

**UNITED  
NATIONS**

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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-95-5/18-  
AR73.2  
Date: 13 March 2009

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**IN THE APPEALS CHAMBER**

**Before:** Judge Mohamed Shahabuddeen, Presiding  
Judge Mehmet Güney  
Judge Liu Daqun  
Judge Andrézia Vaz  
Judge Theodor Meron

**Acting Registrar:** Mr. John Hocking

**THE PROSECUTOR**

v.

**RADOVAN KARADŽIĆ**

**PUBLIC**

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**PROSECUTION'S RESPONSE TO KARADŽIĆ'S APPEAL OF  
THE TRIAL CHAMBER'S DECISION ON ADEQUATE  
FACILITIES**

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**The Office of the Prosecutor:**

Mr. Alan Tieger  
Ms. Hildegard Uertz-Retzlaff

**The Accused:**

Radovan Karadžić

**THE INTERNATIONAL CRIMINAL TRIBUNAL  
FOR THE FORMER YUGOSLAVIA**

**Case No. IT-95-5/18-AR73.2**

**THE PROSECUTOR**

v.

**RADOVAN KARADŽIĆ**

**PUBLIC**

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**PROSECUTION'S RESPONSE TO KARADŽIĆ'S APPEAL OF THE TRIAL  
CHAMBER'S DECISION ON ADEQUATE FACILITIES**

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**Introduction**

1. The Prosecution's Response to Karadžić's Appeal<sup>1</sup> is limited to discussing the applicable standard for appellate review of administrative decisions and to correcting Karadžić's mischaracterization of the Appeals Chamber's decision in *Krajišnik*.<sup>2</sup>

**The Applicable Standard for Appellate Review of Administrative Decisions**

2. The applicable standard for appellate review of administrative decisions is articulated in *Kvočka*.<sup>3</sup> In this case, the deferential standard of the *Kvočka* review requires that, if the Registrar's proper application of the correct law yields a reasonably defensible conclusion, the judicial reviewing body is required to let it

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<sup>1</sup> Appeal of the Trial Chamber's decision on adequate facilities, filed on 5 March 2009 ("Appeal").

<sup>2</sup> *Prosecutor v. Krajišnik*, IT-00-39-A, Decision on Krajišnik request and on Prosecution motion, 11 September 2007 ("*Krajišnik*").

<sup>3</sup> *Prosecutor v. Kvočka et al.*, IT-98-30/1-A, Decision on review of Registrar's decision to withdraw legal aid from Zoran Žigić, 7 February 2003 ("*Kvočka*").

stand even if it might have reached a different conclusion on *de novo* consideration of the question.<sup>4</sup>

3. Karadžić's Appeal challenges the Trial Chamber's judicial review of the Registrar's Remuneration Decision.<sup>5</sup> The Trial Chamber found the Remuneration Decision to be administratively sound. The Trial Chamber found that the Registrar had met the *Kvočka* standard for proper administrative decision-making.<sup>6</sup> To the extent that the Trial Chamber's review can be subjected to appellate scrutiny,<sup>7</sup> the applicable standard on a second review is the *Kvočka* standard of deference to the original decision-maker, not the broader standard applicable to review of discretionary Trial Chamber decisions. To do otherwise would invite Appeals Chamber secondary review from all judicial reviews of administrative decisions. Applying the *Kvočka* standard would maintain the proper deference for the decision-maker's "margin of appreciation of the facts or merits of that case."<sup>8</sup>

4. Past decisions provide limited guidance on the standard applicable on a second review of administrative decisions. In *Kvočka* (where the Appeals Chamber enunciated the standard applicable to judicial review of administrative decisions) and in *Krajišnik* (where it applied this standard), the Appeals Chamber was the court of first instance reviewing the Registrar's decision. Here, however, the Trial Chamber was the first reviewer, and Karadžić is appealing the Trial Chamber's review decision.

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<sup>4</sup> See also, *Prosecutor v. S. Milošević*, IT-02-54-T, Decision affirming the Registrar's denial of assigned counsel's application to withdraw, 7 February 2005, para.4.

<sup>5</sup> Decision on Accused motion for adequate facilities and equality of arms: legal associates, 28 January 2009 ("Decision"), paras. 2-4 referring to Decision made by the Registrar to assign legal assistants to the Accused in a letter from the Head of the Office of Legal Aid and Detention Matters dated 16 October 2008 ("Remuneration Decision").

<sup>6</sup> Decision, paras.27, 28, 37. See also Decision on Accused's application for certification to appeal decision on adequate facilities, 13 February 2009, para.1. The Appeals Chamber has confirmed that the Registrar's decisions on funding for self-represented accused are administrative determinations to which the *Kvočka* standard for judicial review applies: see *Krajišnik*, para.30.

<sup>7</sup> There is some suggestion in the case-law that it would amount to one review too many: see *Prosecutor v. Blagojević*, IT-02-60-AR73.4, Public and redacted reasons for decision on appeal by Vidoje Blagojević to replace his defence team, 7 November 2003 ("*Blagojević*"), fn.24 (incomplete). For the full version, see *Procureur c/ Blagojević*, IT-02-60-AR73.4, Version publique et expurgée de l'exposé des motifs de la décision relative au recours introduit par Vidoje Blagojević aux fins de remplacer son équipe de la défense, 7 novembre 2003, fn.24: "En outre, en se déclarant compétente pour étudier la question elle-même, en examinant la décision du Greffier, et en certifiant l'appel de cette décision, la Chambre de première instance a accordé à l'Appelant un recours supplémentaire." See also Prosecution Submission on Application for Certification to Appeal Decision on Adequate Facilities, 12 February 2009, para.3

<sup>8</sup> *Kvočka*, para.13.

5. Past decisions support that the Appeals Chamber's second review is the same narrow review applied by the Trial Chamber - the *Kvočka* standard.<sup>9</sup> For example, in *Milutinović*, the Appeals Chamber was seised of a certified appeal from the Trial Chamber's decision reviewing the Registrar's refusal to allocate additional funds for Ojdanić's defence. Although the Appeals Chamber did not explicitly state the standard of review it was applying, its finding that Ojdanić failed to show that the Trial Chamber erred suggests that it applied the *Kvočka* standard.<sup>10</sup>

6. Furthermore, in *Nahimana*, the ICTR Appeals Chamber was seised of a challenge against the President's review of the Registry's decision not to withdraw co-counsel during appeal proceedings. The Appeals Chamber found that the relevant test was whether the decisions by the Registrar and the President complied with the *Kvočka* standard.<sup>11</sup> *Nahimana* also supports the application of the *Kvočka* standard to a second judicial review of administrative decisions.

### **The *Krajišnik* Decision**

7. Karadžić does not challenge the Appeals Chamber's findings in *Krajišnik* construing the rights of a self-represented accused under Article 21 of the Statute.<sup>12</sup> Karadžić's limited claim is that the Registry incorrectly interpreted and improperly applied *Krajišnik*. His claims, however, mischaracterize the plain language of the Appeals Chamber's findings in *Krajišnik*. The correct findings are summarized below:

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<sup>9</sup> Compare *Blagojević*, where the Appeals Chamber did not explicitly state the standard of review it was applying, but appears to have examined the Trial Chamber's review of the Registrar's decision appointing co-counsel for errors of law and fact. See *Blagojević*, paras.16, 17, 18, 21-22 *et seq.* In so doing, the Appeals Chamber dealt with all *Blagojević*'s arguments, including some raised for the first time on appeal, "for completeness and to ensure finality in the rather special circumstances of this case." *Blagojević*, paras.10, 24, 42.

<sup>10</sup> See e.g. *Prosecutor v. Milutinović et al.*, IT-99-37-AR73.2, Decision on interlocutory appeal on motion for additional funds, 13 November 2003, paras.21, 25-26.

<sup>11</sup> *Prosecutor v. Nahimana et al.*, ICTR-99-52-A, Decision on appellant Jean-Bosco Barayagwiza's motion contesting the decision of the President refusing to review and reverse the decision of the Registrar relating to the withdrawal of co-counsel, 23 November 2006, para.9.

<sup>12</sup> Thus, the arguments raised in Karadžić's fourth ground of appeal (d) are subject to the Appeals Chamber's Decision in *Krajišnik*, paras.40-42.

- An accused who elects to self-represent is not entitled to legal assistance paid for by the Tribunal pursuant to Article 21(4)(d).<sup>13</sup>
- Article 21(1) “does not require that an accused who opts for self-representation receive all the benefits held by an accused who opts for counsel”; rather, the accused who chooses self-representation “must accept responsibility for the disadvantages this choice may bring”.<sup>14</sup>
- “[W]here an accused elects to self-represent, he is asserting *his ability to conduct his case without legal assistance* and thus Tribunal funding for legal aid for him can be presumed to be unnecessary to the conduct of a fair trial. To the extent that the accused *lacks the ability to conduct his own case* and his self-representation is *thus* ‘substantially and persistently obstructing the proper and expeditious conduct of his trial’, then the remedy is restriction of his right to self-representation.”<sup>15</sup>
- “[T]he term ‘facilities’ in Article 21(4)(b) does not normally encompass legal assistance”, but “to the extent that the Registry requires or encourages indigent self-representing accused *to coordinate their defences through designated legal associates*” in giving effect to Article 21(4)(b), the Tribunal should “provide some funding for such associates. Such funding should not be comparable to that paid to counsel for represented accused (particularly since work such as the drafting of written filings should be considered the responsibility of the self-representing accused), but nonetheless should

<sup>13</sup> *Krajišnik*, para.40. *Compare* Appeal, paras.19-20 (claiming that the Trial Chamber erred in concluding that the Appeals Chamber did not intend the provision of “high-level” [legal] assistance to self-represented accused).

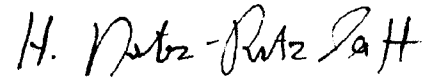
<sup>14</sup> *Krajišnik*, para.41. *Compare* Appeal, paras.22, 35, 39-41 (urging that the Trial Chamber erred in interpreting *Krajišnik* because, as an incarcerated self-represented accused, Karadžić requires the expertise and assistance of experienced, high-level lawyers).

<sup>15</sup> *Krajišnik*, para.41 (emphasis added). *See also* fn.100 (noting that “where stand-by or other counsel have been assigned to a self-represented accused, this has not been seen as complementary to the accused’s right to self-represent but rather as an imposed limitation on the accused’s right to self-represent”). *Compare* Appeal, paras.15-17 (claiming that the Trial Chamber erred in interpreting this paragraph of the *Krajišnik* because the Appeals Chamber “was specifically concerned with the situation where a self-represented accused, either through disruptive behavior or continued poor health, exhibits conduct which substantially obstructs the conduct of his trial.”).

adequately reimburse the legal associates for their *coordinating work* and for *related* legal consultation.”<sup>16</sup>

8. Read in proper context, the above findings from *Krajišnik* were applied by the Registrar and the Trial Chamber.<sup>17</sup>

Word Count: 1486



Hildegard Uertz-Retzlaff  
Senior Trial Attorney

Dated this 13<sup>th</sup> day of March 2009  
At The Hague, The Netherlands

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<sup>16</sup> *Krajišnik*, para.42 (emphasis added), *Compare* Appeal, paras.22, 27, 35 (arguing that the Trial Chamber misinterpreted this paragraph because the Appeals Chamber envisaged such “legal consultation” beyond management and administrative assistance facilitating the conduct of the accused’s case, to include consulting on complex matters of law, and undertaking interviews and other tasks only experienced lawyers can perform).

<sup>17</sup> *Compare Krajišnik*, paras.40-42 with Decision, paras.18-20, 27-32, 36.