

**UNITED
NATIONS**



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-03-67-T
Date: 9 April 2009
Original: English

IN THE APPEALS CHAMBER

Before: Judge Andrézia Vaz, Presiding
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Fausto Pocar
Judge Theodor Meron

Acting Registrar: Mr. John Hocking

Decision: 9 April 2009

PROSECUTOR

v.

VOJISLAV ŠEŠELJ

PUBLIC

**DECISION ON THE REGISTRY SUBMISSION PURSUANT TO
RULE 33(B) FOLLOWING THE PRESIDENT'S DECISION OF
17 DECEMBER 2008**

The Office of the Prosecutor:

Mr. Daryl Mundis
Ms. Christine Dahl

The Accused:

Mr. Vojislav Šešelj

1. 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) is seized of the “Registry Submission Pursuant to Rule 33(B) Following the President’s Decision of 17 December 2008” (“Registry submission”), filed publicly on 18 February 2009.

I. BACKGROUND

2. On 29 September 2008, the Accused Vojislav Šešelj (“Accused”) was informed of the Registrar’s Decision to Monitor All Communications Between the Accused and his Legal Associates (“Registrar’s Decision of 29 September 2008”), pursuant to Rule 65(B) of the Rules Governing the Detention of Persons Awaiting Trial or Appeal Before the Tribunal or Otherwise Detained on the Authority of the Tribunal (“Rules of Detention”).¹

3. On 9 October 2008, the Accused orally requested Trial Chamber III (“Trial Chamber”) to intervene in order to overturn the Registrar’s Decision of 29 September 2008.² On 22 October 2008, following repeated oral requests to the same effect by the Accused, the Trial Chamber decided to rule on the Accused’s request.³

4. On 4 November 2008, the Registrar filed the Registry Submission Pursuant to Rule 33(B) Regarding the Monitoring of Vojislav Šešelj’s Communications (“Registry submission of 4 November 2008”), in which he argued that the Trial Chamber lacked jurisdiction to review the Registrar’s Decision of 29 September 2008, as such power is conferred specifically upon the President of the Tribunal by the Rules of Detention.⁴

5. On 27 November 2008, the Trial Chamber issued a confidential Decision on Monitoring the Privileged Communications of the Accused with Dissenting Opinion by Judge Harhoff in Annex (“Impugned Decision”),⁵ in which the majority determined that the Trial Chamber had jurisdiction to review the Registrar’s Decision of 29 September 2008 pursuant to its inherent power to ensure

¹ On 29 October 2008, the Registrar informed the Accused of his decision to extend the monitoring of his privileged conversations for an additional 30 days: Decision on Monitoring the Privileged Communications of the Accused with Dissenting Opinion by Judge Harhoff in Annex, para. 4.

² T. 10580-10585.

³ T. 10977.

⁴ Registry submission of 4 November 2008, paras 4-8. The Registrar also informed the Trial Chamber that the monitoring of the Accused’s communications would be extended “at least until the matters raised in various submissions pending before the Trial Chamber are resolved” (para. 41).

⁵ A public redacted version of the Impugned Decision was issued on 1 December 2008 and filed on 9 December 2008.

the fairness of the proceedings under Article 20(1) of the Statute of the Tribunal (“Statute”),⁶ and that the said Decision constituted an infringement of the right of the Accused to a fair trial.⁷

6. On 1 December 2008, the Registrar filed the Urgent Registry Submission Pursuant to Rule 33(B) Seeking Direction from the President Regarding the Trial Chamber’s Decision of 27 November 2008 (“Registry submission of 1 December 2008”), requesting the President of the Tribunal to give direction regarding the discharge of his duty in light of the Impugned Decision.

7. On 17 December 2008, the President of the Tribunal issued the Decision on Urgent Registry Submission Pursuant to Rule 33(B) Seeking Direction from the President Regarding the Trial Chamber’s Decision of 27 November 2008 (“President’s Decision of 17 December 2008”), in which he declined to address the question of whether the Trial Chamber lacked jurisdiction to review the Impugned Decision and indicated that only the Appeals Chamber could issue a decision binding upon a Trial Chamber.⁸

II. SUBMISSIONS

8. The Registrar submits that the Trial Chamber’s finding in the Impugned Decision that it had jurisdiction to review the Registrar’s Decision of 29 September 2008 and the extension of said Decision “is contrary to the plain language of Rule 65(B) of the Rules of Detention and the existing jurisprudence of the Tribunal”,⁹ which, according to the Registrar, unequivocally give such jurisdiction to the President of the Tribunal.¹⁰

9. In support, the Registrar refers to the Appeals Chamber decision in *Prosecutor v. Blagojević*, in which the Appeals Chamber ruled that a Trial Chamber “cannot appropriate for itself a power which is conferred elsewhere.”¹¹ The Registrar submits that if the Accused wished to appeal the Registrar’s Decision of 29 September 2008, he should have done so by addressing the President of the Tribunal, “who is the only competent body to review the decision.”¹² The refusal of the Accused to appeal to the President does not, according to the Registrar, confer upon the Trial Chamber a power of review.

⁶ Impugned Decision, para. 20.

⁷ Impugned Decision, para. 33.

⁸ President’s Decision of 17 December 2008, para. 9.

⁹ Registry submission, para. 12.

¹⁰ Registry submission, para. 13.

¹¹ Registry submission, para. 15, citing *Prosecutor v. Blagojević*, IT-02-60-AR73.4, Public and Redacted Reasons for Decision on Appeal by Vidoje Blagojević to Replace his Defence Team, 15 December 2003, para. 7 (“*Blagojević* Decision”).

¹² Registry submission, para. 16.

10. The Registrar contends that “the Trial Chamber was bound by the Appeals Chamber’s jurisprudence on the issue of jurisdiction.”¹³ He adds that although there is no doubt that the provisions of the Statute are superior to those of the Rules of Detention, the “mere superiority of the Statute does not invalidate these other rules.”¹⁴ The Registrar argues that “where the power to review a specific matter is explicitly conferred on another organ of the Tribunal, the primary competence to do so lay with that organ” and that “[o]nly after the proper legal avenues have been exhausted may the Trial Chamber be required to intervene if it finds that the fairness of the proceedings is affected.”¹⁵

11. Finally, the Registrar submits that the Impugned Decision “suggests that two bodies [...] may have concurrent jurisdiction to review the same decision of the Registrar”, and that “such concurrent jurisdiction would be contrary to the principle of legal certainty and may [...] hamper the judicial process instead of facilitating it.”¹⁶ Therefore, the Registrar requests the Appeals Chamber to “state the correct interpretation of its jurisprudence regarding the power of review of decisions of the Registrar where this power is specifically conferred upon the President as in Rule 65(B) of the Rules of Detention.”¹⁷

12. Neither the Accused nor the Prosecution filed a response to the Registry submission.

III. APPLICABLE LAW

13. Rule 65(B) of the Rules of Detention reads with regards to communications with a legal representative:

(B) All such communications shall be privileged, unless the Registrar has reasonable grounds to believe that the privilege is being abused in an attempt to:

- i. arrange an escape;
- ii. interfere with or intimidate witnesses;
- iii. interfere with the administration of justice; or
- iv. otherwise endanger the security and safety of the Detention Unit.

Prior to such communications being monitored, the detainee and his counsel shall be notified by the Registrar of the reasons for monitoring. The detainee may at any time request the President to reverse any decision made by the Registrar under this Rule.

¹³ Registry submission, para. 18.

¹⁴ Registry submission, para. 18.

¹⁵ Registry submission, para. 20.

¹⁶ Registry submission, para. 21.

¹⁷ Registry submission, para. 22.

IV. ANALYSIS

14. The Registrar argues that the Trial Chamber lacked jurisdiction to review the Registrar's Decision of 29 September 2008 and that by doing so, the Trial Chamber acted *ultra vires*, thereby infringing Rule 65(B) of the Rules of Detention.¹⁸

15. The jurisprudence on the issue of review of administrative decisions of the Registrar is well-established. In *Prosecutor v. Krajišnik*, the Appeals Chamber, in the absence of indication as to whom was competent to review a decision of the Registrar under Rule 45 of the Rules of Procedure and Evidence of the Tribunal ("Rules"), noted that power to review a decision of the Registrar as to whether a proposed counsel meets the required qualifications under Rule 44 of the Rules lay with the President of the Tribunal.¹⁹ The Appeals Chamber held that

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, and a Chamber may only step in thereafter under its inherent power to ensure that its proceedings are fair.²⁰

16. On a similar note, in *Prosecutor v. Blagojević*, the Appeals Chamber determined that the Trial Chamber erred in finding that it had jurisdiction to consider Blagojević's request for withdrawal of counsel under its inherent power under Articles 20 and 21 of the Statute. Noting that Article 19 of the Directive on Assignment of Defence Counsel provides that a person may seek the President to review the Registrar's decisions under this Article, the Appeals Chamber held that a Trial Chamber "cannot appropriate for itself a power which is conferred elsewhere" and that "the only option open to a Trial Chamber [...] is to stay the trial until the President has reviewed the decision of the Registrar."²¹

17. In *Nahimana et al. v. Prosecutor*, the Appeals Chamber of the International Criminal Tribunal for Rwanda ("ICTR"), seized with a request of Appellant Hassan Ngeze to review an administrative decision of the authorities of the detention facilities, dismissed the motion, after noting that "the complaint procedure for the detention conditions has not been duly followed by the

¹⁸ Registry submission, paras 12-13, 16.

¹⁹ *Prosecutor v. Krajišnik*, IT-00-39-A, Decision on "Motion Seeking Review of the Decisions of the Registry in Relation to Assignment of Counsel", 29 January 2007, p. 3 ("*Krajišnik* Decision").

²⁰ *Krajišnik* Decision, p. 3 (emphasis added). See also *Blagojević* Decision, para. 7.

²¹ *Blagojević* Decision, para. 7. See also *Prosecutor v. Delalić et al.*, IT-96-21-A, Order on Esad Landžo' Motion for Expedited Consideration, 15 September 1999, para. 3.

Appellant and that he has not yet exhausted the remedies made available to him by the Detention Rules.”²²

18. More recently in the same case before the ICTR, the Appeals Chamber, seized of a request to authorise privileged communication between Hassan Ngeze and two legal assistants and one lawyer, noted that the relevant Rules of the Rules of Detention of the ICTR foresaw that “when a detainee is not satisfied with the response of the Commanding Officer [...] he or she has the right to make a written complaint to the Registrar who shall forward it to the President of the Tribunal” but that in the case at hand, “the Applicant [had] not exhausted the procedure made available to him under the Detention Rules for consideration of his request”. As a result of the non-exhaustion of the available procedure, the Appeals Chamber decided not to consider Hassan Ngeze’s motion on the merits.²³

19. The Appeals Chamber finds that Rule 65(B) of the Rules of Detention is clear in vesting the President with the power to reverse any decision made by the Registrar under this Rule.²⁴ In the case at hand, the Accused failed to direct an appeal against the Registrar’s Decision of 29 September 2008 to the President of the Tribunal. Therefore, he has not exhausted the procedure made available to him under the Rules of Detention for consideration of his request.

20. The Appeals Chamber agrees with the Registrar that the Accused’s failure to appeal the Registrar’s Decision of 29 September 2008 before the competent body does not grant the Trial Chamber jurisdiction to exercise a power clearly attributed to the President by Rule 65(B) of the Rules of Detention.²⁵ While mindful of the Trial Chamber’s fundamental duty to ensure the fairness of the proceedings before the Tribunal, the Appeals Chamber recalls that in a case of review of an administrative decision, a Trial Chamber may only step in under its inherent power to ensure that proceedings are fair once all available remedies have been exhausted.²⁶ Accordingly, the fact that the Statute is superior to the Rules of Detention is of no consequence.

21. Finally, with regard to the issue of concurrent jurisdiction, the Appeals Chamber agrees that the Trial Chamber, by accepting to review the Registrar’s Decision of 29 September 2008, implicitly created a “dual competence on the matter”.²⁷ Such concurrent jurisdiction to review

²² *Nahimana et al. v. Prosecutor*, ICTR-99-52-A, Decision on Hassan Ngeze’s Motion for a Psychological Examination, 6 December 2005, p. 4.

²³ *Ngeze v. Prosecutor*, ICTR-99-52-A-R, Decision on Hassan Ngeze’s Motions of 15 April 2008 and 2 May 2008, 15 May 2008, p. 3-4.

²⁴ Rule 65 of the Rules of Detention reads, in relevant part: The detainee may at any time request *the President* to reverse any decision made by the Registrar under this Rule (emphasis added).

²⁵ Registry submission, para. 16.

²⁶ *Krajišnik* Decision, p. 3.

²⁷ See Dissenting Opinion of Judge Harhoff, para. 13.

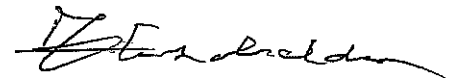
decisions of the Registrar is not consistent with the exercise of a Trial Chamber's inherent power to ensure that proceedings are fair only once all available remedies have been exhausted. Accordingly, implying such concurrent jurisdiction constitutes an error of law.

V. DISPOSITION

22. For the foregoing, the Appeals Chamber **GRANTS** the Registry submission and **INVALIDATES** the Impugned Decision.

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

Done this ninth day of April 2009,
At The Hague,
The Netherlands.



Judge Shahabuddeen
Acting Presiding Judge

[Seal of the Tribunal]