



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: 17 February 2009  
Original: English

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**IN THE APPEALS CHAMBER**

**Before:** A Bench of the Appeals Chamber

**Acting Registrar:** Mr John Hocking

**Submission date:** 17 February 2009

**THE PROSECUTOR**

v

**VOJISLAV ŠEŠELJ**

**PUBLIC**

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

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**Counsel for the Prosecutor:**

Mr Daryl Mundis  
Ms Christine Dahl

**The Accused:**

Mr Vojislav Šešelj

## Introduction

1. Pursuant to Rule 33(B) of the Rules of Procedure and Evidence (“Rules”) of the International Criminal Tribunal for the Former Yugoslavia (“Tribunal”), and further to the Trial Chamber’s “Décision Relative à la Mise sur Écoute des Communications Privilégiées de l’Accusé Avec En Annexe L’Opinion Dissidente Du Juge Harhoff” filed confidentially on 27 November 2008, a Public Redacted version filed on 1 December 2008,<sup>1</sup> (“Trial Chamber’s Decision” and “Dissenting Opinion” respectively), and the President’s “Decision on Urgent Registry Submission Pursuant to Rule 33(B) Seeking Direction from the President on the Trial Chamber’s Decision of 27 November 2008” dated 17 December 2008 (“President’s Decision”), the Registrar respectfully makes the following submission.
2. In accordance with Rule 33(B) of the Rules the Registrar “may [...] make [...] written representations to the [...] Chambers on any issue arising in the context of a specific case which affects or may affect the discharge of [his] functions, including that of implementing judicial decisions [...].”

## Procedural Background

3. On 29 September 2008, the Registrar decided to monitor all communications of the accused Vojislav Šešelj (“Accused”) with his legal associates in accordance with Rule 65(B) of the Rules of Detention (“29 September 2008 Decision”).<sup>2</sup> The 29 September 2008 Decision was

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<sup>1</sup> Version expurgée de la « Décision relative à la mise sur écoute des communications privilégiées de l’accusé avec en annexe l’Opinion Dissidente du juge Harhoff » enregistrée le 27 novembre 2008, filed on 1 December 2008.

<sup>2</sup> Rule 65 of the Rules of Detention reads in relevant parts:

- A. Each detainee shall be entitled to communicate fully and without restraint with his legal representative, with the assistance of an interpreter where necessary.
- 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 (emphasis added).**

taken because the Registrar had reasonable grounds to believe that the privileged communication facilities granted to the Accused at the UNDU for the preparation of his defence, were being abused for contacts with persons other than his recognised legal associates and for matters other than the preparation of his defence, and may have also been used to facilitate interference with or intimidation of witnesses.

4. Between 9 and 22 October 2008, the Accused complained about the 29 September 2008 Decision in court. Although the Presiding Judge initially advised the Accused that he had to challenge the Registrar's decision before the President as set out in 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"), after the Accused repeatedly refused to direct his appeal to the President, on 22 October 2008, the Presiding Judge concluded that "the Trial Chamber has to rule on this."<sup>3</sup>
5. On 4 November 2008, upon invitation from the Trial Chamber, the Registrar filed the "Registry Submission Pursuant to Rule 33(B) Regarding the Monitoring of Vojislav Šešelj's Communications" ("4 November 2008 Submission"), in which he argued that the Trial Chamber lacked jurisdiction to review the 29 September 2008 Decision as Rule 65 of the Rules of Detention specifically confers the power to do so on the President. With this caveat, the Registrar addressed the specific complaints of the Accused regarding the modalities of implementation of the 29 September 2008 Decision. This was done in order to respond to the Accused's complaints and to provide accurate information to the Trial Chamber showing that the 29 September 2008 Decision had not affected the Accused's ability to prepare his defence.<sup>4</sup>
6. On 27 November 2008, the majority of the Trial Chamber, Judge Harhoff dissenting, found that it had jurisdiction to review the 29 September 2008 Decision. The Trial Chamber found that even though not specifically foreseen in Rule 65(B) of the Rules of Detention, the Trial Chamber has an inherent power, under Article 20(1) of the Statute of the Tribunal ("Statute"), a provision superior to Rule 65(B) of the Rules of Detention, to review the decision to verify if it affects the Accused's right to a fair trial.
7. After examining case law of the European Court of Human Rights on attorney-client privilege, the Trial Chamber concluded that monitoring of the Accused's communications with his associates after 28 November 2008 would prevent the Accused from defending himself

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C. Unless such legal representative and interpreter have been provided by the Tribunal on the basis of the indigency of the detainee, all such communications shall be borne at the expense of the detainee.

<sup>3</sup> *Prosecutor v. Vojislav Šešelj*, IT-03-67-T, 22 October 2008, T. 10977:10-11.

effectively and would therefore affect his right to a fair trial.<sup>5</sup> Moreover, the majority found that the Trial Chamber should review the matter even though the Accused had stated that he was perfectly capable of defending himself irrespective of the communication restrictions.<sup>6</sup>

8. Accordingly, the Trial Chamber invited the Registrar to “draw all the necessary inferences from the Trial Chamber’s conclusions.”<sup>7</sup>
9. On 1 December 2008, the Registrar filed his “Urgent Registry Submission Pursuant to Rule 33(B) Seeking Direction from the President on the Trial Chamber’s Decision of 27 November 2008” (“1 December 2008 Submission”), in which he sought direction from the President as to the discharge of his functions in light of the Trial Chamber’s Decision which, the Registrar submitted, the Trial Chamber lacked jurisdiction to take under Rule 65(B) of the Rules of Detention and in light of the existing jurisprudence of the Tribunal.
10. On 17 December 2008, the President rendered the President’s Decision, declining to address the question of whether the Trial Chamber had jurisdiction to review the 29 September 2008 Decision and held that he did not have the power to issue binding decisions upon a Trial Chamber, and that the only avenue to challenge the Trial Chamber’s Decision was before the Appeals Chamber.<sup>8</sup>

#### Submission

11. In light of the President’s finding and for the reasons outlined below, the Registrar makes this submission to the Appeals Chamber. The Registrar respectfully submits that a ruling by the Appeals Chamber is necessary at this time to state the correct interpretation of its jurisprudence regarding the power to review decisions of the Registrar. The Registrar respectfully submits that the Appeals Chamber’s determination will restore judicial certainty, and will clarify the role of the different Tribunal organs with respect to matters arising from the application of the Rules of Detention.

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<sup>4</sup> 4 November 2008 Submission, paragraph 11.

<sup>5</sup> Trial Chamber’s Decision, paragraph 33.

<sup>6</sup> Trial Chamber’s Decision, paragraph 28.

<sup>7</sup> Trial Chamber’s Decision, paragraph 34.

<sup>8</sup> President’s Decision, paragraph 9.

The Trial Chamber lacks jurisdiction

12. The Registrar respectfully submits that the Trial Chamber's finding that it has jurisdiction to review the 29 September 2008 Decision is contrary to the plain language of Rule 65(B) of the Rules of Detention and the existing jurisprudence of the Tribunal.<sup>9</sup>
13. As submitted to the Trial Chamber, the Registrar believes that the language of Rule 65(B) of the Rules of Detention is unequivocal. Appeals against decisions of the Registrar taken under this Rule are properly directed to the President of the Tribunal and not to the Trial Chamber. The Trial Chamber itself directed the Accused to contest the 29 September 2008 Decision before the President on several occasions.<sup>10</sup>
14. The Appeals Chamber's decision in *Prosecutor v. Blagojević*, although on a slightly different matter, supports this position.<sup>11</sup> The specific issue in that case was withdrawal of counsel. According to the Directive on the Assignment of Defence Counsel ("Directive"), the Registrar's refusal to withdraw defence counsel may be appealed to the President of the Tribunal. The Directive does not provide for review of such a refusal by the Trial Chamber. The accused in that case was aware of the provisions of the Directive but chose not to pursue that procedure. Instead, he brought his request for review to the Trial Chamber. The Trial Chamber found that it had the power and duty to guarantee a fair trial and the proper administration of justice in accordance with Articles 20 and 21 of the Statute. In taking this approach, the Trial Chamber stated that the issue impacted upon the substantive rights of the accused to a fair and expeditious trial.
15. In reviewing the Trial Chamber's decision, the Appeals Chamber held:

"The decision of the Trial Chamber (to consider the request of the Appellant [Blagojević] itself rather than direct the Appellant to appeal the Registrar's Decision to the President) was a procedure it adopted pursuant to its inherent power to ensure the fair and expeditious trial of the accused. The Appeals Chamber accepts that there is authority upon which the Trial Chamber could conclude that it had the power to act in this way. However, it considers that the earlier authority which has recognised the power of a Trial Chamber to review a decision of the Registrar

<sup>9</sup> Judge Harhoff also takes the view that the Trial Chamber's Decision is contrary to the Appeals Chamber's decision in *Blagojević* discussed below.

<sup>10</sup> See for example *Prosecutor v. Vojislav Šešelj*, IT-03-67-T, 1 October 2008: T. 10101:13-14: "If you wish to challenge this [decision of the Registrar], you must address yourself to the President of the Tribunal"; 2 October 2008: T. 10293:9-10: "And if you want to oppose, it has to go through the Tribunal's President"; T. 10295:1-3 from: "Your key spokesperson in this case is the President and you have to go to the President to oppose what's happening," T. 10296:4-6: "Now, as you know, you can take this to the President, you can oppose this measure. You are telling me you're not doing it. That's for you to decide."

where that power is specifically conferred on the President is wrong and that it is in the interests of justice for the Appeals Chamber to depart from it. The only inherent power the Trial Chamber has is to ensure that the trial of an accused is fair; it cannot appropriate for itself a power which is conferred elsewhere. As such, the only option open to a Trial Chamber, where the Registrar has refused the assignment of new Counsel, and an accused appeals to it, is to stay the trial until the President has reviewed the decision of the Registrar. The Appeals Chamber considers that it is only by adopting this approach that the Trial Chamber properly respects the power specifically conferred upon the Registrar and the President by the Directive [...].”<sup>12</sup>

16. The Registrar respectfully submits that if the Accused wished to appeal the 29 September 2008 Decision, he had to direct his appeal to the President who is the only competent body to review the decision. The Accused may choose not to do so. However, this choice does not confer upon the Trial Chamber a power of review which is expressly conferred elsewhere.
17. Furthermore, the Accused has previously attempted to circumvent the rules and appeal to the Trial Chamber a decision of the Registrar which he knew was reviewable by the President. On 16 July 2004, Trial Chamber II then seized of this case, denied the Accused’s Motion 31 for review of the Registrar’s decision extending certain restrictions on communications and visitation between the Accused and other persons, finding that it lacked jurisdiction. It ruled that in light of the applicable legal provisions and the stated views of the Appeals Chamber, decisions regarding communication and visitation privileges of an accused fall within the competence of the Registry or the President and not the Chambers.<sup>13</sup>
18. The Registrar respectfully submits that the Trial Chamber was bound by the Appeals Chamber’s jurisprudence on the issue of jurisdiction. In finding that it had jurisdiction to review the 29 September 2008 Decision, the Trial Chamber relied, *inter alia*, on the fact that the right of an accused to a fair trial is enshrined in the Statute whose norms are superior to those of the Rules of Detention.<sup>14</sup> Even though there is no doubt that the provisions of the Statute are superior to other legal documents drawn on the basis of the Statute, such as the Rules and the Rules of Detention, it is the Registrar’s submission that the mere superiority of the Statute does not invalidate these other rules. As observed by Judge Harhoff in his Dissenting Opinion, under Article 15 of the Statute the Judges can delegate power to other

<sup>11</sup> *Prosecutor v. Blagojević*, 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 Appeal Decision”), paragraph 7.

<sup>12</sup> *Ibid.*, (internal citations omitted).

<sup>13</sup> *Prosecutor v. Vojislav Šešelj*, IT-03-67-PT, Decision on Defence Motion for a Ruling on the Rights of the Accused to Communication and Visits While in Detention, 16 July 2004, paragraph 3.

<sup>14</sup> Trial Chamber’s Decision, paragraph 20.

organs of the Tribunal as necessary for the Tribunal to function efficiently.<sup>15</sup> Furthermore, there is no substantive limitation of the Judges' right to delegate parts of their power to the President or the Registrar as in the present case.<sup>16</sup> Judge Harhoff concludes that even though privileged communications between an accused and his legal advisors are regarded as an essential element of the right to a fair trial, nothing prevents the Judges from delegating the power to curtail this right to the Registrar under the President's supervision.<sup>17</sup>

19. The Registrar further notes the following position of Judge Harhoff in his Dissenting Opinion:

"There can be no doubt in my mind that the Judges, by adopting this provision, meant to empower *the President* with the authority to review the Registrar's decisions to limit, suspend or terminate the right of an Accused to have un-monitored communications with his legal representative. Nor do I believe that the Judges were acting erroneously or *ultra vires* in leaving this task with the President. If the power to review the Registrar's decisions to monitor the communications between an Accused and his legal counsel/associates is to be vested in a Trial Chamber rather than in the President, the correct way forward is for the Judges to seek an amendment of the Rules of Detention."

20. Although the Registrar does not question the Trial Chamber's power to ensure the fairness of the trial under Article 20 of the Statute, the Registrar takes the position that where the power to review a specific matter is explicitly conferred on another organ of the Tribunal, the primary competence to do so lays with that organ. Only 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. The Appeals Chamber in *Blagojević* clearly stated that the fact that an administrative issue touches upon the fairness of the trial is no reason for the Trial Chamber to appropriate for itself a power expressly conferred on the President.<sup>18</sup> In order to protect the fair trial rights of the accused, a Trial Chamber may have to stay the proceedings against the accused until the President renders his decision. It is submitted that such an approach would be in line with the consistent jurisprudence of this Tribunal and the International Criminal Tribunal for Rwanda.<sup>19</sup> The Registrar respectfully submits that the Trial Chamber has misinterpreted the Appeals Chamber's decision in *Blagojević*. This view is supported by Judge

<sup>15</sup> Article 15 of the Statute reads: "The judges of the International Tribunal shall adopt rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters."

<sup>16</sup> Dissenting Opinion, paragraph 9.

<sup>17</sup> Dissenting Opinion, paragraph 11.

<sup>18</sup> *Prosecutor v. Vidoje Blagojević*, Case No. IT-02-60-AR73.4, 7 November 2003, at para. 7.

<sup>19</sup> See for example ICTR, *Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze (Appellants) v. The Prosecutor (Respondent)*, ICTR-99-52-A, Decision on Jean-Bosco Barayagwiza's Motion Appealing Refusal of Request for Legal Assistance, 19 May 2004.

Harhoff's Dissenting Opinion.<sup>20</sup> The Registrar also submits that the President's decision quoted in the Trial Chamber's Decision<sup>21</sup> does not support the Trial Chamber's conclusion. In fact, it supports the position that where the rules expressly confer a power on a specific organ of the Tribunal, that organ has the primary competence to exercise that power.

21. Furthermore, the Trial Chamber's Decision suggests that two bodies, the President and the Trial Chamber, may have concurrent jurisdiction to review the same decision of the Registrar. The Registrar respectfully submits that such concurrent jurisdiction would be contrary to the principle of legal certainty and may, in certain cases, hamper the judicial process instead of facilitating it.<sup>22</sup> Similarly, it is respectfully submitted that the Trial Chamber's departure from the jurisprudence of the Appeals Chamber affects the principle of judicial certainty. This principle and the binding character of Appeals Chamber's decisions on Trial Chambers has been clearly spelled out in *Aleksovski*.<sup>23</sup>

<sup>20</sup> Dissenting Opinion, paragraph 12.

<sup>21</sup> In footnote 32 of the Trial Chamber's Decision, the Trial Chamber refers to the President's decision in *Prosecutor v. Vojislav Šešelj*, IT-03-67-PT, Decision on Appeals Against Decisions of the Registrar of 4 January 2007 and 9 February 2007, 25 April 2007.

<sup>22</sup> For example, if the President and the Trial Chamber reach two different conclusions in reviewing the Registrar's decision.

<sup>23</sup> *Prosecutor v Zlatko Aleksovski*, IT-95-14/1-A, Judgment, 24 March 2000, paragraph 113:

Generally, in common law jurisdictions, decisions of a higher court are binding on lower courts. In civil law jurisdictions there is no doctrine of binding precedent. However, as a matter of practice, lower courts tend to follow decisions of higher courts. As one commentator has stated: it is hardly an exaggeration to say that the doctrine of *stare decisis* in the Common Law and the practice of Continental courts generally lead to the same results... In fact, when a judge can find in one or more decisions of a supreme court a rule which seems to him relevant for the decision in the case before him, he will follow those decisions and the rules they contain as much in Germany as in England or France.

The Appeals Chamber considers that a proper construction of the Statute requires that the *ratio decidendi* of its decisions is binding on Trial Chambers for the following reasons:

(i) the Statute establishes a hierarchical structure in which the Appeals Chamber is given the function of settling definitively certain questions of law and fact arising from decisions of the Trial Chambers. Under Article 25, the Appeals Chamber hears an appeal on the ground of an error on a question of law invalidating a Trial Chamber's decision or on the ground of an error of fact which has occasioned a miscarriage of justice, and its decisions are final;


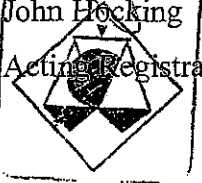
(ii) the fundamental mandate of the Tribunal to prosecute persons responsible for serious violations of international humanitarian law cannot be achieved if the accused and the Prosecution do not have the assurance of certainty and predictability in the application of the applicable law; and

(iii) the right of appeal is, as the Chamber has stated before, a component of the fair trial requirement, which is itself a rule of customary international law and gives rise to the right of the accused to have like cases treated alike. This will not be achieved if each Trial Chamber is free to disregard decisions of law made by the Appeals Chamber, and to decide the law as it sees fit. In such a system, it would be possible to have four statements of the law from the Tribunal on a single legal issue - one from the Appeals Chamber and one from each of the three Trial Chambers, as though the Security Council had established not a single, but four, tribunals. This would be inconsistent with the intention of the Security Council, which, from a plain reading of the Statute and the Report of the Secretary-General, envisaged a tribunal comprising three trial chambers and one appeals chamber, applying a single, unified, coherent and rational corpus of law. The need for coherence is particularly acute in the context in which the Tribunal operates, where the norms of international humanitarian law and international criminal law are



Conclusion

22. In light of the above submissions and the strong dissenting opinion issued by Judge Harhoff on the issue of jurisdiction, the Registrar respectfully 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. The Registrar respectfully submits that as stated in the President's Decision, the Appeals Chamber is the only body that can issue an authoritative ruling on this matter. Given the significance of the issues involved, it is the Registrar's respectful submission that such a ruling is of a critical importance for the proper discharge of the functions of the Registrar and the functioning of the Tribunal as a whole.

Respectfully submitted,  
  
John Hocking  
Acting Registrar  


Dated this 17<sup>th</sup> day of February 2009  
At The Hague,  
The Netherlands.

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developing, and where, therefore, the need for those appearing before the Tribunal, the accused and the Prosecution, to be certain of the regime in which cases are tried is even more pronounced.  
See also *Prosecutor v Zoran Kupreškic et al*, Judgment, 14 January 2000, at paragraph 540.