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10 March 2011

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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-03-69-T

Date: 10 March 2011

Original: English

IN TRIAL CHAMBER I

Before: **Judge Alphons Orie, Presiding**
Judge Michèle Picard
Judge Elizabeth Gwaunza

Registrar: **Mr John Hocking**

Decision of: **10 March 2011**

PROSECUTOR

v.

JOVICA STANIŠIĆ
FRANKO SIMATOVIĆ

PUBLIC

DECISION ON STANIŠIĆ DEFENCE MOTION FOR EQUALITY OF ARMS AND IMMEDIATE SUSPENSION OF THE TRIAL AND ON ASSOCIATION OF DEFENCE COUNSEL (ADC-ICTY) MOTION FOR LEAVE TO APPEAR AS *AMICUS CURIAE*

Office of the Prosecutor
Mr Dermot Groome

Association of Defence Counsel
Mr Slobodan Zečević, President

Counsel for Jovica Stanišić
Mr Wayne Jordash
Mr Geert-Jan Alexander Knoops

Counsel for Franko Simatović
Mr Mihajlo Bakrač
Mr Vladimir Petrović

I. PROCEDURAL HISTORY

1. On 2 February 2011, the Stanišić Defence filed its 'Urgent Stanišić Motion for Equality of Arms and Immediate Suspension of the Trial (other than the Examination of Remaining Prosecution Witnesses) with Annexes A-K' ("Motion"), wherein it requests the Chamber to: (i) "quash the [Registry's] funding decisions in this case [and] compel the Registry to provide adequate resources to facilitate a fair trial pursuant to Articles 20 and 21 of the Statute" of the Tribunal;[1] and (ii) suspend all aspects of the trial process, other than the examination of the remaining Prosecution witnesses, until such resources are provided to the Stanišić Defence.[2] The Prosecution filed a limited response to the Motion ("Prosecution Response").[3]

2. Following an invitation from the Chamber,[4] the Registrar filed submissions on the Motion ("Registrar's Submission") pursuant to Rule 33 (B) of the Tribunal's Rules of Procedure and Evidence ("Rules").[5] With the leave of the Chamber, the Stanišić Defence responded to the Registrar's Submission ("Stanišić Defence Reply")[6] and the Registrar subsequently replied to the Stanišić Defence Reply ("Registrar's Reply").[7]

3. The Association of Defence Counsel Practising before the International Criminal Tribunal for the former Yugoslavia ("ADC-ICTY") requested leave to appear as *amicus curiae* in relation to the Motion ("ADC-ICTY Motion").[8] The Registrar,[9] the Prosecution[10] and the Simatović Defence responded to the ADC-ICTY Motion.[11]

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[1] Motion, para. 38.
[2] Motion, para. 39.
[3] Prosecution Limited Response to Stanišić Motion for Equality of Arms and Immediate Suspension of the Trial, 4 February 2011.
[4] T. 10906, 2 February 2011. The Chamber invited the Registrar to file any submissions by 8 February 2011,
[5] Registrar's Submission Pursuant to Rule 33 Regarding Urgent Stanišić Motion for Equality of Arms and Immediate Suspension of the Trial (Confidential), 11 February 2011. The Chamber, by informal communication on 7 February 2011, granted the Registrar an extension of time until 12pm on 11 February 2011 for the filing of any submissions in relation to the Motion.
[6] Urgent Stanišić Application for Leave to Reply to Registrar's Submission Pursuant to Rule 33 Regarding Defence Motion for Equality of Arms and Immediate Suspension of Trial (Confidential), 17 February 2011 ("Stanišić Application for Leave to Reply"); Stanišić Reply to Registrar Submission Pursuant to Rule 33 Regarding Defence Motion for Equality of Arms and Immediate Suspension of Trial (Confidential), 22 February 2011. The Stanišić Defence Application of 17 February 2011 was filed confidentially, rather than publicly, following a series of informal communications between the Stanišić Defence, the Registry and the Chamber on 16 February 2011. The Chamber granted leave to reply by informal communication on 18 February 2011.
[7] Registrar's Application for Leave to Reply (Confidential), 28 February 2011; Registry Submission Pursuant to Rule 33(B) Regarding the Stanišić Reply (Confidential), 4 March 2011 ("Registrar's Reply"). The Chamber granted leave to reply by informal communication on 1 March 2011.
[8] Association of Defence Counsel (ADC-ICTY) Motion for Leave to Appear as *Amicus Curiae*, 22 February 2011. On 22 February 2011, the Chamber through an informal communication requested the parties and the Registry to file any responses to the ADC-ICTY Motion by close of business on 24 February 2011.
[9] Registrar's Submission Pursuant to Rule 33 Regarding Association of Defence Counsel (ADC-ICTY) Motion for Leave to Appear as *Amicus Curiae*, 24 February 2011 ("Registrar's Submission on ADC-ICTY Motion").

II. SUBMISSIONS

A. Motion

4. The Stanišić Defence submits that the resources provided by the Registry for the purposes of Jovica Stanišić's ("Accused") defence are inadequate and fall short of the amount needed to employ two appropriately qualified Counsel and a team of support staff on a full time basis.[12] The Stanišić Defence argues that the Registry has undermined the Accused's right to an equality of arms, "thereby placing the Defence at a substantial disadvantage when presenting its case".[13] Accordingly, the Stanišić Defence requests the Chamber to intervene in relation to the Registry's funding decisions on the basis of the Chamber's inherent power to ensure that trial proceedings are fair.[14] Further, the Stanišić Defence requests a suspension of all aspects of the trial process, other than the examination of the Prosecution witnesses, until adequate resources are provided.[15] It argues that the currently constituted Stanišić Defence team does not have the capacity to complete tasks beyond the examination of Prosecution witnesses "without being forced to endure excessive and unreasonable working conditions".[16] Finally, the Stanišić Defence requests that the Registry be restrained from "any further reduction in the Defence budget".[17]

5. The Stanišić Defence asserts that the Registry's funding decisions in respect of it are manifestly flawed, in that they fail "to take into account relevant considerations and to conduct reasoned calculations to meet the specificity of the Stanišić case".[18] It submits that the Registrar's calculation of the lump sum applicable to the Stanišić Defence team pursuant to the 'Defence Counsel – Trial Legal Aid Policy'("Legal Aid Policy")[19] fails to take into account a number of considerations, including: whether or not the Stanišić Defence perform trial related work on non-sitting days;[20] the fact that Counsel and staff are expected to be available during all non-sitting days;[21] the heightened impact of the use of Rule 92 *ter* statements on a case that sits only part

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[10] Prosecution Response to Association of Defence Counsel (ADC-ICTY) Motion for Leave to Appear as *Amicus Curiae*, 24 February 2011 ("Prosecution Response to ADC-ICTY Motion").
[11] Simatović Defence Response to ADC Motion for Leave to Appear as *Amicus Curiae*, 28 February 2011 ("Simatović Response to ADC-ICTY Motion"). Although the Simatović Response to ADC-ICTY Motion was filed late, the Chamber will exceptionally consider the response to have been validly filed.
[12] Motion, para. 14; see also paras 1-2.
[13] Motion, para. 1.
[14] Motion, paras 4, 7.
[15] Motion, para. 2.
[16] Ibid. The Chamber notes that the last Prosecution witness testified on 9 February 2011.
[17] Motion, para. 3.
[18] Motion, para. 14.
[19] Defence Counsel – Trial Legal Aid Policy, 1 November 2009.
[20] Motion, para. 21.
[21] Motion, paras 24 -25.

time;[22] and the increase in the amount of disclosure received due to the prolonged nature of the proceedings.[23] In addition, it argues that the Registrar appears to have taken into account an irrelevant consideration, being payment arrangements between the Accused and his defence team.[24] The Stanišić Defence submits that the assessments made by the Registrar were not careful and case-specific to the unique difficulties faced by the Stanišić Defence.[25]

B. Prosecution Response

6. The Prosecution submits that it would be inappropriate for it to interject in disagreements between the Registry and the Stanišić Defence with respect to the Accused's legal representation.[26] The Prosecution notes that there are two Counsel on the record for the Accused,[27] and submits that the Chamber should require the currently constituted team to meet all of its deadlines for responses and submissions.[28]

C. Registrar's Submission

7. The Registrar submits firstly that the Motion should have been brought before the President of the Tribunal pursuant to Article 31 (C) of the Directive on the Assignment of Defence Counsel ("Directive"),[29] rather than before the Chamber.[30] The Registrar submits that the Stanišić Defence fails "to provide justification for involving the Trial Chamber in a matter that relates strictly to the funding of the case".[31] Secondly, the Registrar submits that his calculation of the lump sum payable to the Stanišić Defence for the Prosecution phase of the proceedings was a reasonable exercise of administrative power,[32] in that he: (i) applied the legal provisions governing the remuneration of Defence Counsel set out in the Directive and the Legal Aid Policy;[33] (ii) considered all relevant factors, including the unique difficulties faced by the Stanišić Defence, and accommodated them to the extent permitted within his discretion;[34] and (iii) accorded the Stanišić Defence full procedural fairness.[35] Finally, the Registrar submits that the Stanišić Defence may claim compensation for work performed on non-sitting days in accordance with paragraph 24 of the Legal Aid Policy,

[22] Motion, para. 22.
[23] Motion, para. 23.
[24] Motion, paras 16-17.
[25] Motion, paras 26-32.
[26] Prosecution Response, para. 2.
[27] Prosecution Response, paras 2, 4
[28] Prosecution Response, para. 12.
[29] Directive on the Assignment of Defence Counsel (Directive No. 1/94)(IT/73/REV.11).
[30] Registrar's Submission, paras 24-27.
[31] Registrar's Submission, paras 25-26.
[32] Registrar's Submission, paras 31-33.
[33] Registrar's Submission, paras 34-35.
[34] Registrar's Submission, paras 36-38.
[35] Registrar's Submission, paras 39-42.

which sets out a mechanism for adjustment of the lump sum at the end of the Prosecution phase ("Adjustment Mechanism").[36] The Registrar submits that the Adjustment Mechanism will, if adequately justified by the Stanišić Defence and verified with the Chamber, "allow for compensation for non-sitting days during which the Defence performed reasonable and necessary work".[37] The Registrar notes that the funding of the Defence phase of the case will be finalised "once the scheduling of the commencement of the phase and its estimated duration are determined following information from the Trial Chamber".[38]

D. Stanišić Defence Reply

8. The Stanišić Defence submits that the Chamber – rather than the President – is best placed to deal with the Motion.[39] It submits that the Registry's failure to act fairly or expeditiously in relation to its funding issues necessitated an urgent application to the Chamber.[40] The Stanišić Defence argues that in recent communications, the Registry has taken an "incremental approach"[41] in offering solutions to the Stanišić Defence's funding problems, thereby demonstrating that it has previously failed to adequately consider the Stanišić Defence's arguments and to act with procedural fairness.[42] The Stanišić Defence urges the Chamber to ensure that the Registrar's decisions in relation to the funding of both Prosecution and Defence phases are reasonable in the particular circumstances of this case.[43] In addition, the Stanišić Defence requests the Chamber to lift the confidentiality of the Stanišić Application for Leave to Reply and the Stanišić Defence Reply, or alternatively to grant it leave to file both documents publicly.[44] Further, it requests that the Registrar's Submission be filed publicly so that the Registrar's funding decisions in respect of the Stanišić Defence are available to the public.[45]

E. Registrar's Reply

9. The Registrar reiterates that Article 31 (C) of the Directive provides the proper remedy for funding disputes.[46] In addition, the Registrar submits that he has acted in accordance with his obligations under the Legal Aid Policy and ensured that the Stanišić Defence "continued to receive

[36] Registrar's Submission, paras 28-30, 37, 41.
[37] Registrar's Submission, para. 28.
[38] Registrar's Submission, para. 49.
[39] Stanišić Defence Reply, para. 16.
[40] Stanišić Defence Reply, paras 4, 15.
[41] Stanišić Defence Reply, para. 12.
[42] Stanišić Defence Reply, paras 10-16.
[43] Stanišić Defence Reply, para. 19.
[44] Stanišić Defence Reply, para. 2.
[45] Stanišić Defence Reply, para. 3.
[46] Registrar's Reply, para. 2.

its regular funding at all times".[47] Finally, the Registrar submits that he has not made any determination in relation to funding for the Defence phase, nor has he pre-determined any matters.[48]

F. ADC-ICTY Motion

10. The ADC-ICTY submits that the funding issue raised in the Motion "presents a direct threat to the ability of defence counsel and team members to adequately defend accused persons at the ICTY".[49] It submits that the ADC-ICTY is in a unique position to assist the Chamber in determining the Motion, and in understanding how recent funding decisions have impacted on the ability of accused persons to prepare and present a defence.[50]

G. Responses to ADC-ICTY Motion

11. The Registrar submits that the funding issues in this case have no direct application to any other defence teams working before the Tribunal,[51] but ultimately takes no position on the filing of an *amicus curiae* brief by the ADC-ICTY.[52] Similarly, the Prosecution takes no position on the ADC-ICTY Motion but reserves its right to further respond in the event the ADC-ICTY is invited to make submissions.[53] The Simatović Defence does not object to the ADC-ICTY Motion.[54]

III. APPLICABLE LAW

(i) Settlement of disputes over payment of Defence Counsel

12. Pursuant to Rule 31 (C) of the Directive, where a dispute arises between a party and the Registrar over remuneration or reimbursement of expenses and the dispute involves a sum greater than €4,999:

> an aggrieved party may file a request for review with the Registrar, who shall refer the matter to the President for his determination. Before making a determination the President shall request submissions from the aggrieved party and the respondent. The President's determination shall be final and binding upon the parties.

(ii) Power of the Chamber to ensure that the trial of an accused person is fair

13. Article 20 of the Statute provides in relevant part that a Trial Chamber "shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of

[47] Registrar's Reply, para. 3.
[48] Registrar's Reply, para. 6.
[49] ADC-ICTY Motion, para. 4.
[50] ADC-ICTY Motion, para. 7.
[51] Registrar's Submission on ADC-ICTY Motion, para. 2.
[52] Registrar's Submission on ADC-ICTY Motion, para. 3.
[53] Prosecution Response to ADC-ICTY Motion, para. 2.

procedure and evidence, with full respect for the rights of the accused". Article 21 of the Statute sets out the rights of an accused person before the Tribunal, including his right to a fair and public hearing and his right to have adequate time and facilities for the preparation of his defence.

14. Where the power to review a decision of the Registrar is specifically conferred on the President of the Tribunal, the Trial Chamber cannot appropriate that power for itself.[55] However, a Trial Chamber otherwise has an inherent power to ensure that the trial of an accused person is fair and expeditious.[56] Further, the President has stated that "review of a decision by the Registrar on allocation of funds in terms of its impact upon the right of an accused to 'equality of arms' with the Prosecution lies with the relevant Chamber".[57] When a Trial Chamber uses its inherent power to intervene in the decision making powers of the Registrar, it must ensure that the accused person has first exhausted all available remedies.[58]

(iii) Recalculation of lump sum at end of phase

15. Paragraphs 23 to 26 of the Legal Aid Policy provide for reconciliation of the lump sum payable at the end of a phase, as follows:

> 23) Once the phase is completed and its actual duration is known, the Registrar shall recalculate the lump sum in accordance with the revised duration in order to undertake reconciliation between the funds so far paid to the Defence and the funds the Defence is entitled to receive, based on the recalculated lump sum;
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> 24) In recalculating the lump sum, the Registrar shall take the following days into account:
>
> • The actual number of sitting days, and
>
> • The number of non-sitting days for which he is satisfied, based on information from the Trial Chamber and submissions from Lead Counsel, that reasonable and necessary work was performed by the Defence team. This does not normally apply to periods of 5 or more consecutive working non-sitting days, unless information available to the Registrar dictates otherwise. If work was performed on such days, the Defence may be entitled to remuneration under the recess payment scheme [...].

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[54] Simatović Response to ADC-ICTY Motion, p. 1.
[55] *Prosecutor v. Vidoje Blagojević*, Case No. IT-02-60-AR73.4, Public and Redacted Reasons for Decision on Appeal by Vidoje Blagojević to Replace his Defence Team, 7 November 2003, para. 7 ("*Blagojević* Decision"). See also *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-PT, Decision on the Financing of the Defence of the Accused, 30 July 2007, para. 35 ("*Šešelj* 30 July 2007 Decision").
[56] *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, Decision on the Registry Submission Pursuant to Rule 33(B) Following the President's Decision of 17 December 2008, 9 April 2009, para. 20 ("*Šešelj* 2009 Decision"); *Blagojević* Decision, para. 7; *Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21-A, Order on Esad Landžo's Motion for Expedited Consideration, 15 September 1999, p. 2.
[57] *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-PT, Decision on Appeal Against Registry Decision of 19 December 2006, 12 March 2007, para. 6. See also *Šešelj* 30 July 2007 Decision, para. 36; and *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-PT, Decision on Appeals Against Decisions of the Registrar of 4 January 2007 and 9 February 2007, 25 April 2007, para. 12.
[58] *Šešelj* 2009 Decision, para. 20; *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-A, Decision on "Motion Seeking Review of the Decisions of the Registry in Relation to the Assignment of Counsel", 29 January 2007, p. 3.

> 25) For this purpose, the Defence is required to keep and submit to the Registrar together with the End-of-Stage Report detailed information regarding the work that was performed by each Defence team member during all non-sitting days which took place during the phase.
>
> 26) If the recalculated lump sum is consistent with the provisional lump sum, the corresponding End-of-Phase payment will be made in full. If the recalculated lump sum is bigger than the provisional lump sum, the corresponding increase in the lump sum shall be paid to the Defence with the End-of-Stage payment. If the recalculated lump sum is smaller than the provisional lump sum, the corresponding amount disbursed to the Defence team which exceeds the recalculated lump sum shall be subtracted from the End-of-Phase payment.

(iv) Request for leave to appear as *amicus curiae*

16. Pursuant to Rule 74 of the Rules, a Chamber "may, if it considers it desirable for the proper determination of the case, invite or grant leave to a State, organization or person to appear before it and make submissions on any issue specified by the Chamber".

17. A request for leave to appear as *amicus curiae* may be granted if the State, organization or person requesting such standing may assist the Chamber in its consideration of matters before it.[59]

IV. DISCUSSION

18. The issue before the Chamber is whether the Registrar's decisions, in determining the total amount of funding payable to the Stanišić Defence for the Prosecution phase, result in a violation of the Accused's fair trial rights. As set out below, the Chamber considers that it is not yet in a position to determine whether such a violation has occurred.

19. In order to determine whether the Registrar's funding decisions violate the Accused's fair trial rights, the Chamber must be informed of the *total* amount that the Registrar contributes to the Accused's defence for the Prosecution phase, so as to consider, *inter alia*, its adequacy. In the present instance, the total amount of funding to be provided to the Stanišić Defence for the Prosecution phase is still unknown. At the end of the Prosecution phase, the Registrar will *recalculate* the lump sum payable to the Stanišić Defence, taking into account any adjustment pursuant to paragraph 24 of the Legal Aid Policy. In accordance with this provision the Stanišić Defence may be compensated for work performed on non-sitting days during the Prosecution phase. Therefore, the Adjustment Mechanism may have an important effect on the total amount of funding that the Stanišić Defence ultimately receives for the Prosecution phase of the case. The Chamber notes that, pursuant to Article 31 (C) of the Directive, if the Stanišić Defence is not satisfied with

[59] *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-T, Decision on Association of Defence Counsel (ADC-ICTY) Motion for Leave to Appear as *Amicus Curiae*, 9 June 2009, para. 4; *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-A, Decision on Association of Defence Counsel Request to Participate in Oral Argument, 7 November 2005, p. 3.

the result of the Registrar's lump sum recalculation, it may file a request for review with the Registrar, who shall then refer the matter to the President.

20. Until the final amount of funding for the Prosecution phase has been determined, the Chamber is not in a position to determine whether a violation of the Accused's fair trial rights has occurred, and what the nature of that violation, if any, might be. On this basis, the Chamber finds that the Motion is premature. Similarly, any request for intervention in respect of funding for the Defence phase is also premature. The Chamber therefore denies the Stanišić Defence's request for orders quashing the Registrar's funding decisions and compelling the Registry to provide adequate resources, and further denies the request for suspension of the trial.

21. The Chamber notes that the Prosecution will soon close its case.[60] The Chamber encourages the Stanišić Defence to provide the Registrar with the information necessary for the Adjustment Mechanism as soon as possible. This will allow the Registrar to complete the lump sum recalculation as soon as possible after the end of the Prosecution phase.

22. Given that the Motion is premature, the Chamber considers that it would not be assisted by submissions from the ADC-ICTY at this stage. Accordingly, it denies the ADC-ICTY Motion without prejudice.

23. The Chamber notes the Stanišić Defence's request to lift the confidential status of various filings related to the Motion.[61] It also observes that the Registrar has made no formal submissions on this matter. The Chamber will therefore defer its decision on the status of the relevant filings until the Registrar presents his view on the matter.

[60] The Chamber notes further that the Prosecution phase in terms of funding will conclude at the end of any Rule 98 *bis* procedure in this case. The Chamber has ordered that oral submissions pursuant to Rule 98 *bis*, if any, be heard on 7, 8, 11 and 12 April 2011 – see Scheduling Order, 2 March 2011. The Chamber anticipates that the time between any Rule 98 *bis* hearings and the Chamber's decision in respect of the Rule 98 *bis* procedure will be short.
[61] See supra, para. 8.

V. DISPOSITION

For the foregoing reasons, the Chamber

DENIES the Motion without prejudice;

DENIES the ADC-ICTY Motion without prejudice;

DEFERS its decision in relation to the change of status of the filings related to the Motion; and

INVITES the Registrar to make submissions within 7 days on the status of the filings related to the Motion.

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

Judge Alphons Orie
Presiding Judge

Dated this tenth day of March 2011
At The Hague
The Netherlands