



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: 1 February 2007
Original: English

THE PRESIDENT OF THE INTERNATIONAL TRIBUNAL

Before: Judge Fausto Pocar, President

Registrar: Mr. Hans Holthuis

Decision of: 1 February 2007

PROSECUTOR

v.

MOMČILO KRAJIŠNIK

**DECISION ON REQUEST FOR REVIEW OF THE DECISION OF THE REGISTRY
IN RELATION TO ASSIGNMENT OF COUNSEL**

Counsel for the Appellant

Mr. Colin Nicholls, QC

Office of the Prosecutor

Ms. Carla Del Ponte
Mr. Peter Kremer
Ms. Christine Dahl

1. On 27 December 2006, Counsel for Momčilo Krajišnik (“Krajišnik”) filed before me a “Request for Review by the President of the Decisions of the Registry in Relation to Assignment of Counsel” (“Request”) pursuant to Article 13(A) of the Directive on the Assignment of Defence Counsel (“Directive”).¹ In his Request, Krajišnik seeks review of a Decision by the Registrar of the International Tribunal filed on 8 December 2006 (“Impugned Decision”) assigning Mr. Colin Nicholls, QC, pursuant to Rule 45 of the Rules of Procedure and Evidence of the International Tribunal (“Rules”), as counsel paid by the International Tribunal to represent him on appeal. Specifically, Krajišnik requests that I:

- (a) review and quash the Decision of the Registry appointing [Mr. Colin Nicholls, QC] as permanent lead counsel for Mr. Krajišnik; and
- (b) rule that the Registry appoint Mr. Alan Dershowitz as lead counsel for Mr. Krajišnik subject to a satisfactory response from Mr. Dershowitz that he is prepared to so act; and
- (c) rule that if there is good cause as to why Mr. Dershowitz is unable to be so appointed, Mr. Krajišnik’s right to self-representation on appeal should be fully respected.²

2. On 5 January 2007, Counsel for Krajišnik filed a “Corrigendum to Request for Review by the President of the Decisions of the Registry in Relation to Assignment of Counsel”.³ On 17 January, the Registrar filed the “Registrar’s Submission on Counsel’s Request for Review of the Registrar’s Decisions in Relation to Assignment of Counsel”⁴ (“Registrar’s Submission”) in response to Krajišnik’s Request. On 26 January, Counsel for Krajišnik filed his “Response to Registrar’s Submission on Counsel’s Request for Review of the Registrar’s Decisions in Relation to Assignment of Counsel” (“Response”). The Prosecution did not submit any filings relating to the Request.

Submissions of the Parties

3. Krajišnik submits that the Registrar, in the exercise of his discretionary power to assign counsel to an accused who lacks the means to remunerate counsel, should respect the choice of that accused in the absence of well-founded reasons not to assign the accused’s

¹ IT/73/Rev. 11, 29 June 2006.

² Request, para. 49.

³ Internal quotation marks omitted.

⁴ Internal quotation marks omitted.

chosen counsel.⁵ Krajišnik contends that he has made it abundantly clear that he wishes for Mr. Alan Dershowitz to represent him, and that he considers Mr. Dershowitz's representation to be critical to his case being properly litigated on appeal.⁶ Furthermore, as a legal expert on complex criminal cases with an international reputation, Mr. Dershowitz appears to be eligible to be a member of the Registrar's Rule 45 list of counsel.⁷ Nevertheless, in the Impugned Decision, the Registrar failed to assign Mr. Dershowitz as counsel purportedly because Mr. Dershowitz requested to have his brother appointed as co-counsel as a condition to his assignment, which is contrary to Article 16(F) of the Directive.⁸ Krajišnik argues that the Registrar's failure to waive, in the interests of justice, the Article 16(F) prohibition on family members serving as co-counsel "constituted an inappropriate and unreasonably rigid interpretation and application of the Directive"⁹ and consequently failed "to give proper regard to Mr. Krajišnik's right to counsel of his own choosing."¹⁰

4. In addition, Krajišnik argues that his election to conduct his own defence in the absence of the assignment of Mr. Dershowitz "must also be read as a request for the Registry not to assign alternative counsel [. . .] to his case—a necessary condition for him to exercise his right to self-representation."¹¹ Krajišnik notes that on 7 December 2006, in light of his inability to obtain Mr. Dershowitz's agreement to represent him in time, he notified the Registry by letter that he decided to take advantage of his right under the International Tribunal's Rules to defend himself in his appeal.¹² Nevertheless, on 8 December, the Registrar assigned Mr. Nicholls as Krajišnik's counsel in the Impugned Decision thereby "knowingly depriving Mr. Krajišnik of the opportunity to represent himself" before the matter was appropriately determined by the Appeals Chamber.¹³ Thus, Krajišnik submits that the Registrar's "premature assignment of alternative counsel, in the absence of proper

⁵ Request, para. 25.

⁶ *Id.*, para. 27.

⁷ *Id.*, para. 28. The Rule 45 list of counsel refers to the Registrar's list of counsel who meet the requirements found in Rule 45(B) of the Rules for assignment as counsel to suspects or accused before the International Tribunal who lack the means to remunerate counsel. *See* Rule 45(A) and (B) of the Rules.

⁸ Request, para. 28. Article 16(F) of the Directive provides that "[m]embers of the family or close friends of suspects, accused and counsel are not eligible for assignment under the Directive as counsel, expert, legal assistant, investigator, translator or interpreter, unless the Registrar determines that the assignment is in the interests of justice."

⁹ Request, para. 30.

¹⁰ *Id.*, para. 33.

¹¹ *Id.*, para. 35.

¹² *Id.*, paras. 7, 36.

¹³ *Id.*, para. 36.

resolution of the self-representation issue” was in violation of Article 11(C)(iii) of the Directive.¹⁴

5. In response, the Registrar submits that he acted properly in the Impugned Decision “in determining that Mr. Dershowitz did not fulfil the requirements of Rule 45 of the Rules and Article 14 of the Directive for assignment as counsel” to Krajišnik.¹⁵ He notes that as of 25 October 2006, he and his staff “pursued all possible avenues” to accommodate Krajišnik’s choice of Mr. Dershowitz in a competent and expeditious manner and kept Krajišnik fully informed at all times of all developments in this regard.¹⁶ However, “as of the date of the Impugned Decision, Mr. Dershowitz had not accepted unconditionally to be assigned as counsel to [Krajišnik] although he had expressed an interest in principle, and had not applied for admission to the Rule 45 list—a prerequisite for his assignment as counsel before the Tribunal.”¹⁷ Furthermore, the Registrar argues that his refusal to consider Mr. Dershowitz’s request for the assignment of his brother as co-counsel as a condition for his assignment as lead counsel to Krajišnik, was reasonable and in accordance with Article 16 of the Directive.¹⁸ The Registrar notes that “[o]nly after a determination has been made that the interests of justice require that a second counsel be assigned to the case” under Article 16(C) of the Directive, may the Registrar then “consider the issue of who that second counsel should be” and whether an exception may be made to the prohibition in Article 16(F).¹⁹

6. As for Krajišnik’s election to represent himself if Mr. Dershowitz was not assigned as counsel to his case, the Registrar contends that his decision to assign Mr. Nicholls as alternative counsel from the Rule 45 list was proper in the circumstances. The Registrar notes that he was acting in compliance with an Order from the Pre-Appeal Judge issued on 6 December 2006 to assign counsel to Krajišnik prior to a status conference to be held in the case on 11 December.²⁰ Thus, he argues that it was not in his discretion to consider Krajišnik’s election of self-representation under Article 11(C)(iii) of the Directive “as it had been overruled by a pre-existing judicial order.”²¹ In response to that Order, and in light of

¹⁴ *Id.*, para. 37. Article 11(C)(iii) of the Directive provides that if “an accused: [. . .] fails to elect in writing that he intends to conduct his own defence; the Registrar may nevertheless, in the interests of justice, and without prejudice to Article 19, assign him counsel from the list drawn up in accordance with Rule 45(B) of the Rules.”

¹⁵ Registrar’s Submission, paras. 11-23, 49.

¹⁶ *Id.*, paras. 45, 61.

¹⁷ *Id.*

¹⁸ *Id.*, para. 56.

¹⁹ *Id.*, para. 54.

²⁰ *Id.*, paras. 40-41, 58.

²¹ *Id.*, para. 58.

Mr. Dershowitz's failure to fulfil the requirements of Rule 45 of the Rules, he reasonably provided Krajišnik with an opportunity to select his counsel from those on the Rule 45 list who were available and willing to take his case, which Krajišnik failed to take.²²

Jurisdiction

7. As a preliminary matter, the first issue before me is whether I am competent to review the Impugned Decision. Krajišnik states that I have competence under Article 13(A) of the Directive, which provides that

[t]he suspect whose request for assignment of counsel has been denied may, within fifteen days from the date upon which he is notified of the decision, file a motion before the President for review of that decision. The President may either confirm the Registrar's decision or rule that a counsel should be assigned.

In addition, Krajišnik submits that I may review the Impugned Decision because the President of the International Tribunal "has an inherent jurisdiction to review an administrative decision of the Registrar that impugns upon the rights of an accused at this Tribunal."²³

8. While I do find that I have power to review the Impugned Decision, it is not on the legal bases that Krajišnik suggests. As is evident from the plain language of Article 13(A) of the Directive, the President's power of review is with respect to the Registrar's decision to assign counsel to a *suspect*, a category into which Krajišnik clearly does not fall having been convicted by a Trial Chamber of this International Tribunal.²⁴ Furthermore, Article 13(A) pertains to review of a Registrar's decision whether or not to assign counsel on the basis of a suspect's alleged indigency.²⁵ In this case, the Impugned Decision did not deny assignment of counsel to the Applicant on that basis; "rather, it assigned counsel to the Applicant from the Rule 45 list of counsel and refused to assign the Applicant's preferred counsel because, in its view, that counsel did not fulfil the qualification requirements for admission to the Rule 45 list."²⁶

9. Furthermore, while I do enjoy an inherent power to review administrative decisions of the Registrar where they impinge upon the rights of an accused before the International

²² *Id.*, paras. 19, 61.

²³ Request, paras. 22-23.

²⁴ See *Prosecutor v. Krajišnik*, Case No. IT-00-39-T, Judgement, 27 September 2006.

²⁵ Cf. Decision on "Motion Seeking Review of the Decisions of the Registry in Relation to Assignment of Counsel", 29 January 2007 ("Decision of 29 January 2007"), p. 2.

²⁶ *Id.*, p. 3.

Tribunal,²⁷ I may not exercise that power where the power of review has been expressly conferred elsewhere.²⁸ Thus, I do not agree with Krajišnik's argument that I may review the Impugned Decision on grounds that it fails to respect the exercise of his right to self-representation because that power lies with the Appeals Chamber. As held by the Appeals Chamber, "[w]hether an accused may exercise the right to self-representation under the Statute of the International Tribunal is for the Chamber to decide in light of its duty to ensure the fair and expeditious management of its proceedings."²⁹

10. However, I do have authority to review the Impugned Decision in so far as it was a determination by the Registrar as to whether Krajišnik's counsel of choice met the qualification requirements under Rule 45(B) of the Rules for being assigned to him in this appeal. As recently clarified by the Appeals Chamber, "just as a Chamber may not review the Registrar's decision as to whether a proposed counsel meets the qualification requirements under Rule 44(A) and (B) of the Rules, neither may a Chamber review the Registrar's decision as to whether a proposed counsel meets the qualification requirements for assignment of counsel under Rule 45(B) of the Rules as that power is vested in the President of the International Tribunal."³⁰

Standard of Review

11. The Registrar's decision to permit or deny assignment of counsel under Rule 45 of the Rules in the "interests of justice" involves both questions of law and fact.³¹ Given that the Registrar has "principal responsibility for overseeing the assignment of defence counsel", he enjoys a certain degree of deference or margin of appreciation in reaching a decision on assignment of counsel.³² Where a suspect or an accused requests that I review such an administrative decision of the Registrar, that individual bears the burden of demonstrating that the Registrar has erred and that such error has "significantly affected the Registrar's

²⁷ *Prosecutor v. Delić*, Case No. IT-04-83-PT, Decision on Request for Review, 8 June 2005 ("*Delić Decision*"), para. 6.

²⁸ *Prosecutor v. Blagojević*, Case No. IT-02-60-AR73.4, Public and Redacted Reasons for Decision on Appeal by Vidoje Blagojević to Replace His Defence Team, 7 November 2003 ("*Blagojević Decision*"), para. 7.

²⁹ Decision of 29 January 2007, fn. 11 (emphasis added) citing *Prosecutor v. Šešelj*, Case No. IT-03-67-AR73.3, Decision on Appeal Against the Trial Chamber's Decision on Assignment of Counsel, 20 October 2006, para. 16.

³⁰ *Id.*, p. 3 (emphasis added). See also *Delić Decision*, paras. 7-8.

³¹ *Prosecutor v. Šljivančanin*, Case No. IT-95-13/1-PT, Decision on Assignment of Defence Counsel, 20 August 2003 ("*Šljivančanin Decision*"), para. 22.

decision to his detriment.”³³ In reviewing such an administrative decision by the Registrar, I will only quash that decision where I am persuaded that he has: (1) failed to comply with the legal requirements of the Directive at issue; (2) failed to observe any basic rules of natural justice or to act with procedural fairness towards the person affected by the decision; (3) taken into account irrelevant material or failed to take into account relevant material; or (4) if he has reached a conclusion which no sensible person who has properly applied his mind to the issue could have reached (the “unreasonableness” test).³⁴

Discussion

12. Turning to the merits of the Request, with respect to Krajišnik’s arguments that the Registrar erred in the Impugned Decision through an unreasonable application of the qualification requirements under Rule 45 and the Directive, thereby effectively denying him Mr. Dershowitz as his counsel of choice, I note that these submissions are now moot. On 15 January 2007, the Office of Legal Aid and Defence in the Registry of the International Tribunal informed me that they had made further contact with Mr. Dershowitz who indicated that he is not presently prepared to represent Krajišnik. This is the case even if the Registrar was to find that he fulfilled all of the requirements for assignment as counsel under Rule 45 of the Rules and waived the Article 16(F) prohibition in the interests of justice.³⁵ For other reasons separate from those issues, Mr. Dershowitz is unwilling to accept assignment to the case at this time. Therefore, I need not consider whether the Registrar erred in his interpretation and application of the qualification requirements under Rule 45 and the Directive because, in any event, the Registrar would be barred from assigning Mr. Dershowitz to Krajišnik by Rule 45(B)(iv), which states that counsel may only be assigned from the Rule 45 list who “have indicated their availability and willingness to be assigned by the Tribunal [. . .].”

13. As for Krajišnik’s arguments that the Impugned Decision should be quashed because the alternative assignment of Mr. Nicholls to represent him was in violation of his right of counsel of choice, I do not agree. I recall that the “right to publicly paid counsel of one’s own

³² *Id.* citing *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 Žigić, 7 February 2003 (“*Kvočka et al.* Decision”), para. 12.

³³ *Kvočka et al.* Decision, para. 14.

³⁴ *Id.*, para. 13.

³⁵ Email from Martin Petrov, Head, Office for Legal Aid and Detention Matters, 19 January 2007.

choice is limited”³⁶ and note that Krajišnik concedes on this point.³⁷ It has been firmly established in the jurisprudence of the Appeals Chamber that while the Registrar’s decision to assign counsel to an indigent accused should take into account the preferences of a suspect or accused,³⁸ the “right to free legal assistance of counsel does not confer the right to counsel of one’s own choosing”³⁹ and a suspect or accused “must accept any duly qualified counsel appointed from the list maintained by the Registrar.”⁴⁰ In this case, I find that the Registrar, from the date that Krajišnik requested new counsel be assigned to represent him during his appeal,⁴¹ has made all reasonable efforts to assign Krajišnik’s counsel of choice and has acted with procedural fairness towards Krajišnik. When Krajišnik’s three candidates for counsel⁴² failed to fulfil the qualification requirements of Rule 45 of the Rules and, as such, could not be assigned to Krajišnik, the Registrar provided Krajišnik with the opportunity to choose counsel from its Rule 45 list. When Krajišnik failed to take that opportunity and Mr. Dershowitz did not meet the qualification requirements for assignment to the Rule 45 list, the Registrar was entitled, in the exercise of his discretion, to assign a qualified counsel from the Rule 45 list.

14. With regard to Krajišnik’s submissions on the exercise of his right to self-representation, particularly: (1) that the Registrar violated his election to represent himself under Article 11(C)(iii) of the Directive by pre-maturely assigning Mr. Nicholls and (2) that his right to self-representation should be respected if there is good cause for the Registrar’s failure to appoint Mr. Dershowitz as his counsel,⁴³ those issues are currently pending resolution before the Appeals Chamber in this case and are not within my competence to decide.⁴⁴ As noted previously, the issue of the right to self-representation is one that impacts

³⁶ *Šljivančanin* Decision, para. 20; *Delić* Decision, para. 13.

³⁷ Request, para. 25.

³⁸ *Prosecutor v. Akayesu*, Case No. ICTR-96-4-A, Judgement, 1 June 2001 (“*Akayesu* Judgement”), para. 62. See also *Blagojević* Decision, para. 22.

³⁹ *Id.*, para. 61. See also *Prosecutor v. Kambanda*, Case No. ICTR-97-23-A, Judgement, 19 October 2000 (“*Kambanda* Judgement”), para. 33; *Prosecutor v. Mejakić et al.*, Case No. IT-02-65-AR73.1, Decision on Appeal by the Prosecution to Resolve Conflict of Interest Regarding Attorney Jovan Simić, 6 October 2004, para. 8.

⁴⁰ *Šljivančanin* Decision, para. 20 citing *Akayesu* Judgement, paras. 61-62 and *Kambanda* Judgement, para. 33. Cf. also *Blagojević* Decision, para. 22.

⁴¹ Krajišnik first requested new assignment of counsel for his appeal on 30 September 2006. See Registrar Submission, para. 4.

⁴² Prior to requesting the assignment of Mr. Dershowitz, Krajišnik requested the assignment of Mr. Deyan Brashich and Mr. Peter Robinson, both of whom failed to fulfil the Rule 45 qualification requirements. Krajišnik was informed of this on 4 October 2006. See Registrar Submission, paras. 4-6.

⁴³ Request, paras. 38-48.

⁴⁴ Decision of 29 January 2007, pp. 1, 4.

upon the overall fairness of the proceedings, and authority to decide on that matter lies with the relevant Chamber.⁴⁵

Disposition

15. On the basis of the foregoing, I hereby **DISMISS** Krajišnik's Request in its entirety.

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

Done this 1st day of February 2007,
At The Hague,
The Netherlands.



Fausto Pocar
President

[Seal of the International Tribunal]

⁴⁵ See *supra* para. 9.