



International Tribunal for the
Prosecution of Persons
Responsible for Serious Violations of
International Humanitarian Law
Committed in the Territory of
Former Yugoslavia since 1991

Case No. IT-95-11-PT
Date: 27 July 2004
Original: English

IN TRIAL CHAMBER I

Before: Judge Alphonsus Orie, Presiding
Judge Amin El Mahdi
Judge Joaquín Martín Canivell

Registrar: Mr. Hans Holthuis

Decision of: 27 July 2004

PROSECUTOR

v.

Milan MARTIĆ

EX-PARTE

**CERTIFICATION FOR APPEAL OF DECISION ON
DEFENCE'S MOTION FOR REVIEW OF REGISTRAR'S
DECISION NOT TO RANK THE CASE TO LEVEL III
COMPLEXITY**

Counsel for the Accused:

Mr. Predrag Milovančević

1. Trial Chamber I 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 (“Trial Chamber”) is seised of the “Defence Request for Certification to Appeal Decision on Defence’s Motion for Review of Registrar’s Decision not to Rank the Case to Level III of Complexity” dated 7 July 2004 and filed on 9 July 2004 (hereinafter: the “Request for Certification”).

2. The Request for Certification is made pursuant to Rule 73(B) of the Rules of Procedure and Evidence of the Tribunal which provides that “[d]ecisions on all motions are without interlocutory appeal save with certification by the Trial Chamber, which may grant such certification if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings”.

3. The Trial Chamber notes that Rule 73 (C) provides that “[r]equests for certification shall be filed within seven days of the filing of the impugned decision”. The Request for Certification is filed outside the time-limit set forth in Rule 73 (C). However the late filing was preceded by the transmission by facsimile on 7 July 2004 of the Request for Certification. Following communication between the Defence counsel and the Registry on 8 July 2004, the Defence transmitted a new cover page of the Request for Certification on 9 July 2004. The Trial Chamber considers the filing of the Request for Certification validly done.

4. The Defence requests to be granted leave to appeal the “Decision on Defence’s Motion for Review of Registrar’s Decision not to Rank the Case to Level III of Complexity” dated 1 July 2004, whereby the pre-trial judge assigned to this case considered that “the Trial Chamber may review the administrative decision of the Registrar in exceptional circumstances, in particular in circumstances indicating that the Registrar exercised his margin of appreciation in a manifestly unreasonable manner¹” but found that “on the basis of the submissions of the Defence there exist no

¹ In relation to the interference of a Chamber in an administrative decision, the Appeals Chamber stated: “A judicial review of an administrative decision made by the Registrar in relation to legal aid is concerned ... with the propriety of the procedure by which the Registrar reached the particular decision and the manner in which he reached it. The administrative decision will be quashed if the Registrar has failed to comply with the legal requirements of the Directive. This issue may in the particular case involve a consideration of the proper interpretation of the Directive. The administrative decision may also be quashed if the Registrar has failed to observe any basic rules of natural justice or to act with procedural fairness towards the person affected by the decision, or if he has taken into account irrelevant material or failed to take into account relevant material, or if he has reached a conclusion which no sensible person who has properly applied his mind to the issue could have reached (the “unreasonableness” test). These 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, *Prosecutor v. Miroslav Kvočka et al.*, Decision (Appeals Chamber) on Review of the Registrar’s Decision to Withdraw Legal Aid From Zoran Žigić, Case

circumstances showing that the Registrar made the Impugned Decision in a manifestly unreasonable manner” and “that accordingly the Impugned Decision cannot be reviewed by the Trial Chamber” (hereinafter: the “Impugned Decision”).

5. The Defence submits that it has identified five errors in the Impugned Decision which “have the capacity to significantly affect the fair and expeditious conduct of the proceedings and the outcome of the trial” because “the Defence suspended its trial preparation when the pre-trial funds ran out” in February and March 2004 and is unable to “prepare a competent pre-trial brief pursuant to Rule 65ter(F) by mid-September 2004” as ordered by the pre-trial judge and “if the issue presented by the Motion for a proper ranking of the case is ultimately resolved against the Defence, the Defence will consider whether it is ethically required to withdraw from representing a client whom it cannot adequately defend”.² The Defence further submits that an immediate resolution of the issue by the Appeals Chamber will materially advance the proceedings because otherwise “the Defence would be unable to prepare a competent pre-trial brief”,³ and “should the Appeals Chamber determine after a conviction that the pre-trial judge erred in his decision on the Motion for a proper ranking of the case, the case would have to be retried”.⁴

6. The Defence identifies as a first error the fact that the pre-trial judge took the Impugned Decision on his own whereas, according to the Defence, that Decision should have been taken by the Trial Chamber in full.⁵ The issue of the powers and tasks of the pre-trial judge are set out in Rule 65 *ter* entitled “Pre-Trial Judge”. Paragraph (B) of that Rule states that: “[t]he pre-trial Judge shall, *under the authority and supervision of the Trial Chamber seised of the case*, coordinate communication between the parties during the pre-trial phase. The pre-trial Judge shall ensure that the proceedings are not unduly delayed and *shall take any measure necessary to prepare the case for a fair and expeditious trial*”.⁶ Rule 65 *ter* (C) states that “[t]he pre-trial Judge shall be entrusted with all of the pre-trial functions set forth in Rule 66, Rule 67, Rule 73 *bis* and Rule 73 *ter*, and with all or part of the functions set forth in Rule 73”.⁷

No. IT-98-30-A, 7 February 2003, para. 13; In the *Hadžihašanić* case, the pre-Trial Chamber stated that “in the implementation of the legal aid payment system is a primary responsibility for 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 as was done in the present case”, see above-mentioned “Decision on Urgent Motion for an Ex-parte Oral Hearing on Allocation of Resources to the Defence and Consequences Thereof for the Rights of the Accused to a Fair Trial”.

² Request for Certification, paras 20-28.

³ *Ibid*, para. 30.

⁴ *Ibid*, para. 31.

⁵ *Ibid*, paras 6, 7-9.

⁶ Emphasis added.

⁷ Emphasis added.

7. The competence of the Trial Chamber to review the Registrar's decision stemmed, as will be recalled below, not from the Directive for Assignment of Defence Counsel but from the Trial Chamber's statutory obligation to ensure the fairness of the trial. The Defence request for review of the Registrar's decision falls therefore within the scope of Rule 73. The Defence's assertion that the Trial Chamber may exercise any of the functions of the pre-trial judge whereas the pre-trial judge is not empowered by the Rules to exercise all functions of the Trial Chamber is both true and without merit in this case. The absence of a general power for the pre-trial judge to exercise all functions of the Trial Chamber does not invalidate the exercise by the pre-trial judge of specific functions listed in Rule 65ter (C) with which he is entrusted, which in this case to deliver a decision on the Defence's motion for review of the Registrar's decision. In exercising his functions, the pre-trial judge is supposed to act, as he did in this case, under the authority and supervision of the Trial Chamber.

8. The Defence alleges that the Impugned Decision contains a second error in that it states wrongly that upon the detention on remand of the accused Martić ("the Accused") in May 2002, his case was ranked to Level 1 complexity until May 2003 in "view of the complexity of the case at that time" because, according to the Defence, the ranking of the Martić's case at that time was made without assessment of the complexity of the case.⁸ The "complexity of the case" has to be understood in the sense of the "level of complexity of the case" which means that a case of low complexity is accordingly scaled. The Trial Chamber obviously the Registry took into consideration the limited scope of the original indictment against the Accused from May 2002 to May 2003. Even if the original scaling of the case was done on the basis of a routine practice this does not affect the Impugned Decision. Reference is made to the original scaling of the case only in the context of the procedural history, not as a ground for denying the review of the Impugned Decision.

9. The Defence alleges that the Impugned Decision contains a third error in that it states wrongly that the Registry allocated additional 800 hours of work to lead-counsel and 100 hours to the support defence team of the Accused; according to the Defence, the lead-counsel was allocated an additional amount of 400 hours of work and his support team was allocated 500 hours of work as was mentioned in the Defence's Motion.⁹ The Impugned Decision misstated the division of the additional 900 working hours granted to the Defence team of the Accused to deal with a disclosure made by the Prosecution on 19 January 2004. To that extent, the Impugned Decision may have been taken on the assumption that the additional resources granted above "level 2" by the Registrar to lead-counsel exceeded resources allocated to the support defence team.

⁸ Request for Certification, paras 6, 10.

⁹ Ibid, paras 6, 11.

10. The Defence identifies as a fourth error the fact that the Impugned Decision adopted “the ‘unreasonableness’ test in order to determine whether the Trial Chamber is competent to review the Registrar’s decision, instead of the ‘effect on the fairness of the trial’ test recently adopted by the Appeals Chamber”.¹⁰ The Appeals Chamber indeed recalled in the *Milutinović* case in November 2003 that: [w]here, 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”.¹¹ As quoted in the Impugned Decision, the Appeals Chamber also stated in the *Kvočka* case in February 2003 that: “[t]he administrative decision may also be quashed if the Registrar has failed to observe any basic rules of natural justice or to act with procedural fairness towards the person affected by the decision, or if he has taken into account irrelevant material or failed to take into account relevant material, or if he has reached a conclusion which no sensible person who has properly applied his mind to the issue could have reached (the “unreasonableness” test). These 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”.¹²

11. The Trial Chamber recalls that the Impugned Decision stated that where the Rules of the Tribunal do not explicitly provide for a review of the Registrar’s decisions by a Trial Chamber, the Trial Chamber is empowered to review the Registrar’s decision because questions relating to the legal representation of an accused may affect the conduct of a trial. This power of review is however limited as follows: “the Trial Chamber may review the administrative decision of the Registrar in exceptional circumstances, in particular in circumstances indicating that the Registrar exercised his margin of appreciation in a manifestly unreasonable manner”.¹³ Therefore the Impugned Decision, proceeding in two steps, used the test formulated in the Appeals Chamber *Milutinović* Decision to decide whether it had a power of review over the Registrar’s decision and

¹⁰ Ibid, paras 6, 12-13. The Defence supports this affirmation by quoting the separate and dissenting opinion of Judge Hunt attached to the Appeals Chamber *Milutinović* decision of 13 November 2003 as follows: “Agreeing with such a ruling, Judge Hunt has stated that “...this formulation now made in the Majority Decision overrules the requirement imposed by some Trial Chambers ...that exceptional circumstances must be established before any review will be undertaken...”, *Prosecutor v. Milutinović et al.*, Decision on Interlocutory Appeal on Motion for Additional Funds, Case No. IT-99-37-AR73.2, 13 November 2003 (hereinafter: the “Appeals Chamber *Milutinović* Decision”). This Trial Chamber notes however that this dissenting opinion was made in reference to Article 31 of the Directive on Assignment of Defence Counsel which concerns disagreement relating to calculation of fees, payment of remuneration, or reimbursement of expenses of Defence Counsel and to the obligation for the Registrar to make a decision, after consulting the President and, if necessary, the Advisory Panel.

¹¹ Appeals Chamber *Milutinović* Decision, para. 19.

¹² *Prosecutor v. Miroslav Kvočka et al.*, Decision on Review of the Registrar’s Decision to Withdraw Legal Aid from Zoran Žigić, Case No. IT-98-30-A, 7 February 2003, para. 13, (hereinafter: the “Appeals Chamber *Kvočka* Decision”).

then used the test formulated in the Appeals Chamber *Kvočka* Decision to examine how and whether it could proceed with the review. In the absence of exceptional circumstances justifying the review, in particular the showing that the Registrar acted in a manifestly unreasonable manner, the Trial Chamber declined to review the Registrar's decision.

13. The Defence finally argues that the Impugned Decision erred in finding that "there exist no circumstances showing that the Registrar made the Impugned Decision in a manifestly unreasonable manner" because, according to the Defence, it "has thoroughly elaborated on every factor that is taken into account when ranking a case to a particular level of complexity, giving a comparison to some other cases before the Tribunal".¹⁴ The Trial Chamber recalls that it cannot substitute itself to the Registrar and exercise an administrative power in reassessing the factors already examined by the Registrar; the task of the Trial Chamber, and in this case of the pre-trial judge acting upon the authority and supervision of the Trial Chamber, was to examine whether the Registrar acted in a manifestly unreasonable manner when determining the complexity level of the case. In the present case there was no indication to the effect that the Registrar acted *ultra vires* or used his power unreasonably when assessing whether to grant the Defence's request for additional funds.

15. The subject of the impugned decision is the allocation of resources for the Defence. If the Impugned Decision erred in law or fact, such error would potentially affect the fair and expeditious conduct of the proceedings in a significant way. In respect of some of the issues raised the Trial Chamber is of the opinion that an immediate resolution by the Appeals Chamber may materially advance the proceedings. The vital role of the allocation of resources to the Defence in securing the fairness of the trial, more specifically the exercise of the right of the accused to have adequate time and facilities for the preparation of the Defence and his right to defend himself through counsel, forms a strong reason to grant leave to the Defence to lodge an appeal before the Appeals Chamber.

¹³ Footnote omitted.

¹⁴ Request for Certification, paras 6, 14-19.

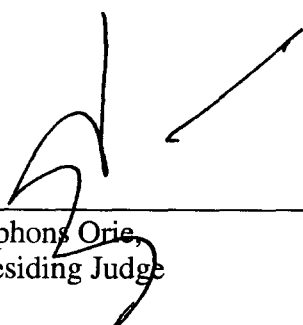
FOR THE FOREGOING REASONS,

PURSUANT TO Rule 73 of the Rules of Procedure and Evidence,

GRANTS the Request for Certification.

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

Dated this 27th Day of July 2004
At The Hague,
The Netherlands.



Alphons Orie,
Presiding Judge

[Seal of the Tribunal]