



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-PT
Date: 8 July 2003
Original: English

IN THE TRIAL CHAMBER

Before: Judge Richard May, Presiding
Judge Patrick Robinson
Judge O-Gon Kwon

Registrar: Mr. Hans Holthuis

Decision of: 8 July 2003

PROSECUTOR

v.

**MILAN MILUTINOVIĆ
DRAGOLJUB OJDANIĆ
NIKOLA ŠAINOVIĆ**

DECISION ON MOTION FOR ADDITIONAL FUNDS

The Office of the Prosecutor

Mr. Geoffrey Nice
Ms. Cristina Romano

Counsel for the Accused

Mr. John Livingston, Mr. Radoje Stefanović and Mr. Miladin Papić for Milan Milutinović
Mr. Tomislav Višnjić, Mr. Peter Robinson and Mr. Vojislav Selžan, for Dragoljub Ojdanić
Mr. Toma Fila, Mr. Vladimir Petrović and Mr. Zoran Jovanović, for Nikola Šainović

THIS TRIAL 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 (“International Tribunal”),

BEING SEISED of a confidential and *ex parte* “Motion for Additional Funds” (“Motion”), filed by the defence of Dragoljub Ojdanić (“Defence”) on 15 April 2003, seeking an order directing the Registrar to allocate additional funds for pre-trial preparation,

NOTING that, in the Motion, the Defence complains that considering the scope of this case, including the volume of disclosure materials, the nature of the accused’s defence, and the extended and complex legal issues involved, the funds allocated by the Registrar for pre-trial preparation are inadequate, also providing a breakdown of its anticipated needs, based on estimates of the remaining period of the pre-trial stage,

NOTING the letter of the Registrar, dated 3 April 2003, in response to the Defence’s request for additional funds, in which the Registrar takes the view that, in the circumstances of this case, the defence team has been provided with sufficient resources and no additional funds will be allocated for the defence during the pre-trial stage,

NOTING the Trial Chamber’s “Invitation to Registry to Comment on Defence Motion for Additional Funds” issued on 21 May 2003, in which the Trial Chamber requested the Registry to comment on the following matters:

- (i) 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,
- (ii) 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 preparation needs for this accused, and
- (iii) the comparison made by the Defence with the *Krajišnik* case (Motion, paragraph 34), and with other “entity” allocations in other cases over and above that provided for level III cases (Motion, paragraph 38, footnote 11),

NOTING the “Registry Comments on Defence Motion for Additional Funds” filed on 13 June 2003 (“Registry Comments”), together with the confidential and *ex parte* “Reply to Registry’s Comments on Defence Motions for Additional Funds” filed on 26 June 2003 (“Reply”), with leave of the Trial Chamber,¹

NOTING that, in response to the Trial Chamber’s invitation to comment, the Registry submits *inter alia* the following observations:

- (i) under the current legal aid payment system (adopted in October 2000 and implemented since 1 January 2001), a lump sum is allocated to the defence depending on the level of complexity of the case, which is based on an estimate of the amount of work required; the actual duration of the pre-trial stage is not a relevant factor,²
- (ii) while the Registry is open to a certain flexibility in considering limited additional resources, the defence is required to demonstrate “exceptional circumstances” or “events beyond the influence of the defence” that justify the allocation of additional resources, the duration of the pre-trial stage alone is not, as such, a valid justification,³
- (iii) although the Tribunal’s budgetary provisions, rules and regulations, and practice set by the United Nations do not prevent the allocations of further resources to the defence, a decision granting the Motion will establish a precedent that may defeat the purpose of the lump sum payment system unanimously approved by the Judges at a Plenary on 13 October 2000, and developed by the Registry in line with the recommendations of the external and internal auditors of the United Nations,⁴
- (iv) comparison with the *Krajišnik* and other cases is not helpful in the consideration of this Motion, as the resources granted to *Krajišnik* defence were allocated under the previous payment regime (monthly allotments of maximum working hours);⁵ however, since the implementation of the new payment system, additional resources have been granted (for leadership cases) in *Plavšić*, due to the Accused’s ranking position and in order to

¹ *Prosecutor v. Milutinović et al.*, “Order Granting Defence Request for Leave to File Reply”, Case No. IT-99-37-PT, 19 June 2003.

² Registry Comments, paras 4-5

³ *Ibid*, para. 6.

⁴ *Ibid*, paras 12-13.

⁵ *Ibid*, para. 16.

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ensure equality with the then co-accused Krajišnik;⁶ in one other case,⁷ the defence was granted a limited trial preparation allotment of 200 counsel hours, a further request for additional hours was denied,⁸ and one leadership case went to trial without additional resources above level III allotment,⁹

NOTING that the Registry further observes that, given the flexibility of the new lump sum payment system, the composition of the defence team and the use of funds is the responsibility of the lead counsel who must ensure that the allotment granted under the legal aid system covers the whole pre-trial stage; and, in the present case, the composition of the defence team¹⁰ may not have ensured an effective use of the funds, contrary to the principles of necessity and efficiency,¹¹

NOTING the Defence Reply in which it is submitted that the Registry's response demonstrates that it did not take into account the actual duration of the pre-trial stage of this case, that some flexibility does exist to increase funding in a particular case; that despite its best efforts, the defence team has been unable to prepare this particular case for trial within the estimate set by the Registrar,

CONSIDERING that the Registrar has the primary responsibility in the determination of matters relating to remuneration of counsel under the legal aid system of the Tribunal,¹² in accordance with the relevant provisions of the Rules of Procedure and Evidence ("Rules"),¹³ and the Directive on Assignment of Defence Counsel issued by the International Tribunal ("Directive"),¹⁴

⁶ *Ibid*, para. 17.

⁷ *Prosecutor v. Enver Hadžihasanović et al.*, Case No. IT-01-47-PT.

⁸ In this respect, the Trial Chamber notes that in that case, a similar motion for additional resources was denied by Trial Chamber II, ruling that the relief sought could not be granted by the Trial Chamber as the Defence's request for additional resources amounted to a challenge of the entire payment system itself, a system adopted by the Judges and implemented by the Registrar. *Prosecutor v. Enver Hadžihasanović et al.*, "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", Case No. IT-01-47-PT, 17 June 2003 ("*Hadžihasanović* Decision").

⁹ *Prosecutor v. Dragan Obrenović, Vidoje Blagojević, Momir Nikolić and Dragan Jokić*; Registry Comments, para. 18.

¹⁰ In this regard, the Registry submits that lead counsel (Mr. Tomislav Višnjić) requested the assignment of both a co-counsel (Mr. Peter Robinson) and a legal consultant (Mr. Vojislav Seležan) at the early pre-trial stage. This, the Registry says, was not allowed under the previous system. Co-counsels were not assigned until two months before the beginning of the trial, and legal consultants were only assigned in specific circumstances. In addition, four investigators have also been assigned to the defence team as opposed to two investigators usually allowed under the previous payment system. Registry Comments, para. 19.

¹¹ *Ibid*, para. 21.

¹² *Hadžihasanović* Decision, *supra* n 8, p. 2.

¹³ An important provision in this respect is Rule 45 on "Assignment of Counsel". Rule 45(A) provides: "Whenever the interests of justice so demand, counsel shall be assigned to suspects or accused who lack the means to remunerate such counsel. Such assignment shall be treated in accordance with the procedure established in a Directive set out by the Registrar and approved by the permanent Judges"; on the other hand, Rule 45(E) states: "The Registrar shall, in consultation with the permanent Judges, establish the criteria for the payment of fees to assigned counsel".

¹⁴ Article 22 ("Responsibility for Remuneration and Expenses"), paragraph (A) of the Directive provides, in relevant part, as follows: "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

CONSIDERING however, 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,¹⁵ albeit only upon exceptional circumstances being shown,

CONSIDERING that the Registrar, in consultation with the Judges, has elaborated a system of remuneration paid to counsel assigned to indigent accused, according to which the costs of legal representation of the accused necessarily and reasonably incurred is met by the Tribunal, in accordance with the budgetary provisions, rules and regulations, and practice set by the United Nations,

CONSIDERING that the current legal aid system provides for a flat fee (lump sum) for the pre-trial stage for all indigent accused before the Tribunal, taking into account the complexity of the cases, guided as always by the need to ensure full respect for the rights of all indigent accused while, at the same time, implementing an efficient use of the limited resources of the Tribunal's legal aid system,

CONSIDERING that counsel who have *agreed* to represent indigent accused before the Tribunal are fully aware of the system of remuneration for assigned counsel, including the basis for calculating the costs of legal representation, the billing arrangement, and the *maximum* allotment for the pre-trial stage according to the particular circumstances of the case,

ACCEPTING as valid the Registrar's Comment that while the Registry 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 requests are to be granted,

CONSIDERING that no such circumstances have been shown,

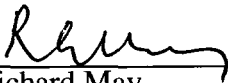
disagreement on the maximum allotment, the Registrar shall make a decision, after consulting the Chamber and, if necessary, the Advisory Panel".

¹⁵ *Prosecutor v. Duško Knežević*, Decision on Accused's Request for Review of Registrar's Decision as to Assignment of Counsel, Case No. IT-95-4-PT & IT-95-8/1-PT, 6 Sept. 2002.

PURSUANT TO Rule 54 of the Rules,

HEREBY DENIES the Motion.

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


Richard May
Presiding

Dated this eighth day of July 2003
At The Hague
The Netherlands

[Seal of the Tribunal]