



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-PT
Date: 30 July 2007
Original: ENGLISH
French

BEFORE THE PRE-TRIAL JUDGE

Before: Judge Jean-Claude Antonetti

Registrar: Mr Hans Holthuis

Decision of: 30 July 2007

THE PROSECUTOR

v.

VOJISLAV ŠEŠELJ

PUBLIC DOCUMENT

DECISION ON THE FINANCING THE DEFENCE OF THE ACCUSED

The Office of the Prosecutor:

Ms Christine Dahl

The Accused:

Mr Vojislav Šešelj

I. INTRODUCTION

1. I, Jean-Claude Antonetti, Judge 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 seized of the motion on the financing of the defence, filed by Vojislav Šešelj ("the Accused") on 4 June 2007 ("the Motion").¹

2. In the Motion, the Accused seeks the application of Rule 21 (4) (d) of the Statute of the Tribunal ("the Statute") and requests that the costs incurred for the preparation and presentation of his defence be covered by the Tribunal, on the ground of his demonstrated indigence.² Consequently, the Accused requests Trial Chamber III ("Chamber III") to review two decisions rendered by the Registry³ in this respect and to order the Registry "to determine a Defence budget to correspond with the total cost of the Prosecution in the case,"⁴ for each phase of the trial.⁵

II. PROCEDURAL BACKGROUND

3. The pre-trial Judge will briefly recall the numerous written submissions on the financing of the defence of the Accused which have been filed by the Registry and the Accused up to this decision.⁶

4. Two days after he was transferred to the seat of the Tribunal on 24 February 2003, the Accused stated his intention to represent himself.⁷ On 31 October 2003, the

¹ Original in BCS with English translation titled "Professor Vojislav Šešelj's Motion for a Decision by Trial Chamber III on Financing His Defence In Accordance with the Statute," submitted on 4 June 2007 and English version filed on 14 June 2007.

² The Motion, p. 16.

³ For the sake of clarity, the generic term "Registry" is used to refer to all of the subordinate organs of the Registrar of the Tribunal, without distinction.

⁴ The Motion, p. 16.

⁵ In particular, the Accused requests the Chamber to order that "the Registrar, when approving the payment of the United Nations funds to finance the defence, set a monthly remuneration for the three legal advisers during the Prosecution case and Defence case, as well as during the appeal, which should be at least equal to that of defence teams in other cases before the ICTY, and one case manager up to the amount paid to the Prosecution's case manager in addition to an appropriate reimbursement of the cost of accommodation rental in the Hague", *Id.* p. 17.

⁶ For a more detailed procedural background, see the Registry Submission pursuant to Rule 33 (B) of the Rules regarding Vojislav Šešelj's Motion for a Decision by the Trial Chamber on Financing His Defence, 29 June 2007 ("the Submissions"), paras. 3-38.

Accused formally requested the financing of his defence before the Tribunal.⁸ An investigation procedure by the Registry ensued as to the financial situation of the Accused, as did many consultations between them, during which the Registry informed the Accused of the modalities of the legal aid generally granted to Accused before the Tribunal who claim to be indigent or partially indigent. On 7 December 2004, the Accused, however, categorically refused to provide the Registry with the information and documentation necessary for the examination of the financial situation of his close relations.⁹

5. After submitting an initial invoice on 23 July 2004 for the work his expert team is said to have carried out in 2003, the Accused submitted two other invoices, for 2004 and 2005 respectively, on 21 December 2004 and 3 January 2006. On 3 January 2006, the Accused also filed a motion for payment of the cost of his defence (“the First Motion”).¹⁰ On 31 January 2006, the Registry filed its submissions pursuant to Rule 33 (B) of the Rules of Procedure and Evidence of the Tribunal (“the Rules”) concerning the First Motion.

6. As the issue of the assignment of standby Counsel remained undecided and no decision on the First Motion had been made, the question of financing the defence resurfaced when the Accused began his hunger strike and thus made a certain number of demands, concerning in particular the facilities which should be given to him in order to prepare and present his defence case.¹¹

7. By letters of 7 and 8 December 2006, the Registry attempted to meet the demands of the Accused by informing him that Mr Vučić, Mr Krasić and Mr Jerković had been accepted as “legal advisers” and would, in that capacity, be granted privileged access to the Accused. Moreover, the Registry notified the Accused that

⁷ The Submissions, para. 4; Decision on Appeal Against the Trial Chamber’s Decision on Assignment of Counsel, 20 October 2006 (“The Decision of 20 October”), para. 2.

⁸ The Submissions, para. 7; The Motion, p. 2.

⁹ The Motion, pp. 7-11; The Submissions, paras. 8-11.

¹⁰ The Submissions, paras. 13, 17-18; Decision on Appeals Against Decisions of the Registrar of 4 January 2007 and 9 February 2007, 25 April 2007 (“The Interlocutory Decision of 25 April”), para. 7.

¹¹ The Submissions, para. 25; The Interlocutory Decision of 25 April, para. 5.

some reasonable costs associated with his defence would be covered by the Registry, in particular the remuneration of a case manager.¹²

8. By letter of 19 December 2006, the Registry specified the nature and scope of the costs that it could cover, despite the absence of specific information concerning the financial situation of the Accused:

- (i) the cost of the first trip to The Hague for the legal assistants and case manager, including travel costs, accommodation as well a daily subsistence allowance for each of them;
- (ii) monthly remuneration of 1,500 euros (€) for the case manager;
- (iii) a maximum allowance of € 1,200 for the rental of an apartment, to serve as a residence and office for the legal assistants and case manager; and
- (iv) provided they go through the registration procedures, the case manager and the legal assistants would have access to the Tribunal under the same conditions as any other defence team.¹³

9. On 22 December 2006 the Accused simultaneously filed three motions requesting the reimbursement of costs incurred since 2003 for the preparation of his defence, which amounted to 6,395,000 dollars.¹⁴ The motions were denied by the Registry on 4 January 2007 on the ground that the legal aid system in place at the Tribunal only allowed for cases of demonstrated indigence of the Accused and cases in which a counsel was assigned or appointed.¹⁵

¹² The Submissions, paras. 28-29; Letters dated 7 and 8 December 2006, attached to the Decision on Appeal Against Registry Decision of 19 December 2006, 12 March 2007 ("The Interlocutory Decision of 12 March").

¹³ Letter dated 19 December attached to the Interlocutory Decision of 12 March.

¹⁴ The Motion, p. 3; The Submissions, para. 31.

¹⁵ The Motion, para. 32.

10. On 22 January 2007, the Accused lodged an appeal of the Registry decision of 19 December 2006 with the President of the Tribunal (“the President” and “the First Appeal to the President”).¹⁶ On 9 February 2007 the Registry filed its submissions on the appeal in accordance with Rule 33 (B) of the Rules.

11. On 19 February 2007 the Accused lodged an appeal of the Decision of 4 January with the President (“the Second Appeal to the President”).¹⁷

12. The President ruled on the First Appeal to the President on 12 March 2007 in his “Decision on Appeal Against Registry Decision of 19 December 2006” (“the Interlocutory Decision of 12 March”), and held that “Šešelj’s arguments are to be raised before the Trial Chamber presently seized with Šešelj’s case.”¹⁸

13. On 25 April 2007 the President denied the Second Appeal to the President (“the Interlocutory Decision of 25 April”).

14. On 28 June 2007 the Office of the Prosecutor (“the Prosecution”) filed its response to the Motion. The pre-trial Judge is of the view that the issues raised in the Motion are to be dealt with in light of the submissions made by the Accused and the Registry, the latter being responsible for granting legal aid. Therefore, the pre-trial Judge considers that the Prosecution has no *locus standi* to file its response and, consequently, will not address its content.

15. On 29 June 2007 the Registry filed its submissions on the Motion pursuant to Rule 33 (B) of the Rules (“the Submissions”).¹⁹

16. On 19 July the Accused received the Submissions in a language he understands.²⁰ As the Accused did not request leave to file a reply within seven days

¹⁶ Filed on 5 January 2007.

¹⁷ The Motion, para. 35.

¹⁸ The Interlocutory Decision of 12 March, p. 5.

¹⁹ Registry Submission pursuant to Rule 33 (B) of the Rules regarding Vojislav Šešelj’s Motion for a Decision by the Trial Chamber on Financing His Defence, 29 June 2007

²⁰ *Procès-verbal* D21130, 23 July 2007, showing that the Accused received the Submissions on 19 July 2007 at 17.00 hours.

of receiving the Submissions in a language he understands,²¹ the pre-trial Judge rules on the Motion as follows.

III. ARGUMENTS OF THE PARTIES

A. The Motion of the Accused

17. As a preliminary matter, the Accused seeks leave to exceed the number of words allowed to him under the Practice Direction on the Length of Briefs and Motions (“the Practice Direction”)²² and by Decision of the pre-trial Judge of 19 June 2006 on the Filing of Motions.²³

18. The Accused also requests the Trial Chamber to recognize his entitlement to legal aid on the ground that he has demonstrated his indigence. Moreover, concerning the amount to be allocated for the legal aid, the Accused demands complete equality in respect of the financial means available the Prosecution for each phase of the trial, while wishing to be informed of the expenses of other defence teams and of the three Standby Counsel in the instant case.²⁴

19. As to whether the Chamber has jurisdiction to rule on the Motion, the Accused submits that the procedures he has undertaken since his transfer to the Tribunal in February 2003 in order to obtain financing for his defence have yet to be finalized, even though the issue of this financing goes to the very heart of the fairness of the trial. In his Motion, the Accused submits that the President of the Tribunal, by Interlocutory Decision of 25 April, invited the Accused to raise this matter, which goes to the issues of a fair trial and the right of the Accused to have adequate time and resources to exercise and prepare his defence, with the Trial Chamber seized of the case. The Accused therefore requested Chamber III to review the Registry decisions of 19 December 2006 and 4 January 2007, in the light of the Motion thus exercising its judicial control over the administrative decisions made by the Registry.²⁵

²¹ See Rule 126 *bis* of the Rules.

²² Practice Direction on the Length of Briefs and Motions (IT/184 Rev. 2), 16 September 2005 (“the Practice Direction”).

²³ The Motion, p. 2.

²⁴ *Id.*, p. 16.

20. On the merits, the Accused first submits that pursuant to Article 21 (4) (d) of the Statute, a fair trial requires the financing of the defence of the Accused, whether a counsel has been assigned or not.²⁶ He submits that this financing “is the equivalent of all the resources and the equivalent of the cost of engaging legal advisers, technical duties, translation, photocopying, and everything else.”²⁷ Such financing is claimed to be necessary to remedy the fact that the Accused has been detained for several years and therefore is not in a position to alone deal with the elementary aspects of the preparation of a defence before the Tribunal.²⁸

21. In addition, the Accused argues that the equality of arms requires that he enjoy “approximately the same” resources as those of the Prosecution,²⁹ which has absolutely not been the case to date, he submits.³⁰ For there to be equality of arms, the Accused requests disclosure to him of the costs incurred by the Prosecution in this case and by the defence teams in the other cases before the Tribunal as well as the cost of the fees paid to Standby counsel assigned in the present case.³¹ He contends that this is all the more justified since this is the most complex case considering its geographic scope and the inclusion of a new criminal offence, i.e. hate speech.³²

22. The Accused is of the view that

with regard to legal aid the ICTY Statute does not differentiate between types of defence, but only in terms of the financial situation of the accused. If the accused is indigent, then he receives United Nations legal aid, and the form of his defence is entirely irrelevant for the purposes of legal aid.³³

²⁵ *Id.*, pp. 2-4.

²⁶ *Id.*, pp. 5-6.

²⁷ *Id.*, p. 11.

²⁸ “Professor Vojislav Šešelj cites the fact that he is wholly unable to maintain even elementary communication with potential defence witnesses or persons who could elucidate certain events for the purpose of, for example, elementary checking of a statement by a Prosecution witness,” *Id.*, p. 14.

²⁹ *Id.*, p. 6.

³⁰ “In other words, the Office of the Prosecutor has everything and in quantities it requires, whereas Professor Vojislav Šešelj has nothing,” *Id.*, p. 7.

³¹ *Id.*, pp. 11-13.

³² *Id.*, p. 13.

³³ *Id.*, p. 7.

Consequently, the Accused considers that he has demonstrated his indigence, with the exception of a sum of \$70,000 currently frozen in an account in the United States, which the Accused has accepted to contribute whenever it becomes available.³⁴

B. The Submissions of the Registry

The Registrar will establish that there is no basis in law upon which the Tribunal can grant the Accused's request as formulated. A decision to disburse public funds to the persons retained by the Accused to assist him in his capacity as a self-represented accused outside the Tribunal's legal aid system would be illegal. In order to qualify for "payment of his defence costs", the Accused needs to comply with the requirements of the Tribunal's legal aid system.³⁵

23. The Registry considers that its decision to deny reimbursement of the costs of preparing his defence must be confirmed because it satisfies the criteria for an administrative decision by a judicial organ.³⁶

24. First, the Registry considers that any interpretation, be it literal,³⁷ systemic³⁸ or teleological,³⁹ leads to the conclusion that Article 21 (4) (d) of the Statute does not guarantee legal aid to an Accused who defends himself.⁴⁰ According to the Registry, this conclusion is confirmed by its study of national law and jurisprudence, which shows that legal aid "is equated with the assignment of defence counsel to an indigent accused and the coverage of contingent court fees and the like."⁴¹

25. Beyond Article 21 (4) (d) of the Statute cited by the Accused, the Registry argues that despite its duty to guarantee the effective exercise of the Accused's right

³⁴ *Id.*, pp. 7-11.

³⁵ The Submissions, para. 43.

³⁶ *Id.*, para. 97.

³⁷ *Id.*, para. 49. The Registry submits that the expression "legal assistance" used in Article 21 (4) (d) of the Statute can only be understood as assistance provided by a "counsel". *Ibid.*

³⁸ *Id.*, paras. 50-52. The Registry further submits that that its literal interpretation of Article 21 (4) (d) of the Statute is in conformity with the Rules and the Directive on the Assignment of Defence Counsel ("the Directive"). According to the Registry, "the so-called 'defence costs' are a consequence of the assignment of counsel and do not exist independently of the assignment of counsel." *Ibid.*

³⁹ *Id.*, paras. 54-57. Moreover, the Registry contends that the Tribunal's system of legal aid perfectly matches the national systems where there is provision for the assignment of counsel to indigent accused in order to ensure the proper administration of justice, the fairness of a trial as well as the public trust. *Ibid.*

⁴⁰ *Id.*, paras. 44-48, 57.

to defend himself, that exercise does not go beyond the “time and facilities necessary for the preparation of his defence” and can in no way cover the payment of fees or the allocation of funds to the Accused.⁴² The Registry thus notes that

While it is conceivable that a self-represented accused who is in detention may need to be assigned an investigator and/or (an) expert(s), paid for by the Tribunal if the accused is indigent, to gather or verify facts or to provide an expert report respectively, it is unimaginable that persons who draft legal submissions, analyse evidence and perform other functions normally performed by defence counsel be remunerated under the notion of facilities provided by the Tribunal to a self-represented accused. While the Tribunal will be required to facilitate the self-represented accused’s communication with such persons, it cannot be expected to pay them.⁴³

26. The Registry further states that the equality of arms, a basic principle of the right to a fair trial, guarantees procedural equality but not complete equality of resources.⁴⁴ According to the Registry, “self-representation is an informed choice which an accused makes, accepting the limitations on his ability to prepare and present a professional defence.”⁴⁵

27. The Registry considers therefore that the assignment or appointment of a counsel paid by the legal aid system is not incompatible with the right of the Accused to present his own defence and that “the Accused’s objective to compel the Tribunal to bear his defence costs can be achieved through the Tribunal’s legal aid system in a manner which is not inconsistent with the Accused’s right to represent himself.”⁴⁶

28. It is therefore suggested by the Registry that legal aid to the Accused must be contingent on the same conditions as those applicable to other accused before the Tribunal in accordance with the Rules and the Directive:

- a. the Accused needs to prove that he is unable to pay for his defence;

⁴¹ *Id.*, para. 53.

⁴² *Id.*, paras. 58-65. See the Submissions, note 25 for a detailed examination of national and international jurisprudence in respect of the allocation of facilities necessary for the preparation of the defence.

⁴³ *Id.*, para. 63.

⁴⁴ *Id.*, para. 67.

⁴⁵ *Id.*, para. 68.

⁴⁶ *Id.*, para. 77.

b. he needs to identify one or more persons who meet the qualification requirements of Rule 45 of the Rules and are available for assignment;

c. as in all other cases, the Registrar shall determine the amount of reasonable and necessary resources for the preparation and presentation of the Accused' s case based on a determination of the level of complexity and duration (where applicable), in accordance with the standard Registry payment policies; and

d. as in all other cases, the Registrar shall disburse such legal aid payments in accordance with the applicable UN rules and regulations, and must be in a position to fulfil his duty of controlling the expenditure of Tribunal legal aid funds.⁴⁷

29. Regarding the burden of the Accused to prove his indigence, the Registry recalls Article 10 of the Directive which requires that account be taken of the financial resources of the Accused, his spouse, as well as those persons with whom he habitually resides, by means of the applicant's declaration of means form or by way of an investigation. By failing to duly fill out his declaration of means form and by refusing to cooperate with the Registry investigation, the Accused is said to have prevented the Registry from taking a position in respect of the indigence of the Accused.⁴⁸

30. Furthermore, the Registry argues that at least one of the associates of the Accused must meet the requirements of Rule 45 of the Rules and thus qualify to be assigned to the defence of the Accused. Such associates will not only be required to respect the protective measures granted to witnesses and documents, but will also be authorized to be present in court. Associates who do not meet the requirements of Rule 45 will be able to perform other tasks within the team and be paid as such.⁴⁹

31. Finally, with regard to the financing modalities, the Registry applies the same payment policies to all of the accused by examining the complexity of the case as well as the estimated length of the trial.⁵⁰ Moreover, the Registry must also "be entitled to

⁴⁷ *Id.*, para. 79.

⁴⁸ *Id.*, paras. 80-87.

⁴⁹ *Id.*, paras. 88-89.

⁵⁰ *Id.*, para. 90.

closely monitor the expenses incurred by the Accused and his defence team.”⁵¹ The Registry therefore requests that the same procedure be followed for the Accused in the present case.

IV. APPLICABLE LAW

A. Jurisdiction of the pre-trial Judge to Rule on the Motion

32. Before ruling on the merits of the Motion, it is appropriate to address the pre-trial Judge’s jurisdiction in the matter. It is necessary to recall the order issued by the President of Trial Chamber III on 27 February 2007 in which the pre-trial Judge was entrusted with *all* of the functions relating to the pre-trial phase of the trial set out in Rules 66, 67, 73, 73 *bis* and 73 *ter* of the Rules.⁵² As the Motion falls within the scope of Rule 73 (A), the pre-trial Judge has jurisdiction to rule on it.

33. Article 20 (1) of the Statute provides that “the Trial Chamber[...] shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused.” Moreover, the Appeals Chamber explicitly recalled that the Trial Chamber seized of the case must ensure the fairness of the trial.⁵³

34. The rights of the Accused before the Tribunal are set out in Article 21 of the Statute. The article provides in particular that:

4. In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:

[...]

(b) to have adequate time and facilities for the preparation of his defence [...];

[...]

⁵¹ *Id.*, para. 91.

⁵² Order Entrusting Functions to Pre-Trial Judge, 27 February 2007.

⁵³ *The Prosecutor v. Vidoje Blagojević*, Public and Redacted Reasons for Decision on Appeal by Vidoje Blagojević to Replace His Defence Team, Case No. IT-02-60-AR73.4, 7 November 2003 (“the *Blagojević* Interlocutory Decision”), para. 12.

(d) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

[...].

35. Pursuant to Rules 20 and 21 of the Statute, the Trial Chamber, sitting as the pre-trial Judge, not only has the power but also the inherent duty to ensure a fair trial and a proper administration of justice.⁵⁴ In the *Blagojević* case, the Appeals Chamber reaffirmed this position, specifying nonetheless that “the only inherent power that a Trial Chamber has is to ensure that the trial of an accused is fair; it cannot appropriate for itself a power which is conferred elsewhere.”⁵⁵

36. The President of the Tribunal applied this same reasoning when he held that he lacked jurisdiction to rule on the motions of the Accused for legal aid to pay his team of experts. Accordingly, the President of the Tribunal mentioned that

it is appropriate for that Chamber to review decisions of the Registrar alleged to directly impact upon an accused’s right to a fair trial, unless the power of review is specifically conferred on me elsewhere. Such is not the case here. In addition, as I have previously noted, “issues relating to an accused’s exercise of the right to self-representation under the Statute of the International Tribunal are expressly for a Chamber to decide in light of its inherent power and duty to ensure the fair and expeditious management of its proceedings. Furthermore, review of a decision by the Registrar on allocation of funds in terms of its impact upon the right of an accused to ‘equality of arms’ with the Prosecution lies with the relevant Chamber.” Therefore, only the Trial Chamber presently seized with the case may consider the issues

⁵⁴ *The Prosecutor v. Vidoje Blagojević*, Decision on Independent Counsel for Vidoje Blagojević’s Motion to Instruct the Registrar to Appoint New Lead and Co-Counsel, 3 July 2003 (“the *Blagojević* Decision”), para. 112. The Chamber went further considering that “any steps which the Trial Chamber takes are discretionary and in its overarching interest and commitment to ensuring that in the case of the Accused, justice is not only done but justice is seen to be done, including by the Accused himself.”

Ibid.

⁵⁵ *The Blagojević* Interlocutory Decision, para. 7.

raised in his Appeals with respect to the Registrar's Decision of 24 January 2007 and Decision of 9 February 2007.⁵⁶

37. The pre-trial Judge therefore has jurisdiction to rule on the Motion.

B. Applicable Law in Respect of the Payment of Defence Costs of a Self-Represented Accused

1. The Right to Self-Representation

38. Pursuant to Article 20 (1) of the Statute it is incumbent upon the pre-trial Judge to ensure that the rights of the accused are duly respected. These rights are set out in Article 21 of the Statute. Beyond the principles of equality, equity and publicity, as well as that of the presumption of innocence, paragraph 4 of Article 21 of the Statute provides a number of *minimal* guarantees to which all accused are entitled, including the right to "have adequate time and facilities for the preparation of his defence", to defend himself, "to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him." Accordingly, Article 21 (4) echoes the wording of Article 14 of the International Covenant on Civil and Political Rights.⁵⁷

39. The Statute therefore establishes the right to represent oneself as one of the rights the Trial Chamber must guarantee to any Accused before the Tribunal.

⁵⁶ The Interlocutory Decision of 25 April, para. 12.

⁵⁷ Article 14 (3) of the International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by the General Assembly in resolution 2200 A (XXI) of 16 December 1966, entry into force on 23 March 1979, provides: "In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: [...] (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing; [...] (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it; (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court; [...]" See *The 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 ("the Decision of 20 October"), footnote 23.

Moreover, this was emphasized by the Appeals Chamber of the Tribunal on several occasions when it held that the right to defend oneself was a fundamental right⁵⁸ and that

the Appeals Chamber sees no reasonable way to interpret Article 21 except as a guarantee of the right to self-representation. Nor should this right be taken lightly. The drafters of the Statute clearly viewed the right to self-representation as an indispensable cornerstone of justice, placing it on a structural par with defendants' right to remain silent, to confront the witnesses against them, to a speedy trial, and even to demand a court-appointed attorney if they cannot afford one themselves.⁵⁹

In the present case, the Appeals Chamber has on two occasions restored the right of the Accused to represent himself.⁶⁰

40. In the *Krajišnik* Interlocutory Decision, the Appeals Chamber held that while self-representation may never be to the Accused's advantage, the fact remains that by virtue of Article 21 (4) (d), which is a "cornerstone", he always has the right to do so.⁶¹

2. The Status of Costs for the Defence of a Self-Represented Accused

41. In the Statute, as well as in the Rules and the Directive, payment of the defence costs of an Accused lacking the financial means to cover them is organized through the assignment of a counsel and the payment of his fees.⁶² Accordingly, even though they are on an equal footing as the right of the accused "to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay

⁵⁸ *Slobodan Milošević v. The Prosecutor*, Case No. IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence Counsel, 1 November 2004, ("the *Milošević* Interlocutory Decision"), para. 17.

⁵⁹ The *Milošević* Interlocutory Decision, para. 11 (footnotes omitted). See also *The 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 ("the *Krajišnik* Interlocutory Decision"), para. 9.

⁶⁰ The Decision of 20 October, paras. 8, 22, 52; *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-AR73.4, "Decision on Appeal Against the Trial Chamber's Decision (No. 2) on Assignment of Counsel," 8 December 2006 ("the Decision of 8 December"), paras. 19, 30.

⁶¹ The *Krajišnik* Interlocutory Decision

⁶² Rule 45 (A); Articles 6 and 22 of the Directive.

for it,” the implementing provisions of his right to represent himself are not set out in the Statute.

42. The Statute, the Rules and the Directive are silent on the issue of payment of the defence costs of a self-represented Accused who claims indigence, which leaves a gap in the law. In order to ensure the effective exercise of the right of any accused to represent himself and for this right not to remain a dead letter, in the absence of an *ad hoc* judicial decision, it is incumbent upon the pre-trial Judge to bridge this gap in the law and to address the issue of the implementing provisions of this right, should the said accused declare to be indigent.

43. Another international tribunal, the International Criminal Court (“the ICC”), had endeavoured to bridge this gap in the law. During the drafting of the regulations applicable before the ICC, the issue of granting “legal aid” to a self-represented accused arose. Accordingly, in the initial draft Regulations of the Registry of the ICC, it was proposed that the Registry of the ICC provide for the appointment of professional investigators and legal assistants to a self-represented accused.⁶³ Although this provision was not adopted in the end, the fact remains that the regulations currently in force may be interpreted as providing for such a possibility.

44. Accordingly, Regulation 83 (1) of the ICC Regulations of the Court provides that

Legal assistance paid by the Court shall cover all costs reasonably necessary as determined by the Registrar for an effective and efficient defence, including the remuneration of counsel, his or her assistants as referred to in regulation 68 and staff, expenditure in relation to the gathering of evidence, administrative costs, translation and interpretation costs, travel costs and daily subsistence allowances.⁶⁴

On the basis of Regulation 83 (1) mentioned above and Regulation 119 (2) of the Regulations of the Registry of the ICC,⁶⁵ it appears therefore that “legal assistance” is

⁶³ “Registrar’s Submission Pursuant to the Trial Chamber’s Request for Further Information on the Request by Vojislav Šešelj for Payment of Expenses for the Preparation of His Defence,” 21 September 2006, footnote 6.

⁶⁴ Regulations of the Court, ICC-BD/01-01-04/Rev. 01/05.

⁶⁵ Regulations of the Registry, ICC-BD/03-01-06-Rev. 1.

not strictly contingent upon the assignment of counsel and would be allowed to a self-represented accused.

45. Based on this example, the pre-trial Judge considers that an accused representing himself without the assistance of counsel before an international court has the right to have associates paid by the international court subject to certain conditions.

V. DISCUSSION

A. Preliminary Issue

46. In response to the preliminary request of the Accused to exceed the word-limit, the pre-trial Judge would first remind the Accused that he is no longer bound by the 800-word limit imposed by Chamber I on 19 June 2006. In a decision dated 17 May 2007, the pre-trial Judge found that the circumstances which had led Chamber I to set a limit of 800 words had ceased to exist and ordered that “any submission from the Accused shall be submitted in accordance with the provisions set forth in the Practice Direction.”⁶⁶

47. Nevertheless, as the Motion totals 5,430 words in the original BCS version, it significantly exceeds the 3,000 words prescribed by the Practice Direction. However, given the fundamental importance of the issues raised in the Motion, the pre-trial Judge considers that “exceptional circumstances”⁶⁷ justify exceeding the 3,000-word limit, and will therefore address the Motion in its entirety.

B. Payment of Costs Incurred by the Accused in the Preparation and Presentation of His Defence

48. The pre-trial Judge stated above that it was necessary to bridge the existing gap in the law in respect of the payment of costs incurred for the preparation and

⁶⁶ Decision Amending the Criteria for the Filing of Submissions from the Accused, 17 May 2007, pp. 2-3.

⁶⁷ Practice Direction, para. 7.

presentation of the defence of an accused claiming indigence.⁶⁸ This reasoning will be further explained in this section.

1. Ensuring a Fair Trial

49. The pre-trial Judge primarily must ensure that the rules for a fair trial are respected. Additionally, the fact that an accused represents himself or is represented by counsel, either assigned or appointed by him, must not affect the other rights arising from the fair trial requirements guaranteed by Article 21 (4) of the Statute, including the right to have the necessary time and facilities to prepare his defence, and to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him. Nevertheless, it is impracticable for an accused, who is detained at the Tribunal's detention unit and represents himself, to go into the field in search of evidence crucial for the cross-examination of witnesses and to conduct investigations to find defence witnesses. These tasks are quite simply impossible for him to perform. Additionally, a fair trial requires that a team be constituted for this purpose.

50. Otherwise, an accused who claims to lack the means to pay such a team and still wishes, for reasons of his own, to represent himself, will therefore find himself forced to go to the trial with no other facilities to prepare his defence than the documents disclosed by the Prosecution under Rules 65 *ter*, 66 and 68 of the Rules. In a memorandum drafted at the request of the Registry, the United Nations Office of Legal Affairs considered that "the Registry's reasoning entails that all accused who do not have financial means to ensure their own defence – for instance, to cover the expenses incurred for their own investigators or advisors – will be compelled to be represented by a defence counsel. It would mean that the exercise of the right of the accused to defend himself or herself in person – as enshrined in Article 21 (4) (d) of the ICTY Statute – would be entirely dependent on the financial means available to him or her."⁶⁹ Similarly, the pre-trial Judge considers that the effective exercise of a right guaranteed by the Statute cannot be curtailed by the financial resources of an accused.

⁶⁸ See para. 42 *supra*.

51. Under Article 21 (4) of the Statute, all accused are entitled to the “minimum” guarantees set forth in this provision. As the rights enshrined in Article 21 (4) are minimum rights, they are not an exhaustive list. In its Submissions, the Registry refers to national law and jurisprudence which tend to indicate that “the issues discussed in the scope of the provision of adequate facilities are purely of a technical nature.”⁷⁰ The pre-trial Judge notes that these references are of little relevance in light of the complexity of the cases over which the Tribunal has jurisdiction.⁷¹ Additionally, it is entirely reasonable to think that guaranteeing a fair trial for an accused who claims indigence and who is self-represented before the Tribunal requires *facilités*⁷² /facilities/ which go beyond those necessary in a national setting.

2. Ensuring Equality of Arms

52. Second, with respect to the principle of equality of arms, the pre-trial Judge can only concur with the jurisprudence referred to by the Registry in its Submissions, in that the equality of arms does not require equality of resources but procedural equality, meaning that the parties must enjoy the same procedural guarantees and conditions during the trial.⁷³ It is inconceivable that the financial situation of an accused should result in an inequality of arms. Therefore, in order to restore balance to the situation of a self-represented accused and to guarantee him “procedural equality”, it may be necessary to grant him more facilities and financial resources than to those afforded to an accused who is represented by counsel. The pre-trial Judge must ensure that the Accused, who claims indigence, has sufficient means to examine or have examined the witnesses against him and to obtain the attendance and examination of witnesses on his behalf *under the same conditions* as witnesses against

⁶⁹ Internal Memorandum titled “ICTY – Application of the ICTY’s Legal Aid System to a Self-Represented Accused” (“the Memorandum of 22 May”), para. 3.

⁷⁰ The Submissions, para. 25.

⁷¹ Memorandum of 22 May, para. 3: “It may be true that, in most national systems where cases are not necessarily complex, an accused, when he chooses to represent himself or herself, must self-finance the costs of his or her own assistants or investigators. However, circumstances are fundamentally different in the context of the ICTY, where cases are all extremely complex and cannot be adequately handled by an accused without the assistance of legal advisors and investigators.”

⁷² As defined in the *Nouveau Petit Robert de la Langue Française*, 2007, p. 998: “A means enabling something to be done effortlessly, without difficulty”.

⁷³ The Submissions, para. 67, referring to *The Prosecutor v. Clément Kayishema and Obed Ruzindana*, Case No. ICTR-95-1-A, Judgement (Reasons), 1 June 2001, para. 69; *The Prosecutor v. Naser Orić*, Case No. IT-03-68-AR73.2, Interlocutory Decision on Length of Defence Case, 20 July 2005, para. 7.

him. Consequently, these rights become ineffective if an accused is in a situation of demonstrated indigence, who is provisionally detained in the detention unit and without a team to assist him.

3. Ensuring the Proper Administration of Justice

53. Third, the pre-trial Judge has the duty to “[ensure] the proper administration of justice, a power that falls clearly within the primary, if not exclusive, responsibility of the Chamber.”⁷⁴ The pre-trial Judge considers that this duty can be fulfilled only if a team of associates assists the Accused in preparing and presenting his defence at every stage of the proceedings.

54. It is crucial for a team of associates to assist the accused before, during and after hearings. Prior to the hearings, such a team is necessary to communicate with the Registry or the Chamber in order to address administrative and organizational matters and to disclose to the Prosecution the documents which the Accused intends to present during cross-examination. During hearings, it is necessary that the team be able to follow the proceedings and the English transcription in real time, and to organize visual aids if necessary. After hearings, all teams have a duty to check the court transcripts for accuracy and to prepare the presentation of defence evidence. All of these tasks cannot reasonably be accomplished by the Accused alone. The Registry acknowledged this in its Submissions noting that

it is conceivable that a self-represented accused who is in detention may need to be assigned an investigator and/or (an) expert(s), paid for by the Tribunal if the accused is indigent, to gather or verify facts or to provide an expert report respectively...⁷⁵

55. However, the pre-trial Judge agrees in part with the position of the Registry which considers it 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. By choosing to represent himself, the Accused accepts at a minimum the burden of drafting his submissions, as he has stated that he is qualified

⁷⁴ *The Prosecutor v. Enver Hadžihasonvić, Mehmed Alagić and Amir Kubura*, Case No. IT-01-47-PT, Decision on Prosecution’s Motion for Review of the Decision of the Registrar to Assign Mr. Rodney Dixon as Co-Counsel to the Accused Kubura, 26 May 2002, para. 24.

to carry out these tasks, considering his qualifications and title of professor of law. While the pre-trial Judge does not doubt the abilities of the Accused, he finds nevertheless that the recent written submissions drafted by the assistants of the Accused are more concise, better argued and reasoned than those previously filed. It is therefore in the interests of the proper administration of justice to succeed in ensuring that the associates of the Accused, who undeniably play a positive role in his defence, may be decently paid for the services they perform.

C. Implementing Provisions

56. Having established the principle of the absolute need to constitute a team in order to assist the Accused, who has chosen to represent himself, in the preparation and presentation of his defence, it is incumbent upon the Registry to take the specific steps to apply the principle after the pre-trial Judge has recalled certain guidelines. The pre-trial Judge concurs with the principal conditions set out by the Registry in its Submissions.⁷⁶

1. Burden of Proof of Indigence

57. Pursuant to Article 8 (A) of the Directive, the Accused, like any accused applying for legal aid, must prove that he does not have the financial means to pay for his defence.

58. In this case, the Accused submits that he duly submitted to the formalities necessary to assess his indigence. On the contrary, the Registry claims that the lack of cooperation from the Accused and his close relations has prevented it from making any determination as to the state of the financial resources of the Accused.

59. While the Registry must implement the generally applicable procedure, the pre-trial Judge reminds the Accused that it is absolutely necessary for him to cooperate with the Registry by filling out *the entire* declaration of means form and by enabling the Registry to use appropriate means to assess the financial situation of the

⁷⁵ The Submissions, para. 63.

⁷⁶ *Ibid*, para. 79.

Accused in a satisfactory manner. The pre-trial Judge would point out that the Accused gave an overview of his financial situation during the status conferences.⁷⁷ He now has to provide the Registry with the necessary documents in support of his prior statements.

2. Qualifications of One or More Associates

60. Furthermore, the Accused must designate one or more persons who possess the qualifications required under Rule 45 of the Rules and are willing and able to work as his associates.

61. These are public and uncontroversial criteria. The Accused must simply designate among his associates *one* associate who satisfies the conditions of Rule 45. Besides indigence, the obligation under Rule 45 is the *sine qua non* for the granting of legal aid.

62. The pre-trial Judge also invites the Accused to designate a person in his team who will work as case manager and who will liaise with the organs of the Tribunal. It is of paramount importance that this person speak one of the two official languages of the Tribunal.

3. Funds Allocated for the Preparation and Presentation of the Defence of the Accused

63. Under the Defence Counsel Payment Scheme for the Trial Stage (“the Payment Scheme”), the Registry must set, depending on the resources of the Tribunal, the reasonable and necessary amounts to be allocated to the Accused for the preparation and presentation of his defence, taking into account the complexity of the case and the estimated length of the trial (where appropriate).

64. The pre-trial Judge reminds the Accused that the allotment of funds is done in a public and equitable manner for all cases, in accordance with the Payment Scheme.

⁷⁷ Status conference of 4 April 2007, T(F) pp. 1005-1008; Status conference of 2 May 2007, T(F) pp. 1052, 1087-1089; Status conference of 5 June 2007, T(F) pp. 1206-1207.

4. Monitoring of Expenses

65. In accordance with the Directive and the Payment Scheme, the Registry must disburse the allocated amounts for legal aid granted to accused persons before the Tribunal, and monitor their use.

VI. DISPOSITION

66. For the foregoing reasons, pursuant to Article 21 (4) of the Statute and Rules 44 and 45 of the Rules, **PARTIALLY GRANT** the Motion and **ORDER** the Registry:

- (i) to implement immediately, in respect of the Accused, the procedures applicable to the provision of legal aid in accordance with the Rules and the Directive as detailed above; and
- (ii) to inform, without delay, the pre-Trial Judge of the effective implementation of the facilities granted to the Accused.

URGE the Accused to provide the Registry with all the useful information to assess his state of indigence and the requisite qualifications of his associates.

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

/signed/

Jean-Claude Antonetti

Pre-Trial Judge

Done this thirtieth day of July 2007

At The Hague

The Netherlands

[Seal of the Tribunal]