

UNITED
NATIONS

IT-98-32/1-A
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22 November 2011

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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-98-32/1-A
Date: 22 November 2011
Original: English

THE PRESIDENT OF THE TRIBUNAL

Before: Judge Theodor Meron, President
Registrar: Mr. John Hocking
Decision of: 22 November 2011

PROSECUTOR

v.

**MILAN LUKIĆ
SREDOJE LUKIĆ**

CONFIDENTIAL AND EX PARTE

**DECISION ON REQUEST FOR REVIEW OF
OLAD DECISION DENYING ADDITIONAL FUNDING**

Counsel for Mr. Sredoje Lukić
Mr. Đuro Čepić and Mr. Jens Dieckmann

1. **I, THEODOR MERON**, 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”), am seised of a request for review by Mr. Đuro Čepić (“Čepić”), Lead Counsel for Mr. Sredoje Lukić (“Lukić”), submitted to the Registrar of the Tribunal (“Registrar”) on 20 September 2011,¹ and referred to me by the Registrar pursuant to Article 31 of the Directive on the Assignment of Defence Counsel (“Directive”).² The Registrar responded on 6 October 2011.³ Čepić did not file a reply.

I. BACKGROUND

2. On 20 July 2009, Trial Chamber III found Lukić guilty of murder, persecution, and inhumane acts as crimes against humanity, and murder and cruel treatment as a violation of the laws and customs of war, and sentenced him to 30 years imprisonment.⁴ On 22 July 2009, the Office of Legal Aid and Detention Matters (“OLAD”) informed Lukić’s counsel that an appeal of the Trial Judgement would be preliminarily classified at complexity level 1, and thus allocated 1050 counsel hours, 450 support staff hours, and any counsel hearing hours.⁵ Lukić’s appeal briefing was completed on 29 December 2009,⁶ and his appeal hearing was held on 14 and 15 September 2011 (“Appeal Hearing”).⁷

3. On 7 September 2011, counsel for Lukić requested funding for 105 additional hours to assist in the preparation of defence arguments to be submitted during the Appeal Hearing.⁸ On 13 September 2011, OLAD rejected this request. It stated that the Registry would consider, in some circumstances, granting “a small additional allotment of hours, while maintaining [a] complexity ranking, to cover an unexpected development beyond the control of the defence that warrants additional resources.” However, it reasoned that preparation for the Appeal Hearing, responding to

¹ Appeal Against OLAD Refusal for Additional Funds (“Request”).

² IT/73/Rev. 11, 11 July 2006. See Request for Review Under Article 31 of the Directive on the Assignment of Defence Counsel, 21 September 2011.

³ Request for Review Under Article 31(C) of the Directive on the Assignment of Defence Counsel (confidential with confidential annexes), (“Response”).

⁴ *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-T, Judgement (“Trial Judgement”), paras 1104-1106.

⁵ See Response, Annex 1 (confidential), Letter from Anna Osure, Deputy Head, OLAD, to Jason Alarid, Lead Counsel, Milan Lukić, and Djuro Čepić, Lead Counsel, Sredoje Lukić, regarding Funding on Appeal.

⁶ Sredoje Lukić’s Reply to the Prosecution’s Response Brief, 29 December 2009 (confidential) (“Reply Brief”).

⁷ Appeals Transcript, pp. 43, 180.

⁸ Response, Annex 2 (confidential), Email from Jens Dieckmann, Co-Counsel, Sredoje Lukić, to Anna Osure, Deputy Head, OLAD, Regarding Request for Additional Defence Funds.

filings following submission of the Reply Brief, and the length of time between the filing of briefs and the Appeal Hearing were not unforeseen circumstances beyond the control of Lukić's counsel.⁹

II. STANDARD OF REVIEW

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

A judicial review of [...] 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 judgment [*sic*] in accordance with Rule 119 of the Rules of Procedure and Evidence [of the Tribunal]. 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 [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

5. 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 both that: "(1) an error of the nature enumerated above has occurred, and (2) [...] such an error has significantly affected the administrative decision to his detriment."¹³

III. APPLICABLE REGULATIONS

6. 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 [of

⁹ See Response, Annex 3 (confidential), Letter from Jaimee Campbell, Head, OLAD, to Djuro Čepić, Lead Counsel, Sredoje Lukić ("13 September Letter").

¹⁰ *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. See also *The 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"), para. 9.

¹¹ Karadžić Decision, para. 9. See also Žigić Decision, para. 13.

¹² Žigić Decision, para. 13. See also Karadžić Decision, para. 10.

¹³ Karadžić Decision, para. 10. See also Žigić Decision, para. 14.

the Tribunal], the Rules [of Procedure and Evidence], this Directive and related policies and subject to the budgetary provisions, rules, 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.

7. Article 24(C) of the Directive governs the remuneration of defence teams 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.

8. Article 24(C) of the Directive does not expressly provide for an increase in the maximum allotment of working hours on appeal. However, the Registry's application of its pre-trial policy of allowing small increases in allotted working hours when unforeseeable circumstances arise has been determined to have normative value in regards to requests for an additional allotment of remunerable hours on appeal for defence counsel. Accordingly, this standard is treated with the same effect as other provisions of the Directive.¹⁴

IV. SUBMISSIONS

A. Submissions by Counsel for Lukić

9. Čepić asserts that the 13 September Letter rejected as insufficiently substantiated the Lukić defence team's claim that the need to prepare for the Appeal Hearing was unforeseeable.¹⁵ He provides additional detail on the specific preparations undertaken, including the dates and times of certain meetings attended by counsel for Lukić in September 2011. Čepić underscores that final drafts of the Lukić defence team's oral preparation could only be completed after 6 September 2011, when specific questions for the Appeal Hearing were provided to parties.¹⁶

10. Čepić further contends that following submission of the Reply Brief, 118 additional documents were filed in the case and required review by the Lukić defence team. He states that review of these additional documents falls outside the scope of activities which the funds allocated to defence teams are meant to cover.¹⁷ Finally, Čepić submits that the long period between the

¹⁴ See *supra*, para. 3; ____ v. ____, Case No. __, [Case Title], 23 February 2011 (confidential and *ex parte*), para. ____.

¹⁵ See Request, p. 1.

¹⁶ See Request, pp. 1-2.

¹⁷ See Request, pp. 2-3.

submission of the Reply Brief and the Appeal Hearing required extended preparation time, as Lukić's counsel had to re-familiarize themselves with relevant facts and arguments.¹⁸

B. Submissions by the Registrar

11. The Registrar responds that he acted within the scope of its discretion in denying additional funding to the Lukić defence team.¹⁹ More specifically, he submits that preparation for the Appeal Hearing, including answers to specific questions posed by the Appeals Chamber of the Tribunal, was a task foreseeable to Lukić's counsel.²⁰ The Registrar notes that the 118 documents submitted after the Reply Brief include translations of all filings into B/C/S, and that only eight of these documents are filings by Lukić.²¹ More generally, the Registrar underscores that reviewing filings is a foreseeable part of an appeal, and that the volume of filings in Lukić's case was not unusual.²²

12. The Registrar maintains that preparation for the Appeals Hearing was an eventuality that Lukić's counsel could have anticipated.²³ He adds that counsel should in any event be familiar with the case,²⁴ and that compensating for "refreshing [counsel's] memory" would be inappropriate.²⁵

V. ANALYSIS

13. I consider that reviewing and responding to case filings, and preparation for oral hearings, are activities fundamental to the conduct of a defence appeal, and in no way unforeseeable.²⁶ None of the details provided by Čepić concerning either the specifics of the filings he addressed or the preparations he made for the Appeals Hearing establish that the workload in this case was materially greater due to unforeseeable circumstances. Čepić has also not established that the time period between close of briefing and the Appeals Hearing was so long as to necessitate unforeseeable supplementary preparation. In these circumstances, the Registrar reasonably exercised his discretion in denying the Request.²⁷

¹⁸ See Request, p. 3.

¹⁹ See Response, paras 22-49.

²⁰ See Response, paras 26-29.

²¹ Response, para. 32.

²² See Response, paras 33-34.

²³ Response, para. 36.

²⁴ Response, para. 36.

²⁵ Response, para. 38.

²⁶ See, e.g., *Prosecutor v. Nikola Sainović et al.*, Case No. IT-05-87-A, Decision on Request for Review of OLAD Decisions on Appeal Phase Remuneration, 25 May 2010 (confidential), para. 27.

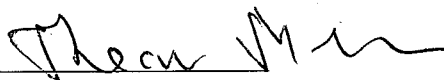
²⁷ In this context, I need not take a position with respect to the Registrar's suggestion that allocating additional funds to assist in refreshing the Lukić defence team's recollection of arguments, even after a break of more than twenty months between submission of the Reply Brief and the Appeals Hearing, would constitute an invalid use of defence resources. See Response, para. 38.

VI. DISPOSITION

14. For the foregoing reasons, the Request is hereby **DISMISSED**.

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

Done this 22nd day of November 2011,
At The Hague,
The Netherlands.


Judge Theodor Meron
President

[Seal of the Tribunal]