

**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-03-67-R33B

Date: 17 May 2011

Original: English

IN THE APPEALS CHAMBER

Before:

**Judge Andréia Vaz, Presiding
Judge Mehmet Güney
Judge Fausto Pocar
Judge Theodor Meron
Judge Howard Morrison**

Registrar:

Mr. John Hocking

Decision of:

17 May 2011

PROSECUTOR

v.

VOJISLAV ŠEŠELJ

PUBLIC

**PUBLIC REDACTED VERSION OF THE "DECISION ON THE
REGISTRY SUBMISSIONS PURSUANT TO RULE 33(B)
REGARDING THE TRIAL CHAMBER'S DECISION ON
FINANCING OF DEFENCE" RENDERED ON 8 APRIL 2011**

The Office of the Prosecutor

Mr. Mathias Marcussen

The Accused:

Mr. Vojislav Šešelj

1. The Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia Since 1991 (“Appeals Chamber” and “Tribunal”, respectively) is seised of the “Registry Submission Pursuant to Rule 33(B) Following the Trial Chamber’s Decision on Financing of Defence Dated 29 October 2010”, filed publicly on 19 November 2010.¹

I. BACKGROUND

2. The Accused, Vojislav Šešelj (“Accused”), has been detained by the Tribunal since 24 February 2003.² On 26 February 2003, the Accused communicated his intention to represent himself.³ On 31 October 2003, the Accused formally requested financing “for [his] defence”.⁴ On 19 November 2003, the Accused submitted a Declaration of Means to the Registry of the Tribunal (“Registry”).⁵

3. On 30 July 2007, the Pre-Trial Judge granted the request of the Accused to have his legal associates paid for by the Tribunal as a self-represented accused, subject to certain conditions.⁶ To ensure that the Accused met these conditions, the Pre-Trial Judge and Trial Chamber III of the Tribunal (“Trial Chamber”) invited the Accused on a number of occasions to furnish the Registry with information which would allow his indigency to be evaluated in accordance with the Tribunal’s Directive on Assignment of Defence Counsel (“Directive”) and the Registry Policy for Determining the Extent to Which an Accused is Able to Remunerate Counsel (“Registry Policy on Remuneration”).⁷

4. The Accused did not provide further evidence regarding his financial assets to the Registry, despite being requested to do so.⁸ Nonetheless, in [REDACTED] the Registry sought and obtained

¹ *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-R33B, Registry Submission Pursuant to Rule 33(B) Following the Trial Chamber’s Decision on Financing of Defence Dated 29 October 2010, 19 November 2010 (public with public and confidential and *ex parte* annexes) (“Registry Submission”).

² *See Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, Decision by the Deputy Registrar, 6 July 2010 (“Registrar’s Decision”), p. 1.

³ *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-I, Notice, 26 February 2003.

⁴ *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-I, Submission No. 24, 31 October 2003.

⁵ Registrar’s Decision, p. 1.

⁶ *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-PT, Décision relative au financement de la défense de l’accusé, 30 July 2007 (the English translation was filed on 10 August 2007) (“Decision on Financing of 30 July 2007”), para. 45. The conditions included, *inter alia*, that the Accused must prove, in accordance with Article 8(A) of the Directive on the Assignment of Defence Counsel, that he does not have sufficient means to pay for his defence. *See* Decision on Financing of 30 July 2007, paras 57-59, 66.

⁷ *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, Décision relative au financement de la défense de l’accusé, 23 April 2009 (the English translation was filed on 29 April 2009) (“Decision on Financing of 23 April 2009”), para. 23; *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-PT, Décision relative à la mise en œuvre du financement de la défense, 30 October 2007 (the English translation was filed on 1 November 2007) (“Decision on Financing of 30 October 2007”), pp. 1-2; Decision on Financing of 30 July 2007, para. 66.

⁸ *See* Registrar’s Decision, pp. 2-4. *See also* Decision on Financing of 23 April 2009, para. 23; Decision on Financing of 30 October 2007, pp. 1-2; Decision on Financing of 30 July 2007, para. 59.

substantial information from [REDACTED] regarding the financial means of the Accused, pursuant to its powers under Article 9 of the Directive.⁹

5. During a hearing on 2 March 2010, the Accused advised the Trial Chamber that he would need two years to prepare his defence.¹⁰ Concerned that the issue of the Accused's indigency had not been resolved, and the possible ramifications this might have for the Accused's right to a fair and expeditious trial, the Trial Chamber [REDACTED]^{11 12 13}

6. On 6 July 2010, [REDACTED] approximately seven years following the Accused's initial request, the Registry denied the Accused's request for Tribunal funding for his defence team pursuant to Article 8(C) of the Directive.¹⁴ The Registry indicated that the Accused had failed to cooperate fully with the Registry in its investigation into his indigency, and had not disclosed all the evidence it considered necessary for it to be able to make an assessment of his financial situation as required under the Directive and the Remuneration Scheme for Persons Assisting Indigent Self-Represented Accused ("Remuneration Scheme").¹⁵

7. [REDACTED]^{16 17 18}

8. [REDACTED] on 29 October 2010, the Trial Chamber seised itself, *proprio motu*, of the matter of the financing of the Accused's defence, and issued the Impugned Decision.¹⁹ In the Impugned Decision, the Trial Chamber ordered *proprio motu* the Registry, pursuant to Article 21(4)(b) of the Statute of the Tribunal ("Statute") and Rule 54 of the Rules, to provide "50% of the

⁹ [REDACTED]

¹⁰ *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, T. 2 March 2010, p. 15576: "[...] I have still not started working on my case, because I've not had the resources, I've not had the money. My associates are scattered. They haven't been paid for seven years. So you will have to give me at least two years to be able to prepare my case, and that on the condition that all the other problems are resolved."

¹¹ *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, Décision relative au financement de la défense, 29 October 2010 (the English translation was filed on 1 November 2010) (confidential with confidential and *ex parte* annexes), ("Impugned Decision"), Annex [REDACTED]

¹² [REDACTED]

¹³ [REDACTED]

¹⁴ Registrar's Decision, p. 4.

¹⁵ Registrar's Decision, pp. 2-4.

¹⁶ [REDACTED]

¹⁷ [REDACTED]

¹⁸ [REDACTED]

¹⁹ Impugned Decision, para. 27. *See also Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, Version expurgée de « L'opinion individuelle de la Juge Flavia Lattanzi à la 'Décision relative au financement de la défense' rendue le 29 octobre 2010 » enregistrée le 24 novembre 2010, 25 November 2010 (the English translation was filed on 7 December 2010); *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, Version expurgée de la « Décision relative au financement de la défense » enregistrée le 29 octobre 2010, 2 Novembre 2010 (the English translation was filed on 9 November 2010).

funds allocated in principle to a totally indigent accused, to the defence team for the Accused consisting of three privileged associates, a case manager and an investigator".²⁰

9. On 19 November 2010, the Registry filed submissions pursuant to Rule 33(B) of the Rules before the Appeals Chamber requesting it to invalidate the Impugned Decision based on the Trial Chamber's lack of jurisdiction or quash the Impugned Decision.²¹ Neither the Accused nor the Prosecution filed any response.

II. SUBMISSIONS

10. In its submission, the Registry challenges the jurisdiction of the Trial Chamber to issue the Impugned Decision.²² Alternatively, the Registry argues that even if the Trial Chamber did have jurisdiction, it erred in law and acted *ultra vires* by ordering the Registry to provide Tribunal funding to an accused whose indigency has not yet been established, and by arbitrarily determining the amount of such funding.²³

11. In support of its submission that the Trial Chamber lacked jurisdiction to issue the Impugned Decision, the Registry claims that Article 13(A) of the Directive, relied upon by the Trial Chamber in the Impugned Decision, does not provide a basis for jurisdiction.²⁴ Article 13 of the Directive states that:

- (A) The suspect whose request for assignment of counsel has been denied may, within fifteen days from the date upon which he is notified of the decision, file a motion before the President for review of that decision. The President may either confirm the Registrar's decision or rule that a counsel should be assigned.
- (B) The accused whose request for assignment of counsel has been denied or who has been found to have sufficient means to remunerate counsel in part, may within fifteen days from the date upon which he is notified of that decision, file a motion to the Chamber before which he is due to appear for review of the Registrar's decision. The Chamber may:
 - (i) confirm the Registrar's decision; or
 - (ii) quash the Registrar's decision and rule that counsel be assigned; or
 - (iii) direct the Registrar to reconsider the extent to which the accused is able to remunerate counsel.

The Registry claims that it is clear from the terms of Article 13(A) that it only applies to suspects.²⁵ It further argues that, if Article 13(B) of the Directive were interpreted to apply, this does not

²⁰ Impugned Decision, Disposition.

²¹ Registry Submission, para. 52.

²² Registry Submission, paras 3, 7(A), 9-39, 50.

²³ Registry Submission, paras 7(B), 40-49, 51.

²⁴ Registry Submission, paras 11-17.

²⁵ Registry Submission, para. 17.

provide a basis for the Trial Chamber's jurisdiction.²⁶ The Registry argues that Article 13(B) of the Directive does not apply to decisions rendered pursuant to Article 8(C) of the Directive.²⁷ It further argues that the Trial Chamber's jurisdiction provided therein can only be triggered by a request for review by the accused,²⁸ and that, in any case, the Trial Chamber exceeded the powers of review granted under Article 13 of the Directive.²⁹

12. The Registry further claims that the Trial Chamber's reliance on Article 20(1) of the Statute, which places a duty upon the Trial Chamber to ensure that a trial is fair and expeditious, and Article 21(4)(b) of the Statute, which guarantees adequate time and facilities to an accused in the preparation of his defence, was erroneous.³⁰ The Registry claims that these provisions do not provide a basis for grounding the Trial Chamber's exercise of jurisdiction. First, the Registry argues that while it is incumbent on the Trial Chamber to ensure a fair trial and the proper administration of justice under Article 20(1) of the Statute, in issuing the Impugned Decision the Trial Chamber substituted its own decision for that of the Registry, thus appropriating for itself a power conferred elsewhere.³¹ The Registry argues that this is expressly prohibited under the jurisprudence of the Tribunal.³²

13. Second, the Registry asserts that existing Tribunal law and policy have already defined the scope of the right of a self-represented accused to a meaningful participation in the proceedings under Article 21(4)(b) as the right to receive assistance in the form of facilities, and in the case of a fully or partially indigent self-represented accused, the remuneration of legal associates authorised by the Registry.³³ This has been given effect in Registry policy through the Remuneration Scheme, which the Trial Chamber has not challenged for being unfair, inequitably applied or lacking in any other respect.³⁴ Consequently, the Registry argues that there is no reason why the Remuneration

²⁶ Registry Submission, paras 18-20.

²⁷ Registry Submission, para. 18.

²⁸ Registry Submission, para. 19. The Registry also states that the Accused confirmed that he had no intention of challenging the Registrar's Decision. See Registry Submission, para. 19, referring to *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, T. 7 July 2010, p. 16350.

²⁹ Registry Submission, paras 20-22. In particular, the Registry submits that, even if the Trial Chamber could review the Registrar's Decision *proprio motu* under Article 13(B) of the Directive, the scope of the Trial Chamber's review should have been limited to the legality and propriety of that decision by applying the *Kvočka* test for judicial review of administrative decision. Registry Submission, para. 20, referring to *Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30/1-A, Decision on Review of Registrar's Decision to Withdraw Legal Aid from Zoran Žigić, 7 February 2003 ("*Kvočka et al.* Decision"), para. 13. See also Registry Submission, para. 10, fn. 10.

³⁰ Registry Submission, paras 23-25.

³¹ Registry Submission, paras 9-10.

³² Registry Submission, para. 9, referring to *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; *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-A, Decision on "Motion Seeking Review of the Decisions of the Registry in Relation to Assignment of Counsel", 29 January 2007, p. 3; *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, 15 December 2003, para. 7.

³³ Registry Submission, paras 27-28.

³⁴ Registry Submission, para. 30.

Scheme should not apply to the Accused, and that the Trial Chamber has impermissibly set aside the provision requiring the cooperation of the Accused in determinations of indigency.³⁵

14. Furthermore, the Registry notes the reference, in the Impugned Decision, to the duration of the Accused's detention, and considers that while the right of every accused to an expeditious trial under Article 21(4)(c) is indisputable, the fact that the Accused has not to date been eligible for Tribunal funding for his defence has no connection with the duration of his detention.³⁶ The Registry also notes the Trial Chamber's reference to the interests of justice in the Impugned Decision, and asserts that the interests of justice should not be equated with the assumed or imputed interests of the Accused.³⁷ Moreover, the Registry considers that "[t]he allocation of Tribunal funds for the defence of the Accused in the absence of compliance with the applicable rules would, in fact, be contrary to the interests of justice, as it would lead to inequality before the law and unjustified expenditure of finite public funds, and could in fact even be detrimental to the Accused himself, as he may be entitled to more than 50% of the funding available to a fully indigent accused in a case of level three complexity."³⁸ The Registry further contests the Trial Chamber's reference to the "completion strategy" as an alleged justification for the exercise of its jurisdiction.³⁹

15. Finally, the Registry argues that even if the Trial Chamber does have jurisdiction over the matter, the Impugned Decision is based on an incorrect interpretation of the applicable rules and jurisprudence.⁴⁰ The Registry asserts that the burden of proof regarding the indigency of a person requesting Tribunal funding of his defence is squarely on the accused pursuant to Article 8(A) of the Directive,⁴¹ and that the Trial Chamber erred in determining that it is "the responsibility of the Registry to obtain all of the confirmation it can in order to rapidly resolve the issue of how the Accused's defence will be funded".⁴² It submits that the Accused has failed to establish that he lacks the means to pay for his defence and, in particular, has not cooperated with the Registry's inquiry into his means, despite exhaustive accommodation on the part of the Registry and the Trial Chamber's direct invitation to cooperate.⁴³ Further, as there is insufficient information to determine what funds the Accused has available to fund his defence, the "rough estimate" of this amount made by the Trial Chamber without a comprehensive documentary basis contradicts the principle of equality before the law as stipulated in Article 21(1) of the Statute.⁴⁴ The Registry also notes the

³⁵ Registry Submission, paras 30-32.

³⁶ Registry Submission, para. 36.

³⁷ Registry Submission, paras 37-38.

³⁸ Registry Submission, para. 38.

³⁹ Registry Submission, paras 33-34.

⁴⁰ Registry Submission, para. 40.

⁴¹ Registry Submission, para. 43.

⁴² Registry Submission, para. 42, *quoting* Impugned Decision, para. 22.

⁴³ Registry Submission, para. 44.

⁴⁴ Registry Submission, para. 45.

Trial Chamber's assertion that it would be unreasonable to take into account the means of the Accused's wife and children under Article 10 of the Directive and argues that such an approach contradicts the Directive, the Registry Policy on Remuneration, and the jurisprudence of the Tribunal.⁴⁵ The Registry concludes by arguing that, in the circumstances, the Trial Chamber's allocation of partial funds to the Accused as set forth in the Impugned Decision represents an arbitrary award.⁴⁶

III. DISCUSSION

A. Preliminary Issues

16. The Appeals Chamber has previously allowed the Registrar to seek appellate review under Rule 33(B) of the Rules of a trial chamber decision in situations where the decision is directed at the Registry,⁴⁷ as is the case here. Accordingly, the Appeals Chamber is satisfied that it has jurisdiction to consider the Registry Submissions.

B. Standard of Review

17. In the present case, the Appeals Chamber considers the issue of the fairness of the Accused's trial, which forms the subject-matter of the Impugned Decision, is a matter that relates to the general conduct of the trial proceedings and falls within the discretion of the Trial Chamber.⁴⁸ Accordingly, the standard of review to be applied by the Appeals Chamber is that for the review of a discretionary decision of the Trial Chamber. Thus, the Registrar must demonstrate that the Trial Chamber has committed a "discernable error". A discernible error can be established by showing that the Trial Chamber decision was (1) based on an incorrect interpretation of governing law;

⁴⁵ Registry Submission, paras 46-48.

⁴⁶ Registry Submission, para. 51. *See also* Registry Submissions, para. 21.

⁴⁷ *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T [sic], Decision on the Registry Submission Pursuant to Rule 33(B) Following the President's Decision of 17 December 2008, 9 April 2009; *André Rwamakuba v. The Prosecutor*, Case No. ICTR-98-44C-A, Decision on Prosecution's Notice of Appeal and Scheduling Order, 18 April 2007, para. 7. Rule 33(B) of the Rules broadly allows the Registrar, in the execution of his functions, to make representations to Chambers "on any issue arising in the context of a specific case which affects or may affect the discharge of such functions, including that of implementing judicial decisions, with notice to the parties where necessary" (emphasis added).

⁴⁸ *See, e.g., Prosecutor v. Radovan Karadžić*, Case No. 95-5/18-AR73.7, Decision on Appeal from Decision on Motion for Further Postponement of Trial, 31 March 2010, para. 19. The Appeals Chamber recalls that decisions relating to the assignment of counsel have been considered as matters within the discretion of the Trial Chamber. *See Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-AR73.1, Decision on Miroslav Šeparović's Interlocutory Appeal Against Trial Chamber's Decisions On Conflict of Interest and Finding of Misconduct, 4 May 2007, ("*Gotovina* Decision") para. 11; *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-AR73.3, Decision on Appeal Against the Trial Chamber's Decision on Assignment of Counsel, 20 October 2006, para. 7 ("*Šešelj* Decision of 20 October 2006"); *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defense Counsel, 1 November 2004 ("*Milošević* Decision of 1 November 2004"), para. 9.

(2) based on a patently incorrect conclusion of fact; or (3) so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion.⁴⁹

C. Trial Chamber's Jurisdiction

18. The Registry submits that the Impugned Decision should be quashed because the Trial Chamber had no jurisdiction to issue the Impugned Decision.⁵⁰ The Registry claims that the Trial Chamber erroneously grounded its jurisdiction on Article 13 of the Directive and Article 20(1) of the Statute.⁵¹

19. The Appeals Chamber is satisfied that the Statute, being the primary instrument by which jurisdiction is conferred on the Chamber, provided a sound basis for the Trial Chamber's exercise of jurisdiction. Article 20(1) of the Statute makes it an essential function of the Trial Chamber to ensure that the accused receives a "fair and expeditious" trial; and Article 21 sets out the rights of every accused before the Tribunal to adequate time and facilities for the preparation of a defence,⁵² and the right to be tried without undue delay.⁵³

20. The duty of the Trial Chamber to ensure the fairness of proceedings is a matter within its primary competence.⁵⁴ The issue of the legal assistance provided to a self-represented accused is not just an administrative matter, but may also impact the substantive rights of an accused to a fair and expedient trial.⁵⁵ Accordingly, the Appeals Chamber is satisfied that, once it decided that the matter would be likely to impact the Accused's right to a fair and expedient trial, the Trial Chamber was acting within its jurisdiction in addressing the legal assistance provided to the self-represented Accused. It was not unreasonable for the Trial Chamber to address the question of resources,⁵⁶ particularly in light of the possible alternatives, which include staying the proceedings where the lack of resources would risk a miscarriage of justice.⁵⁷

⁴⁹ *Gotovina* Decision, para. 11; *Šešelj* Decision of 20 October 2006, para. 7; *Milošević* Decision of 1 November 2004, para. 10. See also *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* Decision of 7 May 2009"), para. 11.

⁵⁰ Registry Submission, para. 7(A).

⁵¹ Registry Submission, paras 11-39.

⁵² Article 21(4)(b) of the Statute.

⁵³ Article 21(4)(c) of the Statute. The Appeals Chamber does not consider it necessary to address the arguments of the Registry with respect to Article 13 of the Directive, as it is satisfied that the Trial Chamber did not rely upon that Article for the exercise of jurisdiction.

⁵⁴ Article 20(1) of the Statute; Article 21(4)(b) of the Statute. See Decision on Financing of 30 July 2007, para. 53.

⁵⁵ See, e.g., *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-A, Decision on Krajišnik Request and on Prosecution Motion, 11 September 2007, para. 36.

⁵⁶ See, e.g., *Prosecutor v. Radoslav Brđanin and Momir Talić*, Case No. IT-99-36-PT, Decision on Second Motion by Brđanin to Dismiss the Indictment, 16 May 2001, para. 5.

⁵⁷ See *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, T. 7 July 2010, pp. 16348, 16352-16353.

21. The Appeals Chamber is also satisfied that the Trial Chamber was entitled to exercise jurisdiction over the issue of the legal assistance provided to the self-represented Accused despite the Registry's primary competence over indigence pursuant to the Directive. It is well established in the jurisprudence of the Tribunal that a Trial Chamber may intervene in a matter which is within the competence of the Registry where the matter goes to the fairness of the trial.⁵⁸ In this regard, the Appeals Chamber also notes that the Registry was well aware of the Trial Chamber's concerns with respect to this matter, and that the Registrar issued his decision denying Tribunal funding to the Accused during the Trial Chamber's investigation into it.⁵⁹

22. In addition, the Appeals Chamber observes that the Trial Chamber did not expressly invoke the appropriate standard relevant to review of administrative decisions.⁶⁰ Nonetheless, it follows from the Impugned Decision that the Trial Chamber considered such issues as whether the Registry failed to take into account relevant material⁶¹ and whether the Registrar's Decision⁶¹ was reasonable in view of the particular circumstances of the case.⁶² Accordingly, the Appeals Chamber is satisfied that the Trial Chamber's consideration of the Registrar's Decision conformed to the principles set forth in the *Kvočka et al.* Decision.

23. With respect to the Registrar's argument that the Trial Chamber did not simply intervene in a matter within the competence of the Registrar, but in effect substituted its own decision for that of the Registrar thus appropriating for itself a power conferred elsewhere,⁶³ the Appeals Chamber is not persuaded that this is so. In rendering the Impugned Decision, the Trial Chamber did not appropriate the powers of the Registrar. The Trial Chamber did not reach any conclusion as to the indigence of the Accused, and the Impugned Decision does not prejudice the ability of the Registrar to make a determination regarding his indigency (or lack thereof).⁶⁴ Indeed, the Trial Chamber

⁵⁸ Decision on Financing of 23 April 2009, para. 21; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Decision on Accused Request for Judicial Review of the Registry Decision on the Assignment of Mr. Marko Sladojević as Legal Associate, 20 April 2009, para. 8; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Decision on Accused Motion for Adequate Facilities and Equality of Arms: Legal Associates, 28 January 2009, para. 12 (Decision upheld on appeal by *Karadžić* Decision of 7 May 2009). See also *The Prosecutor v. Léonidas Nshogoza*, Case No. ICTR-2007-91-PT, Decision on Motions Requesting Assignment of Counsel of Choice, 13 October 2008, para. 25; *Léonidas Nshogoza v. The Prosecutor*, Case No. ICTR-2007-91-A, Decision on Request for Judicial Review of the Registrar's and President's Decisions Concerning Payment of Fees and Expenses, 13 April 2010, paras 3, 13.

⁵⁹ [REDACTED]

⁶⁰ *Kvočka et al.* Decision, para. 13 (noting that an administrative decision will be quashed, *inter alia*, "if the Registrar has failed to observe any basic rule 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)").

⁶¹ Impugned Decision, paras 21-23.

⁶² Impugned Decision, para. 26.

⁶³ Registry Submission, paras 10, 21-22.

⁶⁴ In consideration of the absence of any Trial Chamber determination in relation to the indigence of the Accused, the Appeals Chamber is satisfied that its observations relating to the appropriateness of the inclusion of the means of the

emphasized that the Decision did not interfere with the right of the Accused to receive other financing should he establish his indigency.⁶⁵

D. The Legal Basis of the Impugned Decision

24. In its Submission, the Registry asserts that in ordering the Registry to fund the Accused's defence up to 50%, the Trial Chamber erroneously interpreted the applicable rules and jurisprudence relating to Tribunal funding for self-represented accused.⁶⁶ The Registry argues that the burden to prove indigency rests firmly on the Accused and that the latter's failure to cooperate should not result in the Trial Chamber granting an arbitrary award.⁶⁷ The Registry also asserts that while the right of every accused to an expeditious trial under Article 21(4)(c) of the Statute is indisputable, the fact that the Accused to date has not been eligible for Tribunal funding for his defence has no connection with the duration of his detention.⁶⁸

25. The Appeals Chamber is not persuaded by the Registrar's submissions that the Impugned Decision erroneously interpreted the applicable rules and jurisprudence of the Tribunal. The Appeals Chamber recalls that the burden to prove indigence is on the Accused,⁶⁹ and notes the argument of the Registry that the Accused failed to cooperate, as he was required to do under the Directive. Thus, while the Registry identified assets of the Accused, it asserted that it was unable to assess whether those assets formed part of the Accused's disposable means without the provision of further information from the Accused.⁷⁰ However, the Appeals Chamber notes that much of the information the Registry claims it still requires in order to determine the indigency of the Accused relates to the content of certain bank accounts which, in the absence of cooperation from the Accused, could in theory be verified with a court order.⁷¹ Although this avenue for resolving the matter was available, the Registry never sought such an order from the Trial Chamber, probably due to the fact that the Registry considered that the burden remained with the Accused.

26. The Appeals Chamber notes that despite the fact that the burden of proof is placed on the Accused, it is within the power of the Registry to request any relevant information regarding the financial means of the Accused pursuant to Article 9 of the Directive. The Appeals Chamber further notes that the purpose of the Directive is to "provide legal assistance to indigent accused in the most

members of the Accused's family in the Registry Submissions of 20 August 2010 had no bearing on the outcome of the Impugned Decision and, accordingly, the Registrar's submissions in this regard need not be addressed.

⁶⁵ Impugned Decision, para. 27.

⁶⁶ Registry Submission, paras 21, 40.

⁶⁷ Registry Submission, paras 43, 51.

⁶⁸ Registry Submission, para. 36.

⁶⁹ Article 8(A) of the Directive.

⁷⁰ [REDACTED]

⁷¹ [REDACTED]

efficient, economical and equitable manner in order to safeguard the rights afforded to suspects and accused under the Statute and Rules”.⁷² Considering the Directive in light of its purpose, and taking into account that the matter had been outstanding since October 2003, that the Trial Chamber had made clear its concerns that the non-resolution of the issue was impacting the fairness of the proceedings, and that the Accused is self-represented, the Appeals Chamber considers that it would have been appropriate for the Registrar to take all action possible to resolve the matter in a fair and equitable manner as part of his duty to assist the Trial Chamber in the smooth functioning of the trial. Such possible action included seeking appropriate orders from the Trial Chamber to allow the Registry to secure the information it claimed it needed to determine the indigency of the Accused.

27. The Appeals Chamber is also not satisfied that the issue of funding of the Accused’s defence has no connection with the duration of the Accused’s detention. The basis for the Trial Chamber’s exercise of jurisdiction was to ensure that the case of the Accused continued as expeditiously as possible.⁷³ The Trial Chamber noted that the case had reached the Rule 98*bis* stage, and following the outcome of that proceeding, the Defence case would proceed.⁷⁴ The Accused had provided warning to the Trial Chamber that he would not present his defence if he did not receive Tribunal funding for his legal associates.⁷⁵ Thus, contrary to the submission of the Registrar, it was not unreasonable for the Trial Chamber to consider that the failure to provide funding would delay the trial.⁷⁶ The Appeals Chamber recalls that “[w]here an accused elects self-representation, the concerns about the fairness of the proceedings are, of course, heightened, and a Trial Chamber must be particularly attentive to its duty of ensuring that the trial be fair”.⁷⁷

28. The Appeals Chamber notes that the Trial Chamber ordered the Registry to provide the Accused with Tribunal funding, unless and until further information is obtained, which could

⁷² Article 1 of the Directive.

⁷³ Impugned Decision, para. 26.

⁷⁴ Impugned Decision, para. 26.

⁷⁵ *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, T. 2 March 2010, pp. 15576, 15579; *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, T. 7 July 2010, pp. 16348-16349.

⁷⁶ The Appeals Chamber, on the contrary, considers that the Trial Chamber’s reference to the completion strategy in the context of recalling its responsibility for the expeditiousness of the trial was not appropriate. While the Appeals Chamber recalls that considerations of judicial economy may not impinge on the right of the parties to a fair trial, the “completion strategy” cannot be considered either as a context factor justifying different or additional Trial Chamber’s responsibilities for ensuring the rights of the accused. See *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR73.6, Decision on the Interlocutory Appeal by the *Amici Curiae* Against the Trial Chamber Order Concerning the Presentation and Preparation of the Defence Case, 20 January 2004 (“*Milošević* Decision”), para. 12. See also *Théoneste Bagosora et al. v. The Prosecutor*, Case No. ICTR 98-41-A, Decision on Aloys Ntabakuze’s Motion for Severance, Retention of the Briefing Schedule and Judicial Bar to the Untimely Filing of the Prosecution’s Response Brief, 24 July 2009, para. 38. However, the Trial Chamber did not emphasize this factor nor did the Trial Chamber rely independently on it in exercising jurisdiction. Therefore, this consideration did not ultimately affect the correctness of the Trial Chamber’s reliance on the Statute in exercising jurisdiction in the matter.

⁷⁷ *Milošević* Decision, para. 19.

establish his indigence (or lack thereof).⁷⁸ This Decision is not a final ruling on the matter by the Trial Chamber, but is simply an interim measure, until sufficient information is available for the Registry to assess the financial status of the Accused itself.⁷⁹ The Decision was made without prejudice to the ability of the Registry to recover the allocated funds from the Accused, if it becomes apparent that he has sufficient means to remunerate his legal associates.⁸⁰


E. Conclusion

29. The Appeals Chamber concludes that the Registry has not demonstrated that the Trial Chamber made a “discernable error” in rendering the Impugned Decision.

IV. DISPOSITION

For the foregoing reasons, the Appeals Chamber **DISMISSES**, Judges Güney and Pocar dissenting, the Registry Submission.

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



Judge Andréia Vaz
Presiding

The partially dissenting opinion of Judge Güney and the dissenting opinion of Judge Pocar are appended hereto.

Done this 17th day of May 2011,
at The Hague, The Netherlands.

[Seal of the Tribunal]

⁷⁸ Impugned Decision, Disposition. This is better reflected in the language adopted in the original French version of the Impugned Decision, which indicates that the Registrar is ordered to fund the defence team of the Accused “*tant qu’il n’y aura pas d’élément nouveau*”. See Impugned Decision (original French version), Disposition.

⁷⁹ In the Impugned Decision, the Trial Chamber referred to a precedent where a trial chamber, while recognising that the information provided by the accused with regard to his financial situation remained incomplete and did not enable an adequate assessment of his financial means, directed the Registrar, in the interests of justice, to assign counsel to the accused on a provisional basis. See Impugned Decision, fn. 12, referring to *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-PT, Decision on Assignment of Defence Counsel, 15 February 2006 (public with confidential annex), para. 11.

⁸⁰ Rule 45(E) of the Rules. Given the provisional nature of the Impugned Decision, and the consideration that it is not based on the determination of the Accused’s indigency, it is not necessary at this stage to address the Registry’s argument on the arbitrary nature of the allocation of “partial funds” to the Accused in the absence of complete information on his disposable means. See Registry Submissions, para. 51.

PARTIALLY DISSENTING OPINION OF JUDGE GÜNEY

1. In the Majority Decision¹, the majority of the Appeals Chamber (“the Majority”) upheld the Impugned Decision², essentially concluding that the Trial Chamber did not commit a “discernable error” when deciding *proprio motu* that the Accused should be provided 50% of the funds allocated in principle to a totally indigent accused (“the Funds”), pending investigation about his indigence.³ The Majority found, *inter alia*, that, the Impugned Decision was in conformity with the *Kvočka* standards of review (“*Kvočka* Standards”).⁴ Although I agree in part with the reasoning of the Majority Decision, I am unable to agree with the outcome of the Majority Decision, for the following reasons.

2. As regards the Trial Chamber’s jurisdiction, I believe that it was not unreasonable for the Trial Chamber to intervene. Indeed, in light of the very special circumstances of this case and the long procedural history regarding the public funding of the Accused’s Defence, the direct intervention of the Trial Chamber based on the fair trial rights principle in order to solve this issue was within its discretion.⁵ However, I cannot agree with the extent of the intervention.

3. I do not believe that the Trial Chamber applied the principles of administrative review set forth in the *Kvočka* Decision at all.⁶ Although the Trial Chamber rightfully based its jurisdiction on fair trial rights⁷, the extent of its revision was limited by the *Kvočka*’s Standards. The *Kvočka* Standards set the following boundaries for the review of an administrative decision pertaining to legal aid:

... the Registrar’s decision may be quashed and, if appropriate, the Chamber may also either rule that legal aid should be granted or, where it is satisfied that the accused has the means to remunerate counsel partially, **refer the matter again to the Registrar for him to determine the portion of the cost of having counsel for which the accused does not have the means to pay.** In some cases, it may be appropriate for the Chamber simply to quash the decision and to direct the Registrar to reconsider his decision in the light of the Chamber’s decision. **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. [emphasis added]**⁸

¹ Decision on the Registry Submissions Pursuant to Rule 33 (B) Regarding the Trial Chamber’s Decision on Financing of Defence, 8 April 2011 (Majority Decision), Judges Pocar and Güney dissenting.

² *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, Decision on Financing of Defence, 29 October 2010, (“Impugned Decision”).

³ Majority Decision, para. 29; Impugned Decision, Disposition.

⁴ Majority Decision, para. 22; *The Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1-A, Decision on Review of Registrar’s Decision to Withdraw Legal Aid from Zoran Žigić, 7 February 2003, (“*Kvočka* Decision”) para. 13

⁵ Majority Decision, paras. 18-21.

⁶ Judge Pocar’s Dissenting Opinion on the “Decision on the Registry Submissions Pursuant to Rule 33 (B) Regarding the Trial Chamber’s Decision on Financing of Defence”, para. 5.

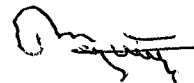
⁷ Impugned Decision, para. 14.

⁸ *Kvočka* Decision, para. 13.

4. The Registrar denied the Accused's request for funding pursuant to Article 8 (C) of the Practice Directive, and hence closed its investigation into the Accused's indigence because of the latter's lack of cooperation.⁹ According to the standards of administrative review, the Trial Chamber, once it decided that the Registrar's Decision was so unreasonable that it needed to intervene, was limited in its intervention to simply rule that legal aid should partially be granted pending further financial investigation and referring the matter again to the Registrar to determine the appropriate amount.¹⁰ I am not convinced that the alleged emergency of the situation¹¹, the length of the provisional detention, or the Completion Strategy justified this intrusive intervention into the Registrar's competency.¹²

5. In view of the foregoing analysis, I believe that the Trial Chamber abused its discretion when ordering the Registrar to allocate the Funds to the Accused. Hence, I consider that the Appeals Chamber should have: (i) upheld the decision of the Trial Chamber to quash the Registrar's Decision; (ii) referred the matter back to the Registrar; and (iii) directed the Registrar to determine a proper amount of funds to be provided temporarily to the Accused, pending completion of the financial investigation into the Accused's indigence. I therefore respectfully dissent from the Majority.

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



Judge Mehmet Güney

Done this 17th day of May 2011,
at The Hague, The Netherlands.

[Seal of the Tribunal]

⁹ Registrar's Decision, para. 3.

¹⁰ *Kvočka* Decision, para. 13

¹¹ I note in particular that the Rule 98 *bis* Oral Decision will be issued only on the 4 May 2011, which will set in motion the court schedule to hear the defense case, 6 months after the Impugned Decision was rendered.

¹² Impugned Decision, para. 26.

DISSENTING OPINION OF JUDGE POCAR

A. Preliminary matter

1. [REDACTED]¹

B. Dissenting opinion

2. In its Impugned Decision, the Trial Chamber ordered *proprio motu* the Registrar, pursuant to Article 21(4)(b) of the Statute and Rule 54 of the Rules, to provide “50% of the funds allocated in principle to a totally indigent accused, to the defence team for [Šešelj] consisting of three privileged associates, a case manager and an investigator, based on the Scheme for Persons Assisting Indigent Self-Represented Accused and on the basis of a determination of the complexity of this case at Level 3”.²

3. In this Decision,³ the Appeals Chamber dismisses the Registry Submission requesting it to invalidate the Impugned Decision based on the Trial Chamber’s lack of jurisdiction or, alternatively, to quash the Impugned Decision on the basis that the Trial Chamber erred in law.⁴ I strongly disagree with both the reasoning and the conclusions of the Majority of the Appeals Chamber that the Trial Chamber: (1) had jurisdiction on this matter; and (2) did not err in law. In my view, the Trial Chamber abused its discretion and acted contrary to the jurisprudence of the Tribunal.

1. Trial Chamber’s Jurisdiction

4. Rule 45 of the Rules⁵ and the Directive on the Assignment of Defence Counsel⁶ clearly attribute the provision of legal aid – and the related matter of the indigence of an accused – to the primary competence of the Registrar.

¹ Decision on the Registry Submissions Pursuant to Rule 33(B) Regarding the Trial Chamber’s Decision on Financing of Defence, 8 April 2011 (confidential) (“Decision”).

² *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, Décision relative au financement de la défense, 29 October 2010 (the English translation was filed on 1 November 2010) (confidential with confidential and *ex parte* annexes) (“Impugned Decision”), Disposition.

³ Decision, Disposition.

⁴ Registry Submission Pursuant to Rule 33(B) Following the Trial Chamber’s Decision on Financing of Defence Dated 29 October 2010, 19 November 2010 (public with public and confidential and *ex parte* annexes) (“Registry Submission”), para. 52. See also Registry Submission, paras 3, 7, 9-51.

⁵ Rule 45(A) of the Rules reads as follows: “Whenever the interests of justice so demand, counsel shall be assigned to suspects or accused who lack the means to remunerate such counsel. Such assignments shall be treated in accordance with the procedure established in a Directive set out by the Registrar and approved by the permanent Judges.”

⁶ Directive on the Assignment of Defence Counsel (Directive No. 1/94), Doc. IT/73/Rev.11, 11 July 2006 (“Directive”).

5. While administrative decisions of the Registrar are subject to judicial review,⁷ in the present case the Trial Chamber did not conduct a judicial review of the Registrar's Decision,⁸ but seized itself of a matter that is within the primary competence of the Registrar and ruled on the merits of Šešelj's request for funding *proprio motu*.

6. Worse still, in the present case, Šešelj did not appeal the Registrar's Decision. Moreover, Šešelj even indicated that he had no intention of challenging the Registrar's Decision.⁹ Nevertheless, the Trial Chamber stepped in under its inherent power and impermissibly appropriated for itself a power which is conferred to the Registrar. Accordingly, I strongly disagree that the Trial Chamber had jurisdiction to rule on the issue of financing Šešelj defence team.

2. Merits of the Trial Chamber's Impugned Decision

7. With respect to the merits of the Impugned Decision, I note that only accused, who lack the means to remunerate counsel, have the right to have counsel assigned and paid by the Tribunal.¹⁰ According to Article 7(B) of the Directive,¹¹ an accused claiming that he is indigent and requesting the assignment of counsel is required to submit a declaration of means. Moreover, pursuant to Article 8 of the Directive,¹² the burden of proof to establish that an accused is unable to remunerate counsel rests solely on the accused.

8. As correctly indicated in the Registrar's Decision,¹³ Šešelj did not provide evidence or information regarding his financial assets to the Registry, despite being requested to do so on many

⁷ *Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30/1-A, Decision on Review of Registrar's Decision to Withdraw Legal Aid from Zoran Žigić, 7 February 2003, para. 13 ("A judicial review of an administrative decision made by the Registrar in relation to legal aid is concerned initially with the propriety of the procedure by which Registrar reached the particular decision and the manner in which he reached it."). In this decision, the Appeals Chamber set out the standard for judicial review of administrative decisions of the Registrar. An administrative decision can be quashed only if that decision: (i) failed to comply with the relevant legal requirements of the Directive; (ii) failed to observe the basic rules of natural justice and procedural fairness towards the person affected by the decision; (iii) took into account irrelevant material, or failed to take into account relevant material; or (iv) reached a conclusion which no sensible person who has properly applied his mind to the issue could reach. See also *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-AR73.6, Decision on Radovan Karadžić's Appeal from Decision on Motion to Vacate Appointment of Richard Harvey, 12 February 2010, para. 33.

⁸ *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, Decision by the Deputy Registrar, 6 July 2010 ("Registrar's Decision").

⁹ Registry Submission, para. 19, referring to *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, T. 7 July 2010, p. 16350.

¹⁰ Article 6 of the Directive.

¹¹ Article 7(B) of the Directive reads as follows: "A suspect or accused requesting the assignment of counsel is required to make a declaration of his means on the form provided by the Registrar."

¹² Article 8 of the Directive reads as follows: "(A) A suspect or accused who requests the assignment of counsel must produce evidence establishing that he is unable to remunerate counsel. (B) Where the Registrar has opened an inquiry into the means of a suspect or accused pursuant to Article 9, the suspect or accused shall provide or facilitate the production of information required to establish his ability to remunerate counsel. (C) Where a suspect or accused fails to comply with his obligations under Articles 8(A) and (B) to the extent that the Registrar is unable to properly assess the suspect or accused's ability to remunerate counsel, the Registrar may deny the request for the assignment of counsel after warning the suspect or accused and giving him an opportunity to respond."

¹³ Registrar's Decision, pp. 2-4.

occasions.¹⁴ However, in ordering *proprio motu* the Registrar to provide 50% of the funds allocated in principle to a totally indigent accused to the Šešelj defence team,¹⁵ the Trial Chamber effectively reversed the burden of proof. In so doing, the Trial Chamber also set a very dangerous precedent, that even when an accused fails to demonstrate that he is indigent, he may receive public funds to finance his defence. Moreover, the Trial Chamber further erred in law and reversed the burden of proof, when it found “that, even though the Accused has not fully cooperated in providing proof of his indigence, pursuant to Article 8 of the Directive, it is nevertheless the responsibility of the Registry to obtain all of the confirmation it can in order to rapidly resolve the issue of how the Accused’s defence will be funded.”¹⁶

9. Similarly, in its Decision, the Majority of the Appeals Chamber also errs as it blames the Registry for never seeking an order from the Trial Chamber to verify the content of Šešelj’s bank accounts.¹⁷ In so doing, the Majority of the Appeals Chamber also reverses the burden of proof. If the burden of proof rests solely on the accused, the Registry certainly has no obligation to seek a court order, in the absence of cooperation from the accused, to prove the indigence of an accused and cannot be blamed for its failure to do so.¹⁸

10. Moreover, the Majority of the Appeals Chamber furthers its unconvincing reasoning by stating that the Impugned Decision is not a final ruling on the matter by the Trial Chamber, “but is simply an interim measure, until sufficient information is available for the Registry to assess the financial status of the Accused itself” and concluding that the Impugned Decision “was made without prejudice to the ability of the Registry to recover the allocated funds from the Accused, if it becomes apparent that he has sufficient means to remunerate his legal associates.”¹⁹ In my view, it is naïve to believe that an accused, who refused to collaborate with the Registry to prove his indigence, will reimburse the allocated funds if he is ultimately proved not indigent.

¹⁴ Registrar’s Decision, pp. 2-4, referring to, *inter alia*, *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-PT, *Décision relative au financement de la défense de l’accusé*, 30 July 2007 (the English translation was filed on 10 August 2007), paras 57-59, 66; *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, *Décision relative à la mise en oeuvre du financement de la défense*, 30 October 2007 (the English translation was filed on 1 November 2007), pp. 1-2; *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, *Décision relative au financement de la défense de l’accusé*, 23 April 2009 (the English translation was filed on 29 April 2009) (“Trial Chamber Decision of 23 April 2009”), para. 27. See also Trial Chamber Decision of 23 April 2009, paras 22-24.

¹⁵ Impugned Decision, Disposition.

¹⁶ See Impugned Decision, para. 22.

¹⁷ Decision, paras 25-26.

¹⁸ I further note that Article 9 of the Directive, on which the Majority of the Appeals Chamber relies to conclude that the Registry had the duty to request a Trial Chamber’s order to verify the content of Šešelj’s bank accounts, does not impose an obligation on the Registry, but indicates that the latter *may* request any relevant information. Article 9 of the Directive reads as follows: “(A) For the purpose of establishing whether the suspect or accused is able to remunerate counsel, the Registrar may inquire into his means, request the gathering of any information, hear the suspect or accused, consider any representation, or request the production of any document likely to verify the request. (B) In exercising his authority under Article 9(A), the Registrar may request any relevant information at any time, including after counsel has been assigned, from any person who appears to be able to supply such information.”

¹⁹ Decision, para. 28.

3. Conclusion

11. In the end, the conclusion of the Impugned Decision and the position of the Majority of the Appeals Chamber are that an accused before this Tribunal is eligible to receive Tribunal funding for his defence in the absence of established indigence. This reverses the burden of proof, clearly sets a very dangerous precedent and will not provide any incentive or motivation for the Tribunal's accused to prove their indigence, ultimately resulting in a waste and mismanagement of public funds.

12. For the foregoing reasons, I disagree with the reasoning and the conclusion of this Decision. Upon careful consideration, I would grant the Registry Submission and overturn the Impugned Decision.

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



Judge Fausto Pocar

Done this 17th day of May 2011,
at The Hague, The Netherlands.

[Seal of the Tribunal]