



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-95-5/18-
AR73.2
Date: 7 May 2009
Original: English

IN THE APPEALS CHAMBER

Before: Judge Theodor Meron, Presiding
Judge Mehmet Güney
Judge Fausto Pocar
Judge Liu Daqun
Judge Andrézia Vaz

Acting Registrar: Mr. John Hocking

Decision of: 7 May 2009

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON INTERLOCUTORY APPEAL OF THE TRIAL
CHAMBER'S DECISION ON ADEQUATE FACILITIES**

The Office of the Prosecutor:

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused:

Mr. Radovan Karadžić

1. The Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991 (“Appeals Chamber” and “Tribunal”, respectively) is seised of the “Appeal of the Trial Chamber’s Decision on Adequate Facilities” (“Appeal”), filed by Radovan Karadžić (“Appellant”) on 5 March 2009 appealing the “Decision on Accused Motion for Adequate Facilities and Equality of Arms: Legal Associates” rendered by the Trial Chamber in this case on 28 January 2009 (“Impugned Decision”).¹

A. Procedural Background

2. The Appeals Chamber notes that the procedural history has already been clearly set out by the Trial Chamber:

1. On 4 August 2008, following his transfer to the seat of the Tribunal on 30 July 2008, the Accused elected to represent himself in proceedings before the Tribunal. In the Registry Submission, it is stated that, between this time and 29 September 2008, Registry representatives met with the Accused on several occasions to discuss the options available in respect of his representation, and the Accused was provided with the Registry policies on defence funding.

2. On 29 September 2008, the Accused declared himself to the Registry to be indigent, and applied for the appointment of a team of experienced legal staff and for legal aid funding to remunerate the members of that team. Citing the complexity and significance of his case, the Accused requested the appointment of at least three legal advisors to be remunerated at the level of *amicus curiae* or counsel appointed to represent other accused, as well as five support personnel. On 16 October 2008, the Head of the Office for Legal Aid and Detention (“OLAD”) wrote to the Accused, informing him of the assignment of Mr. Peter Robinson as legal associate and Mr. Milivoje Ivanišević as investigator in his case, and setting out the terms and conditions for remuneration of these and any other defence team members who may be assigned in the future (“Remuneration Decision”).

3. This letter explained that, pursuant to Article 21(4)(b) and (d) of the Statute of the Tribunal (“Statute”) and a decision of the Appeals Chamber in *Prosecutor v. Krajišnik* [Case No. IT-0039-A, Decision on Krajišnik Request and on Prosecution Motion, 11 September 2007] (“*Krajišnik Appeal Decision*”) a self-represented accused is “not entitled to receive legal aid funds” but that, in order to give effect to Article 21(4)(b), the Registry “considers it appropriate to provide some funding, outside the Tribunal’s legal aid system” for the remuneration of the associates of a self-represented accused. The Accused was further informed that, pursuant to the “Remuneration Scheme for Persons Assisting Indigent Self-Represented Accused”, a Registry policy promulgated on 28 September 2007 (“Remuneration Scheme”), “legal associates” designated to assist self-represented accused are remunerated at the same hourly rate as those assisting assigned counsel. Finally, the letter also stated that, given the complexity of the case, the Registrar was willing, on an exceptional basis, to consider increasing the number of assistants remunerated by the Tribunal and/or the maximum allotment of hours upon submission of a reasoned request.

4. By letter dated 21 October 2008, the Accused requested the Registrar to reconsider the Remuneration Decision. The Registrar denied this request in a letter dated 14 November 2008, asserting that the Accused’s needs could be met by the provision of additional support staff or increasing the maximum allotment of hours, and noting that, where warranted by the interests of justice, a Trial Chamber may appoint standby counselor *amicus curiae* in the case of a self-represented accused to make submissions to the Trial Chamber on matters in favour of the defence.

¹ *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Decision on Accused Motion for Adequate Facilities and Equality of Arms: Legal Associates, 28 January 2009.

5. On 19 November 2008, the Registrar assigned Mr. Goran Petronijević as a second legal “advisor” to the Accused.²

3. On 25 November 2008, the Appellant filed a motion before the Trial Chamber seeking an order directing the Registrar to provide him with adequate facilities for his defence and equality of arms with the Prosecution by (1) authorising him to have the services of legal associates who have sufficient experience and qualifications to provide high-level assistance to him, and (2) remunerating those legal associates accordingly.³ On 28 January 2009, the Trial Chamber dismissed the Appellant’s Motion, finding that it was “unable to identify in the material presented to it any failure of the type listed by the Appeals Chamber in the *Kvočka et al.* Appeal Decision meriting the overturning of the Remuneration Decision.”⁴

4. On 27 February 2009, the Trial Chamber granted the Appellant’s application for certification.⁵ The Appellant filed his Appeal on 5 March 2009 and the Prosecution responded on 13 March 2009.⁶ The Registrar filed submissions pursuant to Rule 33(B) of the Rules of Procedure and Evidence (“Rules”) on 30 March 2009.⁷ The Appellant filed a consolidated reply on 14 April 2009.⁸

B. Submissions

5. The Appellant submits that a decision of a Trial Chamber relating to the funding provided to a self-represented accused is a discretionary one and thus in reviewing the Trial Chamber’s decision, the Appeals Chamber must determine whether there was a discernible error warranting its intervention in the Trial Chamber’s finding under the *Kvočka et al.* standard that the Remuneration Decision was not unreasonable.⁹ The Appellant requests that the Appeals Chamber quash the Impugned Decision and order the Registrar to adequately remunerate his legal advisors.¹⁰ In support of his request, the Appellant submits that (1) the Trial Chamber erred by misinterpreting the reasoning of the Appeals Chamber in the *Krajišnik* Appeal Decision to erroneously find that it does

² Impugned Decision, paras 1-5 (footnotes omitted).

³ *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Motion for Adequate Facilities and Equality of Arms: Legal Associates, 25 November 2008 (“Motion”), para. 1.

⁴ Impugned Decision, para. 37, citing *Prosecutor v. Miroslav Kvočka, Mlado Radić, Zoran Zigić and Dragoljub Prcać*, Case No. IT-98-30-1/A, Decision on Review of Registrar’s Decision, 7 February 2003 (“*Kvočka et al.* Appeal Decision”).

⁵ *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Decision on Accused’s Application for Certification to Appeal Decision on Adequate Facilities, 13 February 2009. See also *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Application for Certification to Appeal Decision on Adequate Facilities, 6 February 2009.

⁶ Prosecution’s Response to Karadžić’s Appeal of the Trial Chamber’s Decision on Adequate Facilities, 13 March 2009 (“Prosecution Response”).

⁷ Registrar’s Submission Pursuant to Rule 33(B) Regarding Radovan Karadžić’s Appeal of the Trial Chamber’s Decision on Adequate Facilities, 30 March 2009 (“Registrar’s Submission”).

⁸ Consolidated Reply to the Prosecution Response and to the Registrar’s Submission Regarding Radovan Karadžić’s Appeal of the Trial Chamber’s Decision on Adequate Facilities, 14 April 2009 (“Reply”).

⁹ Appeal, paras 11-13. See also Reply, paras 5-8.

not require the Registrar to fund “high level” assistants;¹¹ (2) the Trial Chamber erred by minimising the role and tasks of a legal associate in a manner inconsistent with the *Krajišnik* Appeal Decision thereby erroneously finding that hourly support staff rates provide adequate reimbursement for “the type of assistance they are supposed to provide”;¹² (3) the Trial Chamber erred in affirming the Remuneration Scheme’s misapplication of the *Krajišnik* Appeal Decision to erroneously find that the provision of funding at rates payable to legal assistants “is not an unreasonable approach”;¹³ and (4) the Impugned Decision will prevent the Appellant from receiving legal assistance from anyone above the level of support staff and thereby infringe his right to a fair trial and prevent the proper administration of justice.¹⁴

6. The Prosecution responds that, to the extent that the Trial Chamber’s review can be subjected to appellate scrutiny,¹⁵ the applicable standard on a second review is the same as the *Kvočka et al.* standard of deference to the original decision-maker, not the broader standard of review of discretionary Trial Chamber decisions.¹⁶ It further submits that the Appellant mischaracterises the Appeals Chamber’s findings in the *Krajišnik* Appeal Decision which were applied by the Registrar and the Trial Chamber.¹⁷

7. The Registrar submits that the Appeals Chamber can only overturn the Trial Chamber’s review where its decision was (i) based on an incorrect interpretation of the governing law; (ii) based on a patently incorrect conclusion of fact; or (iii) so unfair or unreasonable as to constitute an abuse of discretion.¹⁸ It submits that this standard is further limited to the standard of a judicial review of administrative decision stipulated in the *Kvočka et al.* Appeal Decision.¹⁹ With regard to the substance of the appeal, it submits that the Appellant misunderstands and mischaracterises the *Krajišnik* Appeal Decision and misconstrues the Impugned Decision.²⁰ It submits that the Trial Chamber correctly concluded that the *Krajišnik* Appeal Decision does not require the Registrar to provide expensive legal advice to a self-represented accused.²¹ Further, it argues that the Trial Chamber correctly concluded that the role and tasks of legal associates are comparable to those of

¹⁰ Appeal, para. 47.

¹¹ Appeal, paras 14(a), 15-20.

¹² Appeal, paras 14(b), 21-27.

¹³ Appeal, paras 14(c), 28-36.

¹⁴ Appeal, paras 14(d), 37-46.

¹⁵ Prosecution Response, para. 3, citing *Prosecutor v. Vidoje Blagojević*, IT-02-60-AR73.4, Public and Redacted Reasons for Decision on Appeal by Vidoje Blagojević to Replace his Defence Team, 7 November 2003 (“*Blagojević* Appeal Decision”), fn. 24 in which it is suggested that an appeal of a judicial review would be one review too many.

¹⁶ Prosecution Response, para. 3. See also paras 4-6.

¹⁷ Prosecution Response, paras 7-8.

¹⁸ Registrar’s Submission, fn. 7. The Registrar’s Submission actually states “so fair or unreasonable” (emphasis added), but based on the jurisprudence cited, the Appeals Chamber understands this to be a typographical error.

¹⁹ Registrar’s Submission, fn. 7.

²⁰ Registrar’s Submission, paras 24, 32, 41.

²¹ Registrar’s Submission, paras 24-30.

legal assistants and not those of counsel.²² In this regard, it submits that “the term ‘legal consultation’ as used in the *Krajišnik* Decision [...] is related to the legal associates’ coordination role” and does not suggest that legal associates are expected to act as shadow counsel for the accused.²³ The Registrar also submits that the Trial Chamber was correct in finding that it was not unreasonable to remunerate legal associates at the same rate as legal assistants.²⁴ In particular, it notes that the *Krajišnik* Appeal Decision did not specify any particular level of remuneration and explains that the Remuneration Scheme was established taking into consideration the *Krajišnik* Appeal Decision, the relevant features of existing Tribunal legal aid policies and the United Nations financial rules and regulations for the disbursement of public funds.²⁵ Finally, with regard to the Appellant’s argument that the Impugned Decision will prevent him from receiving adequate assistance and thereby undermine the fairness of his trial, the Registrar recalls the jurisprudence of the Tribunal that by choosing to represent himself, the Appellant has asserted that additional legal representation is unnecessary for the conduct of a fair trial.²⁶ It argues that it has provided the Appellant with funding and facilities which exceed the Appeals Chamber’s requirements²⁷ and to the extent that the Appellant cannot conduct his defence with these resources it raises the issue of his ability to represent himself.²⁸

8. The Appellant replies that he is not seeking an overall amount equivalent to that of counsel representing accused. Rather, he submits that for the limited and defined tasks which he cannot perform and for which he requires assistance, his legal associates should be paid at a rate which reflects their experience and skills.²⁹ Further, he argues that the characterisation of legal associates as support staff has already had repercussions with regard to access to confidential materials which demonstrates that this characterisation is “unworkable and impractical”.³⁰ He argues that he is not precluded from making arguments as to the fairness of proceedings simply because he has chosen to represent himself; to the contrary, he argues that in such cases fairness concerns are in fact heightened.³¹

²² Registrar’s Submission, paras 31-38.

²³ Registrar’s Submission, para. 35.

²⁴ Registrar’s Submission, paras 39-51.

²⁵ Registrar’s Submission, paras 45-47.

²⁶ Registrar’s Submission, paras 52-54.

²⁷ Registrar’s Submission, para. 56.

²⁸ Registrar’s Submission, para. 55.

²⁹ Reply, paras 11, 16-17.

³⁰ Reply, paras 14-15.

³¹ Reply, paras 12-13.

C. Discussion

1. Preliminary Issue

9. The Prosecution raised the issue of whether the Appeals Chamber should be seised of this appeal by pointing to the *Blagojević* Appeal Decision which, in its submission, suggests that an appeal of a judicial review would “amount to one review too many”.³² However, while the Appeals Chamber in *Blagojević* suggested that a review by the Appeals Chamber of the Trial Chamber’s judicial review of the Registrar’s decision amounted to an “additional” review,³³ the Appeals Chamber in that case nonetheless proceeded to undertake the judicial review on the merits thereby indicating that it considered itself to be properly seised of the appeal.³⁴ Similarly, in this case the Appeals Chamber considers that it is properly seised of this appeal of the Trial Chamber’s judicial review.

2. Standard of Review

10. The Appeals Chamber recalls that it is well established that in undertaking a first judicial review of an administrative decision, the Trial Chamber, Appeals Chamber or President, as the case may be, must apply the standard set out in the *Kvočka et al.* Appeal Decision.³⁵ The *Kvočka et al.* Appeal Decision first considered the nature of a judicial review of an administrative decision:

A judicial review of such an administrative decision is not a rehearing. Nor is it an appeal, or in any way similar to the review which a Chamber may undertake of its own judgment in accordance with Rule 119 of the Rules of Procedure and Evidence. A judicial review of an administrative decision made by the Registrar in relation to legal aid is concerned initially with the propriety of the procedure by which [the] Registrar reached the particular decision and the manner in which he reached it.³⁶

With this approach in mind, the *Kvočka et al.* Appeal Decision then set out that an administrative decision by the Registrar will be quashed if the decision-maker:

³² Prosecution Response, para. 3, fn. 7. See also Registrar’s Submission, para. 17.

³³ *Blagojević* Appeal Decision, fn. 24. See *Procureur c. Vidoje Blagojević*, IT-02-60-AR73.4, *Version publique et expurgée de l’exposé des motifs de la décision relative au recours introduit par Vidoje Blagojević aux fins de remplacer son équipe de défense*, 7 november 2003 for the complete footnote.

³⁴ *Blagojević* Appeal Decision, paras 7-8. See also *Prosecutor v. Milan Milutinović, Dragoljub Ojdanić and Nikola Šainović*, Case No. IT-99-37-AR73.2, Decision on Interlocutory Appeal on Motion for Additional Funds, 13 November 2003 (“*Milutinović* Appeal Decision”) in which the Appeals Chamber was also seised of an appeal of the judicial review of a decision by the Registrar.

³⁵ See *Prosecutor v. Veselin Šljivančanin*, Case No. IT-95-13/1-PT, Decision on Assignment of Defence Counsel, 20 August 2003, para. 22; *Prosecutor v. Momčilo Krajsnik*, Case No. IT-00-39-PT, Decision on the Defence’s Motion for an Order Setting Aside the Registrar’s Decision Declaring Momčilo Krajsnik Partially Indigent for Legal Aid Purposes, 20 January 2004, para. 16; *Prosecutor v. Mile Mrkšić*, Case No. IT-95-13/1-PT, Decision on Defence Request for Review of the Registrar’s Decision on Partial Indigence of Mile Mrkšić, 9 March 2004, p. 3; *Prosecutor v. Mile Mrkšić, Miroslav Radić and Veselin Šljivančanin*, Case No. IT-95-13/1-PT, Decision on Appointment of Co-Counsel for Mrkšić, 7 October 2005, para. 9.

³⁶ *Kvočka et al.* Appeal Decision, para. 13.

- (a) failed to comply with the legal requirements of the Directive, or
- (b) failed to observe any basic rules of natural justice or to act with procedural fairness towards the person affected by the decision, or
- (c) took into account irrelevant material or failed to take into account relevant material, or
- (d) reached a conclusion which no sensible person who has properly applied his mind to the issue could have reached (the “unreasonableness” test).³⁷

The *Kvočka et al.* Appeal Decision also specified that “[t]hese issues may in the particular case involve, at least in part, a consideration of the sufficiency of the material before the Registrar, but (in the absence of established unreasonableness) there can be no interference with the margin of appreciation of the facts or merits of that case to which the maker of such an administrative decision is entitled”.³⁸ Finally, in the review, the party contesting the administrative decision bears the onus of persuasion and must show that (a) an error of the nature described has occurred, and (b) that such error has significantly affected the impugned decision to his detriment.³⁹

11. Turning to the standard of review to be applied to an appeal of a judicial review of an administrative decision, the Appeals Chamber notes that past appeals of judicial reviews have not always clearly stated the standard of review applicable on a second review of an administrative decision.⁴⁰ However, it recalls that decisions relating to the general conduct of trial proceedings are matters that fall within the discretion of the Trial Chamber.⁴¹ In order to successfully challenge a discretionary decision, a party must demonstrate that the Trial Chamber has committed a “discernible error” resulting in prejudice to that party.⁴² The Appeals Chamber will only overturn a Trial Chamber’s discretionary decision where it is found to be (1) based on an incorrect interpretation of governing law; (2) based on a patently incorrect conclusion of fact; or (3) so unfair or unreasonable as to constitute an abuse of the Trial Chamber’s discretion.⁴³

³⁷ *Kvočka et al.* Appeal Decision, para. 13.

³⁸ *Kvočka et al.* Appeal Decision, para. 13. See also *Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze*, Case No. ICTR-99-52-A, Decision on Appellant Jean-Bosco Barayagwiza’s Motion Contesting the Decision of the President Refusing to Review and Reverse the Decision of the Registrar Relating to the Withdrawal of Co-Counsel, 23 November 2006 (“*Nahimana et al.* Appeal Decision”), para. 9.

³⁹ *Kvočka et al.* Appeal Decision, para. 14. See also *Nahimana et al.* Appeal Decision, para. 9; *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-T, Decision on Independent Counsel for Vidoje Blagojević’s Motion to Instruct the Registrar to Appoint New Lead and Co-Counsel, 3 July 2003 (“*Blagojević* Trial Decision”), para. 116.

⁴⁰ See *Milutinović* Appeal Decision, paras 21, 24-26: The Appeals Chamber did not set out the applicable standard of review but considered that the Trial Chamber and the Registrar correctly assessed the elements of the case and took into account the relevant factors; *Blagojević* Appeal Decision, paras 16-22, 24-33, 48-54: The Appeals Chamber did not set out the applicable standard of review but considered that the Trial Chamber took into account the relevant factors and that it was reasonably open to the Trial Chamber to find as it did.

⁴¹ See, *inter alia*, *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-AR73.1, Decision on Appellant Radovan Karadžić’s Appeal Concerning Holbrooke Agreement Disclosure, 6 April 2009, para. 14; *Prosecutor v. Ante Gotovina, Ivan Čermak, and Mladen Markač*, Case No. IT-06-90-AR73.3, 26 January 2009, para. 5.

⁴² *Ibid.*

⁴³ *Ibid.*

3. Trial Chamber's Application of the Standard of Review

12. The Appeals Chamber finds that the Trial Chamber correctly applied the *Kvočka et al.* standard in undertaking its review of the Registrar's Remuneration Decision. The Trial Chamber first set out *Kvočka et al.* Appeal Decision as the applicable standard of review.⁴⁴ It then proceeded to consider whether the Registrar failed to comply with the applicable legal requirements, in this case the *Krajišnik* Appeal Decision, and found that the Remuneration Scheme was "not an unreasonable approach to the provision of assistance for self-represented accused".⁴⁵ It concluded that "[t]he Chamber has been unable to identify in the material presented to it any failure of the type listed by the Appeals Chamber in the *Kvočka et al.* Appeal Decision meriting the overturning of the Remuneration Decision."⁴⁶ Accordingly, the Appeals Chamber turns to consider whether the Trial Chamber committed a discernible error in its interpretation of the *Krajišnik* Appeal Decision resulting in prejudice to the Appellant.

4. Whether the Registrar is Required to Fund "High-Level" Assistants

13. The Appellant submits that the Trial Chamber erred in finding at paragraphs 31 and 32 of the Impugned Decision that the *Krajišnik* Appeal Decision does not require the Registrar to fund "high-level" assistants but rather contemplates as a remedy to an accused's need for legal assistance the assignment of counsel.⁴⁷ The Trial Chamber concluded, relying on the *Krajišnik* Appeal Decision, that:

[s]hould the Accused lack the ability to present his defence efficiently or effectively because of his lack of knowledge of law and legal procedures, or because of the complexities of the case, the solution envisaged by the Appeals Chamber was not the provision of experienced, high-level professional assistants but "restriction of his right to self representation".⁴⁸

The Appellant submits that the *Krajišnik* Appeal Decision did not contemplate that the remedy to an accused's inability to undertake his own defence without high-level legal support was the restriction of his right to self-representation because the relevant portion of the *Krajišnik* Appeal Decision cites the *Šešelj* Appeal Decision which was concerned with the imposition of counsel in a situation of disruptive behaviour rather than a need for legal assistance.⁴⁹ Accordingly, the Appellant submits that the imposition of counsel referred to in the *Krajišnik* Appeal Decision addresses a situation in which "either through disruptive behaviour or continued poor health, [the accused] exhibits conduct

⁴⁴ Impugned Decision, paras 13-15.

⁴⁵ Impugned Decision, paras 28-34.

⁴⁶ Impugned Decision, para. 37.

⁴⁷ Appeal, para. 15.

⁴⁸ Impugned Decision, para. 31, citing *Krajišnik* Appeal Decision, para. 41.

which substantially obstructs the conduct of the trial” not a situation of lack of knowledge of the law or legal procedures.⁵⁰ However, the Appeals Chamber finds that, read in context, the *Krajišnik* Appeal Decision was indeed addressing an accused’s ability to conduct his own trial, not a situation of misconduct or ill health. The *Krajišnik* Appeal Decision reads:

Moreover, the Appeals Chamber considers that where an accused elects to self-represent, he is asserting his ability to conduct his case without legal assistance and thus Tribunal funding for legal aid for him can be presumed to be unnecessary to the conduct of fair trial. To the extent that an accused lacks the ability to conduct his own case and his self-representation is thus “substantially and persistently obstructing the proper and expeditious conduct of his trial”, then the remedy is the restriction of his right to self-representation. To allow an accused to self-represent and yet also receive full legal aid funding from the Tribunal would, as the saying goes, let him have his cake and eat it too.⁵¹

14. Accordingly the Appeals Chamber finds no error in the Trial Chamber’s interpretation of the *Krajišnik* Appeal Decision to the effect that where an accused lacks the requisite knowledge of the law or legal procedures to the extent that it will substantially and persistently obstruct the proper and expeditious conduct of the trial, the solution is not the funding of highly experienced legal associates, but rather the curtailment of his right to self-representation.

5. Type of Assistance Provided by Legal Associates

15. The Appellant submits that the Trial Chamber erred by minimizing the role and tasks of legal associates in a manner inconsistent with the *Krajišnik* Appeal Decision.⁵² He argues that the *Krajišnik* Appeal Decision acknowledges that legal associates will provide “legal consultation” not just coordination and management services⁵³ and further that the Remuneration Scheme requires that at least one member of a team assisting self-represented accused meet the requirements of counsel under Rule 45 of the Rules.⁵⁴ He submits that this demonstrates that the Registrar “wants to treat Rule 45 qualified legal associates as counsel and pay them as support staff.”⁵⁵

16. The *Krajišnik* Appeal Decision recognised that “[t]o the extent that the Registry requires or encourages indigent self-representing accused to coordinate their defences through designated legal associates”, it “should adequately reimburse the legal associates for their coordinating work and for related legal consultation.”⁵⁶ However, it concluded that “[s]uch funding should not be comparable

⁴⁹ Appeal, paras 16-17, citing *Krajišnik* Appeal Decision, para. 41; *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-AR73.3, Decision on Appeal Against the Trial Chamber’s Decision on Assignment of Counsel, 20 October 2006 (“*Šešelj* Appeal Decision”), para. 20.

⁵⁰ Appeal, para. 17.

⁵¹ *Krajišnik* Appeal Decision, para. 41, citing *Šešelj* Appeal Decision, para. 20.

⁵² Appeal, paras 21-27.

⁵³ Appeal, paras 21-22.

⁵⁴ Appeal, paras 23-24.

⁵⁵ Appeal, para. 26. See also para. 25.

⁵⁶ *Krajišnik* Appeal Decision, para. 42.

to that paid to counsel for represented accused (particularly since work such as the drafting of written filings should be considered the responsibility of the self-representing accused)".⁵⁷ While the *Krajišnik* Appeal Decision does contemplate the provision of legal consultation by a legal associate, it makes clear that this is not to be equated with the comprehensive work of counsel which is to be undertaken by the accused himself. The mere fact that a legal associate may provide legal consultation does not necessarily imply that he or she will undertake the functions and tasks for which counsel is normally responsible. Indeed, much of the work undertaken by legal assistants in a regular defence team, such as researching and preparing memoranda on legal issues, could fall within the meaning of legal consultation yet their role is to support and assist the assigned counsel.

17. While the provision of legal consultation would normally imply that a legal associate be either admitted to practice law in a state or be a university professor of law, it does not *a priori* require that the legal associate possess the full expertise and experience required under Rule 45 of the Rules. Indeed, the *Krajišnik* Appeal Decision stated that "[t]he Registry *may* impose additional criteria on designated legal associates who seek funding from the Tribunal (comparable to the Registry's ability to require that Tribunal-funded counsel meet the requirements of Rule 45 of the Rules as well as of Rule 44 of the Rules)"⁵⁸ but it did not require the Registry to do so.

18. The Remuneration Scheme which followed from the *Krajišnik* Appeal Decision does in fact require that legal associates be "a member of the Association of Defence Counsel Practicing before the ICTY" ("ADC").⁵⁹ Such membership requires that applicants "possess at least seven years of relevant experience, whether as a judge, prosecutor, attorney or in some other capacity, in criminal proceedings."⁶⁰ On its face this requirement implies that a legal associate must possess experience comparable to that of assigned counsel, thereby suggesting that if this is a comparable minimum experience requirement, such a legal associate should in fairness be compensated comparably to an assigned counsel. However, experience alone does not determine the rate of pay; the functions and tasks undertaken are also important as is the level of responsibility assumed. For example, the Appeals Chamber notes that the Directive on the Assignment of Defence Counsel contemplates the

⁵⁷ *Krajišnik* Appeal Decision, para. 42.

⁵⁸ *Krajišnik* Appeal Decision, para. 42 (emphasis added).

⁵⁹ Remuneration Scheme, para. 5.1(A). Contrary to the Appellant's submissions (Appeal, paras 23-24), the Remuneration Scheme does not require that at least one member of the defence team be a qualified lawyer with a minimum of seven years experience and subject to a disciplinary regime. The Remuneration Scheme only requires the inclusion of a case manager on the team (*see* Remuneration Scheme, para. 3.2). The Appeals Chamber notes that while in *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-PT, Decision on the Financing [of] the Defence of the Accused, 30 July 2007, paras 60-62, the Pre-Trial Judge in that case stated that at least one member of the defence team had to meet the qualifications required by Rule 45, this requirement was not retained in the *Krajišnik* Appeal Decision, despite the Appeals Chamber's consideration of that decision (*see Krajišnik* Appeal Decision, fns 98, 101).

⁶⁰ Constitution of the Association of Defence Counsel Practicing Before the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, Article 3.2.c.

possibility of legal assistants with 10 years or more of experience.⁶¹ A legal assistant with such experience could thus be considered to have comparable experience to counsel but is not paid at the same rate of pay as counsel because he or she fulfils a different function on the defence team.

19. The Trial Chamber took note of the requirement that legal associates be members of the ADC and considered that the requirement could exist to ensure that advisors to self-represented accused are subject to some form of enforceable code of conduct rather than to ensure a certain level of expertise.⁶² In its submissions, the Registrar appears to implicitly agree that this was the rationale behind the imposition of the ADC membership requirement.⁶³ Accordingly, given concerns such as confidentiality, it appears that by requiring legal associates to be members of the ADC, the Registrar was attempting to ensure some measure of control rather than to impose a certain level of legal expertise on legal associates or to delineate the type of tasks they would be expected to undertake. While the Appeals Chamber finds that the Registrar could have sought to address concerns about confidentiality and codes of conduct in a more targeted manner, such as by requiring the signing of confidentiality agreements, it notes that the Registrar has indicated that it intends to remove the ADC membership requirement from the Remuneration Scheme.⁶⁴

20. In any event, contrary to the Appellant's arguments, the rationale for the ADC membership requirement does not appear to be a reflection on the type of work and tasks expected to be undertaken by legal associates. As noted by the Trial Chamber, this is further supported by the fact that the Registrar has demonstrated flexibility in the application of the Remuneration Scheme, in particular with regard to the qualification requirements under of the Remuneration Scheme.⁶⁵

21. For the foregoing reasons the Appeals Chamber finds that the Appellant has failed to demonstrate that the Trial Chamber erred in its assessment of the role and tasks to be undertaken by legal associates as contemplated in the *Krajišnik* Appeal Decision.

⁶¹ Directive on the Assignment of Defence Counsel, Directive No. 1/94, Annex 1.

⁶² Impugned Decision, para. 33.

⁶³ Registrar's Submission, paras 48-49. This explanation is supported by the Registrar's Submission Pursuant to Rule 33(B) on Access by the Accused's Defence Team to Confidential Information of 23 February 2009 ("Registrar's Submission on Access to Confidential Information") in which the Registrar addressed the issue of the disclosure of confidential material to the those assisting a self-represented accused in light of the fact that in such a situation there is no lead counsel to take responsibility for the conduct of the members of the defence team. Contrary to the Appellant's submission that the Registrar conditioned access to confidential disclosures and filings to members of the Appellant's defence team upon the designation of a person who could be responsible for other team members and subject to the disciplinary regime imposed upon counsel (Appeal, para. 25, citing Registrar's Submission on Access to Confidential Information), no such requirement is mentioned in the Registrar's submissions in that decision.

⁶⁴ Registrar's Submissions, para. 49.

⁶⁵ Impugned Decision, para. 34.

6. Remuneration Scheme's Rates of Pay for Legal Associates

22. The Appellant challenges the Trial Chamber's finding that the Remuneration Scheme's provision of funding at rates payable to support staff was "not an unreasonable approach".⁶⁶ The Appellant points to OLAD's letter of 16 December 2008 which stated that the payment of legal associates at the rate of support staff was based on the *Krajišnik* Appeal Decision's finding that legal associates' pay "should not be comparable to that paid to counsel for a represented accused."⁶⁷ The Appellant argues that this misinterprets the *Krajišnik* Appeal Decision which considered that the volume of work undertaken by those assisting a self-represented accused would be less given that the accused undertakes his own work rather than addressing the rate of pay.⁶⁸ The Appellant submits that "even if an accused assumes full responsibility for written filings, there are hundreds of other tasks which either require the expertise of experienced lawyers, or which the accused will be prevented from [undertaking] because of his incarceration."⁶⁹

23. The *Krajišnik* Appeal Decision is not explicit as to whether it was referring to the volume or the rate of pay when it concluded that legal associates' pay "should not be comparable to that paid to counsel for represented accused" and left open what would constitute adequate reimbursement.⁷⁰ However, the Appeals Chamber recalls that it has already concluded that there was no error in the Trial Chamber's finding that the *Krajišnik* Appeal Decision did not require the Registrar to fund "high-level" assistants⁷¹ particularly given the *Krajišnik* Appeal Decision's finding that "where an accused elects to self-represent, he is asserting his ability to conduct his case without legal assistance [...]"⁷² With regard to the Appellant's submission that "even if an accused assumes full responsibility for written filings, there are hundreds of other tasks which [...] require the expertise of experienced lawyers"⁷³, the Appeals Chamber considers that the *Krajišnik* Appeal Decision's reference to the Appellant drafting his own written filings was merely an example of the many tasks he is expected to undertake himself given his choice to be self-represented. While the Appeals Chamber acknowledges that by reason of his detention there are certain tasks normally undertaken by counsel which he will not be able to complete himself, in general a self-represented accused is expected to undertake all the tasks normally assumed by counsel. Acknowledgement of an appellant's disadvantage based on his detention can reasonably be understood as one of the reasons for the provision of legal associates, but should not be confused with the role of counsel. In light of

⁶⁶ Appeal, para. 28, quoting Impugned Decision, para. 34.

⁶⁷ Appeal, para. 29, quoting *Krajišnik* Appeal Decision, para. 42.

⁶⁸ Appeal, paras 33-34.

⁶⁹ Appeal, para. 35.

⁷⁰ *Krajišnik* Appeal Decision, para. 42.

⁷¹ See *supra* para. 14.

⁷² *Krajišnik* Appeal Decision, para. 41.

these findings, the Appeals Chamber concludes that the Appellant has failed to show that it was unreasonable for the Trial Chamber to conclude based on the *Krajišnik* Appeal Decision that the Registry was not required to pay legal associates at the same rate as counsel for a represented accused.

7. Impact of Funding on Access to Appropriate Assistance

24. The Appellant submits that if the Impugned Decision is upheld, it will prevent him from receiving legal assistance from anyone above the level of support staff and thereby impinge on his right to a fair trial and prevent the proper administration of justice.⁷⁴ In this regard, the Appellant argues that lawyers with the required skills and experience to assist him cannot be expected to work for the rate of a legal assistant.⁷⁵ He also argues that in the *Slobodan Milošević* case, three highly experienced lawyers were appointed and submits that there is no reason for such a disparity with his case.⁷⁶

25. In relation to the Appellant's argument that he will be unable to secure appropriate legal assistance under the current Remuneration Scheme, the Appeals Chamber notes the Registrar's submission before the Trial Chamber that among the legal associates assigned under the Remuneration Scheme in other cases of self-represented accused, there are practicing lawyers with up to 15 years of relevant legal experience.⁷⁷ This suggests that the Appellant's argument that he will not be able to secure appropriate legal support is unfounded. Furthermore, the Appellant has failed to demonstrate why his case should be treated differently from those of other self-represented accused who have made do with legal associates paid according to the Remuneration Scheme.

26. Regarding the Appellant's submission that "the Registry was willing to pay expensive and experienced lawyers to participate in the trial proceedings"⁷⁸ in the *Slobodan Milošević* case, the Appeals Chamber recalls that those lawyers served as *amicus curiae* and later as assigned counsel, not legal associates.⁷⁹ Such an option was also offered to the Appellant.⁸⁰ However, the Appeals

⁷³ Appeal, para. 35.

⁷⁴ Appeal, paras 37-46.

⁷⁵ Appeal, paras 37, 39.

⁷⁶ Appeal, para. 42.

⁷⁷ Registrar's Submission Pursuant to Rule 33(B) Regarding Radovan Karadžić's Motion for Adequate Facilities and Equality of Arms, 2 December 2008, para. 28.

⁷⁸ Appeal, para. 42.

⁷⁹ *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Order Inviting Designation of *Amicus Curiae*, 30 August 2001; *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Reasons for Decision on Assignment of Defence Counsel, 22 September 2004; *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence Counsel, 1 November 2004; *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Decision on Assigned Counsel's Motion for Withdrawal, 7 December 2004.

⁸⁰ In the Registrar's letter denying the Appellant's request to Registrar to Reconsider the Remuneration Decision, the Registrar advised the Appellant that, where warranted by the interests of justice, a Trial Chamber could appoint standby counsel or *amicus curiae* in the case of a self-represented accused to make submissions to the Trial Chamber on behalf

Chamber notes that the Appellant appears to have rejected the option of *amicus curiae* or standby counsel when stating in his Motion that:

[a]n *amicus curiae* works independently of an accused and the Trial Chamber is not obliged to consider his or her arguments. A standby counsel and a self-represented accused have a built-in conflict of interest--the very nature of a standby counsel supposes that he will be willing to act contrary to the wishes of the accused by replacing him when the Trial Chamber deems it necessary. Neither type of counsel is a substitute for adequate facilities provided to a self-represented accused in the form of a trusted and experienced legal advisor [...].⁸¹

27. Contrary to the Appellant's argument that the "Impugned Decision serves to strip Dr. Karadžić of any benefit or assistance he may have received through the provision of legal associates, and eliminates any practical effect of the [Krajišnik] Appeals Chamber decision"⁸², both the Registrar and the Trial Chamber appear to have carefully considered the principles set out in the *Krajišnik* Appeal Decision and to have presented the Appellant with a number of options to assist him in his self-representation. This includes not only the provision of funding for additional legal associates and other support staff and raising the maximum allotment of hours but also the option of *amicus curiae* and standby counsel.⁸³ It is true that these options may not amount to the equivalent funding of a full defence team available to a represented accused; however, as the Appeals Chamber stated in the *Milošević* case:

[t]here is no doubt that, by choosing to conduct his own defence, the accused deprives himself of resources a well-equipped legal defence team could have provided. A defendant who decides to represent himself relinquishes many of the benefits associated with representation by counsel. The legal system's respect for a defendant's decision to forgo assistance of counsel must be reciprocated by the acceptance of responsibility for the disadvantages this choice may bring.⁸⁴

Accordingly the Appellant has failed to show that either Trial Chamber's decisions failed to comply with the requirements set out in the *Krajišnik* Appeal Decision or were unreasonable.

of the Defence (Motion, Annex E, Letter from the Registrar to Radovan Karadžić regarding your request for reconsideration, 14 November 2008, pp. 3-4. See also Appeal, para. 8).

⁸¹ Motion, para. 24 (footnotes omitted).

⁸² Appeal, para. 39.

⁸³ See Motion, Annex E, Letter from the Registrar to Radovan Karadžić regarding your request for reconsideration, 14 November 2008.

⁸⁴ *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR73.6, Decision on Interlocutory Appeal by the *Amici Curiae* Against the Trial Chamber Order Concerning the Presentation and Preparation of the Defence Case, 20 January 2004, para. 19.


D. Disposition

For the foregoing reasons, the Appeals Chamber

DISMISSES the Appeal in its entirety.

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

Dated this seventh day of May 2009
At The Hague
The Netherlands



Judge Theodor Meron
Presiding

[Seal of the Tribunal]