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-99-37-AR73.2
Date: 13 November 2003
Original: English

IN THE APPEALS CHAMBER

Before: **Judge Inés Mónica Weinberg de Roca, Presiding**
Judge Fausto Pocar
Judge Mohamed Shahabuddeen
Judge David Hunt
Judge Mehmet Güney

Registrar: **Mr. Hans Holthuis**

Decision of: **13 November 2003**

PROSECUTOR

v.

Milan MILUTINOVIĆ
Dragoljub OJDANIĆ
Nikola ŠAINOVIĆ

DECISION ON INTERLOCUTORY APPEAL ON MOTION FOR ADDITIONAL FUNDS

Counsel for Dragoljub Ojdanić:
Mr. Tomislav Višnjić
Mr. Peter Robinson
Mr. Vojislav Seležan

Counsel for Milan Milutinović:
Mr. John Livingston
Mr. Radoje Stefanović
Mr. Miladin Papić

Counsel for the Prosecutor:
Mr. Geoffrey Nice
Ms. Cristina Romano
Mr. Milbert Shin

Counsel for Nikola Šainović:
Mr. Toma Fila
Mr. Vladimir Petrović
Mr. Zoran Jovanović

The Association of Defence Counsel of the ICTY:
Mr. John Ackerman

The AIAD-ICDAA:
Mr. Peter Murphy

I. Background

1. The Appeals Chamber of the International Criminal 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 "International Tribunal" respectively) is seised of "General Ojdanić's Appeal of Decision on Motion for Additional Funds *Ex Parte*", filed on 23 July 2003 ("Appeal") pursuant to Rule 73 of the Rules of Procedure and Evidence of the International Tribunal ("Rules").

2. Dragoljub Ojdanić ("Appellant") was indicted on 24 May 1999 and charged with war crimes and crimes against humanity committed in villages and municipalities throughout Kosovo between January and June 1999. He is charged with individual and superior responsibility for the crimes as a result of his position of Chief of Staff of the Yugoslavian Army, as well as his membership in a joint criminal enterprise with the President of the Federal Republic of Yugoslavia, the President of the Republic of Serbia, the Vice-Premier of the Federal Republic of Yugoslavia, and other persons.

3. After his surrender to the International Tribunal, the Appellant designated Mr. Tomislav Višnjić as his lead counsel, Mr. Peter Robinson as his co-counsel, and Mr. Vojislav Seležan as legal consultant. The International Tribunal's Legal Aid System ("Legal Aid System") bears the cost of a defence for indigent accused; it is not in dispute that the system is designed to give the defence quality representation to secure equality of arms with the Prosecution. The Registrar ranks cases according to (I) difficult, (II) very difficult, and (III) leadership. All cases are initially ranked at Level I (difficult). The complexity of the case is then determined in consultation with the Trial Chamber by taking into account an extensive list of factors.[1] The system ensures proportional allocation of funds by attaching payment to the level of complexity of a case.[2]

4. The case of the Appellant was upgraded to a leadership case, Level III, by the Registrar in consultation with the Trial Chamber on 31 January 2003. Accordingly, the Registrar allocated for the pre-trial phase a maximum allotment of 3000 working hours for counsel and co-counsel and 4000 working hours for investigators and legal assistants. The Registrar previously assessed in a

[1] Report of the International Tribunal for the Former Yugoslavia to the United Nations General Assembly on the Structure and Functioning of the Legal Aid System, 31 May 2003, para. 25. Factors include the number and nature of counts in the indictment, possible amendments of the indictment, the nature and preliminary motions and challenges to the Tribunal's jurisdiction, the number of accused joined in the same case, the number of witnesses and documents involved, the geographical territory covered in the indictment, the previous ranking of the accused within the military or political hierarchy, and the legal issues expected to arise in the course of the trial.
[2] See *Ibid.*, paras. 25-29.

decision dated 13 September 2002, that the Appellant is partially indigent and should bear the costs of 400 hours of investigative work at the pre-trial stage.

5. In a letter dated 5 March 2003, the Appellant requested the allocation of additional resources. The Appellant claimed that further resources were necessary given the specificity of the case and the anticipated work necessary to prepare the case for trial.[3] In his reply dated 3 April 2003, the Registrar advised counsel for the Appellant that no additional funds would be allocated for his defence during the pre-trial stage. The Registrar justified this position by stating that the tasks put forward by the Appellant were already taken into consideration when upgrading the case to Level III on 31 January 2003. The Registrar further explained that the Trial Chamber and the Appellant were consulted before a decision was taken on the maximum allotment.

6. In a motion dated 15 April 2003, the Appellant sought review of the Registrar's decision by the Trial Chamber and submitted that the resources provided by the Registrar were insufficient to complete the tasks required for an effective and competent defence. The Appellant requested the allocation of additional counsel hours and support hours for the pre-trial stage in order to prepare the case for trial.[4]

7. In the "Decision on Motion for Additional Funds" of 8 July 2003 ("Impugned Decision"), the Trial Chamber held that the Registrar has the primary responsibility for the determination of matters relating to remuneration of counsel under the Legal Aid System, in accordance with the relevant provisions of the Rules, and the Directive on Assignment of Defence Counsel issued by the International Tribunal ("Directive").[5] The Trial Chamber considered that the Registrar has elaborated a Legal Aid System in consultation with the Judges, that the current system takes into account the complexity of the case, and that counsel have agreed to represent the indigent Appellant before the International Tribunal being fully aware of the system of remuneration for assigned counsel.[6] The Impugned Decision further stated "that in the exercise of its powers under Rule 54 of the Rules and the Trial Chamber's statutory obligation to ensure a fair and expeditious conduct of the proceedings with full respect for the rights of the accused, the Trial Chamber is undoubtedly empowered to review the Registrar's decision, albeit only upon exceptional circumstances being shown."[7] Furthermore, the Trial Chamber accepted as "valid the Registrar's Comment that while the Registrar is open to a certain flexibility in considering requests for additional resources, the Defence should demonstrate exceptional circumstances or circumstances beyond its control if such

[3] Motion, paras. 27-33.
[4] *Ibid.*
[5] Impugned Decision, p. 4.
[6] *Ibid.*

requests are to be granted". The Trial Chamber considered that no such circumstances had been shown, and accordingly the Trial Chamber denied the Motion.[8]

8. The Trial Chamber granted certification pursuant to Rule 73 of the Rules for leave to appeal the Impugned Decision on 16 July 2003.[9] On 23 July 2003, the Appellant filed the Appeal. The Registrar responded on 22 August 2003[10] and the Appellant replied on 29 August 2003.[11] On 29 August 2003,[12] the Association of Defence Counsel of the ICTY ("ADC-ICTY") filed an "*Amicus Curiae* Brief of Association of Defence Counsel of ICTY in Support of Appeal and Motion for Leave to File Same" ("*Amicus Curiae* Brief of ADC-ICTY"). On 3 September 2003, the ADC-ICTY filed an Addendum to the *Amicus Curiae* Brief ("Addendum"). On 30 September 2003,[13] the Association Internationale des Avocats de la Défense-International Criminal Defence Attorneys Association (AIAD-ICDAA) filed its "Motion of the AIAD-ICDAA For Leave to Appear as *Amicus Curiae* and to Join in Brief of Association of Defence Counsel of ICTY" ("*Amicus Curiae* Submission of AIAD-ICDAA").

II. Submissions

(a) Submissions of the Appellant

9. The Appellant presents the following grounds of appeal.

i. "The Trial Chamber misdirected itself as a matter of law when it failed to consider the impact of the Registrar's decision on the right of the accused to adequate time and facilities for the preparation of his defence, as provided in Article 21(4)(b) [of the Statute of the International Tribunal];

ii. The Trial Chamber misdirected itself as a matter of law when it failed to consider the impact of the Registrar's decision on the right of the accused to 'equality of arms' with the prosecution, as provided in Article 20(1) [of the Statute of the International Tribunal]; and

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[7] *Ibid.*, p. 5.
[8] *Ibid.*
[9] Decision on Defence Request for Certification of Appeal Against the Decision of the Trial Chamber on Motion for Additional Funds, 16 July 2003.
[10] Response of Registry to General Ojdanić's Appeal of Decision on Motion for Additional Funds, 22 August 2003 ("Response").
[11] Reply Brief: General Ojdanić's Appeal of Decision on Motion for Additional Funds, 29 August 2003.
[12] It is noted that the ADC-ICTY had already filed an *Amicus Curiae* Brief on 14 July 2003 in support of certification for this appeal.

iii. The Trial Chamber misdirected itself as a matter of law by deferring to the Registrar despite the Registrar's failure to (1) take into account the duration of the pre-trial phase; (2) adapt the allotment when the pre-trial phase was substantially longer than estimated; and (3) consult the Trial Chamber and/or Advisory Panel when the defence disagreed with the allotment, as required by Article 22(A) of the Directive on the Assignment of Defence Counsel."[14]

10. The Appellant first submits that the Trial Chamber misdirected itself as a matter of law when it failed to take positive action to discharge its duty to see that the Appellant receives a fair trial, including the provision of adequate resources for his defence and equality of arms with the Prosecution. The Appellant argues that the Trial Chamber:

i. Recognised its power to review the Registrar's decision but never considered the adverse impact that failure to allot additional funds would have upon these rights of the Appellant;
ii. Remained passive in the face of uncontradicted submissions that counsel to the Appellant was unable to fulfil their obligations to adequately defend the Appellant;
iii. Had a duty to see that adequate resources were made available to the Appellant "in its role as the ultimate guardian and fairness of the proceedings,"[15] and
iv. Erred by not addressing the issue of whether the rights of the Appellant to act and comment upon the Prosecution's evidence and submissions were being abridged by the failure to provide adequate facilities and resources to the Appellant's counsel (i.e., the impact that the Registrar's decision would have on the Appellant's ability to access experts).

11. The Appellant's second contention is that the Trial Chamber:

i. Misdirected itself as a matter of law when it failed to consider the impact of the Registrar's decision on the right of the Appellant to "equality of arms" with the Prosecution;
ii. Failed to address the "imbalance of resources between the prosecution" and the Appellant in the Impugned Decision,[16] as the principle of equality of arms "is intended to elevate the defence to the level of the prosecution as much as possible in its ability to prepare and present its case";[17] and
iii. Did not consider that the principle of equality of arms suggests that the Appellant be given the resources to at least read the exculpatory materials disclosed by the Prosecution.

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[13] It is noted that the AIAD-ICDAA had similarly filed an *Amicus Curiae* Brief on 16 September 2003. However, the 30 September amendment included the "Resolution" of "the Executive of the International Criminal Defence Attorneys Association" of 24 September 2003, as an Annex, adopting "as its own the arguments submitted in the brief."
[14] Appeal, para. 9.
[15] *Ibid.*, para. 51.
[16] *Ibid.*, para. 63.
[17] *Ibid.*, para. 66.

12. The Appellant, in its third ground of appeal, argues that:

i. The Trial Chamber misdirected itself as a matter of law by deferring to the Registrar despite the Registrar's failure to modify the payment in light of the long duration of the pre-trial phase of the proceedings;

ii. The nature of the review required of a decision of the Registrar concerning legal aid provided to an accused is explained in *Prosecutor v. Kvočka et al*;[18]

iii. The Registrar did not follow the directives of the Judges in establishing the legal aid for the Appellant;

iv. The duration of the pre-trial stage is a relevant consideration when deciding upon the amount of resources to be allocated because the duration of the pre-trial period bears a direct relationship to the amount of work required for trial preparation;[19]

v. The Trial Chamber erred by not quashing the decision of the Registrar to adapt the allotment when the pre-trial phase was substantially longer than originally estimated, and counsel "never agreed to the completely unrealistic estimate of eight months to prepare the case, and was never consulted by the Registry";[20] and

vi. The Registrar failed to consult the Trial Chamber or the Advisory Panel before refusing to adapt the allotment, which is required by Article 22(A) of the Directive.

(b) Submissions of the Registrar

13. In response to the first ground of appeal, the Registrar submits that the Legal Aid System gives the defence latitude to organize its work according to the workload and necessities of the defence team. Counsel for the Appellant is responsible for assessing what is reasonable and necessary in the interest of the Appellant, which requires a degree of prioritisation.[21]

14. In response to the second ground of appeal, the Registrar submits that the concept of equality of arms refers to procedural equality between the Appellant and the Prosecution, and "does not necessarily amount to the material equality of possessing the same financial and/or personal resources".[22]

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[18] *Prosecutor v. Miroslav Kvočka, Mlado Radić, Zoran Žigić & Dragoljub Prcać*, IT-98-30/1-A, Decision on Review of Registrar's Decision to Withdraw Legal Aid from Zoran Žigić, 7 February 2003.
[19] Appeal, paras. 74-75.
[20] *Ibid.*, para. 79.
[21] Response, para. 6.
[22] *Ibid.*, para. 8.

15. In response to the third ground of appeal, the Registrar submits that the time estimate used to calculate the lump sum in the present case is an estimate of the amount of work required to get the case ready for trial. The Registrar further submits that the Impugned Decision accepted the Registrar's comments that the Appellant should demonstrate exceptional circumstances beyond its control, and that it considered that no such circumstances were shown.[23] As a final point, the Registrar asserts that it did consult with the Trial Chamber and the Appellant's counsel before upgrading the Appellant's case to Level III, as stated in the letter of 31 January 2003.

(c) Submissions of the Proposed *Amici Curiae*- Association of Defence Counsel ICTY (ADC-ICTY) and the Association Internationale des Avocats de la Défense-International Criminal Defence Attorneys Association (AIAD-ICDAA)

16. In addition to stating its support for the Appellant's position, the ADC-ICTY and the AIAD-ICDAA effectively seek a review and overhaul of the Legal Aid System and request that the Registrar be ordered to review the situation of other defence teams in the same or similar position, including but not limited to the defence team in the case of *Hadzihasanović and Kubura*.[24] The ADC-ICTY and the AIAD-ICDAA request that the Registrar be ordered to consult as a matter of urgency with the ADC-ICTY with a view to designing a defence resource system which fully recognizes the principle of equality of arms and the right of all accused to a full and fair defence. Moreover, pending agreement on such a system, they ask that defence teams be reasonably, and fully funded on the basis of an hourly rate for work actually and reasonably accomplished. They further submit that the Appeals Chamber should order that the ADC-ICTY be granted leave to file this brief as an *Amicus Curiae* and to appear and argue if an oral hearing of the Appeal is to be held.[25] The AIAD-ICDAA seeks leave "to intervene and submit arguments in favour of the [Appeal] against the denial by the Trial Chamber of the Motion for Additional Funds".[26] The AIAD-ICDAA "does not propose to file an additional brief, but joins in the Brief and Motion filed by the [ADC-ICTY] on 29 August 2003".[27]

III. Discussion

[23] *Ibid.*, para. 13.
[24] *Prosecutor v. Mehmed Alagić, Enver Hadžihasanović and Amir Kubura*, IT-01-47-PT, Decision on Urgent Motion for an *ex parte* Oral hearing on the Allocation of Resources to the Defence and the Consequences thereof for the Right of the Accused to a Fair Trial, 17 June 2003.
[25] *Amicus Curiae* Brief of ADC-ICTY, para. 29.
[26] *Amicus Curiae* Submission of AIAD-ICDAA, Annex 1.
[27] *Ibid.*, p. 2.

(a) *Amici Curiae*

17. A new Legal Aid System was brought into force on 13 October 2000. This new system, in which the Registrar allocates a fixed fund for each phase of the trial, replaced the old system in which lawyers for indigent accused were paid an hourly rate. The parties appear to seek to address the merits and deficiencies of this scheme.

18. As the submissions of the ADC-ICTY and the AIAD-ICDAA relate predominantly to this larger issue, the Appeals Chamber does not find it desirable for the proper determination of this case to grant leave to the ADC-ICTY and to the AIAD-ICDAA to present submissions, pursuant to Rule 74 of the Rules.

(b) First Ground of Appeal

19. The Trial Chamber correctly considered that the Registrar has the primary responsibility in the determination of matters relating to remuneration of counsel under the Legal Aid System of the International Tribunal. The Appeals Chamber has already held that, where the Directive expressly provides for a review of the Registrar's decision, the Trial Chamber cannot interfere in the Registrar's decision, and its only option is to stay the trial until that procedure has been completed.[28] Where, however, the Directive does not expressly provide for a review of the Registrar's decision, the Trial Chamber, pursuant to its statutory obligation to ensure the fairness of the trial, is competent to review the Registrar's decision in the light of its effect upon the fairness of the trial.

20. The exercise of such power should, however, be closely related to the fairness of the trial, and it should not be used as a substitute for a general power of review which has not been expressly provided in the Directive. If there is no effect of the Registrar's decision upon the fairness of the trial, the accused should be left to pursue the remedy given in Article 31 of the Directive which requires the Registrar, in the event of a disagreement relating to calculation of fees, payment of remuneration, or reimbursement of expenses of Defence Counsel, to make a decision, after consulting the President and, if necessary, the Advisory Panel.

[28] *Prosecutor v. Blagojević*, IT-02-60-AR73.4, Ex Parte and Confidential Decision on Appeal by Vidoje Blagojević to Replace his Defence Team, 7 November 2003, para. 7.

21. The Appeals Chamber notes that the Trial Chamber correctly assessed the elements of this case. It invited the Registrar to comment on the Defence Motion for Additional Funds. Mindful of its obligations to ensure a fair and expeditious conduct of the proceedings with full respect for the rights of the accused, the Trial Chamber took into account the submissions of both parties and all the relevant factors in reaching the decision that no exceptional circumstances existed for granting additional funds to the Defence. The Appellant has failed to show that the Trial Chamber committed an error in accepting the Registrar's finding that the Defence had not demonstrated any exceptional circumstances or circumstances beyond its control which would warrant additional resources during the pre-trial phase.

22. The Appeals Chamber further notes that counsel for the Appellant claim that they may be ethically required to withdraw from representing the Appellant because they do not have adequate resources to defend him. The Appeals Chamber observes that the assigned counsel agreed to represent the Appellant, aware of the system of remuneration for assigned counsel, and are bound thereby.[29] There has been no change in the terms of representation or in the initial agreement, and counsel are required to fulfil their obligations to the International Tribunal.

(c) Second Ground of Appeal

23. The Appellant submits that the Trial Chamber misdirected itself as a matter of law when it failed to consider the impact of the Registrar's decision on the right of the accused to 'equality of arms' with the Prosecution. The Appeals Chamber recalls the findings in the *Kayishema and Ruzindana* case, where the ICTR Appeals Chamber held that "equality of arms between the Defence and the Prosecution does not necessarily amount to the material equality of possessing the same financial and/or personal resources".[30] Similarly, in the *Tadić* case, the Appeals Chamber took the view that "equality of arms obligates a judicial body to ensure that neither party is put at a disadvantage when presenting its case".[31]

24. In the present case, the Appeals Chamber is of the view that the Appellant has not shown how the Trial Chamber failed to address the imbalance of resources between the Prosecution and the Defence and in that way violated the principle of equality of arms. The principle of equality of

[29] See Article 9(C) of the Code of Professional Conduct for Counsel Appearing Before the International Tribunal, IT/125 REV. 1, as amended, 12 July 2002.
[30] *The Prosecutor v. Clement Kayishema and Obed Ruzindana*, Case No ICTR-95-1-A, Judgement, 1 June 2001, para. 69
[31] *Prosecutor v. Duško Tadić*, IT-94-1-A, Judgement, 15 July 1999, para. 48.

arms would be violated only if either party is put at a disadvantage when presenting its case. In the circumstances of this case, the Appeals Chamber finds that the Appellant cannot rely on the alleged inadequacy of funds during the pre-trial stage to establish such a disadvantage.

(d) Third Ground of Appeal

25. In his third ground of appeal, the Appellant reproaches the Trial Chamber with having deferred to the Registrar despite various failures made by the Registrar in his assessment of the Defence request for additional funds. The Appeals Chamber is of the view, on the face of the language used in Article 22 of the Directive, that the Registrar misdirected himself when he affirmed in his submissions to the Trial Chamber that "the actual duration of the pre-trial stage is not a relevant factor" to take into account when allocating a lump sum under the Legal Aid System.[32] However, the Registrar was correct to take the view that the amount of resources allocated to each Defence team depends on factors such as the level of complexity of the case and the amount of work required to ensure an effective pre-trial preparation.[33] As such, it is the amount of work required, rather than the length of the pre-trial stage, which should determine the allotment for each Defence team.

26. Further, when considering the request for additional funds in respect of an extension of the anticipated duration of the pre-trial stage, the Registrar said that "the duration of the pre-trial stage *alone* is not, *as such*, a valid justification".[34] The Appeals Chamber understands from this, that the Registrar was not excluding the element of the duration of the pre-trial stage when considering a request, but that he only thought that a longer pre-trial period alone was not enough to justify an increase. The Appeals Chamber finds that the Appellant has not shown how the Registrar erred in his assessment of the request for additional funds. This ground of appeal fails.

Disposition

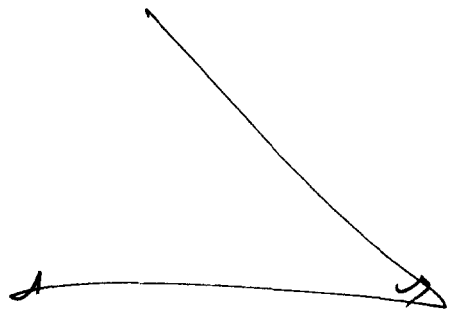
27. For the foregoing reasons, the Appeals Chamber:

1. DISMISSES the Appeal;

[32] Impugned Decision, p. 3 citing the "Registry Comments on Defence Motion for Additional Funds", filed 13 June 2003, paras. 4-5.
[33] See Registry Comments on Defence Motion for Additional Funds, 13 June 2003, paras. 4-5.
[34] *Ibid.*, para. 6 (emphasis added).

2. DENIES the Motion for leave to file the *Amicus Curiae* Brief of ADC-ICTY, the Addendum, and the *Amicus Curiae* Submission of AIAD-ICDAA.

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



Inés Mónica Weinberg de Roca
Presiding Judge

Dated this 13th day of November 2003
At The Hague,
The Netherlands.

Judge Shahabuddeen appends a separate opinion to the present decision.
Judge Hunt appends a dissenting opinion to the present decision.

[Seal of the Tribunal]

SEPARATE OPINION OF JUDGE SHAHABUDDEEN

1. I respectfully agree with the decision of the Appeals Chamber and propose to support its chief proposition that an extension of the duration of the pre-trial stage is not a sufficient reason for paying out additional legal aid funds unless justified by work which was not estimated when the original grant was made, and that the present claim was not in fact so justified.

2. Article 22(A) of the Directive on Assignment of Defence Counsel states:

> Where counsel has been assigned, the costs of legal representation of the suspect or accused necessarily and reasonably incurred shall be met by the Tribunal subject to the budgetary provisions, rules and regulations, and practices set by the United Nations. All costs are subject to prior authorization by the Registrar. If authorization was not obtained, the Registrar may refuse to meet the costs. The Registrar establishes maximum allotments for each defence at the beginning of every stage of the procedure taking into account his estimate of the duration of the phase. In the event that a phase of the procedure is substantially longer or shorter than estimated, the Registrar may adapt the allotment. In the event of disagreement on the maximum allotment, the Registrar shall make a decision, after consulting the Chamber and, if necessary, the Advisory Panel.

3. In paragraph 25 of its decision, the Appeals Chamber correctly found, on the face of the language used by the Registrar, that he "misdirected himself when he affirmed in his submissions to the Trial Chamber that 'the actual duration of the pre-trial stage is not a relevant factor' to take into account when allocating a lump sum under the Legal Aid System". As has been seen, article 22(A) of the Directive explicitly requires him, "at the beginning of every stage of the procedure," to take "into account his estimate of the duration of the phase".

4. However, the Registrar's views have to be read as a whole. When he came to the particular issue involved in this case concerning a request for additional funds as distinguished from an original allocation, he said, as noted in paragraph 26 of the decision of the Appeals Chamber, that "the duration of the pre-trial stage *alone* is not, *as such*, a valid justification."[1] I agree with the Appeals Chamber that, in saying so, "the Registrar was not excluding the element of the duration of the pre-trial stage when considering a request [for additional funds], but that he only thought that a

[1] Emphasis added as in paragraph 25 of the decision of the Appeals Chamber.

longer pre-trial period alone was not enough to justify an increase". So, for the purposes of a claim to additional funds, the Registrar did take account of the duration of the pre-trial stage.

5. But what the Registrar also did was to take the position that an extension of duration, however long, would not by itself justify the grant of additional funds. In his view, there would have to be an increase over and above the original estimate of the amount of work falling to be done, and this was not the case. Was the Registrar right in so holding? I think he was.

6. The relevant words in article 22(A) of the Directive are that, in "the event that a phase of the procedure is substantially longer or shorter than estimated, the Registrar may adapt the allotment." In my opinion, the word "may" in that sentence does not have its usual discretionary meaning: it attracts the standard jurisprudence which says that enabling words are construed as compulsory whenever the object of the power which they confer is to effectuate a legal right. If, in this case, the phase of the procedure is indeed substantially longer than estimated, the Appellant has a legal right to additional funds and, correspondingly, the Registrar has no discretion in deciding whether to make an adaptation in order to effectuate that legal right. So the question is whether the phase of the procedure is substantially longer than estimated.

7. Whether "a phase of the procedure is substantially longer ... than estimated" within the meaning of article 22(A) of the Directive turns on the word "substantially". In my view, that word qualifies not only the temporal aspect of an extension but also the material aspect of an extension. What is longer is not the time *simpliciter*, but the time taken by the "phase of the procedure". That the "phase of the procedure is substantially longer ... than estimated" means that there is unestimated work which remains to be done in order to bring that phase of the procedure to a close. Thus, an entitlement to additional funds depends not merely on whether there is an extension of duration but on whether that extension reflects an increase in work over and above the level originally estimated.

8. In effect, if duration is extended but no unestimated work has to be done, the Registrar is entitled to say that the phase of the procedure is not substantially longer than estimated within the meaning of the applicable provision. On similar reasoning, it would be wrong to hold that a shortening of duration mechanically results in a corresponding reduction in funds even where there has been no reduction of work; that could not have been intended. Additional subsidiary legislation could make this clear, but the absence of such legislation does not stand in the way of upholding a reasonable reading of what now exists.

9. Now, as to whether there was unestimated work so as to justify a finding that the phase of the procedure was substantially longer than estimated. On the facts, it appears that the Registrar adopted a three-level legal aid system, in the progressively favourable positions of Levels I, II and III. On 31 January 2003, he upgraded the Appellant's case to Level III from a lesser position which it previously occupied in that scheme, thereby giving to the Appellant the maximum allotment available in the highest category. There is no evidence that that upgrading decision was then put in issue. Five weeks later, on 5 March 2003, the Appellant requested additional funds.

10. The Registrar is not contending that the effect of his adoption of the three-level system is that the maximum associated with the highest level can in no circumstances be varied; as seen in paragraph 11 below, subject to certain restrictions, he accepts that there can be a variation. His submission, as correctly recalled by the Appeals Chamber and as I believe has been accepted by it, is "that the tasks put forward by the Appellant were already taken into consideration when upgrading the case to Level III on 31 January 2003", and that both "the Trial Chamber and the Appellant were consulted before a decision was taken on the maximum allotment."[2] Thus, the position of the Registrar, which seems reasonable, is that those tasks, having been already taken into consideration when that previous maximum was fixed, could not be relied on in support of a claim that duration was substantially extended within the meaning of article 22(A) of the Directive. It follows that, duration not having been extended, a case for adaptation did not arise; accordingly, there was no legal right to adaptation or to additional funds flowing from adaptation.

11. Following on what was said in paragraph 10 above, I should add that, although the tasks in question had already been taken into consideration at the time of the upgrading decision, the Registrar was prepared to consider "an unforeseen circumstance" or "exceptional circumstances or circumstances beyond [the Appellant's] control."[3] I do not read these restrictive qualifications as intended to apply to an entirely new situation the essential tasks of which were not previously considered; such a situation would have to be assessed in the normal way. I read the restrictions as intended to be applicable only to a situation in which essentially the same tasks had already been taken into account. When the restrictions are so understood, I am unable to appreciate what can be wrong with the limitations which they impose on the functions of any responsible manager of the

[2] The excerpt comes from paragraph 5 of the decision of the Appeals Chamber. See also paragraph 8 of the Registry Comments on Defence Motion for Additional Funds, 13 June 2003, and paragraph 18 of the Response of the Registry to General Ojdanić's Appeal of Decision on Motion for Additional Funds, 22 August 2003.
[3] See Registry Comments, *supra*, paras. 6 and 8, and Response of the Registry, *supra*, para. 13.

resources of the international community. The Registrar correctly thought that these reasonable restrictions did not permit what is being sought.

12. As to the last sentence of article 22(A) of the Directive, I read this, so far as a possible variation of an existing allotment is concerned, as being applicable only if the Registrar decides to adapt the existing allotment and there is then disagreement as to what should be the new maximum. This is consistent with the penultimate sentence of that provision. It is illustrated by the situation in which the Registrar decides that there should be an increase over the original amount and considers that the increase should be to a certain extent, but the claimant considers that there should be an even larger increase. However, in this case the Registrar did not decide to increase the existing allotment. Accordingly, the procedure for resolving a disagreement as to what should be the new maximum was not triggered. The stage for consulting the Trial Chamber and, if necessary, the Advisory Panel did not arrive.

13. I agree with the decision of the Appeals Chamber to dismiss the appeal and thus to affirm the decision of the Trial Chamber.

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

Mohamed Shahabuddeen

Dated 13 November 2003

At The Hague

The Netherlands

[Seal of the Tribunal]

DISSENTING OPINION OF JUDGE DAVID HUNT

The background to the appeal

1. This appeal is concerned with the Directive on Assignment of Defence Counsel which commenced to operate in 2002,[1] and with the manner in which a decision made by the Registrar under that Directive concerning legal aid may be challenged by an accused person who is dissatisfied with the Registrar's decision. The Directive came into existence approximately one year after the adoption of a variation to the legal aid provided to accused persons before the Tribunal. For the pre-trial phase (which is the subject of this appeal), lump sum payments for preparation for trial are now made to the defence in each case, the amount depending upon the ranking of the particular case as assessed by the Registrar. This ranking is intended to represent the complexity of the case, and thus the work necessary to be carried out for the defence to be ready for trial.[2]

2. Dragoljub Ojdanić (the "appellant") has been charged as the Chief of the General Staff of the Armed Forces of the Federal Republic of Yugoslavia with individual and superior responsibility for crimes committed by members of those Armed Forces and others in Kosovo in 1999, and he is also alleged to have participated in a joint criminal enterprise with Slobodan Milošević ("Milošević") and others to commit those crimes. He appeals against a decision of the Trial Chamber which reviewed a decision of the Registrar to refuse the grant of additional funds for his defence but declined to interfere with that decision.[3]

3. The appellant was originally charged in the same indictment as Milošević, together with Milan Milutinović (the President of Serbia), Nikola Šainović (the Deputy Prime Minister of the Federal Republic of Yugoslavia) and one Vlajko Stojiljković (who has since

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[1] IT/73/Rev 9, 12 July 2002 ("Directive").

[2] Registry Comments on Defence Motion for Additional Funds, 13 June 2003 ("Response to Motion"), par 4. Article 21.4(d) of the Tribunal's Statute requires the Tribunal to provide legal assistance to those accused who are unable to provide legal assistance of their own choosing. There are no official documents of the Tribunal which describe this continually evolving system of lump sum payments, but it is described in general terms in the Report of the International Tribunal for the Former Yugoslavia to the United Nations General Assembly on the Structure and Functioning of the Legal Aid System, 31 May 2003 ("Report to the UN"), pars 18-32, a document which was prepared by the Registry. Although the judges of the Tribunal endorsed the Registrar's proposal to adopt a lump sum system of payments upon the basis of an "overview" provided by the then Registrar, they have not endorsed either the details of the lump sum system or the Report presented to the UN General Assembly. The statement by the Registrar that "[the lump sum] payment system was unanimously approved by the Judges at the Plenary on 13 October 2000" (Response to Motion, par 13) must therefore be read down accordingly.

[3] Decision on Motion for Additional Funds, 8 July 2003 ("Trial Chamber Decision").

died). The trial of Milošević was separated when he was transferred to the Tribunal in 2001 prior to the arrival of the three remaining defendants, and because of the consolidation of three indictments against Milošević. The indictment against the appellant and his two remaining co-accused was assessed with the highest ranking, Level 3. The extensive scope of the Kosovo case against Milošević is well-known, and need not be elaborated. The Level 3 assessment made by the Registrar provided the appellant with funds to cover 3000 hours of pre-trial work to be shared between the counsel assigned to his defence team and 4000 hours of work by their support staff.

The application to the Trial Chamber

4. The appellant says that, despite the efforts by his counsel to work efficiently and effectively and to avoid duplication of effort, these funds were exhausted within eleven months, some time earlier this year, and there remains a considerable amount of work to be done, including the review of voluminous records relating to the Yugoslav Army which had been sought but which had not been supplied as at the date of his original application.[4] This is said to involve an estimated 300,000 pages of material.[5] The appellant categorises the prosecution case as one which does not disclose any direct evidence of his involvement in (or knowledge of) the crimes charged but which relies upon the proposition that, so widespread were the expulsions and killings in Kosovo, these must have been planned at the appellant's level of command and he must have known of the plan to carry them out.[6] He refers to the expenditure upon his many attempts to obtain provisional release, successful at first but ultimately rejected by the Appeals Chamber,[7] an unresolved application pursuant to Rule 54 for material from NATO and its Member States, the preliminary motions concerning jurisdiction and the concept of joint criminal enterprise,[8] and numerous issues relating to disclosure which have sometimes been resolved informally but other times by decision of the Trial Chamber.[9]

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4 Motion for Additional Funds, 15 April 2003 ("Motion"), pars 8-11, 21.
5 *Ibid*, par 29.
6 *Ibid*, par 12.
7 Decision on Provisional Release, 30 October 2002; Decision on Motion for Modification of Decision on Provisional Release and Motion to Admit Additional Evidence, 12 December 2002; Decision Refusing Ojdanić Leave to Appeal, 27 June 2003.
8 Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – *Joint Criminal Enterprise*, 21 May 2003; Decision on Motion Challenging Jurisdiction, 6 May 2003.
9 Motion, pars 15-19.

5. The appellant says that there remains the continuing need to read the transcript of the Milošević trial (which presently exceeds 28,000 pages in length),[10] an investigation into the prosecution and defence cases once disclosure has been completed, it being more efficient (it is said) to await the completion of disclosure so that witnesses will not have to be re-interviewed should additional material be discovered during disclosure,[11] and final pre-trial preparation involving formal admissions by the appellant of undisputed testimony and acts and seeking reciprocal admissions from the prosecution.[12]

6. The Registrar's response to the appellant's request for additional funds was that the nature of the appellant's position, the amount of material disclosed and the discovery processes had already been taken into account when assessing the case at Level 3.[13] The Registrar said that, although he took the view that the case is a complex one, involving "a huge amount of material and complex legal issues", he nevertheless considered the factors put forward by the appellant as justifying the additional funds sought "to be *foreseeable* in most proceedings before the Tribunal and are therefore included in the allotment granted for leadership cases".[14] The request for further resources was accordingly refused.

7. The Trial Chamber invited the Registrar to comment upon the appellant's motion before it,[15] in particular (so far as is relevant to this appeal) in relation to two issues. The first was in these terms:[16]

> [...] whether the allotment was based on an estimate of the length of the pre-trial stage that has turned out to be inaccurate, and if that is so, whether the actual length of the pre-trial stage has been taken into account in determining whether the allotment should be increased;

The Registrar responded that the necessary time for effective pre-trial preparation as assessed by the Registry is four months, six months and eight months for the three respective levels of complexity, and that this assessment is based on "the amount of work that is required to ensure an effective preparation of a case in accordance with the legal aid concept". The eight month estimate used to calculate the lump sum in the present case was not, therefore, "an

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[10] This is an obligation imposed upon counsel for any accused person where the other trial concerns the same events: *Prosecutor v Aleksovski*, IT-95-14/1-AR73, Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 Feb 1999, par 18.
[11] Motion, par 30.
[12] *Ibid*, par 33.
[13] Letter to Counsel, 3 April 2003 (annexed to Motion).
[14] *Ibid*. I have added the emphasis, for the purposes of par 40, *infra*.
[15] Invitation to Registry to Comment on Defence Motion for Additional Funds, 21 May 2003 ("Invitation").
[16] *Ibid*, p 2.

estimate of the length of pre-trial stage, but an estimate of the amount of work required". As a consequence, he said, the actual duration of the pre-trial stage is not a relevant factor to be taken into account in order to assess the resources which are granted to a case; they depend on the substance of a case and not on the number of months the pre-trial period lasts.[17] In reply, the appellant referred to Article 22(A) of the Directive, which provides that the Registrar, in establishing the maximum allotment for the defence at the beginning of each stage or phase of the proceedings (here the pre-trial stage), is required to take into account "his estimate of the duration of the phase".[18]

8. The second issue raised by the Trial Chamber was in these terms:[19]

> [...] taking into account the breakdown of the anticipated Defence needs as submitted in the Motion, to what extent, if any, the current payment arrangements (budgetary provisions, rules and regulations, and practice set by the United Nations) allow for some flexibility to provide the necessary funding for pre-trial needs for this accused [...].

As to this issue, the Registrar responded that the allotments made under the lump sum payment system are "maximum hours to be allocated during the pre-trial stage". However, he said, the Registry is open to a "certain flexibility" in considering the grant of limited additional resources "in case of exceptional circumstances that arise over the course of the pre-trial and which impact on the workload of the defence". However, in order to obtain the grant of additional resources, the defence must submit a reasoned request to the Registry showing that "events beyond the influence of the defence justify the allocation of additional resources". The duration of the pre-trial stage alone is not, as such, considered by the Registry to be a valid justification for additional resources.[20] In reply, the appellant says that the pre-trial stage of this case is three times longer than the Registrar's estimate and that his defence team, despite its best efforts, has simply been unable to prepare for trial within the estimate set by the Registrar.[21] The appellant says that, although he does not seek to challenge the Registrar's payment system, the defence was never given the opportunity to agree to the fixed fee of 3000 hours for counsel time, and could not have agreed to such an amount which (he says) was "plainly inadequate for this case".[22]

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[17] Response to Motion, par 5.
[18] Reply to Registry's Comments on Defence Motion for Additional Funds, 26 June 2003 ("Reply"), pars 4, 9. The relevant passage in Article 22(A) is quoted more fully in par 31, *infra*.
[19] Invitation, p 2.
[20] Response to Motion, par 6.
[21] Reply, par 10.
[22] *Ibid*, par 14, footnote 2.

The Trial Chamber's decision

9. The Trial Chamber, considering that the Registrar has the primary responsibility in the determination of matters relating to the remuneration of counsel under the Tribunal's legal aid system, nevertheless held that –

> [...] questions relating to the legal representation of an accused may affect the conduct of a trial, that in the exercise of its powers under Rule 54 of the Rules and the Trial Chamber's statutory obligation to ensure a fair and expeditious conduct of the proceedings with full respect for the rights of the accused, the Trial Chamber is undoubtedly empowered to review the Registrar's decision, albeit only upon exceptional circumstances being shown [...].[23]

The Trial Chamber then accepted as valid the Registrar's contention that the defence should demonstrate exceptional circumstances or circumstances beyond its control if requests for additional resources are to be granted, and agreed with the Registrar that no such circumstances had been shown.[24] The Motion was accordingly denied.[25]

The appeal

10. The appellant adds little by way of background in his appellate brief. He emphasises the nature of the trial as being document intensive and broad in scope,[26] requiring him to demonstrate at the trial that, contrary to the prosecution case, the basic crimes charged were committed by persons acting on their own and not under his command,[27] and to demonstrate how the chain of command operated on a *de facto* basis within the Army and the Minister of the Interior,[28] a task which (together with that of reviewing the disclosures) he has described as "monumental".[29]

11. Before dealing with the grounds of appeal, however, it is necessary to refer to the issue to which brief reference was made at the commencement of this Opinion, the manner in which a decision made by the Registrar under the Directive concerning legal aid may be challenged by the accused person who is dissatisfied with the Registrar's decision.

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[23] Trial Chamber Decision, p 5.
[24] *Ibid*, p 5.
[25] *Ibid*, p 6.
[26] General Ojdanić's Appeal of Decision on Motion for Additional Funds *Ex Parte*, 23 July 2003 ("Interlocutory Appeal"), par 13.
[27] *Ibid*, par 16.
[28] *Ibid*, par 19.
[29] *Ibid*, par 17.

Did the Trial Chamber have power to review the Registrar's decision?

12. The Directive expressly permits a review of certain decisions made by the Registrar:

(a) Where the Registrar denies a request of a *suspect* for the assignment of counsel

In accordance with Article 11, the Registrar must determine how far the suspect lacks the means to remunerate counsel, and thus the extent to which the suspect is entitled to legal aid. Article 13(A) provides for a review of that decision by the President.

(b) Where the Registrar denies a request of an *accused* for the assignment of counsel

Article 11 also requires the Registrar to determine the extent to which an accused is entitled to legal aid, and Article 13(B) provides for a review of the Registrar's decision by the Trial Chamber before which the accused is to appear.

(c) Where the Registrar withdraws an assignment of counsel

Article 18(A) permits the Registrar to withdraw the assignment of counsel to either a suspect or an accused where the extent to which the suspect or accused is entitled to legal aid has changed. Article 18(C) incorporates the review procedure provided by Article 13 – by the President in the case of a suspect and by the relevant Chamber in the case of an accused.

(d) Where the Registrar refuses to withdraw an assignment of counsel

Article 19(A) permits the Registrar to withdraw the assignment of counsel at the request of the accused, his counsel or his lead counsel. Article 19(F) gives to the accused the right to a review by the President of a refusal to grant such a request.

(e) Where the Registrar, in consultation with the Trial Chamber, suspends counsel

Article 19(B) permits the Registrar, in consultation with the Chamber, to suspend the assignment of counsel "for a reasonable and limited time". The same Article gives counsel the right to a review by the President of that decision by the Registrar.

(f) Analogous provisions

There are two provisions which are analogous to those already referred to where the accused may challenge the decision of the Registrar. Article 22(A) requires the Registrar to "adapt" the maximum amount of remuneration in the event that a stage of the procedure is substantially longer or shorter than estimated. The same Article provides that, in the event of disagreement on the maximum allotment, the Registrar is required to make a decision "after consulting the Chamber and, if necessary, the Advisory Panel". The Advisory Panel is constituted by Article 32, and it consists of a number of professional advocates and representatives of professional bodies of advocates with whom the President and the

Registrar may consult on matters relating to the assignment of counsel. Article 31 similarly provides that, in the event of disagreement on questions relating to calculation and payment of remuneration or to reimbursement of expenses, the Registrar shall make a decision, after consulting the President and, if necessary, the Advisory Panel. Article 22(A) is the subject of examination later in this Opinion.[30]

13. There are a number of decisions within the Tribunal where a Chamber has reviewed a decision of the Registrar upon the application of an accused who is dissatisfied with that decision:

(i) In *Prosecutor v Delalić et al*,[31] an appellant sought an order from the Appeals Chamber that a particular counsel be assigned as Co-Counsel. No such application had been made to the Registrar. The Appeals Chamber dismissed the motion upon the basis that, although the Appeals Chamber has power to control its proceedings in such a way as to ensure that justice is done and that (particularly in relation to matters of practice) the proceedings are fair and expeditious, it was not ordinarily appropriate to consider matters which are within the primary competence of the Registrar, and that in any event the relief sought from the Appeals Chamber had by that time already been granted by the Registrar.[32] This case is referred to mainly for completeness, as the statements by the Appeals Chamber concerning the powers of a Chamber to consider matters within the primary competence of the Registrar were *obiter dicta*.

(ii) In *Prosecutor v Hadžihasanović et al*,[33] the prosecution objected to the assignment by the Deputy Registrar (acting for the Registrar) of counsel to appear for an accused, the objection being that counsel had some time earlier been employed as a legal officer within the Office of the Prosecutor, notwithstanding that no conflict of interest could be demonstrated. The Trial Chamber held that the specific issues of the qualification, appointment and assignment of counsel were properly within its jurisdiction where it can be shown that such an issue affects, or is likely to affect, the right of the accused to a fair and expeditious trial or the integrity of the proceedings.[34] When reviewing the Registrar's

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[30] Paragraphs 31 *et seq*, *infra*.
[31] IT-96-21-A, Order on Esad Landžo's Motion for Expedited Consideration, 15 Sept 1999.
[32] *Ibid*, p 2.
[33] 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, 16 Mar 2002 ("*Hadžihasanović* 2002 Decision").
[34] *Ibid*, par 23.

decision, the Trial Chamber repeated the basis of its jurisdiction in those terms, and it also justified that jurisdiction upon the basis of its obligation to ensure that justice is done and seen to be done and that the accused will have a fair and expeditious trial not interrupted or halted by a foreseeable risk that a counsel has to be dismissed.[35] This situation is not expressly covered by any of the provisions of the Directive.

(iii) In *Prosecutor v Halilović*,[36] the accused challenged the decision of the Registrar assigning a particular counsel rather than the counsel he had sought. The Trial Chamber ruled that the provisions of Article 13(B) were related to the issue of the means of counsel to remunerate counsel, and not the identity of the particular counsel assigned, so that no basis existed under that Article for a review of the Registrar's decision.[37] This situation is not expressly covered by any of the other provisions of the Directive.

(iv) In *Prosecutor v Martić*,[38] the accused challenged the decision of the Registrar in which he had ruled that a particular counsel sought by the accused had a potential conflict of interest arising out of his association with a suspect in the same case. The accused argued that such a ruling should be made by the Trial Chamber and not by the Registrar. The Trial Chamber followed the *Hadžihasanović* 2002 Decision in holding that it had jurisdiction to review that ruling of the Registrar.[39] The *Martić* Decision is of a formal nature without detailed reasoning, but the nature of the relief granted suggests that the Trial Chamber reviewed the Registrar's decision as an administrative decision (as subsequently required by the decision of the Appeals Chamber in *Prosecutor v Kvočka et al*),[40] rather than that it determined an appeal against a finding of fact. It would seem that, as in the *Halilović* Decision, the situation was outside that covered by Article 13(B), and therefore is not expressly covered by any of the provisions of the Directive.

(v) In *Prosecutor v Knežević*,[41] the complaint was again that the Registrar had no power to rule upon whether counsel had a conflict of interest. The Trial Chamber followed the *Hadžihasanović* 2002 Decision and the *Martić* Decision to hold that it had jurisdiction to

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[35] *Ibid*, par 55.
[36] IT-01-48-PT, Decision on Sefer Halilović's Application to Review the Registrar's Decision of 19 June 2002 ("*Halilović* Decision").
[37] *Ibid*, p 3.
[38] IT-95-11-PT, Decision on Appeal Against Decision of Registry, 2 Aug 2002 ("*Martić* Decision").
[39] *Ibid*, p 6.
[40] IT-98-30/1-A, Decision on Review of Registrar's Decision to Withdraw Legal Aid from Zoran Žigić, 7 Feb 2003 ("*Žigić* Decision"), pars 12-14.
[41] IT-95-4&8/1-PT, Decision on Accused's Request for Review of Registrar's Decision as to Assignment of Counsel, 6 Sept 2002.

review the Registrar's decision; it also considered that Rule 54, which gives it power to issue such orders as may be necessary for the conduct of the trial, gave it power to review the decisions of the Registrar to assign counsel.[42] It held that the evidence justified the Registrar's decision.[43] Once again, this situation was not expressly covered by any of the provisions of the Directive.

(vi) In the *Žigić* Decision,[44] the appellant challenged the decision of the Registrar withdrawing legal aid upon the basis that he now had sufficient means to remunerate counsel for the remainder of his appeal. This falls directly within Article 18(A) of the Directive, and thus the Appeals Chamber was expressly given the power to review the Registrar's decision pursuant to Article 13(B), as incorporated by Article 18(C), as the Chamber before which the appellant was to appear.

(vii) In *Prosecutor v Hadžihasanović & Kubura*,[45] the accused challenged the decision of the Registrar, after consulting the Trial Chamber, to assess the case as a Level 3 one, upon the basis that such a ranking was "simply not sufficient to properly prepare this case for trial". The Trial Chamber considered that the implementation of the legal aid payment system is the primary responsibility of the Registrar, and that the Trial Chamber would only be called upon to act if the facts of the case would show that no reasonable Registrar could have acted in the way he had acted in this case.[46] This clearly indicated that the Trial Chamber was reviewing the Registrar's decision as an administrative decision. The motion was ultimately dismissed because, in reality, it constituted a challenge to the entire legal aid system rather than to the decision of the Registrar in that case.[47] The challenge on its face fell directly within the terms of Article 22(A), which provides that, in the event of disagreement on the maximum allotment, the Registrar is required to make a decision after consulting the Chamber and, if necessary, the Advisory Panel. The review made by the Trial Chamber therefore overrode the procedure laid down in the Directive.

(viii) In the Trial Chamber Decision in the present case, the Trial Chamber stated that, although the Registrar had the primary responsibility in the determination of matters relating

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[42] *Ibid*, p 4.
[43] *Ibid*, p 5.
[44] *Prosecutor v Kvočka et al*, footnote 40, *supra*.
[45] IT-01-47-PT, Decision on Urgent Motion for *Ex Parte* Oral Hearing on Allocation of Resources to the Defence and Consequences Thereof for the Rights of the Accused to a Fair Trial, 17 June 2003 ("*Hadžihasanović* 2003 Decision").
[46] *Ibid*, p 2.
[47] *Ibid*, pp 2-3.

to the remuneration of counsel under the legal aid system, as questions relating to the legal representation of an accused may affect the conduct of the trial, the Trial Chamber's statutory obligation to ensure a fair and expeditious conduct of the proceedings with full respect for the rights of the accused, and in exercise of its powers under Rule 54, empowered it to review the Registrar's decision, "albeit only upon exceptional circumstances being shown".[48] It cited as authority the *Knežević* Decision.

(ix) In *Prosecutor v Strugar*,[49] the accused challenged the decision of the Registrar to assess the case as a Level 2 case. The Trial Chamber stated that, although the primary responsibility in relation to the remuneration of counsel under the legal aid system resides with the Registrar, the Trial Chamber was empowered to review the Registrar's decision upon exceptional circumstances being demonstrated.[50] This ruling was based upon the *Hadžihasanović* 2002 Decision and upon the Trial Chamber Decision in the present case. The challenge fell directly within the terms of Article 22(A), as in the *Hadžihasanović* 2003 Decision, and the review made by the Trial Chamber therefore overrode the procedure laid down in the Directive.

14. The Appeals Chamber has recently ruled that, where the Directive expressly provides for a review of the Registrar's decision, the Trial Chamber cannot interfere in the Registrar's decision, and its only option is to stay the trial until that procedure has been completed.[51] It follows that both the *Hadžihasanović* 2003 Decision and the *Strugar* Decision have been overruled upon that issue. In the present case, the Majority Decision has ruled that, where the Directive does not expressly provide for a review of the Registrar's decision, the Trial Chamber, pursuant to its statutory obligation to ensure the fairness of the trial, is competent to review the Registrar's decision in the light of its effect upon the fairness of the trial.[52] The exercise of such power should, however, be closely related to the fairness of the trial, and it should not be used as a substitute for a general power of review which has not been expressly provided in the Directive. If there is no effect of the Registrar's decision upon the fairness of the trial, the accused should be left to pursue the remedy given in Article 31 of the Directive

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[48] Trial Chamber Decision, pp 4-5. The passage is quoted in par 9, *supra*.

[49] IT-01-42-PT, Decision on Defence Request for Review of Registrar's Decision and Motion for Suspension if all Time Limits, 19 Aug 2003 ("*Strugar* Decision").

[50] *Ibid*, p 2.

[51] *Prosecutor v Blagojević*, IT-02-60-AR73.4, *Ex Parte* and Confidential Decision on Appeal by Vidoje Blagojević to Replace his Defence Team, 7 Nov 2003 ("*Blagojević* Decision"), par 7.

[52] *Prosecutor v Milutinović et al*, IT-99-37-AR73.2, Decision on Interlocutory Appeal on Motion for Additional Funds, 13 November 2003 ("Majority Decision"), par 19.

which requires the Registrar, in the event of a disagreement relating to calculation of fees, payment of remuneration, or reimbursement of expenses of Defence Counsel, to make a decision, after consulting the President and, if necessary, the Advisory Panel.[53] I agree with those rulings. In particular, this formulation now made in the Majority Decision overrules the requirement imposed by some Trial Chambers in the decisions already discussed that exceptional circumstances must be established before any review will be undertaken, and it substitutes a more relevant limitation which is a sufficient limitation upon the enthusiasm of some parties to have the Trial Chamber interfere with the Registrar's decisions generally.

15. The first issue to be decided is whether the procedure laid down in Article 22(A) for resolving a disagreement between the Registrar and defence counsel in relation to the maximum allotment – whereby the Registrar is obliged to consult with the Trial Chamber and, if necessary, the Advisory Panel before proceeding – is sufficiently analogous to a review as to require a similar restraint upon the power of the Trial Chamber to act beyond staying the proceedings until that procedure has been carried out. In my opinion, there should be a similar restraint. It is obvious that, in the course of such a consultation pursuant to Article 22(A), the Trial Chamber would need to satisfy itself that the Registrar's decision was administratively sound, and that it would effectively be reviewing that decision but in the course of a procedure which complies specifically with the terms of the Directive.

16. The second issue to be decided is whether that procedure was applicable in the present case. The application for additional funds falls directly within the terms of Article 22(A), in that the appellant is seeking to have the Registrar "adapt" the allotment made to the defence because the pre-trial stage had been substantially longer than estimated. In my opinion, therefore, the Trial Chamber's only option in the present case was to stay the trial until the procedure which the Article lays down had been completed. The Trial Chamber (which did not have the benefit of the recent ruling of the Appeals Chamber) made an error of law by proceeding to review the Registrar's decision. What then is the consequence of that error of law? As I have already pointed out, had the procedure laid down in Article 22(A) been followed, there would effectively have been a review in the course of the consultation which should have taken place, so it may therefore safely be assumed that the result of the consultation would have been an acceptance by the Trial Chamber of the correctness of the Registrar's decision. That, however, is not an end to the issue.

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[53] *Ibid*, par 20.

17. Article 22(A) requires the Registrar, in the event of disagreement on the maximum allotment, to make a decision "after consulting the Chamber and, if necessary, the Advisory Panel". One of the many problems with the wording of Article 22(A) is that it is unclear as to just when the disagreement is said to arise. The apparent practice within the Registry is that, once a request for additional funds is made by an accused, the Registrar's response refusing the request is given without any discussion between them. The disagreement can thus arise only either at the time of the refusal or following its receipt by the accused. It could hardly be assumed that the mere request for additional funds upon the basis that more work is involved than was originally estimated constitutes a disagreement between the accused and the Registrar as to the original allotment made. That would make a farce of the procedure which the Article lays down. If this is the proper interpretation of the Article, as I believe it is, then the Registrar is required to consider, after the consultation has taken place, whether to vary his initial response to the request.

18. But what is meant by the requirement that the Registrar consult not only with the Trial Chamber but also "if necessary" with the Advisory Panel? There is a similar provision on Rule 15 of the Rules of Procedure and Evidence ("Disqualification of Judges"). Where a party in a particular case applies to the Presiding Judge of a Chamber for the disqualification and withdrawal of a judge of that Chamber from that case, Rule 15(B) requires the Presiding Judge to confer with the judge in question before making his decision, and "if necessary" the Bureau shall determine the matter. This provision has been interpreted by the Appeals Chamber as meaning that, if the Presiding Judge and the judge in question agree that there is no basis for his or her disqualification, it is not "necessary" for the Presiding Judge to refer the application to the Bureau for its determination. Once the applicant challenges the decision of the Presiding Judge, however, it becomes "necessary" for the application to be referred to the Bureau.[54] By analogy, therefore, if there is a disagreement between the Registrar and the Trial Chamber as a result of that consultation, or if the accused still challenges the decision of the Registrar after he has consulted with the Trial Chamber, it becomes "necessary" for the Registrar to consult with the Advisory Panel also.

19. Such consultation with the Advisory Panel would have become necessary in the present case if the procedure had been followed, because the appellant would no doubt have

[54] *Prosecutor v Galić*, IT-98-29-AR54, Decision on Appeal from Refusal of Application for Disqualification and Withdrawal of Judge, 13 Mar 2003, par 8.

continued to disagree with the Registrar's decision after his consultation with the Trial Chamber. There has thus been a breach of Article 22(A) which is detrimental to the appellant.[55] In the rather special circumstances of this case, I nevertheless propose to consider the appeal upon its merits notwithstanding that the procedure laid down by Article 22(A) was not complied with.[56]

The grounds of appeal

20. There are three grounds of appeal taken by the appellant.[57] Each asserts that the Trial Chamber has misdirected itself as a matter of law –

(1) by failing to consider the impact of the Registrar's decision on the right of an accused to have adequate time and facilities for the preparation of his defence, as provided by Article 21.4(b) of the Tribunal's Statute;

(2) by failing to consider the impact of the Registrar's decision on the right of the accused to "equality of arms" with the prosecution, as provided in Article 20.1 of the Tribunal's Statute; and

(3) by deferring to the Registrar despite his failure –

  (i) to take into account the duration of the pre-trial phase,

  (ii) to adapt the allotment when the pre-trial phase was substantially longer than estimated, and

  (iii) to consult the Trial Chamber and/or Advisory Panel when the defence disagreed with the allotment, all required by Article 22(A) of the Directive on the Assignment of Defence Counsel.

The first ground of appeal

21. The appellant's principal argument is based upon the provisions of Article 21.4(b) of the Tribunal's Statute,[58] which relevantly states:

> In 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 [...].

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[55] See par 16, *supra*.
[56] cf *Blagojević* Decision, par 10.
[57] Interlocutory Appeal, p 2.
[58] *Ibid*, p 2 and par 42.

The appellant says that his defence team is an experienced one, and has not had to devote any of their resources to learning the law and procedure of the Tribunal.[59] The Registry, he says, has never disputed that the hours worked by the defence team were reasonable and necessary for his defence, and it has approved the detailed invoices submitted each month since May 2002 by each defence team member.[60] However, as each of the three counsel assigned is a sole practitioner, the appellant says, they are unable to work for the appellant on a *pro bono* basis in order to complete the work needed to ensure that he has adequate representation and a fair trial.[61] Absent the allocation of sufficient additional resources, he says, counsel have advised him that disclosure would remain unreviewed, necessary materials from third parties not obtained and investigation not undertaken.[62]

22. The Registrar has responded that the defence team has indeed provided the Registry with detailed information on the tasks to be accomplished by the team during the pre-trial stage, but the preparation of the defence is not without limits, as defence counsel is responsible for assessing what is reasonable and necessary in the interest of the accused and not exhausting every possible avenue, so that a degree of "prioritisation" is required.[63] He has adopted English authority relating to the costs allowed in legally aided civil litigation as appropriately defining what is reasonable in the interests of the accused in this Tribunal.[64] Those authorities state that the amount provided should be sufficient to pay for work which is "adequate" for representation, meaning neither "barely adequate" nor "super abundant". The grant of legal aid, those authorities state, does not provide a blank cheque to draw on the legal aid fund as if it were a client with a bottomless purse ready to pay for everything the lawyer could think of. Whether those authorities are appropriate for application in criminal proceedings before this Tribunal has not been argued, and I leave that issue to one side as I am content to deal with the appeal upon the basis that the provision of legal aid funds to provide an "adequate" representation is sufficient. Finally, the Registrar points out that the defence accepted their assignment in accordance with the terms of the present payment

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[59] *Ibid*, par 23.
[60] *Ibid*, par 41.
[61] *Ibid*, par 39.
[62] *Ibid*, par 39.
[63] Response of the Registry to General Ojdanić's Appeal of Decision on Motion for Additional Funds, 22 Aug 2003 ("Response to Appeal"), par 6.
[64] *Francis v Francis & Dickerson* [1955] 3 All ER 836, per Sachs J; *Storer v Wright & Anor* [1981] 1 All ER 1015, per Lord Denning MR.

scheme, and that they have an ethical obligation to complete any preparation involved in the pre-trial stage.[65]

23. In reply, the appellant says that his counsel never agreed to accept the assignment to defend him for a fixed fee, and that they would never have agreed to undertake his representation if it were known that the Registrar's "patently inadequate" estimate of eight months pre-trial preparation time was not capable of being "adapted" when that phase was shown to be substantially longer in duration than the Registrar's estimate.[66]

24. The appellant's reliance upon Article 21.4(b) is misplaced. There is no suggestion in the present case that the appellant is being forced on for trial without having had adequate time and facilities for the preparation of his defence. The reference in Article 21.4(b) to facilities is not a reference to legal aid, as that issue is dealt with independently in Article 21.4.(d),[67] which requires legal assistance to be assigned to an accused without payment by him where the interests of justice so require and if he does not have sufficient means to pay for it. The reference to facilities is to the procedural opportunities and assistance which the Tribunal must provide to an accused in order to meet the case against him.[68]

25. I would accordingly reject the appellant's first ground of appeal upon this basis.

The second ground of appeal

26. The appellant next argues that the Trial Chamber also misdirected itself as a matter of law when it failed to consider the impact of the Registrar's decision on the right of the

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[65] Response to Appeal, par 7. Article 9(C) of the Code of Professional Conduct for Defence Counsel Appearing Before the International Tribunal, IT/125/Rev 1, 12 July 2002, provides that, subject to leave from the Trial Chamber, assigned counsel may not withdraw from acting for the accused until a replacement counsel is either engaged by the accused or assigned by the Registrar, or the accused notifies the Registrar in writing of his intention to conduct his own defence. This obligation prevails over any other code of practice and ethics governing counsel in the event of an inconsistency between them (Article 4). A similar provision appears in Article 20(A) of the Directive.

[66] Reply Brief: General Ojdanić's Appeal of Decision on Motion for Additional Funds, 29 Aug 2003 ("Reply Brief"), par 7.

[67] "In 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:
[...]
(d) [...] to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it [...].

[68] *Prosecutor v Tadić*, IT-94-1-A, Judgment, 15 July 1999, par 52.

accused to "equality of arms" with the prosecution, as provided in Article 20.1,[69] which states:

> The Trial Chamber 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.

The right to "equality of arms" is to be gathered from the Tribunal's Statute in more places than merely Article 20.1 but, as the principle is firmly accepted in the jurisprudence of the Tribunal, it is unnecessary to discuss the source of the right any further. What is in issue in the present appeal is the way in which that principle should be applied to the Tribunal's legal aid system.

27. The appellant realistically concedes that "equality of arms" does not entitle him to the same amount of money to conduct his defence as the prosecution requires to prove the case against him,[70] but he asserts that the defence must be elevated as much as possible to the level of the prosecution in its ability to prepare and present its case.[71] In the present case, the defence has not been given sufficient resources even to read the material disclosed by the prosecution.[72]

28. The Registrar responds that he has complied with his obligation by assessing the case at Level 3, the highest level available. By doing so, he claims, he has provided the defence with all practical resources he is capable of granting under the current payment system in force at the Tribunal.[73] The appellant in his Reply Brief does not add anything beyond what he has already said upon this issue.

29. The Rwanda Appeals Chamber has endorsed the statement that the rights of the accused and equality between the parties should not be confused with the equality of means and resources,[74] and, as I understand it, the Majority Decision in the present case is of the same view.[75] I do not see how the Trial Chamber Decision in the present case has departed

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[69] Interlocutory Appeal, p 2 and par 58.
[70] *Ibid*, par 65.
[71] *Ibid*, par 66.
[72] *Ibid*, pars 66-67.
[73] Response to Appeal, para 9-10.
[74] *Prosecutor v Kayishema*, ICTR095-1, Judgment, 1 June 2001, pars 63, 70. Reference is made to *Hentrich v France,* Eur Court HR, Judgment of 22 September 1994, par 56.
[75] Majority Decision, par 23.

from that principle. Because it accepted as valid the Registrar's contention that the defence should demonstrate exceptional circumstances or circumstances beyond its control if requests for additional resources are to be granted, and because it agreed with the Registrar that no such circumstances had been shown in this case, the Trial Chamber did not find it necessary to enter into any consideration at all of the application of the principle of equality to the resources provided to the appellant in this case. Whether that was a correct approach is an issue which arises under the third ground of appeal. Accordingly, there was no error of law made by the Trial Chamber in relation to equality of arms. It will nevertheless be necessary to return later in this Opinion to the claim made by the Registrar that, where he has assessed a case at Level 3, he has provided the defence with all practical resources he is capable of granting.

30. I would therefore reject the second ground of appeal as well.

The third ground of appeal

31. Finally, the appellant argues that the Trial Chamber misdirected itself by deferring to the Registrar notwithstanding that the Registrar had made a number of errors in relation to the procedure laid down by Article 22(A). There have already been a number of references made to Article 22(A) in this Opinion, but it would be more convenient at this stage to quote more fully the relevant passage in the Article to which the appellant refers. Under the heading "Responsibility for remuneration and expenses", the Article provides:

> The Registrar establishes maximum allotments for each defence at the beginning of every stage of the procedure taking into account his estimate of the duration of the phase. In the event that a stage of the procedure is substantially longer or shorter than estimated, the Registrar may adapt the allotment. In the event of disagreement on the maximum allotment, the Registrar shall make a decision, after consulting the Chamber and, if necessary, the Advisory Panel.

The errors identified by the appellant are that the Registrar failed (i) to take into account the duration of the pre-trial phase, (ii) to adapt the allotment when the pre-trial phase was substantially longer than estimated, and (iii) to consult with the Trial Chamber and/or Advisory Panel when the defence disagreed with the allotment in accordance with this Article.

32. I have already dealt with the failure of the Registrar to comply with his obligation to consult with the Trial Chamber and, if necessary, the Advisory Panel,[76] and I have concluded that the appellant suffered detriment as a result of the breach of Article 22(A).[77] It is, however, important to deal with the other issues as well.

33. The other two issues require consideration of the interpretation placed by the Registrar upon the passage quoted from Article 22(A). The Registrar has explained that – notwithstanding the fact that his estimate of the necessary time for effective pre-trial preparation for a Level 3 case is stated to be eight months, and notwithstanding the emphasis placed by the Article upon the duration of a particular stage and whether the length of that stage is substantially longer or shorter than estimated – the administration of the legal aid system in fact proceeds upon an estimation of the amount of work which is required, not upon the time which it may take a particular team to do that work.[78] That approach is, in my opinion, a realistic and appropriate one. The purpose of the lump sum payment system was to avoid paying for the time actually spent by a particular defence team in doing that work. It is therefore proper to assess the amount of work which is necessary for a Level 3 case as the Registrar has done rather than the time either taken or available, although he would be well advised to seek an amendment to the wording of Article 22(A) so that it reflects more faithfully the interpretation which he has placed upon it. In the sense which the Registrar has given to the Article, he was undoubtedly correct when he stated that the actual duration of the pre-trial stage is not a relevant factor to be taken into account in order to assess the resources which are granted to a case. Upon this issue, I respectfully disagree with the Majority Decision that the Registrar misdirected himself when he made that statement.[79]

34. However, if the Registrar's approach to interpretation is to be accepted (as I believe it should be), when Article 22(A) provides that the Registrar may "adapt" the allotment when the pre-trial stage is substantially longer or shorter than estimated, that provision must, for the sake of consistency, be interpreted as permitting the allotment to be adapted when the amount of work necessary for effective pre-trial preparation is substantially greater or less than estimated. The Registrar's response is that the amount of work necessary for that purpose

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[76] Paragraphs 17-18, *supra*.
[77] Paragraph 19, *supra*.
[78] Paragraph 7, *supra*.
[79] Majority Decision, par 25.

was taken into account when assessing the case at Level 3.[80] What the Registrar intended by that response is made clear by his claim, already referred to, that he has complied with his obligation by assessing the case at Level 3, the highest level available, and that he has thereby provided the defence with all practical resources he is capable of granting under the current payment system in force at the Tribunal.[81] In defending his refusal to provide the appellant with additional funds, the Registrar added:[82]

> The Registry feels that if additional hours were ordered by the Trial Chamber, it would establish a precedent for the other defence teams who would, in the future, systematically request and expect additional allotments. The presumptive limits or maximum allotment set by the Registry may be rendered meaningless if the resources requested by the defence in its submission are granted.

In my opinion, the Registrar has by all these statements seriously misdirected himself in the present case.

35. The indictment made it clear that this was a so-called "leadership" case, which automatically promoted it to a Level 3 case. It is obvious from everything which the Registrar has said that he believes that *no* Level 3 case can be granted funds which exceed the maximum allotment set out by the Registry. No estimation at all is therefore made of the amount of work which would actually be required in preparation for the particular accused in any Level 3 case. As the Registrar has said, the accused is given everything which is capable of being given to him by the assessment of the case as a Level 3 one. The Registrar contends that the defence must assess for itself what is reasonable and necessary in the interests of the accused, but he concedes that the preparation must nevertheless be "adequate" for that purpose.[83] His view necessarily appears to be that, if the funds provided turn out to be *inadequate* for that purpose, it is the fault of counsel for not giving to the work the degree of "prioritisation" required.[84]

36. What does "prioritisation" mean in this context? Does it mean that, where it is impossible to do with the funds granted what is needed for an "adequate" preparation in the particular Level 3 case, counsel must reduce the amount of work done below what is needed? It is difficult to interpret the Registrar's statements in any other way. How then does the

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[80] Paragraph 6, *supra*.
[81] Paragraph 28, *supra*.
[82] Response to Motion, par 12.
[83] Paragraph 22, *supra*.
[84] Paragraph 22, *supra*.

Tribunal's legal aid system provide the legal assistance which the interests of justice require, as Article 21.4(d) provides?[85] The Registrar makes the bold claim, in his Report to the UN, that:[86]

> The Tribunal's legal aid system bears the cost of a defence for indigent accused and ensures that the defence is given quality representation to secure equality of arms with the Tribunal's Prosecutors.

If the Tribunal's legal aid system is being administered in accordance with views which the Registrar has expressed in the present case, that is a very hollow claim indeed. A system of legal aid which requires defence counsel to select only that part of the work which is necessary as can reasonably be done with the funds granted does *not* ensure such representation. Nor is such representation ensured by a system of legal aid which says that, no matter how much work is reasonably necessary (or "adequate") in a Level 3 case, counsel who accept an assignment to such a case must personally bear the costs beyond the maximum allotment allowed, because it is their fault for not giving the work the degree of "prioritisation" required. Prioritisation could be the answer only if it means that counsel should give priority to those matters which are necessary to provide an "adequate" representation, rather than those which may be appropriate but unnecessary for that purpose. But such an interpretation provides no answer at all where, despite "prioritisation" in that sense, the work which is necessary for that purpose exceeds the maximum allotment set by the Registry.

37. The answer, in my opinion, is that the Registrar has seriously misunderstood what the existing legal aid system is capable of and should be providing. The terms of Article 22(A) are clear. Interpreting the Article consistently with the Registrar's (correct) view that what must be estimated is the amount of work which is necessary for the preparation of the particular Level 3 case (rather than the length of time either taken or available), the Article says that the Registrar must first establish the maximum allotment for the pre-trial stage of that case by taking into account his estimate of the amount of work necessary for that purpose. In the event that the amount of work turns out to be greater than he has estimated, the Registrar may "adapt" the allotment – that is, adapt the allotment to take into account the additional work which is necessary beyond that which was estimated. The context necessarily requires the word "allotment" there to be a reference to the maximum allotment

[85] The terms of this provision are quoted in footnote 67, *supra*.
[86] Executive Summary, p 2.

established. The maximum allotment made by the Registrar therefore *can* be exceeded within the terms of Article 22(A).

38. Where, however, there has been no estimation at all made in the particular level 3 case, as the Registrar's comments have made clear is the situation in Level 3 cases generally,[87] and where the maximum allotted has been demonstrated to be insufficient for the "adequate" preparation of the accused case in answer to what has been alleged against him, then the Registrar must in justice do what he failed to do before, and that is to make the estimation which Article 22(A) requires him to make in each individual case. In the present matter, the case against the appellant is very largely based upon the Kosovo indictment against Milošević, the two having been co-accused in the same indictment. It must be apparent to the Registrar when he undertakes the estimation which is required that the amount of work which is required in preparation to meet the case against the appellant is very more substantial than many other Level 3 cases, and that refuge in "presumptive limits or maximum allotment set by the Registry" is not available in this case.[88]

39. The Registrar is not obliged to accept the assertion of the defence in any particular case that the work which has been done by counsel was no more than that which is necessary to provide an "adequate" representation in that case. In the present case, the defence does appear to have proceeded according to a programme which, although appropriate where there is a bottomless purse to pay for representation, should more appropriately have entered the investigation stage far earlier than was contemplated here. For example, it may well be more comfortable for counsel to read everything which is disclosed by the prosecution before undertaking their investigation into the prosecution and defence cases,[89] but in this Tribunal the prosecution continues to seize more and more documents and to issue more and more indictments, and in most cases there will inevitably be a continuous discovery process as a result of what is learnt in other cases. This is inevitable because of the failure of various States to provide the cooperation which the Tribunal's Statute demands of them.[90] It is not an ideal system, but defence counsel must face up to that situation, and do everything which they can by way of investigation as they go along, even if it may require revisiting some witnesses.

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[87] Paragraphs 34-35, *supra*.
[88] The words quoted are taken from the Response to Motion, par 12, quoted in full in par 34, *supra*.
[89] Paragraph 5, *supra*.
[90] Article 29.

40. Moreover, although it may be foreseen that there will be problems caused by a continuous discovery process, the *extent* of those problems may well not be foreseen, and this is the very type of consideration which the Registrar must take into account in determining whether more work has become necessary than that which he had estimated. It is not, as the Registrar has claimed,[91] what is "foreseeable" which is included in the maximum allotment established, but what is "foreseen" as necessary in order to prepare a case for "adequate" representation.[92] The difference between the two words is substantial, and the use by the Registrar of the word placing the greater burden on the defence is but another indication of how the legal aid system is misunderstood by those who administer it.

41. The next issue which must be addressed is the claim by the Registrar that the "flexibility" introduced into the legal aid system is demonstrated by the possibility of additional resources being granted "in case of exceptional circumstances that arise over the course of the pre-trial and which impact on the workload of the defence" or where "events beyond the influence of the defence justify the allocation of additional resources".[93] There is absolutely no justification for the imposition of such limitations to be found in the Directive, and they are inconsistent with the Directive. The Directive says (as the Registrar correctly interprets it) that the maximum allotment established by the Registrar "may" be adapted in the event that the work necessary for the "adequate" preparation for trial turn out to be greater than was estimated. However, the discretion imported by the word "may" must be exercised genuinely in relation to the facts of the particular case.[94] It is *not* appropriate to condition the exercise of any such discretion by a general restriction whose obvious purpose is to make the

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[91] Paragraph 6, *supra*.

[92] Paragraph 11 of an Appendix to the Registrar's Report to the UN, the *Defence Counsel Payment Scheme for the Trial Stage*, 13 May 2003, states: "At the completion of the particular stage, if any truly *unforeseen* and exceptional events have arisen during the course of the proceedings that have impacted upon the preparation of the defence case, the defence will have the opportunity to submit a request, accompanied by a detailed work report, that the lump sum allotment be adjusted". (The emphasis has been added for the purposes of this Opinion.) This Appendix issued by the Registrar commences with the statement: "This written policy [...] shall be the authoritative version of the modified payment scheme for trial (the '2003 system'), and in case of any discrepancy between this policy and any previous information disseminated, this policy shall prevail." The Appendix deals expressly with the trial stage, but the new lump sum payment system purports to approach all stages in the same way. In par 40 of this Opinion, I shall return to phrase "and exceptional events" used in the Appendix.

[93] Paragraph 8, *supra*. See also the passage quoted from the *Defence Counsel Payment Scheme for the Trial Stage* in the previous footnote.

[94] If Judge Shahabuddeen is correct when he says that the word "may" in Article 22(A) does not have its usual meaning that the Registrar has a discretion whether or not to adapt the maximum allotment (Separate Opinion of Judge Shahabuddeen, 13 November 2003, par 6), then it necessarily follows, in my respectful view, that there was not even a pretence to be found in Article 22(A) to justify the imposition by the Registrar of the limitations he has imposed, and the appeal would have to be upheld upon that basis alone. Neither the Majority Decision nor the Separate Opinion has discussed this issue.

administration of the legal aid system easier for the junior legal officers with no apparent experience in trials or as counsel who have for some time now been charged by the Registrar with the administration of that system. That is no excuse at all for imposing impossible barriers to the flexibility promised. The limitations are invalid. What is needed is the deployment of legal officers to deal with the legal aid system who do have experience which enables them to advise the Registrar how he should determine applications for additional funds, and who do not need to be protected by impossible barriers such as the Registrar has now imposed.

42. Finally, the appellant complains that his pre-trial allotment is less than half of that granted to the defendant in the *Krajišnik* Case,[95] another "leadership" case.[96] This was an issue which he also raised before the Trial Chamber, but it is clear that the comparison is erroneous, as *Krajišnik* was funded at the pre-trial stage according to the previous payment system which provided monthly allotments of maximum working hours regardless of the complexity of the case. Until the trial commenced, he was provided with an "entity leadership allotment" in addition to the regular monthly allotment.[97] That payment system has been replaced by the present payment scheme. This complaint fails.

Disposition

43. I would uphold the third ground of appeal, allow the appeal and direct the Registrar to re-consider the grant of additional funds to the appellant in accordance with this Opinion.

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

Dated this 13th day of November 2003,
At The Hague,
The Netherlands.

David Hunt

Judge David Hunt

[Seal of the Tribunal]

[95] IT-00-39-PT.
[96] Interlocutory Appeal, par 38.
[97] Response to Motion, par 15.