EX PARTE STATUS LIFTED PURSUANT TO PRESIDENT ORDER OF 23/09/2011, RP A12382-A12380
MADE PUBLIC PURSUANT TO PRESIDENT'S DECISION OF 04/12/2017, MICT-14-67, RP D28-D20

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25 MAY 2010

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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-05-87-A

Date: 25 May 2010

Original: English

THE PRESIDENT OF THE INTERNATIONAL TRIBUNAL

Before: **Judge Patrick Robinson, President**

Registrar: **Mr. John Hocking**

Decision of: **25 May 2010**

THE PROSECUTOR

v.

NIKOLA ŠAINOVIĆ
DRAGOLJUB OJDANIĆ
NEBOJŠA PAVKOVIĆ
VLADIMIR LAZAREVIĆ
SRETEN LUKIĆ

CONFIDENTIAL AND *EX PARTE*

DECISION ON REQUEST FOR REVIEW OF OLAD DECISIONS ON APPEAL PHASE REMUNERATION

Counsel for Mr. Nebojša Pavković

Mr. John E. Ackerman

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I, PATRICK ROBINSON, President 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 ("Tribunal"), render the following decision in relation to two requests for review, submitted to the Registrar by Mr. John Ackerman, Counsel for Mr. Nebojša Pavković ("Mr. Ackerman" and "Mr. Pavković", respectively) on 4 March 2010 ("First Request for Review") and 10 March 2010 ("Second Request for Review"), respectively, and referred to me by the Registrar pursuant to Article 31 of the Directive on the Assignment of Defence Counsel ("Directive").[1]

I. BACKGROUND

1. On 2 February 2010, Mr. Ackerman submitted a request to the Office of Legal Aid and Detention Matters ("OLAD") for the allocation of 500 additional remunerable hours to Mr. Pavković's Defence team ("First Request for Funds"). Mr. Ackerman reasoned that these additional hours were warranted because the defence team had expended almost all hours allocated to date and still had a significant amount of work to complete in relation to Mr. Pavković's appeal, including the need to respond to the Prosecution's reply to Mr. Pavković's appeal brief. Mr. Ackerman also explained that the team was awaiting the Trial Chamber's decision on Mr. Pavković's motion to admit additional evidence pursuant to Rule 115 of the Rules of Procedure and Evidence of the Tribunal ("Rules"), and that "there will be arguments which will require significant preparation time as well as several hours in court, considering that there are many of us in this case". Mr. Ackerman indicated that "neither I nor any member of my team will continue to work on this matter unless we are being appropriately compensated" and "[i]f this request is not granted, I then suggest you find other counsel to complete this appeal".[2]

2. On 10 February 2010, OLAD responded to the First Request for Funds, explaining that the Registrar will only consider a request for additional funds upon a showing of "unforeseen and new circumstances beyond the control of the defence that have an impact on the workload of a defence team". OLAD asserted that "the need to respond to the Prosecutor's Reply and the preparation of the final arguments cannot be considered unforeseen circumstances in appeal proceedings". OLAD further asserted that the First Request for Funds did not provide sufficient detail substantiating the need for 300 to 500 additional hours. OLAD accordingly asked Mr. Ackerman to provide further details regarding the additional work he expected would need to be undertaken in relation to the Rule 115 motion, whether any new and unforeseen circumstances had impacted the workload of the

[1] IT/73/Rev. 11
[2] *See* First Request for Review, Attachment 1.

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defence team, and if so, the work that would need to be undertaken as a result. Furthermore, OLAD reminded Mr. Ackerman of his obligations under the Code of Conduct and the rules applicable to the withdrawal of assigned counsel under the Tribunal's legal aid system, stating that Mr. Ackerman "accepted [his] assignment to the *Pavković* case in full awareness of the resources available under the legal aid system of the Tribunal".[3]

3. On 17 February 2010, Mr. Ackerman submitted a letter to OLAD, providing the following justifications in support of the First Request for Funds: (1) the potential need to file a response in the event that the Prosecution files a motion pursuant to Rule 115 of the Rules will warrant the allocation of an additional number of hours that cannot currently be estimated; (2) an additional 150 hours are needed to complete a supplemental brief ordered by the Appeals Chamber; (3) approximately 50 additional hours will be needed to discuss the Judgement with Mr. Pavković after he receives it in his native language in order to determine whether it will be necessary to raise additional grounds of appeal; (4) approximately 75 hours will be needed to prepare for final arguments and 80 in-court hours for final arguments; and (5) the Judgement and post-Judgement discussions with Mr. Pavković will necessitate an additional 15 to 20 hours.

4. Mr. Ackerman also noted that his team had expended 100 hours working on the reply to the Prosecution's response to Mr. Pavković's appeal brief. He submitted that the Registrar was correct in suggesting that work such as replying to the Prosecution's response and preparing and presenging oral arguments were foreseeable to Mr. Ackerman at the beginning of the appeal and argues that "that is why I requested a Level 3 designation". He asserted that the Registrar's decision to rank the Pavković appeal at level 2 "simply involved a failure on the part of the Registry to foresee the complexity and amount of work involved in this appeal" and that the additional hours requested in the First Request for Funds were "within a Level 3 designation".

5. Mr. Ackerman further submitted that contrary to OLAD's contention, as of August 2009, he had not "accepted any tasks in full awareness of the resources available'." In this regard, he explained that he was informed in February or March 2009 that the *Pavković* appeal would be ranked at level 1 until after the filing of the notices of appeal, when a new assessment would be made. Six months later, he still had no information with regard to the level at which the appeal would be funded, and sent a request that the appeal be ranked at level 3. However, in October 2009, nearly two months after the request had been sent, OLAD denied it and ranked it at level 2.[4]

[3] *See* First Request for Review, Attachment 2.
[4] *See* First Request for Review, Attachment 3.

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6. On 19 February 2010, Mr. Ackerman filed a motion before the Appeals Chamber to stay all defence filing deadlines in the Appeal, pending the Registry's decision on his First Request for Review ("Motion for Stay").[5] The Appeals Chamber denied the Motion for Stay on 2 March 2010, finding, *inter alia*, that Mr. Ackerman had "agreed to represent [Mr. Pavković] in full awareness of the system of remuneration for assigned counsel and is bound thereby" and "is therefore under the obligation to continue working in his client's best interests until the representation is terminated (with the completion of the proceedings or an approved withdrawal)" ("2 March 2010 Decision").[6]

7. On 2 March 2010, Mr. Ackerman sent a letter to Mr. Pavković, advising him, *inter alia*, that the Registrar had indicated that he would not be paid for any more work on Mr. Pavković's case, that Mr. Ackerman had recently filed a request for 500 additional hours to work on the case, and that should the Registry fail to grant additional funds to complete the appeal, he will have to withdraw from the case.[7]

8. On 3 March 2010, OLAD granted the First Request for Funds in part ("First Impugned Decision"), allocating the defence an additional 100 counsel hours and 150 support staff hours, on the basis that:

> The Registry is satisfied that your team's work on the Supplemental Brief and, exceptionally, on the Reply to the Prosecution's Response warrants the allocation of additional funds. The Registry is not in a position, however, to allocate funds based on the possibility that the Prosecution may decide to request the admission of additional evidence. Should this indeed be the case at a later stage, you may submit a substantiated request for the Registry's consideration. The same applies to the possibility that you may raise additional grounds of Appeal once your client has reviewed the Judgment. As to the need to discuss the Judgment with your client, to prepare the final arguments and to consult with your client after the Appeals Judgment has been rendered, additional funds are not warranted as these tasks were considered in the initial allotment to the Pavković defence team.[8]

9. Mr. Ackerman filed the First Request for Review on 4 March 2010, which was forwarded to me by the Deputy Registrar via memorandum on 10 March 2010.

10. On 8 March 2010, Mr. Ackerman submitted a request to OLAD for the allocation of an additional 270 counsel hours to the *Pavković* Defence team given that the Prosecution disclosed 7,573 pages of Rule 68 discovery material on 5 March 2010 ("Second Request for Funds"). In support of the Second Request for Funds, Mr. Ackerman submitted that this material "was totally unforeseen and therefore could not have been included in initial hourly calculations". He further submitted that because most if not all of the material was not in the English language, Mr. Aleksić, a member of the defence team, must read it and advise him of its relevance. He estimated that at a

[5] General Pavković's Motion for Stay of Proceedings Pending Action by the Registrar, 19 February 2010, para. 1.
[6] Decision on Nebojša Pavković's Motion for Stay of Proceedings, 2 March 2010, paras 13-16.
[7] *See* First Request for Review, Attachment 5.

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rate of two minutes per page, it would take Mr. Aleksić at least 250 hours to get through this material, as well as an additional 10 to 20 hours to "make determinations regarding its use" in consultation with Mr. Ackerman. Mr. Ackerman also indicated that "[a]ny additional hours needed should a Rule 115 Motion be necessary can be dealt with later".[9]

11. On 10 March 2010, OLAD denied the Second Request for Funds, reasoning that the disclosure of 7,573 pages of Rule 68 material does not qualify as an unforeseen circumstance. The Registrar explained that:

> To the contrary, the OTP is obliged to ongoing disclosure pursuant to Rule 68 of the Rules. Such disclosure is therefore common at all stages of the proceedings, and it has been the Registrar's consistent approach that ongoing disclosure as such does not warrant the allocation of additional funds. Exceptions were made in cases in which, for example, a significant quantity of disclosure occurred just before the start of trial. However, neither the number of pages disclosed, nor the timing of the disclosure warrant additional funds, as neither is extraordinary in disclosure practices for cases such as the instant case.

The Registrar nevertheless invited Mr. Ackerman to request additional funds should he file a Rule 115 motion.

12. Mr. Ackerman filed the Second Request for Review on 10 March 2010, which was forwarded to me by the Deputy Registrar via memorandum on 15 March 2010.

13. The Registrar submitted a Rule 33(B) submission in relation to the First Request for Review ("First Rule 33(B) Submission") on 18 March 2010 and in relation to the Second Request for Review on 24 March 2010 ("Second Rule 33(B) Submission"). Mr. Ackerman filed a response to the Second Rule 33(B) Submission ("Response to Second Rule 33(B) Submission") on 31 March 2010, which the Registrar forwarded to me on 1 April 2010. The Registrar replied to this Response on 13 April 2010 ("Registrar's Reply to Rule 33(B) Response").

II. STANDARD OF REVIEW

14. The following standard has been set for the review of administrative decisions made by the Registrar:

> 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 judgement 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

[8] *See* First Request for Review, Attachment 4.
[9] *See* First Request for Review, Attachment 1.

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> propriety of the procedure by which the Registrar reached the particular decision and the manner in which he reached it.[10]

Accordingly, an administrative decision may be quashed if the Registrar:

> (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).[11]

15. Unless unreasonableness has been established "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] The onus of persuasion lies on the party challenging the administrative decision to show that: (1) an error of the nature enumerated above has occurred, and (2) that such an error has significantly affected the administrative decision to his detriment. An administrative decision may only be quashed when both elements are shown.[13] Furthermore, in legal aid cases "it is clear, from the implicit restriction that only the Registrar may determine the *extent* to which the accused has the means partially to remunerate counsel, that the power of the Chamber to substitute its own decision for that of the Registrar is limited".[14]

III. APPLICABLE LAW

16. Article 23(A) of the Directive provides that:

> 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 in accordance with the Statute, the Rules, this Directive and related policies and subject to the budgetary provisions, rules,

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[10] *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Request for Review of OLAD Decision on Trial Phase Remuneration, 19 February 2010 ("*Karadžić* Decision of 19 February 2010"), para. 9; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Appeal of OLAD Decision in Relation to Additional Pre-Trial Funds, 17 December 2009 ("*Karadžić* Decision of 17 December 2009"), para. 18; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-AR73.2, Decision on Interlocutory Appeal of the Trial Chamber's Decision on Adequate Facilities, 7 May 2009 ("*Karadžić* Appeal Decision"), para. 10; *Prosecutor v. Veselin Šljivančanin*, Case No. IT-95-13/1-PT, Decision on Assignment of Defence Counsel, 20 August 2003 ("*Šljivančanin* Decision"), para. 22; *Prosecutor v. Miroslav Kvočka et al*, Case No. IT-98-30/I-A, Decision on Review of Registrar's Decision to Withdraw Legal Aid from Zoran Žigić, 7 February 2003 ("*Žigić* Decision"), para. 13.

[11] *Karadžić* Decision of 19 February 2010, para. 9; *Karadžić* Decision of 17 December 2009, para. 18; *Karadžić* Appeal Decision, para. 10; *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-A, Decision on Krajišnik Request and on Prosecution Motion, 11 September 2007 ("*Krajišnik* Decision"), para. 30; *Šljivančanin* Decision, para. 22; *Žigić* Decision, para. 13.

[12] *Karadžić* Decision of 19 February 2010, para. 10; *Karadžić* Decision of 17 December 2009, para. 18; *Karadžić* Appeal Decision, para. 10; *Krajišnik* Decision, para. 30; *Žigić* Decision, para. 13.

[13] *Karadžić* Decision of 19 February 2010, para. 10; *Karadžić* Decision of 17 December 2009, para. 18; *Karadžić* Appeal Decision, para. 10; *Žigić* Decision, para. 14.

[14] *Karadžić* Decision of 19 February 2010, para. 10; *Karadžić* Decision of 17 December 2009, para. 18; *Žigić* Decision, para. 14.

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> regulations, and practice set by the United Nations. All costs are subject to prior authorisation by the Registrar. If authorisation was not obtained, the Registrar may refuse to meet the costs.

Article 24(C) of the Directive governs the remuneration of assigned counsel and assigned members of the defence team during appellate proceedings, and provides that:

> During appellate proceedings, assigned counsel and assigned members of the defence team shall be remunerated on the basis of a maximum allotment of working hours paid at a fixed hourly rate as established in Annex I to this Directive, for the work reasonable and necessary to the preparation and presentation of the defence case.

The Directive does not specify the maximum allotment of working hours allocated to defence teams during appeal proceedings. However, in the First Rule 33(B) Submission, the Registrar explains that based on the aforementioned provisions of the Directive:

> [...] the Registrar has determined the maximum allotments deemed reasonable and necessary for the preparation of an appeal of a certain level of complexity, and has consistently applied these allotments to all appeals cases before this Tribunal.[15]

The Registrar further explains that:

> These allotments are as follows: 1,050 counsel hours, plus all hearing hours and 450 support staff for a case ranked at complexity level one; 1,400 counsel hours, plus all hearing hours and 600 support staff hours for a case ranked at complexity level two; 2,100 counsel hours, plus all hearing hours and 900 support staff hours for a case ranked at complexity level three.[16]

Additionally:

> Although Article 24(C) of the Directive does not expressly provide for an increase in the maximum allotment, the Registry has equitably applied the standards of the payment policy for the pre-trial stage allowing for exceptional increases in the lump sum [...] if the Lead Counsel demonstrates unforeseeable circumstances beyond the control of the Defence, which substantially impact upon the preparation reasonably required by the Defence team [...].[17]

IV. SUBMISSIONS

A. First Request for Review

17. Mr. Ackerman requests that I review the Registry's allocation in the First Impugned Decision of only 250 additional hours to his Defence team. He argues that this decision is arbitrary and unacceptable, given that his defence team has thus far only been paid for hours deemed by the Registry as reasonable and necessary, all hours previously allocated to his defence team have been expended, and an estimated additional 500 hours are needed to complete the "reasonable and necessary" work on the appeal.

[15] First Rule 33(B) Submission, para. 16.
[16] First Rule 33(B) Submission, para. 16, fn. 12.
[17] First Rule 33(B) Submission, para. 16, fn. 13.

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18. Mr. Ackerman submits that although under the lump sum system that applies during the pre-trial and trial stages, counsel are required to perform all "reasonable and necessary" work for an agreed upon lump sum, under the hourly system, which is applied to cases on appeal, "counsel agree to perform all 'reasonable and necessary' work for an hourly rate of payment." He submits that the Registry has informed him that he has "an obligation to perform 'reasonable and necessary' work on this case without compensation", that he never agreed to do so, and that he has been consistently informed that he can request additional hours upon demonstrating that they are necessary. He argues that the First Impugned Decision contravenes Article 8(3)(a) of the International Covenant on Civil and Political Rights ("ICCPR"), which "does not permit a person to be forced or compelled to perform labour".[18]

19. In response, the Deputy Registrar ("Registrar") requests that I dismiss the First Request for Review on the basis that the First Impugned Decision "represents a reasonable determination, taken fairly and with due process, based on a careful examination of all relevant information".[19] The Registrar explains that:

> The policy applied to Counsel with respect to funding of the Appeal is set forth in Article 24(C) of the Directive and applicable UN Financial Rules and Regulations. Counsel had ample notice of this policy, and has been clearly instructed in a number of different correspondences of the limits of available resources, as well as the circumstances under which additional funds might be warranted and the method by which they should be requested.[20]

20. The Registrar notes that the Registar granted Mr. Ackerman's First Request for Funds in part on the basis that the Defence Team's work on the Supplemental Brief was unforeseeable and impacted upon the Defence team's workload. Furthermore, although the need to draft a reply to a Prosecution response is generally foreseeable, in the instant case, given "the magnitude of the case and the overall number of replies and responses [...] the impact on the workload of the defence was significant".[21] The Registrar submits, however, that the Registry was justified in dismissing the remainder of the First Request for Funds on the basis that: (1) "hearing hours for counsel are remunerated over and above the maximum allocation of hours and are therefore not at issue at this time"; (2) the Registry may not allocate funds based on the possibility that the Prosecution may file a motion pursuant to Rule 115 of the Rules or that after Mr. Pavković has reviewed the Trial Judgement, the Defence may raise additional grounds of appeal, although Mr. Ackerman may submit a request for additional hours should this be the case at a later stage; and (3) the need to discuss the Judgement with Mr. Pavković, prepare the final arguments and to consult with Mr. Pavković after the Appeal Judgement does not warrant additional funds as "these tasks are typical

[18] First Request for Review.
[19] First Rule 33(B) Submission, paras 20 and 43.
[20] First Rule 33(B) Submission, para. 20.

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for every Appeals case before the Tribunal and were considered in the initial allotment of funds to the Defence team".[22]

21. The Registrar also asserts that Mr. Ackerman's argument that the Registry violated Article 8(3) of the ICCPR by not granting the First Request for Funds in full is untenable. In this regard, the Registrar submits that Mr. Ackerman "voluntarily accepted to participate in the appeal of the Accused 'in full awareness of the system of remuneration for assigned counsel' despite his claims to the contrary", and that to date, the Registry "has granted all substantiated additional resources sought". The Registrar argues that "Counsel was fully aware of the limited Legal Aid funding available to him. He was, more specifically, aware that he would be paid for reasonable and necessary work **within a maximum allotment** of hours" and that "[t]he Appeals Policy assumes that counsel will avoid billing all of the allotted hours at the beginning of the appeal, and will instead plan and allocate resources appropriately." The Registrar also points out that in its 2 March 2010 Decision, the Appeals Chamber denied Mr. Ackerman's request to stay all deadlines until his request for additional resources had been granted in full, finding that Mr. Ackerman had not demonstrated good cause for a stay and stating that "Counsel agreed to represent the Accused in full awareness of the system of remuneration for assigned counsel and is bound thereby". The Registrar asserts that "Counsel may not threaten to suddenly cease representation of an accused before the Tribunal because he or she is not happy with the allocation of funds for a particular assignment." Finally, the Registrar submits that Mr. Ackerman's conduct "runs contrary to the obligations in the Code of Conduct".[23]

B. Second Request for Review

22. In the Second Request for Review, Mr. Ackerman requests that I review the Second Impugned Decision, in which OLAD denied his request for a total of 270 additional counsel hours in light of the 7,573 pages of Rule 68 material disclosed to the *Pavković* Defence team on 5 March 2010. In support of his Request, Mr. Ackerman submits that:

> The limited hours assigned to me by the Registry have been expended. Each of those expended hours were approved by the Registry as having been reasonable and necessary to the appeal of Pavkovic. No payment could otherwise have been made.

Mr. Ackerman submits that the Second Impugned Decision requires him to either perform several hundred hours of work on the *Pavković* appeal without compensation or violate his ethical responsibilities, and that nothing in the Statute or Rules authorizes the Tribunal to compel members

[21] Para. 24.
[22] First Rule 33(B) Submission, paras 25-27.
[23] First Rule 33(B) Submission, paras 29-42.

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of the judiciary, Prosecutors or Defence Counsel to work "without reasonable compensation". Mr. Ackerman also reiterates his argument in the First Request for Review that the Second Impugned Decision contravenes the ICCPR's prohibition against involuntary servitude and asserts that:

> [...] should the Registry continue to take the position that I must perform additional reasonable and necessary services for General Pavković without compensation therefore, I will refuse to do so. I will withdraw from the case.[24]

23. In the Second Rule 33(B) Submission, the Registrar argues that the Registry's denial of the Second Request for Funds was justified and accordingly requests that I dismiss the Second Request for Review in its entirety.[25] In support of his argument, the Registrar argues that:

> The Registry is not satisfied that the OTP's disclosure of 7,573 pages pursuant to Rule 68 of the Rules during Appeals proceedings qualifies as an "unforeseen circumstance" and warrants the allocation of additional funds. The OTP is obliged to carry out ongoing disclosure pursuant to Rule 68 of the Rules. Such disclosure is therefore common at all stages of the proceedings, and it has been the Registry's consistent approach that ongoing disclosure as such does not warrant the allocation of additional funds. Exceptions were made in cases in which, for example, a significant quantity of disclosure occurred just before the start of the trial. However, in the instant case neither the number of pages disclosed, nor the timing of the disclosure warrant additional funds, as neither is extraordinary for comparable cases.[26]

22. The Registrar further argues that the Second Impugned Decision "does not create a situation of involuntary servitude or in which services are performed without compensation". The Registrar asserts that Mr. Ackerman accepted to represent Mr. Pavković on appeal "in full awareness of the system of remuneration for assigned counsel" and submits that "[i]t is Counsel's responsibility to diligently plan the use of the available funding to ensure the most economic and efficient use of public funds".27

23. In the Response to Second Rule 33(B) Submission, Mr. Ackerman argues, inter alia, that the Registry's assignment of complexity levels to appeals is "completely arbitrary", and that the Pavković appeal "was assigned complexity level two rather than complexity level three on a purely arbitrary basis. He asserts that in determining the complexity level of the Pavković appeal, "no known estimate was made by Chamber or Registry as to the amount of Rule 68 material that would likely be provided by the Prosecution during the course of the appeal". He also submits that the Registry's system of remunerating Defence Counsel is "totally unfair and illegal" given that Prosecution may "pursue all avenues of investigation and research without cessation of salary past a certain number of hours" whereas Defence Counsel are only compensated for reasonable and necessary work "within the arbitrary assignment of hours". He asserts that this system violates the

[24] Second Request for Review.
[25] Second Rule 33(B) Submission, paras 26 and 36.
[26] Second Rule 33(B) Submission, para. 25.
[27] Second Rule 33(B) Submission, paras 30-33.

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ICCPR and the principle of equality of arms. Mr. Ackerman further submits that "[i]t cannot be the case that the Registry expects counsel to only do as much work on an appeal as their arbitrarily assigned hours would permit regardless of counsel's professional opinion that significant additional work is reasonable and necessary to adequately represent his client".[28]

24. In the Registrar's Reply to Rule 33(B) Submission Response, the Registrar submits that "the determination of the level of complexity of cases in appeal is not 'arbitrary', but rather a transparent and consistent procedure applied to all legally aided cases before the Tribunal equally". The Registrar reiterates that Mr. Ackerman was fully informed about the procedure and criteria applied for assigning case complexity levels. The Registrar further notes that when the Pavković appeal was ranked at complexity level two, Mr. Ackerman did not challenge the Registry's decision. In addition, the Registrar submits that "it is firmly established within Tribunal jurisprudence that equality of arms does not mean equality of resources" and "implies *procedural* equality between the Defence and the Prosecution as opposed to substantive equality." The Registrar submits that it has provided the Defence with "the necessary means to ensure equality of arms with the OTP".[29]

V. DISCUSSION

A. First Request for Review

24. As previously indicated, in the First Impugned Decision, the Registrar granted the First Request for Funds in part, allocating Mr. Ackerman a total of 250 hours for the *Pavković* Defence team's work on the reply to the Prosecution's response and the supplemental brief. Accordingly, Mr. Ackerman's First Request for Review is confined to the Registrar's denial of Mr. Ackerman's requests for: (1) an unspecified number of hours to file a response in the event that the Prosecution files a Rule 115 motion; (2) 50 hours to discuss the Judgement with Mr. Pavković; (3) 75 hours to prepare for final arguments; (4) 80 hours for final arguments; and (5) 15 to 20 hours for post-Judgement discussions with Mr. Pavković. I will review the Registrar's decision in relation to each of these requests in turn.

25. I observe that in denying Mr. Ackerman's request for additional hours to file a response to a potential Prosecution motion pursuant to Rule 115 of the Rules, the Registrar reasoned that the Registry may not allocate funds based on the mere possibility that the Prosecution will file a Rule 115 motion. However, the Registrar indicated that the Registry would consider a substantiated request from the Defence team for additional hours to respond to such a motion should one be filed.

[28] Response to Second Rule 33(B) Submission.
[29] Registrar's Reply to Rule 33(B) Response, paras 7-14.

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I consider that it was reasonable for the Registrar to deny this request for additional hours given that Mr. Ackerman had not yet demonstrated a need for them, and the request was therefore premature.

26. I also consider that the Registrar's denial of Mr. Ackerman's request for 80 additional hours for the presentation of final arguments constituted a reasonable exercise of his discretion, given that, as explained by the Registrar, the Registry allocates hearing hours for Defence Counsel in addition to the maximum allocation of hours allotted per phase. I thus expect that the *Pavković* Defence team will be compensated for all hours spent in court delivering final arguments.

27. It remains to be determined whether the Registrar correctly exercised his discretion in denying Mr. Ackerman's request for a total of 140 to 145 additional hours for the purpose of discussing the Trial Judgement with Mr. Pavković once he has received it in his native language in order to determine whether it will be necessary to raise additional grounds of appeal, preparing for final arguments, and discussing the Appeals Judgement with Mr. Pavković after it is rendered. I recall that the Registry ranked the Pavković case at complexity level two, which entitled the Pavković' Defence team to a total of 2,000 remunerable hours for the appeal phase. Furthermore, pursuant to the Registry policy, Defence teams may only receive hours in addition to the maximum allotment per phase upon demonstrating "unforeseeable circumstances beyond the control of the Defence, which substantially impact upon the preparation reasonably required by the Defence team". The need to discuss the Trial Judgement with one's client during the appeal phase, prepare for final arguments, and discuss the Appeal Judgement after it is rendered are tasks typical of all appeal cases before the Tribunal. I therefore consider that the Registrar reasonably exercised his discretion when he concluded that these tasks do not constitute "unforeseeable circumstances beyond the control of the Defence" that warrant the allocation of hours above and beyond the maximum number of hours initially allotted for the appeal phase.

28. It is correct, as Mr. Ackerman asserts, that under the hourly system of remuneration that applies to cases on appeal, "counsel agree to perform all 'reasonable and necessary' work for an hourly rate of payment". However, there is a cap on the number of hours that may be billed for reasonable and necessary work during the appeal phase, absent a showing of unforeseen circumstances.[30] In this regard, the hourly rate of remuneration that applies on appeal is akin to the lump sum system that applies during the pre-trial and trial phases, the main difference being that during the appeal phase, instead of receiving a lump sum of money per phase, the Defence team receives a lump sum of hours to be paid at a rate commensurate with the role and experience level of the Defence team member to whom the hour is distributed.

[30] *See* First Rule 33(B) Submission, para. 16. *See also* 2 March 2010 Decision, para. 10, fn. 23.

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29. Mr. Ackerman was informed of the system of remuneration for assigned counsel that applies on appeal and agreed to represent Mr. Pavković in awareness of that system.[31] Thus, contrary to Mr. Ackerman's assertions, I do not consider that the Impugned Decision may be construed as requiring Mr. Ackerman "to perform 'reasonable and necessary' work on the *Pavković* case without pay." Accordingly, I will not address Mr. Ackerman's submission that the Impugned Decision compels him to work without pay, in contravention of the ICCPR.

B. Second Request for Review

30. I recall that the *Pavković* case was initially ranked at complexity level one on 3 March 2009. On 27 May 2009, the *Pavković* Defence filed its notice of appeal,[32] and on 21 October 2009, the Registry upgraded the *Pavković* case to complexity level two, and accordingly allocated it a maximum of 2,000 hours, plus all hearing hours, during the appeal phase. The Registry's decision to rank the appeal at complexity level 2, rather than level 3, as requested by Mr. Ackerman, was based in part on its consultation with the Appeals Chamber,[33] which considered that although "an upgrade of Pavković's appeal to Level 2 is appropriate [...] an upgrade to Level 3 requested by Pavković is not justified at present".[34] It is notable that when indicating to the Registry its position regarding this matter, the Appeals Chamber emphasized that:

> It remains our understanding that all the appellants will still be able to apply for a further upgrade at a later stage, if appropriate, *where matters such as ongoing disclosure*, additional evidence under Rule 115 of the Rules and possible variation of the grounds of appeal arising from the anticipated translation of the Trial Judgement into B/C/S warrant such an adjustment.[35]

31. The Prosecution's disclosure of 7,573 pages of Rule 68 material to the *Pavković* Defence occurred nearly ten months after the *Pavković* Defence filed its notice of appeal. Although, as the Registrar submits, the Prosecution "is obliged to ongoing disclosure pursuant to Rule 68 of the Rules" and therefore, such disclosure is "common at all stages of the proceedings", such disclosure is much less common on appeal than during other stages of the proceedings. Furthermore, I do not consider that the disclosure of such a high volume of material at such a late stage in the proceedings is a common or foreseeable occurrence. As such, Mr. Ackerman can not reasonably be expected to have factored the additional work of processing 7,573 pages of potentially exculpatory material into his initial calculations when determining how to distribute the hours allocated to the *Pavković* Defence team. Furthermore, the Appeals Chamber's explicitly indicated that it based its recommendation that the *Pavković* appeal should be ranked at level 2 rather than level 3, in part, on

[31] 2 March 2010 Decision, para. 14. *See also* First Rule 33(B) Submission, para. 39, fn.3.
[32] *Prosecutor v. Pavković*, Case No. IT-05-87-A,
[33] *See* First Registry Submission, Annex I.
[34] Registrar's Reply to Rule 33(B) Response, Annex V.
[35] Registrar's Reply to Rule 33(B) Response, Annex V (emphasis added).

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an understanding that Mr. Pavković and his co-appellants would be eligible to apply for additional funds in the event, *inter alia*, that "matters such as ongoing disclosure [...] warrant such an adjustment". In light of the foregoing, I consider that it was unreasonable for the Registrar to conclude that such disclosure did not constitute an unforeseeable circumstance warranting the allocation of the 270 additional counsel hours requested by Mr. Ackerman.

32. As regards the dissatisfaction that Mr. Ackerman expresses in both the First Request for Review and Second Request for Review in relation to the level of complexity assigned to the *Pavković* appeal, I note that this issue was not subject of the First or Second Impugned Decision, which Mr. Ackerman has requested that I review. Indeed, to my knowledge, Mr. Ackerman has never requested the review of OLAD's decision to rank the *Pavković* appeal at level 2. Under these circumstances, I am not seized of this issue and accordingly will not render any decision thereon.

VI. DISPOSITION

33. In light of the foregoing, I **DISMISS** the First Request for Review, **GRANT** the Second Request for Review, and **ORDER** the Registrar to allocate the Pavković Defence team 270 additional counsel hours.

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

Done this 25th day of May 2010,
At The Hague,
The Netherlands.

Judge Patrick Robinson
President

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