



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: 8 October 2008
Original: English

IN THE APPEALS CHAMBER

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

Registrar: Mr. Hans Holthuis

Decision of: 8 October 2008

PROSECUTOR

v.

MOMČILO KRAJIŠNIK

PUBLIC

**DECISION ON MOTION OF *AMICUS CURIAE* TO MAKE A
SUBMISSION ON PROCEDURAL FAIRNESS TO FORMER
COUNSEL**

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
Mr. Nathan Z. 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 “Amicus Curiae Submission Regarding Procedural Fairness for Former Counsel in Ineffective Assistance Claim”, filed publicly on 6 August 2008 (“Motion”), in which *Amicus Curiae* requests the Appeals Chamber (i) to lift the confidentiality of the redacted portions of sub-ground of appeal 1(A)¹ of *Amicus Curiae*’s Appeal Brief for Mr. Brashich and Mr. Stewart QC (“former counsel”) only, and (ii) to invite former counsel to respond to *Amicus Curiae*’s Appeal Brief;²

NOTING that the Prosecution opposes the request, arguing *inter alia* (i) that former counsel have sufficient notice of the allegations against them on the basis of the public redacted version of *Amicus Curiae*’s Appeal Brief, and (ii) that former counsel, being on notice of the allegations against them, could have requested the Appeals Chamber to be heard on the ineffective assistance claim but have not done so;³

NOTING the reply by *Amicus Curiae* in which he argues that it would be fundamentally unfair to deny former counsel the opportunity to comment on any assertions made against them, and that a submission by former counsel without an invitation by the Appeals Chamber cannot be expected;⁴

NOTING that *Amicus Curiae* concedes that no precedent exists for such a right of response by former counsel;⁵

CONSIDERING that the public and redacted version of the *Amicus Curiae*’s Appeal Brief provides former counsel with sufficient notice of the allegations against them for the purpose of assessing whether they would like to make submissions relating to those allegations;⁶

CONSIDERING that neither former counsel have indicated that they would like to be heard on the said allegations and that the Appeals Chamber, at this juncture and pending the examination of evidence adduced by the parties pursuant to Rule 115 of the Rules of Procedure and Evidence

¹ “Sub-ground 1(A): Ineffective Assistance of Counsel”, Corrigendum to *Amicus Curiae*’s Appellate Brief, filed confidentially on 14 January 2008, p. 2.

² Motion, para. 13.

³ Prosecution Response to *Amicus Curiae* Submission Regarding Procedural Fairness for Former Counsel in Ineffective Assistance Claim, 11 August 2008, paras 3-4.

⁴ Reply to Prosecution Response to *Amicus Curiae* Submission Regarding Procedural Fairness for Former Counsel in Ineffective Assistance Claim, 12 August 2008, paras 4, 8.

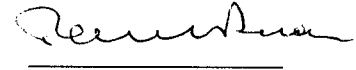
⁵ Motion, para. 12.

⁶ Public and Redacted *Amicus Curiae*’s Appellate Brief, 31 August 2007, paras 3-68. These submissions were reiterated publicly during the appeal hearing on 21 August 2008, *cf.* AT. 300-309.

("Rules"), does not find it in the interests of justice to call the former counsel to appear under Rules 98 and 107 of the Rules;

HEREBY DISMISSES the Motion.

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



Judge Fausto Pocar
Presiding Judge

Judge Mohamed Shahabuddeen appends a Declaration.

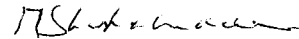
Dated this eighth day of October 2008,
At The Hague,
The Netherlands.

[Seal of the Tribunal]

DECLARATION OF JUDGE SHAHABUDDEEN

I support today's decision dismissing *amicus curiae's* motion that, *inter alia*, the Appeals Chamber should 'invite former counsel to respond to *Amicus Curiae's* Appeal Brief'. That would give former counsel a locus in the proceedings as an additional party; there is no basis for giving him that locus. But I do not understand that the dismissal concludes the question whether the Appeals Chamber should bring former counsel as its own witness and so give him an opportunity to answer the allegations against him. In my view, the consideration that no request to be heard has been made by former counsel is not pertinent; the question relates to the duty of the Court itself.

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



Mohamed Shahabuddeen

Dated 8 October 2008
At The Hague
The Netherlands

[Seal of the Tribunal]