



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: IT-00-39-A

Date: 20 August 2008

Original: English

IN THE APPEALS CHAMBER

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

Registrar: Mr. Hans Holthuis

Order of: 20 August 2008

THE PROSECUTOR

v.

MOMČILO KRAJIŠNIK

Public

**ORDER ON “MOTION TO INTERVIEW RADOVAN KARADŽIĆ WITH A VIEW
TO THEN CALLING HIM AS A WITNESS PURSUANT TO RULE 115”**

Counsel for the Prosecution:

Mr. Peter Kremer QC

The Appellant:

Mr. Momčilo Krajišnik

Amicus Curiae:

Mr. Colin Nicholls QC

Counsel for the Appellant on the matter of JCE:

Mr. Alan M. Dershowitz

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);

BEING SEIZED OF the “Motion to Interview Radovan Karadžić with a view to then calling him as a witness pursuant to Rule 115”, filed publicly on 13 August 2008 (“Motion”), in which Momčilo Krajišnik (“Appellant”) requests the Appeals Chamber to allow “as a very minimum, a full opportunity to speak and take a proof from Mr. Karadžić so as to allow the Appellant an opportunity to consider fully if he wishes to call him” as a witness pursuant to Rule 115 of the Rules of Procedure and Evidence (“Rules”), and to shorten the time allowed for a response by the Prosecution and *Amicus Curiae*;¹

CONSIDERING that the Prosecution responds that the Motion should be dismissed, arguing that the matter should be settled by the Registrar and that the Appellant’s arguments on Rule 115 requirements are premature;²

NOTING that *Amicus Curiae* has communicated to the Appeals Chamber that he does not intend to file a response;

CONSIDERING that the Appellant filed a request for leave to reply to the Response, arguing *inter alia* that leave should be granted to file the reply and that the Response should be dismissed, as “the Appeals Chamber is the only authority that can resolve the issue in question”;³

CONSIDERING that pursuant to paragraph 14 of the Practice Direction on Procedure for the filing of written submissions in appeal proceedings before the International Tribunal,⁴ the Appellant does not have to ask for leave to file his Reply as it lies as of right;

CONSIDERING that while the Prosecution argues that “the Registrar is in a position to know whether any condition of detention might prevent contact between Krajišnik and Karadžić”,⁵ any decision by the Registrar “that impinges upon the rights of an accused at this Tribunal must be subject to a process of judicial review, even where the Registrar is of the view that he has acted

¹ Motion, paras 24-26.

² Prosecution Response to Krajišnik Motion to interview Radovan Karadžić with a view to then calling him as a witness pursuant to Rule 115, filed publicly on 18 August 2008 (“Response”), paras 1-3.

³ Request for leave to reply and Reply to Prosecution Response to Krajišnik Motion to Interview Radovan Karadžić with a view to presenting his statement and then calling him as a witness pursuant to Rule 115, filed publicly on 19 August 2008 (“Reply”).

⁴ IT/155/Rev. 3, 16 September 2005.

⁵ Response, para. 1.

in full compliance with the Rules and relevant Practice Directions, and that the Rules and Practice Direction should be read accordingly”;⁶

CONSIDERING that the Appellant seeks leave to communicate with Radovan Karadžić in the United Nations Detention Unit in order to consider whether to further seek leave to call him as a witness pursuant to Rule 115 of the Rules;

CONSIDERING that the Appellant has shown that the potential evidence of Radovan Karadžić was unavailable to him until the present moment and that he sufficiently specifies the parts of the Trial Judgement at which such potential evidence could be directed;⁷

FINDING that, in these circumstances and in order to be able to meaningfully exercise his right pursuant to Rule 115 of the Rules, the Appellant should be allowed to speak to Radovan Karadžić in order to determine whether or not he wants to call him as a witness pursuant to Rule 115 of the Rules;

CONSIDERING, however, that it is not necessary for the Appellant to “take a proof from Mr. Karadžić”⁸ in order to exercise his right pursuant to Rule 115 of the Rules;⁹

PURSUANT TO Rules 54, 107 and 115 of the Rules;

ORDERS that the Appellant is allowed to speak to Radovan Karadžić in order to determine whether or not he wants to call him as a witness pursuant to Rule 115 of the Rules;

DIRECTS the Registrar to provide for the necessary arrangements to allow the Appellant to speak to Radovan Karadžić in order to determine if the Appellant wants to call him as a witness pursuant to Rule 115 of the Rules;

⁶ *Prosecutor v. Rasim Delić*, IT-04-83-PT, Decision on Request for Review, 8 June 2005, para. 6. See also *Prosecutor v. Vidoje Blagojević*, IT-02-60-AR73.4, Public and Redacted Reasons for the Decision on Appeal by Vidoje Blagojević to Replace his Defence Team, 7 November 2003, para. 7.

⁷ Motion, para. 16.

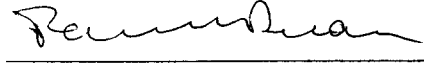
⁸ Motion, para. 24.

⁹ The Appeals Chamber recalls that a party cannot simply request the Appeals Chamber to call someone as a witness but must present some material in order to show that the party is not merely on a fishing expedition (*cf. Ferdinand Nahimana et al. v. The Prosecutor*, ICTR-99-52-A, Decision on Appellant Jean-Bosco Barayagwiza’s Motion for Leave to Present Additional Evidence Pursuant to Rule 115, 5 May 2006, para. 20, citing *Prosecutor v. Kupreškić et al.* IT-95-16-A, Decision on the Motions of Drago Josipović, Zoran Kupreškić and Vlatko Kupreškić to Admit Additional Evidence Pursuant to Rule 115 and for Judicial Notice to Be Taken Pursuant to Rule 94 (B), 8 May 2001, para. 5. and *Ferdinand Nahimana et al. v. The Prosecutor*, ICTR-99-52-A, Decision on Appellant Hassan Ngeze’s Six Motions for Admission of Additional Evidence on Appeal and/or Further Investigation, 23 February 2006 (confidential), para. 40). However, the Appeals Chamber notes that the Appellant is in possession of a statement of Radovan Karadžić (*see* Motion, paras 3 *et seq.*) which satisfies the above mentioned requirement.

ORDERS that the Appellant, should he elect to do so, must file any motion seeking leave to call Radovan Karadžić as a witness pursuant to Rule 115 no later than 15 September 2008; and

DISMISSES the remainder of the Motion.

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



Judge Fausto Pocar
Presiding Judge

Dated this twentieth day of August 2008,
At The Hague,
The Netherlands.

[Seal of the Tribunal]