



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-05-88-T
Date: 20 February 2007
Original: English

IN TRIAL CHAMBER II

Before: Judge Carmel Agius, Presiding
Judge O-Gon Kwon
Judge Kimberly Prost
Judge Ole Bjørn Støle – Reserve Judge

Registrar: Mr. Hans Holthuis

Decision of: 20 February 2007

PROSECUTOR

v.

**VUJADIN POPOVIĆ
LJUBIŠA BEARA
DRAGO NIKOLIĆ
LJUBOMIR BOROVČANIN
RADIVOJE MILETIĆ
MILAN GVERO
VINKO PANDUREVIĆ**

CONFIDENTIAL

**DECISION ON THIRD REQUEST FOR REVIEW OF THE REGISTRY
DECISION ON THE ASSIGNMENT OF CO-COUNSEL FOR RADIVOJE
MILETIĆ**

Office of the Prosecutor

Mr. Peter McCloskey

Counsel for the Accused

Mr. Zoran Živanović and Ms. Julie Condon for Vujadin Popović
Mr. John Ostojić and Mr. Christopher Meek for Ljubiša Beara
Ms. Jelena Nikolić and Mr. Stéphane Bourgon for Drago Nikolić
Mr. Aleksandar Lazarević and Mr. Miodrag Stojanović for Ljubomir Borovčanin
Ms. Natacha Fauveau Ivanović for Radivoje Miletić
Mr. Dragan Krgović and Mr. David Josse for Milan Gvero
Mr. Peter Haynes and Mr. Đorđe Sarapa for Vinko Pandurević

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”);

BEING SEISED OF the “Request for Review of the Decision of the Registry on the Assignment of Co-Counsel”, filed confidentially by counsel for Radivoje Miletić (“Lead Counsel” and “Accused”, respectively) on 11 December 2006 (translation from original French) (“Third Request for Review”);

NOTING the “Decision on Request for Review of the Registry Decision on the Assignment of Co-Counsel for Radivoje Miletić” issued confidentially by the Trial Chamber on 16 November 2006 (“Second Trial Chamber Decision”), in which the Registry¹ was directed to reconsider its decision denying the assignment of Mr. Petrušić as co-counsel for the Accused in light of the fact that it had “attached too much weight to the potential of a conflict of interest stemming from Mr. Petrušić’s former representation of Radislav Krstić and failed to address the possible perception of inconsistency amongst counsel in the present case”;²

NOTING that, in a letter dated 6 December 2006, the Registry informed Lead Counsel that it had reconsidered her request for the assignment of Mr. Petrušić as co-counsel for the Accused but that it remained unconvinced that such assignment would be in the interests of justice (“Third Registry Decision”);³

NOTING the “Registrar’s Submission Pursuant to Rule 33(B) of the Rules of Procedure and Evidence Regarding Radivoje Miletić’s Motion for Review of the Registrar’s Decision on the Assignment of Co-Counsel” filed confidentially on 27 December 2006 (“Third Rule 33 Submission”), in response to the Third Request for Review;

NOTING further the “Request for Leave to Respond and Response to the Registrar’s Submission on Assignment of Co-Counsel” filed by Lead Counsel on 3 January 2006 (translation from original French) (“Reply”);

CONSIDERING that leave to file the Reply shall be granted and that any relevant argument brought forward by Lead Counsel in the Reply shall be examined herein;

¹ For the purposes of this decision and for ease of reference, the term “Registry” shall refer to the Registrar, the Deputy-Registrar, as well as the Head and Deputy-Head of the Office of Legal Aid and Detention Matters (“OLAD”), as applicable.

² Second Trial Chamber Decision, para. 46. For an extensive overview of the proceedings leading up to the Second Trial Chamber Decision, see Second Trial Chamber Decision, paras. 2–6.

³ Correspondence from the Head of OLAD to Lead Counsel, 6 December 2006 (“Third Registry Decision”), p. 2.

NOTING that it is “the primary, if not exclusive, responsibility of the Chamber”⁴ to ensure the proper administration of justice and to safeguard the rights of the accused as set forth in Articles 20(1)⁵, 21(2),⁶ and 21(4)⁷ of the Statute;

NOTING further Rule 54 of the Rules of Procedure and Evidence of the Tribunal (“Rules”) which provides that “[a]t the request of either party or *proprio motu*, a Judge or a Trial Chamber may issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or of the preparation or conduct of the trial”;

NOTING that Rule 54 of the Rules is the legal basis upon which Trial Chambers generally issue a wide array of orders and decisions at the pre-trial and trial stages, and that it has been interpreted broadly to apply

widely in the judicial practice of the [...] Tribunal, including in matters as distinct as scheduling court sessions, indicating protective measures, subpoenaing witnesses or documents, and requesting medical reports on detainees. It is conceivable that an issue like the assignment [...] of counsel can be a matter falling within the scope of the rule because of its being part of the process of preparation or, later on, conduct of a trial. The issue of whether a person is suitable to act as counsel in a certain case is just one aspect of the fair trial obligation imposed on the Chamber. A competent and qualified counsel serves the important purpose of assisting the [...] Tribunal in fulfilling its extraordinary international mandate. Whether the accused receives a fair trial whereby justice is both done and seen to be done, is a matter over which the Chamber has jurisdiction;⁸

CONSIDERING therefore that the obligation vested in the Trial Chamber to ensure the proper administration of justice cumulatively entails that “any steps which the Trial Chamber takes are discretionary and in its overarching interest and commitment to ensuring that in the case of the [a]ccused, justice is not only done but justice is seen to be done, including by the [a]ccused himself”;⁹

⁴ *Prosecutor v. Hadžihasanović, Alagić, and Kubura*, Case No. IT-01-47-PT, Decision on Prosecution’s Motion for Review of the Decision of the Registrar to Assign Mr. Rodney Dixon as Co-Counsel to the Accused Kubura, 26 March 2002 (“*Kubura* Co-Counsel Decision”), para. 24.

⁵ Article 20(1) of the Statute provides that “[t]he Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.”

⁶ Article 21(2) of the Statute provides that “[i]n the determination of charges against him, the accused shall be entitled to a fair and public hearing.”

⁷ Article 21(4) of the Statute provides that

[i]n the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality: [...] (b) to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing; (c) to be tried without undue delay[.]

⁸ *Kubura* Co-Counsel Decision, para. 19.

⁹ *Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-T, Decision on Independent Counsel for Vidoje Blagojević’s Motion to Instruct the Registrar to Appoint New Lead and Co-Counsel, 3 July 2003 (“*Blagojević* Counsel Decision”), para. 112 (note 262 omitted).

CONSIDERING that there exists a principle according to which an accused person before the Tribunal has the right to defend himself in person or through legal assistance of his own choosing,¹⁰ and that, although the jurisprudence of the Tribunal is clear that this right does not comprise the choice of co-counsel, which primarily focuses on lead counsel's needs for suitable assistance,¹¹ it is always desirable for the fairness of trial to consider the preferences of the accused, especially when these coincide with lead counsel's preferences, even in the case of an accused who does not have the means to remunerate counsel;

NOTING that whatever reasons the Registry may have had for granting co-counsel status to a member of another defence team in the present case while denying it to Mr. Petrušić, *de facto* inconsistency both appear to exist and in fact exist between their cases and this may further affect the perception of justice;

NOTING that, both in the Third Registry Decision and in the Third Rule 33 Submission, the Registry stresses that the assignment of Mr. Petrušić as co-counsel for the Accused could pose a threat to the expeditious conduct of the proceedings, as he is not proficient in either of the two official languages of the Tribunal;¹²

CONSIDERING that, as a matter of principle, a risk to the expeditiousness of the proceedings is a factor which should generally be considered when assigning co-counsel, as

where a co-counsel is not able to perform the full range of the functions of counsel because of lack of proficiency in one of the working languages of the Tribunal, it is rather inevitable that there may be unnecessary disruption or delay to the trial in the event that lead counsel is not able to continue (whether permanently or temporarily);¹³

CONSIDERING however that it is the Trial Chamber, not the Registry, that is in the best position to determine which factors pose a risk to the expeditious conduct of the proceedings;

CONSIDERING in this regard that the use of the native language of the Accused to present oral submissions and cross-examine witnesses in five of the defence teams appearing in the present case has not hindered the expeditiousness of trial until now and that the Trial Chamber has no reason to believe that the use of BCS by an additional counsel would create such hindrance for the remainder of these proceedings;

¹⁰ Statute, Art. 21(4)(b), 21(4)(d).

¹¹ *Prosecutor v. Blagojević and Jokić*, 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, para. 22; *Prosecutor v. Mrkšić, Radić and Šljivančanin*, Decision on Appointment of Co-Counsel for Mile Mrkšić, paras. 13–15.

¹² Third Registry Decision, p. 5; Third Rule 33 Submission, paras. 17, 23.

¹³ Third Rule 33 Submission, n. 4 (citing First Trial Chamber Decision, para. 26); *see also Popović et al.*, Order Lifting Confidentiality of the Confidential Decision on Appointment of Co-Counsel for Radivoje Miletić, 30 September 2005.

CONSIDERING that the past representation of Radislav Krstić by Mr. Petrušić and the current representation of Ljubomir Borovčanin by Mr. Stojanović demonstrate that Mr. Petrušić's assignment as co-counsel for the Accused would not hinder the expeditiousness of the proceedings;

CONSIDERING that such assignment would, on the contrary, reduce the potential of a delay in the event that Lead Counsel became unable to represent the Accused, as Mr. Petrušić could rapidly and efficiently replace her;

CONSIDERING further that, in addition to the concerns expressed by the Prosecution that possible delays might result from the lack of co-counsel for the Accused,¹⁴ an overall consensus exists in the present case that for a seven-accused case of such complexity,¹⁵ a co-counsel per defence team is an absolute necessity, in order to assist lead counsel in giving each accused "adequate [...] facilities for the preparation of his defence",¹⁶ and to replace lead counsel in the event that the latter becomes unable to represent his or her client;¹⁷

CONSIDERING therefore that the assignment of Mr. Petrušić as co-counsel can only serve to promote—and not hinder—the expeditious conduct of the proceedings;

CONSIDERING that the proper administration of justice also demands that the Trial Chamber guarantee the fairness of trial and that, in this light, regardless of the cause for such situation,¹⁸ it would now be very difficult for a new co-counsel to step in at the present advanced stage of the proceedings;

CONSIDERING that, mindful of the difficulties with which the Registry is faced in assigning counsel in accordance with the Rules and the Directive, the duty is bestowed exclusively upon the Trial Chamber to safeguard the integrity of the proceedings of a case before it, all the more so when not one but seven accused are concerned;

CONSIDERING therefore that the only course of action available to the Trial Chamber at this stage which would duly guarantee that justice is both done and seen to be done is the assignment of Mr. Petrušić as co-counsel for the Accused;

¹⁴ *Popović et al.*, T. 6313–6314 (24 January 2007).

¹⁵ On 8 August 2006, counsel for the seven co-accused in the present case were informed by the Registry that the respective cases for each of their clients during the Prosecution case-in-chief would be attributed level III of complexity.

¹⁶ Statute, Art. 21(4)(b).

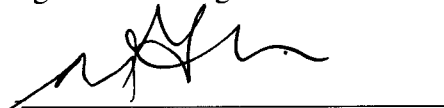
¹⁷ With regard to Lead Counsel's position, see Third Request for Review, para. 31; with regard to the Registry's position, see Third Rule 33 Submission, para. 25.

¹⁸ The Trial Chamber makes this finding notwithstanding its previous finding set forth in the Second Trial Chamber Decision, para. 37.

PURSUANT TO Articles 20(1), 21(2), and 21(4) of the Statute and Rules 54 and 126 *bis* of the Rules,

HEREBY GRANTS the Third Request for Review, and **ORDERS** that the Registry assign Mr. Petrušić as co-counsel for the Accused with immediate effect.

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



Carmel Agius
Presiding

Dated this twentieth day of February 2007
At The Hague
The Netherlands

[Seal of the Tribunal]