

30 MARCH 2009



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: 30 March 2009

Original: English

APPEALS CHAMBER

Before:

**Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Lui Daqun
Judge Andréia Vaz
Judge Theodor Meron**

Acting Registrar:

Mr. John Hocking

Submission date:

30 March 2009

THE PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**REGISTRAR'S SUBMISSION PURSUANT TO RULE 33 (B) REGARDING RADOVAN
KARADŽIĆ'S APPEAL OF THE TRIAL CHAMBER'S DECISION ON ADEQUATE
FACILITIES**

The Office of the Prosecutor:

Mr. Alan Tieger
Mr. Mark B. Harmon
Ms. Hildegard Uertz-Retzlaff

The Accused:

Mr. Radovan Karadžić

A. INTRODUCTION

1. Pursuant to Rule 33(B) of the Rules of Procedure and Evidence ("Rules") of the International Criminal Tribunal for the Former Yugoslavia ("Tribunal"), the Registrar respectfully offers his comments on the "Appeal of the Trial Chamber's Decision on Adequate Facilities", filed by Radovan Karadžić ("Accused") on 6 March 2009 ("Appeal").

B. PROCEDURAL HISTORY

2. On 30 July 2008, the Accused was transferred to the seat of the Tribunal.
3. In a letter dated 4 August 2008, the Accused elected to represent himself in proceedings before the Tribunal. The Registrar notified the Trial Chamber of the Accused's election and filed his letter on 6 August 2008.
4. On 29 September 2008, the Accused applied for Tribunal funding for his defence as a self-represented accused on the basis that he did not have sufficient means to pay for it himself, and requested that persons assigned to assist him in the preparation of his case be compensated at the rate of counsel assigned by the Registrar to indigent accused.
5. By letter dated 16 October 2008, the Registrar assigned Mr. Peter Robinson as a legal associate and Mr. Milivoje Ivanišević as an investigator to the Accused, and advised the Accused that the assignments were governed by the Remuneration Scheme for Persons Assisting Indigent Self-Represented Accused ("Remuneration Scheme").¹ The Accused was also informed that in light of the scope and complexity of his case, the Registrar was willing to increase the number of assistants remunerated by the Tribunal and/or the maximum allotment of hours available to such assistants over and above the set maximums in the Remuneration Scheme ("Remuneration Decision").²
6. By letter dated 21 October 2008, the Accused requested the Registrar to reconsider the Remuneration Decision and insisted that his legal associates be remunerated at the rate of assigned defence counsel or consultants.
7. By letter of 14 November 2008, the Registrar denied the Accused's request for reconsideration as far as the remuneration rates go, but reiterated his willingness to consider exceptionally assigning up to eight assistants to the Accused and/or increasing the overall allotment of

¹ *Remuneration Scheme for Persons Assisting Indigent Self-Represented Accused* of 28 September 2007.

² See Annex "B" of the Appeal, p. 3.

working hours for such assistants upon a reasoned request, in line with the Accused's planned composition of his defence team, ("Reconsideration Decision").

8. On 19 November 2008, the Registrar assigned Mr. Goran Petronijević as a second legal associate to the Accused.
9. On 25 November 2008, the Accused filed his "Motion for Adequate Facilities and Equality of Arms: Legal Associates" ("Motion") before the Trial Chamber.
10. On 2 December 2008, the Registrar filed his "Submission Pursuant to Rule 33(B) Regarding Radovan Karadžić's Motion for Adequate Facilities and Equality of Arms" ("Registrar's Submission").
11. On 28 January 2009, the Trial Chamber issued its "Decision on Accused Motion for Adequate Facilities and Equality of Arms: Legal Associates" ("Impugned Decision"), denying the Accused's Motion and upholding the Remuneration Decision.
12. On 6 February 2009, the Accused filed his "Application for Certification to Appeal Decision on Adequate Facilities", which was granted by the Trial Chamber on 13 February 2009, in its "Decision on Accused's Application for Certification to Appeal Decision on Adequate Facilities."
13. On 5 March 2009, the Accused filed his "Appeal of the Trial Chamber's Decision on Adequate Facilities" ("Appeal").
14. On 13 March 2009, the Prosecution filed the "Prosecution's Response to Karadžić's Appeal of the Trial Chamber's Decision on Adequate Facilities" ("Prosecution's Response").

C. REGISTRAR'S SUBMISSION

The Review by the Appeals Chamber

15. The Registrar respectfully submits that the Impugned Decision was rendered on review of an administrative decision of the Registrar – the Remuneration Decision. As such, it was not a discretionary decision as the Accused suggests. Rather, the Trial Chamber's review was guided by the standard for proper administrative decision-making as stipulated by the Appeals

Chamber in *Kvočka*.³ In essence, the *Kvočka* standard is a four-prong test for proper administrative decision-making and judicial review thereof that requires: (1) compliance with the relevant legal requirements; (2) observance of basic rules of natural justice and procedural fairness; (3) consideration of only relevant material and no irrelevant material; and (4) reaching a decision that is reasonable.⁴

16. The Trial Chamber's review was therefore limited to verifying whether the Registrar had complied with the *Kvočka* test in reaching the Remuneration Decision. In the Registrar's Submission, the Registrar demonstrated that the Remuneration Decision complied with the standard for proper administrative decision-making. The Trial Chamber agreed and affirmed the Remuneration Decision.

17. As noted by the Prosecution in the Prosecution Response, the question whether a judicial decision on review can be subjected to appellate scrutiny is not free of doubt.⁵ The Registrar appreciates that in this case the Trial Chamber exercised its discretion under Rule 73(B) of the Rules and granted certification to appeal the Impugned Decision.⁶ This does not mean, however, that the Appeals Chamber is bound to consider the Appeal on its merits if it deems that a second judicial review of an administrative decision is impermissible or unwarranted, and that entertaining this Appeal would amount to such a review.

³ *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 ("Žigić Decision"), 7 February 2003, at para. 13. Subsequently cited in *Prosecutor v. Veselin Šljivančanin*, Case No. IT-95-13/1-PT, Decision on Assignment of Defence Counsel, 20 August 2003, at para. 22; *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-PT, Decision on the Defence's Motion for an Order Setting Aside the Registrar's Decision Declaring Momčilo Krajišnik Partially Indigent for Legal Aid Purposes, 20 January 2004, at para. 16; *Prosecutor v. Mile Mrkšić*, Case No. IT-95-13/1-PT, Decision on Defence Request for Review of the Registrar's Decision on Partial Indigence of Mile Mrkšić, 9 March 2004, at page 3; and *Prosecutor v. Mrkšić et al.*, Case No. IT-95-13/1-PT, Decision on Appointment of Co-Counsel for Mrkšić, 7 October 2005, at para. 9.

⁴ Paragraph 13 of the Žigić Decision provides: "[t]he administrative decision will be quashed if the Registrar has failed to comply with the legal requirements of the Directive. This issue may in the particular case involve a consideration of the proper interpretation of the Directive. The administrative decision will also be quashed if the Registrar has failed to observe any basic rules 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). These issues may in the particular case involve, at least in part, a consideration of the sufficiency of the material before the Registrar, but (in the absence of established unreasonableness) 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."

⁵ See Prosecution's Response, footnote 7, quoting footnote 24 of *Procureur v. Blagojević*, IT-02-60-AR.73.4, 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; see also *Prosecution Submission on Application for Certification to Appeal Decision on Adequate Facilities* of 12 February 2009 ("Prosecution Submission"), footnote 14 of the Prosecution Submission.

⁶ Rule 73(B) of the Rules stipulates that certification to appeal may be granted "if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings."

18. Should the Appeals Chamber nonetheless proceed to consider the Appeal, it is respectfully submitted that the Accused must demonstrate that the Trial Chamber failed to abide by the *Kvočka* standard or misapplied the *Kvočka* test in a manner that amounts to a discernible error of law or fact.⁷ Instead, the Accused merely repeats the same arguments that were unsuccessful before the Trial Chamber. The Accused seeks a rehearing before the Appeals Chamber as he disagrees with the Trial Chamber's and the Registrar's concurring interpretations of the *Krajišnik* Decision. It is clearly established in the Tribunal's jurisprudence that an interlocutory appeal is not a *de novo* review of the decision of the Trial Chamber⁸ the same way as the original judicial review by the Trial Chamber was not a rehearing. It is respectfully submitted that the Appeal can be dismissed on this ground alone. In this respect, the Registrar endorses the argument of the Prosecution that a rehearing of the Motion would undermine the role of the Trial Chamber as the principal guardian of the Accused's fair trial rights.⁹ It would further undermine the standard of judicial review of administrative decisions as established by the Appeals Chamber in *Kvočka*.

19. Finally, should the Appeals Chamber undertake a review of the Impugned Decision, the Registrar respectfully submits that the scope of that review may not be broader than the scope of the Trial Chamber's review of the original Remuneration Decision. In particular, the Appeals Chamber's review of the Impugned Decision should be limited to verifying whether the Trial Chamber has applied the *Kvočka* test correctly. It is further submitted that the Impugned Decision can only be quashed if the Appeals Chamber determines that the Trial Chamber has committed a discernible error of fact or law in its application of the *Kvočka* test to the

⁷ The Registrar submits that Trial Chambers exercise broad discretion on issues of fairness of trial and the adequate allocation of facilities to accused, as decisions on the matter draw upon the Trial Chamber's familiarity with the conduct of the parties and the specific demands of the case. The Appeals Chamber must accord deference to a Trial Chamber's decision in this respect. The Appeals Chamber's review is limited to the determination whether the Trial Chamber has committed a discernible error or abused its discretion. A Trial Chamber's decision can consequently only be overturned where it is found to be: (i) based on an incorrect interpretation of the governing law; (ii) based on a patently incorrect conclusion of fact; or (iii) so fair or unreasonable as to constitute an abuse of discretion. *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-AR.73.4, Decision on Appeal Against the Trial Chamber's Decision (NO.2) on Assignment of Counsel, 8 December 2006, para. 16; *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR.73.14, Decision on the Interlocutory Appeal Against the Trial Chamber's Decision on Presentation of Documents by the Prosecution in Cross-Examination of Defence Witness, 26 February 2009 ("Decision on the Interlocutory Appeal"), para. 5; *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR.73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence Counsel, 1 November 2004 ("*Milošević* Decision on the Assignment of Counsel"), para. 10. This standard has to be further limited to the standard of a judicial review of administrative decision-making as stipulated in the *Žigić* Decision at para. 13.

⁸ The Registrar notes that an interlocutory appeal is not a *de novo* review of the Trial Chamber's decision. *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-AR.73.2, Decision on Krajišnik's Appeal Against the Trial Chamber's Decision Dismissing the Defense Motion for a Ruling That Judge Canivell is Unable to Continue Sitting in This Case, 15 September 2006, para. 9; *Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84-AR.65.2, Decision on Lahi Brahima's Interlocutory Appeal Against the Trial Chamber's Decision Denying his Provisional Release, 9 March 2006, para. 5; *Prosecutor v. Zdravko Tolimir et al.*, Case No. IT-04-80-AR.73.1, Decision on Radivoje Miletić Interlocutory Appeal against the Trial Chamber's Decision on Joinder of Accused, 27 January 2006, para. 6.

⁹ See Prosecution Submission, para. 3.

Remuneration Decision. The Registrar respectfully submits that this is a high threshold given that in matters of judicial review, the principle is one of deference to the original decision-maker's margin of appreciation of the facts or merits of the case (in this case the Registrar).¹⁰ It is respectfully submitted that the Accused has failed to show that the Trial Chamber's judicial review of the Impugned Decision under the *Kvočka* test was deficient in any way.

Four Grounds of Appeal – the Same Argument

20. The Accused has submitted four separate grounds of appeal alleging three errors of law in the Impugned Decision and making one general complaint about the Impugned Decision. An analysis of the Accused's submissions makes it clear that all of his grounds of appeal stem from an alleged misinterpretation and misapplication of a finding by the Appeals Chamber in *Krajišnik* ("*Krajišnik* Decision").¹¹ The Registrar submits that the Appeal is therefore limited to the first prong of the *Kvočka* test, namely whether the Trial Chamber erred in finding that the Registrar had complied with the relevant legal requirements in reaching the Impugned Decision. The Registrar's submission is therefore limited to that issue.
21. The Accused argues that due to its erroneous interpretation of the *Krajišnik* Decision, the Trial Chamber has erred in: 1) finding that the Registrar is not required to fund "*high-level*" assistants; 2) "minimizing the role and tasks of a legal associate" and therefore finding the remuneration provided by the Registrar to be adequate "for the type of assistance they are supposed to provide"; and 3) finding that remunerating legal associates at the rate of defence legal assistants is not an unreasonable approach.¹² The Accused concludes that by limiting the remuneration of his associates, the Impugned Decision impinges on his right to a fair trial and prevents the proper administration of justice.¹³ In conclusion, the Accused argues that given the complexity and magnitude of his case, he requires high-level legal assistance, that such legal assistance can only be provided by experienced high-level lawyers, and that such lawyers must therefore be compensated at the rate of assigned defence counsel. The Accused asserts that anything short of that infringes upon his right to a fair trial as a self-represented accused.
22. As demonstrated below, the Trial Chamber correctly rejected these arguments in upholding the Remuneration Decision.

¹⁰ *Žigić* Decision, para. 13.

¹¹ *Prosecutor v. Momčilo Krajišnik*, Decision on Krajišnik Request and on Prosecution Motion, IT-00-39-A, 11 September 2007 ("*Krajišnik* Decision"), at para. 42.

¹² Appeal, para. 14 (a), (b) and (c).

¹³ Appeal, para. 14 (d).

The Trial Chamber's Interpretation of the Governing Law was Correct

23. The Registrar submits that in reviewing the Remuneration Decision under the *Kvočka* test, the Trial Chamber had to satisfy itself that the Registrar had complied with the legal requirements, that is that he had interpreted and applied the relevant legal provisions correctly. The Trial Chamber heard both the Accused and the Registrar on the matter,¹⁴ and made its own analysis of the relevant jurisprudence. It found no error in the Registrar's interpretation of the governing law and upheld the Remuneration Decision.

1. The Trial Chamber Rightly Concluded that the *Krajišnik* Decision does not Require the Registrar to Provide Expensive Legal Advice to a Self-Represented Accused

24. In his Appeal, the Accused focuses on a portion of the Impugned Decision, which he claims is a misstatement of the *Krajišnik* Decision, and which has caused the alleged misapplication by the Trial Chamber of the Appeals Chamber's findings. A plain reading of the Impugned Decision and the *Krajišnik* Decision show that this argument is without merit.

25. The Registrar submits that the Accused has misunderstood the *Krajišnik* Decision. Notably, the Accused mis-characterises the *Krajišnik* Decision and misconstrues relevant paragraphs of the Impugned Decision. The Accused continues to assert that "facilities" equates or encompasses legal assistance despite the explicit Appeals Chamber's finding to the contrary.

26. In the *Krajišnik* Decision, the Appeals Chamber held that an indigent accused who elects to represent himself is not entitled to have legal assistance paid for by the Tribunal pursuant to Article 24(4)(d),¹⁵ and is not entitled to receive legal aid funds.¹⁶ The Appeals Chamber further confirmed that the term "facilities" in Article 21(4)(b) of the Statute does not encompass legal assistance.¹⁷ It is in this context that the Appeals Chamber considered it appropriate to provide some funding, outside the Tribunal's legal aid system, for a self-represented accused's designated legal associates. It held:

¹⁴ See the Accused's Motion, the Registrar's Submission and the Accused's *Motion for Leave to Reply: Adequate Facilities and Equality of Arms* of 16 December 2008 in reply to the Registrar's Submission.

¹⁵ *Krajišnik* Decision, para. 40.

¹⁶ As the Appeals Chamber put it, "to allow an accused to self-represent and yet to receive full legal aid funding from the Tribunal would, as the saying goes, let him have his cake and eat it too.", *Krajišnik* Decision, para. 41. In this regard, the Registrar considers the so-called "defence funding" to be a consequence of the assignment of counsel. Such funding usually consists of the remuneration and other entitlements paid to assigned counsel and defence support staff under the Tribunal's legal aid regime.

¹⁷ *Krajišnik* Decision, para. 42. See also footnote 104 of the *Krajišnik* Decision.

“To the extent that the Registry requires or encourages indigent self-representing accused to coordinate their defences through designated legal associates, it is appropriate for the Tribunal to 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 adequately reimburse the legal associates for their coordinating work and for related legal consultation.”¹⁸

27. In reaching the Impugned Decision, the Trial Chamber analysed the *Krajišnik* Decision in the context of the Statute and the Directive on the Assignment of Defence Counsel,¹⁹ and recalled the above findings of the Appeals Chamber. It also quoted the Appeals Chamber’s finding that “where 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.”²⁰

28. The Trial Chamber had found that the Accused was essentially seeking all the assistance and public funding associated with full legal representation by counsel, while at the same time retaining his status as a self-represented Accused.²¹ The Trial Chamber correctly stated that this was not the intended result of the *Krajišnik* Decision. The Trial Chamber concluded therefore, that “the *Krajišnik* Appeal Decision is a clear statement that it is not for the Registry to fund the provision to a self-represented accused of expensive legal advice [but rather to provide] modest financial support to assist the efficient and effective presentation of the Defence case.”²²

29. It is in this context that the Trial Chamber stated that “should the Accused lack the ability to present his defence efficiently and effectively because of his lack of knowledge of law and legal procedures, or because of the complexities of the case, the solution envisaged by the Appeals Chamber was not the provision of experienced, high-level professional assistants but ‘restriction of his right to self-representation.’”²³ The Accused has made repeated claims that he is unable to

¹⁸ *Ibid.*

¹⁹ Directive No. 1/94, IT-73/REV. 11.

²⁰ Impugned Decision, para. 30, quoting *Krajišnik* Decision, para. 41.

²¹ Impugned Decision, para. 27.

²² Impugned Decision, para. 31.

²³ Impugned Decision, para. 31 (internal citations omitted). The Appeals Chamber’s wording referred to by the Trial Chamber is plain and unambiguous: the lack of the ability to conduct one’s own case oneself may (as demonstrated by the use of the word “thus”, *Krajišnik* Decision, para. 41) be a circumstance amounting to a substantial and persistent obstruction of the proceedings. Nothing in the *Krajišnik* Decision suggests that its finding as quoted in para. 16 of the Appeal was confined to disruptive behaviour in court or continued poor health of the self-represented accused. Furthermore, as the Appeals Chamber has ruled in *Šešelj* that “[w]hether the appropriate circumstances [showing that an accused’s self-representation rises to the level of substantial and persistent obstruction of the trial] exist *and what they are* is a matter for the Trial Chamber to determine on a case-by-case basis [...]”, *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. 20 (emphasis added).

conduct his defence without the assistance of experienced high-profile lawyers. The Trial Chamber's statement is both reasonable and legally correct.

30. The Registrar respectfully submits that these findings of the Trial Chamber are consistent with the guidance provided by the Appeals Chamber in the *Krajišnik* Decision. Furthermore, as discussed further below,²⁴ these findings need to be read in the larger context of the judicial review undertaken by the Trial Chamber. By fragmenting his Appeal, the Accused has misstated the Trial Chamber's findings.

2. The Trial Chamber Rightly Concluded that the Role and Tasks of Legal Associates are Comparable to those of Legal Assistants

31. The Accused asserts that due to its misinterpretation of the *Krajišnik* Decision, the Trial Chamber has minimised the role and tasks of his legal associates. He submits that he needs his associates to provide him with legal advice on complex legal issues, to undertake interviews with high-level witnesses and to secure the provision of evidence and documents from states pursuant to Rule 54bis of the Rules. He further states that "it cannot be the case that a lawyer who has the necessary experience in international criminal law and the procedure of the International Tribunals to be able to provide meaningful advice to Dr. Karadžić would be characterized as 'support staff'."²⁵

32. By submitting that he requires legal assistance on complex legal issues that can only be provided by experienced lawyers, the Accused demonstrates a misunderstanding of the *Krajišnik* Decision. Furthermore, this is work he should be doing himself if he asserts he can represent himself. The Registrar respectfully recalls the Appeals Chamber's finding that an accused who elects to self-represent is asserting his ability to conduct his case without legal assistance.²⁶ Similarly, in *Milošević* the Appeals Chamber held that:

"[t]here is no doubt that, by choosing to conduct his own defence, the accused deprives himself of resources a well-equipped legal defence team could have provided. A defendant who decides to represent himself relinquishes many of the benefits associated with representation by counsel. The legal system's respect for a

²⁴ See paras. 41 – 48.

²⁵ Appeal, para. 27.

²⁶ *Krajišnik* Decision, at para. 42.

defendant's decision to forgo assistance of counsel must be reciprocated by the acceptance of responsibility for the disadvantages this choice may bring.”²⁷

33. In *Šešelj*, the Trial Chamber held that “[b]y choosing to represent himself, the Accused accepts at a minimum the burden of drafting his submissions, as he has stated that he is qualified to carry out these tasks”.²⁸ Furthermore, as Judge Shahabuddeen states in his Separate Opinion in another decision in the *Krajišnik* case, “[i]n asserting his right to self-representation, the appellant is saying [...] that he will act as his own counsel.”²⁹

34. In light of this jurisprudence, there can be no doubt that legal associates assigned by the Registrar to a self-represented accused are not counsel for the accused. Since work typically performed by defence counsel is to be done by the accused himself, legal associates assigned to assist him perform tasks typically carried out by defence legal assistants and other support staff (for example: conducting legal research and drafting of memoranda; selecting, analysing and classifying documents as requested by the accused; attending work sessions with the accused in the United Nations Detention Unit (“UNDU”); proof-reading of drafts and the preparation of evidence).³⁰

35. Indeed, the Tribunal “should adequately reimburse the legal associates for their coordinating work and for related legal consultation.”³¹ This does not suggest, however, that legal associates are expected or required to act as shadow counsel to the self-represented accused. On the contrary, in addition to administrative and case management support, they provide the self-represented accused with specific legal advice related to the associates’ coordinating and auxiliary role. Legal associates have historically served as a link between various Tribunal sections and the self-represented accused on issues such as filing of motions and responses to motions, submission of translation requests to the Tribunal’s Conference and Languages Services Section, preparation of exhibits for presentation during trial. They also play an important role in explaining to the accused the applicable rules and procedures, advising him on deadlines, and the accused’s entitlements under the relevant policies and other Tribunal

²⁷ *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 on the Interlocutory Appeal”), para. 19.

²⁸ *Prosecutor v. Vojislav Šešelj*, Decision on the Financing of the Defence of the Accused, IT-03-67-PT, 30 July 2007 (“*Decision on Financing*”), para. 55.

²⁹ See Separate Opinion of Judge Shahabuddeen in *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-A, Decision on Momčilo Krajišnik’s Request to Self-Represent, on Counsel’s Motions in Relation to Appointment of *Amicus Curiae*, and on the Prosecution Motion of 16 February 2007, 11 May 2007 (*Krajišnik* Decision on Request to Self-Represent”), para. 36.

³⁰ The Registrar has established these tasks based on the tasks typically carried out by legal assistants to counsel for represented accused. To do so, the Registrar has analysed a number of End-of-Stage Reports submitted to him pursuant to paragraph 11 of the Trial Legal Aid Policy of 1 May 2006, as well as defence invoices.

documents. Such consultation falls within the term “legal consultation” as used in the *Krajišnik* Decision and is related to the legal associates’ coordination role.³²

36. Therefore, whilst it is accepted that part of the legal associates’ role is to provide legal advice to a self-represented accused, such advice is not intended to be of the level that the Accused submits he needs. Such advice is available to the Accused through the assignment of counsel under the Tribunal’s legal aid system. For these reasons, the Appeals Chamber has ruled that the remuneration of legal associates to a self-represented accused “should not be comparable to that paid to counsel for a represented accused.”³³ The tasks performed by legal associates are comparable to those performed by legal assistants to counsel.

37. The Accused further contends that a skilled lawyer with experience in international criminal law and the applicable law of the Tribunals cannot be characterised as “support staff”.³⁴ The Registrar submits that it is not the qualifications and experience that such a lawyer possesses but rather the role and tasks he performs in the case of a self-represented accused that place him in that position. Many legal assistants practicing before the Tribunal in various defence teams are qualified lawyers admitted to the bar in their national jurisdictions, and possess several years of professional experience, including years of such experience before the Tribunal. The Directive itself clearly foresees the possibility for legal assistants (and other support staff) to have ten or more years of experience.³⁵ Among the legal associates assigned under the Remuneration Scheme in other cases of self-represented accused are practicing lawyers with up to 15 years relevant legal experience.

38. In light of the foregoing, the Registrar respectfully submits that in endorsing the Remuneration Decision, the Trial Chamber correctly found that designated legal associates “provide management and administrative assistance that would facilitate the Accused’s conduct of the case.”³⁶ This finding is consistent with the Appeals Chamber’s description of the role of legal associates as providing “coordinating work and related legal consultation.” As noted by the Trial Chamber, there is “a clear distinction between the purpose of the legal aid scheme for

³¹ *Krajišnik* Decision, para. 42 (emphasis added).

³² This reading of the *Krajišnik* Decision is also in line with a finding of the Trial Chamber in *Šešelj* that it is “unimaginable that associates who draft the written submissions of the accused be paid for carrying out the work of a counsel whereas the Accused has chosen to represent himself”, *Prosecutor v. Vojislav Šešelj*, Decision on Financing, para. 55.

³³ Impugned Decision, para. 31.

³⁴ Appeal, para. 27.

³⁵ See Annex 1 to the Directive.

³⁶ Impugned Decision, para. 30.

representation through counsel under the Directive and what the Appeals Chamber saw as the purpose of support to self-represented accused.”³⁷

3. The Trial Chamber Rightly Concluded that Remunerating Legal Associates at the Rates of Legal Assistants is not Unreasonable

39. The Accused claims that the Trial Chamber erred in finding that the remuneration rates for legal associates were not unreasonable. The Accused challenges the Trial Chamber’s endorsement of the rationale behind the remuneration rates set out in the Remuneration Scheme. The Accused submits that this endorsement is based on a misinterpretation of the *Krajišnik* Decision. He submits that his legal associates must be paid as counsel, and that this was the clear intention of the Appeals Chamber in the *Krajišnik* Decision.

40. To support his claim, the Accused introduces the concept of what he calls “calculable amounts”. The Accused submits that the Appeals Chamber actually intended to provide a self-represented accused with the full amount of legal aid funding provided to counsel under the lump sum legal aid policies, less a portion corresponding to “some of the work [that] will be done by the self-represented accused himself.”³⁸

41. It is respectfully submitted that the Accused not only mischaracterises the *Krajišnik* Decision but also demonstrates a misunderstanding of the Tribunal’s legal aid policies. The remuneration of the Accused’s legal associates is only one of the elements of the Remuneration Decision. The Registrar respectfully submits that in order to verify whether the Trial Chamber erred, the Appeals Chamber should consider the Impugned Decision and the underlying Remuneration Decision in their entirety.

42. The Registrar submits that the Trial Chamber correctly found that the Remuneration Decision was not unreasonable. In reaching that decision, the Registrar applied the Remuneration Scheme which, it is submitted, provides adequate funding for associates to a self-represented accused in accordance with the findings of the Appeals Chamber.

43. In fact, the Remuneration Scheme goes beyond the finding in the *Krajišnik* Decision that it is appropriate for the Tribunal to provide “some funding for [designated legal] associates”³⁹ and allows for the remuneration of up to four assistants to a self-represented accused, who discharge

³⁷ Impugned Decision, para. 31.

³⁸ Appeal, para. 33.

the functions of legal associate, case manager, investigator and language assistant. In exceptional circumstances, further defence team members may be assigned.⁴⁰

44. The Registrar submits that in the present case, he has shown further flexibility as he has offered to assign up to eight assistants to the Accused in one of the above capacities, and/or to increase the allotment of working hours for the Accused's defence team upon submission of a reasoned request.⁴¹ He has done so to ensure that the Accused receives adequate assistance as a self-represented accused in view of the scope and complexity of the Accused's case and taking into account the Accused's wishes as to the composition of his defence team. In addition, however, the Accused wants his associates to be paid as defence counsel.

45. The *Krajišnik* Decision did not specify any particular level of funding or remuneration system for the defence of a self-represented accused, but left the matter to the Registrar to determine. Accordingly, the Registrar established the Remuneration Scheme considering the role and tasks of a self-represented accused's assistants as envisaged in the *Krajišnik* Decision and the relevant features of existing Tribunal legal aid policies, and taking into account the applicable United Nations financial rules and regulations for the disbursement of public funds. The Remuneration Scheme provides for a composition of the defence team similar to that of an accused represented by counsel. In determining the rates of remuneration, the Registrar was mindful of the fact that legal associates to a self-represented accused do not act as counsel for the accused and cannot be remunerated as such.⁴² Since work typically performed by defence counsel is to be done by the self-represented accused himself, legal associates assigned to assist him perform tasks typically carried out by defence support staff in cases of represented accused.⁴³ Accordingly, the Remuneration Scheme provides that persons assigned to assist an indigent self-represented accused shall be remunerated at the hourly rates for defence support staff as set out in Annex I to the Directive.⁴⁴

46. The Registrar has based the Remuneration Scheme on a payment system consisting of the allocation of a maximum working hours paid at a fixed hourly rate. This concept is used in the so-called "ceilings payment system" previously used in pre-trial and trial, and currently applied on appeal in cases of represented accused. Under this payment scheme, the Registry grants maximum allotments of working hours to the defence team and each defence team member

³⁹ *Krajišnik* Decision, para. 42.

⁴⁰ Remuneration Scheme, paras. 3.5. and 3.6.

⁴¹ Three such defence team members have already been assigned under the Remuneration Scheme, a request for one further legal associate is pending with the Registry. The Accused is yet to request the assignment of further assistants.

⁴² *Krajišnik* Decision, paras. 41, 42.

⁴³ See para. 34.

submits hourly invoices to the Registry in which s/he has to describe the tasks performed each month and the time spent on each activity. If satisfied that the work was reasonable and necessary for the defence of the accused,⁴⁵ the Registrar will authorise the payment of the invoice. Under this payment scheme, the Registry controls directly the allocation and disbursement of public funds to the individual members of the defence team.

47. Contrary to the Accused's submissions, the Registrar considered and deliberately ruled out the possibility of establishing a payment scheme for self-represented accused based on a lump sum. Under the Defence Counsel Pre-Trial and Trial Legal Aid Policies,⁴⁶ a lump sum is made available to counsel in the form of regular monthly stipends. In the case of a self-represented accused, however, there is no lead counsel who can be entrusted with the management of the funds and the distribution of the lump sum among the members of the defence team. Lead counsel is also held accountable for the performance and conduct of defence support staff, including any billing or other financial irregularities in accordance with the Code of Professional Conduct for Defence Counsel Practicing before the ICTY ("Code of Conduct"). The Registrar ruled out the possibility of making public funds available directly to the self-represented accused, and opted for a ceiling system. That system operates using payment rates that have been approved by the Judges of the Tribunal in plenary. The ceiling system and the defined rates have been successfully applied in a number of cases at the Tribunal over the years and have been reviewed by both the internal and external United Nations auditors.

48. Further, contrary to the Accused's contention, since legal associates do not represent the accused and do not act as his counsel,⁴⁷ the Registrar does not require them to meet the same qualification requirements as counsel. However, to protect the integrity of the Tribunal and the judicial process, the Registrar requires all support staff assigned to a self-represented accused to sign an undertaking to be bound by the Tribunal's main legal documents, and to respect the confidentiality of all case-related materials. As they hold a position of considerable trust (with access to the accused at the UNDU and confidential Tribunal materials), the Registrar has an obligation to implement control measures and an accountability mechanism for associates of a self-represented accused. The Accused appears to read such measures as an indication that the Registrar treats support staff as counsel in some instances. The Accused's assertion is

⁴⁴ Remuneration Scheme, para. 3.4.

⁴⁵ Remuneration Scheme, para. 4.2; see also Article 23(A) of the Directive.

⁴⁶ See *Defence Counsel – Pre-Trial Legal Aid Policy* and *Trial Legal Aid Policy*, both of 1 May 2006.

⁴⁷ "An accused who chooses to represent himself acts as his own counsel." Separate Opinion of Judge Shahabuddeen, *supra*, footnote 29.

misconceived and demonstrates his lack of understanding of the Remuneration Scheme and the ensuing assignments.

49. The Accused relies on a decision in *Šešelj* where the Pre-Trial Judge ordered that one of the associates designated by the accused satisfy the conditions of Rule 45.⁴⁸ That decision has since been overridden by the Appeals Chamber's *Krajišnik* Decision.⁴⁹ The Accused challenges the requirement that legal associates must be a member of the Association of Defence Counsel Practising before the ICTY ("ADC"). However, the Trial Chamber specifically discussed this requirement in the Impugned Decision. The Trial Chamber recognised that the membership was designed to achieve a measure of control, and observed that the Registrar had demonstrated flexibility in his application of the Remuneration Scheme by waiving certain qualification requirements, including this one.⁵⁰ In view of the Trial Chamber's comments and the experience gained in the application of the Remuneration Scheme, the Registrar has now removed this requirement and will soon publish a revised version of the Remuneration Scheme.

50. The Accused draws a parallel between the remuneration of an *amicus curiae* and that of support staff assigned to assist a self-represented accused. An *amicus curiae*, whilst not a party to the proceedings, is appointed to provide independent professional advice and to make submissions on an issue specified by a Chamber.⁵¹ A legal associate, on the contrary, is retained by a self-represented accused to assist him with the coordination of his defence and related legal consultation. The *amicus curiae* plays an independent and neutral role in the proceedings and has standing to make representations to the Chamber. The Accused cannot rightfully claim that his legal associates be paid at a similar rate to *amicus curiae* when their role and functions are distinct.

51. The funding provided by the Tribunal for the Accused's defence is the sum total of all working hours of all his assistants assigned under the Remuneration Scheme multiplied by the applicable hourly rates. The rates at which the Accused's legal associates are paid are therefore just one of the elements of the Remuneration Decision. Accordingly, it is the Registrar's submission that the Trial Chamber properly applied the *Kvočka* test and rightly concluded that in the context

⁴⁸ Appeal, para. 24.

⁴⁹ It is clear that when the Appeals Chamber issued the *Krajišnik* Decision, it was well aware of the decision taken in *Šešelj*. In fact, in footnotes 98 and 101, the Appeals Chamber explicitly refers to the *Šešelj* Decision on Financing. In contrast to the finding of the Pre-Trial Judge in *Šešelj* in paras. 63-64 of the Decision on Financing, the Appeals Chamber clearly stated that public funding for a self-represented accused is not available under the Tribunal's legal aid scheme envisaged in Rule 45 of the Rules (para. 40 of the *Krajišnik* Decision).

⁵⁰ Impugned Decision, para. 33, quoting the Remuneration Scheme, para. 5.1.(A).

⁵¹ See Rule 74 of the Rules.

described above, remunerating the Accused's legal associates at the rates of defence legal assistants was not unreasonable.

4. The Fairness of the Accused's Trial Does Not Depend on the Remuneration Rates of his Associates

52. The Accused contends that the Impugned Decision will prevent him from receiving legal assistance from anyone other than support staff, and that this violates his right to a fair trial and prevents the proper administration of justice.⁵² He claims that the Impugned Decision eliminates any practical effect of the *Krajišnik* Decision as he will have to face the Prosecutor's charges "aided only by support staff and not by experienced lawyers".⁵³

53. However, the Accused misconceives his role and entitlements as a self-representing accused. By deciding to represent himself, the Accused dispenses with the provision of legal assistance. The Appeals Chamber has held that an accused who elects to self-represent "is asserting his ability to conduct his case without legal assistance and thus Tribunal funding for legal aid for him can be presumed unnecessary to the conduct of a fair trial."⁵⁴ Such accused "deprives himself of resources a well-equipped legal defence team could have provided" and accepts responsibility for the disadvantages this choice may bring.⁵⁵ It has also been established that the right to adequate facilities under Article 21(4) of the Statute does not encompass the provision of legal assistance.⁵⁶

54. Regarding the Accused's submission that he will have to face the Prosecutor's charges "aided only by support staff, and not by experienced lawyers", the Registrar respectfully submits that this is precisely the concept of self-representation as described by various Chambers of this Tribunal.⁵⁷ The Accused knowingly and voluntarily chose to represent himself, thereby waiving his right to legal assistance by professional counsel. He now claims that as a "non-lawyer", it is virtually impossible to represent himself adequately before the Tribunal.⁵⁸ Self-representation is an informed choice which an accused makes, accepting the limitations on his ability to prepare

⁵² Appeal, para. 14 (d), 37.

⁵³ Appeal, para. 39.

⁵⁴ *Krajišnik* Decision, para. 41.

⁵⁵ *Milošević* Decision on the Interlocutory Appeal, para. 19.

⁵⁶ *Krajišnik* Decision, para. 42, see also footnote 104 of *Krajišnik* Decision.

⁵⁷ See Judge Shahabuddeen, *supra*, footnote 29; *Krajišnik* Decision, para. 41; *Milošević* Decision on the Interlocutory Appeal, para. 19.

⁵⁸ Appeal, para. 39.

and present a professional defence. A self-represented accused cannot therefore argue that such limitations render his trial unfair.⁵⁹

55. In his own submission, the Accused requires assistance in tasks such as the drafting of motions, the arguing of complex jurisdictional questions, the preparation of relevant cross-examination and the assessment of witness statements.⁶⁰ The Registrar submits that these tasks are essential elements of a defendant's representation in criminal proceedings. The Accused's apparent⁶¹ and declared inability to carry them out may raise questions as to his ability to represent himself.

56. The Registrar has provided the Accused with funding and facilities which exceed the Appeals Chamber's explicit findings.⁶² The Accused has been offered the assistance of eight assistants remunerated by the Tribunal. He has been provided with the necessary facilities to prepare his defence at the UNDU. By offering the Accused such facilities and funding, the Registrar was mindful of the complexity and magnitude of the Accused's case.

57. Under the Statute, the Trial Chamber has the primary responsibility to ensure that the Accused's right to a fair trial is not jeopardized. The Trial Chamber was fully aware of this responsibility when it endorsed the Remuneration Decision⁶³ and found that it was not inconsistent with the Accused's right to a fair trial as a self-represented accused. Furthermore, the option of appointing an *amicus curiae* or standby counsel is always available to the Trial Chamber in addition to the personnel assigned by the Registrar to assist the Accused.⁶⁴

⁵⁹ UK ARCH 16-57, 2006, *Sweet and Maxwell*, Chp 16 – Human Rights; *Faretta v. California*, 422 U.S. 806, 834 n.46 (1975): a *pro se* defendant cannot claim his/her own ineffectiveness as a ground for reversal; *Menefield v. Borg*, 881 F.2d 696, 700 (9th Cir. 1989; dictum: “the accused has little recourse against the failings caused by his own inartfulness”); see *U.S. v. Smith*, 907 F.2d 42, 45 (6th Cir. 1990; a defendant, not entitled to law library access, may not argue ineffective assistance on appeal in regard to his own *pro se* proceeding based on limited research resources); *U.S. v. Flewitt*, 874 F.2d 669, 675 (9th Cir. 1989; a defendant who refused standby counsel and failed to utilize discovery procedures may not claim own ineptitude as grounds for reversal).

⁶⁰ Appeal, para. 40.

⁶¹ See transcript of the Status Conference of 20 February 2009, page 109, lines 8-15: Judge Bonomy: “Well, you see, that's very unhelpful because you are counsel in your case, and the Chamber, when it comes into one of these hearings, expects to be assisted by counsel. Now, what you're say[ing] is that you're trying to conduct this case but you're incapable of conducting, and that's an unsatisfactory situation for the Court to be in. I expect you when you come here to have a position on the various issues that have to be addressed by the Trial Chamber.”

⁶² See *supra*, paras. 43 – 48.

⁶³ “The question for the Chamber to examine is whether that [Remuneration] [D]ecision will result in the Accused not receiving a fair trial in keeping with both the minimum guarantees of Article 21(4) of the Statute and the guidance provided by the Appeals Chamber in the *Krajišnik* Appeal Decision”, Impugned Decision, para. 27.

⁶⁴ In previous cases, Chambers have appointed *amici curiae* or standby counsel out of concerns for the fairness of the proceedings: See *Prosecutor v. Vojislav Šešelj*, Decision on Prosecution's Motion for Order Appointing Counsel to Assist Vojislav Šešelj with his Defence, IT-03-67-PT, 9 May 2003, para. 27; *Milošević* Decision on the Assignment of Counsel, para. 19; *Prosecutor v. Slobodan Milošević*, Order Inviting Designation of *Amicus Curiae*, IT-02-54-PT, 30 August 2001. See also *Krajišnik* Decision on Request to Self-Represent, paras. 18-21, 25.

E. CONCLUSION


58. The Registrar respectfully submits that the Appeal should be denied as the Accused seeks a rehearing of his case before the Appeals Chamber. The Registrar further submits that a second judicial review in this case should be guided by the standard set forth by the Appeals Chamber in *Kvočka*.
59. As demonstrated above, the Impugned Decision was reasonable and in full compliance with the relevant Appeals Chamber jurisprudence, and should therefore be affirmed. The Accused has not substantiated any of the alleged errors of the Trial Chamber. Instead, he focuses his Appeal on a single aspect of the Remuneration Scheme, thereby taking it out of the context of the Remuneration Decision and the totality of the facilities offered to him, as assessed by the Trial Chamber.
60. The Registrar reiterates that it would be contrary to the Statute, Rules and other Tribunal documents to fund the Accused's associates at the rate of defence counsel. A self-represented accused's right to adequate facilities as enshrined in Article 21(4)(b) of the Statute cannot be used to circumvent the well-balanced equilibrium between the Tribunal's legal aid system and the Remuneration Scheme. To remunerate legal associates of a self-representing accused at a rate comparable to counsel would effectively amount to the application of the monetary component of the Tribunal's legal aid scheme to a self-representing accused without the assignment of counsel. Such a solution would be in clear contradiction with the express findings of the Appeals Chamber that an accused who chooses to self-represent is not entitled to legal assistance nor is he entitled to receive Tribunal legal aid funds⁶⁵ and would also be contrary to the very purpose of the Tribunal's legal aid schemes. To provide the Accused with funding similar to that offered to counsel through the Tribunal's legal aid system while allowing him to represent himself would "let him have his cake and eat it too."⁶⁶
61. The Registrar submits that by upholding the Remuneration Decision, the Trial Chamber correctly applied the *Kvočka* test for proper administrative decision-making referred to in paragraph 15 *supra*. In the absence of established unreasonableness, there can be no interference with the Impugned Decision.

⁶⁵ *Krajišnik* Decision, para. 40, 42, see also footnote 104 of the *Krajišnik* Decision.

⁶⁶ *Krajišnik* Decision, para. 41.

62. For the foregoing reasons, the Registrar respectfully submits that the Appeals Chamber dismiss the Appeal.

Respectfully submitted,



John Hocking
Acting Registrar

Dated this 30th day of March 2009

At The Hague,

The Netherlands.