order of the [UNDU], the Registrar may refuse to allow a former detainee to visit any other detainee at the Detention Unit.” Accordingly, given that there is no further explanation as to why in this particular case this particular former detainee was deemed a safety risk, the Chamber agrees with the Accused that he was not provided with adequate reasons for the Decision. The Chamber considers, therefore, that the Decision violated the Accused’s right to procedural fairness.

17. The Chamber notes that the Registrar now provides in the Submission a more detailed basis for his Decision. In his Request, however, the Accused argues that the Decision should nevertheless be summarily dismissed because the Registrar does not explain why he failed to provide this information to him in the first place. However, the Chamber notes that in the Submission the Registrar argues that his Decision was properly reasoned and that the Accused

²⁵ *Kvočka* Appeal Decision, para. 13.

²⁶ *Kvočka* Appeal Decision, para. 13.

²⁷ *Kvočka* Appeal Decision, para. 14.

²⁸ *See* Motion, paras. 3, 5.

was expressly informed of the relevant reasons.²⁹ Accordingly, given that the Registrar is not conceding a failure in this respect, he cannot have been expected to explain it in the Submission. The Chamber does not therefore consider this to be a sufficient basis for the summary dismissal of the Decision.

18. The Accused also objects to the Chamber now assessing the reasons provided in the Submission, and argues that if the Chamber nevertheless decides to do so, he should be granted a leave to reply to the Submission and the Registrar should be ordered to disclose to him the UNDU security assessment used to reach the Decision.³⁰ However, as Krajišnik's testimony is expected to commence soon and since sufficient information is already before it, the Chamber is of the view that it should proceed to consider the Submission in its entirety in order to determine the Motion. By the same token, the Chamber does not consider that it would be assisted by a reply from the Accused.

19. Having reviewed the Decision and the Submission, the Chamber is satisfied that the Registrar has not failed to comply with the requirements of the relevant legal authorities in this instance. It is clear from the Submission that in reaching his Decision, he took into account the relevant authorities, namely the Rules of Detention and the Witness Proofing Protocol and then decided to refuse the Accused's request on the basis of Rule 61(E) of the Rules of Detention, as he is entitled to do. Similarly, the Chamber is satisfied that the Registrar has taken into account relevant material and has not considered material that is irrelevant to this issue.

20. As for the reasonableness of the Decision, the Chamber notes that the Registrar's overriding concern appears to have been Krajišnik's status as a former long-serving detainee rather than any other factors that might be relevant to Krajišnik's behaviour, such as his character or his past behaviour while detained at the UNDU. This being the case, the Decision seems to imply that not a single former long-serving detainee with an in-depth knowledge of the security regime of the UNDU or the main building would ever be allowed to visit a current detainee, no matter what the reason for that visit might be.³¹ However, Rule 61(E) of the Rules of Detention does not create such an absolute ban and merely gives the Registrar the *discretion* to refuse to allow a visit by a former detainee in the interests of justice and good order.³²

²⁹ See Submission, para. 20.

³⁰ See Request, para. 4.

³¹ See Submission, paras. 11–12.

³² This is particularly clear when Rule 61(E) is compared to Rule 61(B), which mandates that the Registrar "shall refuse to allow a person to visit a detainee" if he believes that the purpose of the visit is to obtain information that may be reported in the media.

21. The Registrar's sole focus on Krajišnik's status as a former detainee is illustrated further by his submission that if Krajišnik were allowed to meet the Accused as a visitor, he would have a "global view" of the security regime in place. In other words, he would have knowledge from the perspective of both a detainee and a visitor to the UNDU, which in turn could lead him to "potentially expose" it to third parties.³³ The Chamber sees this reasoning as both flawed and unreasonable. It appears that at this point the Registrar is simply speculating as to whether or not Krajišnik would indeed expose this knowledge to third parties and does not appear to have any specific facts indicating that that would indeed be the case. In addition, it is arguable that Krajišnik could, simply by meeting one of the former witnesses in this case who had previously met the Accused at the UNDU (or in the main building, for that matter), obtain the same information and thus share it with third persons. In other words, preventing Krajišnik to visit the Accused in the UNDU or at the main building would not necessarily avoid the security issues envisaged by the Registrar. In addition, it is not clear to the Chamber, based on the arguments made in the Submission, how the security concerns arising from Krajišnik's potential in-person meeting with the Accused in the main building would not also arise during his presence in the main building during his testimony.

22. Accordingly, while the Chamber understands the rationale behind Rule 61(E) in some circumstances, such as for example when a former detainee has exhibited problematic behaviour in the past or the Registrar has specific information leading him to suspect that a former detainee would pose a security threat to the Tribunal, the Chamber fails to see why in the circumstances of this case the Accused should not be allowed to meet with Krajišnik in person, either at the UNDU or in the main building. The Chamber also does not consider that a person's status as a former long-serving detainee alone would automatically prevent them, in the interests of justice and good order, from meeting a current detainee for the purposes of witness proofing.

23. Accordingly, the Chamber is of the view that the Decision was unreasonable, particularly since the purpose of Krajišnik's visit is to facilitate the Accused's preparation for Krajišnik's testimony. As a result, the Chamber considers the Accused's Request to be moot in its entirety.

24. Finally, the Chamber recalls that the Registrar filed the Submission confidentially on the basis that matters of the Tribunal's security and safety are discussed therein.³⁴ The Chamber also notes that it is mainly paragraphs 10 to 15 of the Submission that touch on the safety and security of the UNDU. However, the Chamber considers the submissions contained therein, and throughout the Submission, to be of such a general nature that it is difficult to envisage how the

³³ Submission, para. 13.

³⁴ See *supra*, footnote 10.

safety or the security of the UDNU and/or the Tribunal would be jeopardised if the Submission were to be made public. Accordingly, the Chamber will order that the Submission be reclassified as public and shall also issue this decision publicly.

IV. Disposition

25. Accordingly, the Trial Chamber, pursuant to Rule 54 of the Rules, hereby:

- (a) **GRANTS** the Motion;
- (b) **ORDERS** the Registry to facilitate an in-person meeting between Krajišnik and the Accused either at the UNDU or in the main building for the purposes of proofing;
- (c) **ORDERS** the Registry to reclassify the Submission as public;
- (d) **DENIES** the Accused's request for a leave to reply; and
- (e) **DISMISSES** the remainder of the Request as moot.

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



Judge O-Gon Kwon
Presiding

Dated this twenty-ninth day of October 2013
At The Hague
The Netherlands

[Seal of the Tribunal]