

**UNITED
NATIONS**



Mechanism for International Criminal Tribunals

Case No.: MICT-13-55-A

Date: 24 June 2016

Original: English

BEFORE THE APPEALS CHAMBER

Before: Judge Theodor Meron, Presiding
Judge William Hussein Sekule
Judge Vagn Prüsse Joensen
Judge José Ricardo de Prada Solaesa
Judge Graciela Susana Gatti Santana

Registrar: Mr. John Hocking

Decision of: 24 June 2016

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON A MOTION FOR REVIEW OF THE REGISTRAR'S
DECISION ON INDIGENCE**

The Office of the Prosecutor:

Mr. Serge Brammertz
Ms. Laurel Baig
Ms. Barbara Goy
Ms. Katrina Gustafson

Counsel for Mr. Radovan Karadžić:

Mr. Peter Robinson

THE APPEALS CHAMBER of the International Residual Mechanism for Criminal Tribunals (“Appeals Chamber” and “Mechanism”, respectively),¹

NOTING the judgement issued in this case by the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia (“ICTY”), on 24 March 2016;²

BEING SEISED OF a motion filed on 30 May 2016 by Mr. Radovan Karadžić seeking review of the Registrar’s decision of 24 May 2016 (“Impugned Decision”) finding that Karadžić has sufficient assets to contribute to the cost of his defence on appeal the amount of 146,501 euros (“EUR”), which according to Karadžić was calculated primarily on the basis of two properties owned by his spouse (“Properties”);³

NOTING Karadžić’s submissions that: (i) the Registrar erred in basing the Impugned Decision on the indigence determination made by the ICTY applying the relevant ICTY Registry policy as, in the absence of a policy of the Mechanism on this issue, the Registrar was obliged to re-examine the issue of whether funds from the Properties were readily disposable;⁴ (ii) the Registrar’s determination that these Properties were readily disposable despite the continuing refusal of Karadžić’s spouse to use them to fund his defence was unreasonable and in breach of the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, which require the relevant means test to be applied on the basis of only the income of the person applying for legal aid in the event of a conflict between family members;⁵ and (iii) the interests of justice require that his contribution to the cost of his defence not be deducted from the funds allocated for the appeal;⁶

NOTING the order issued by the Pre-Appeal Judge staying the execution of the Impugned Decision pending determination of the merits of the Motion, in order to minimise the risk of unjustified delay in the proceedings, and directing the Registrar to file any submissions on the issues raised in the Motion;⁷

¹ Order Assigning Judges to a Case Before the Appeals Chamber, 20 April 2016.

² *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Public Redacted Version of Judgement Issued on 24 March 2016, 24 March 2016.

³ Motion for Review of Registrar’s Decision on Indigence, 30 May 2016 (“Motion”), paras. 1, 3, 39.

⁴ Motion, paras. 14, 17-22, *referring to* ICTY Registry Policy for Determining the Extent to Which an Accused is Able to Remunerate Counsel.

⁵ Motion, paras. 3, 6, 7, 10, 13, 14, 23-30, *referring to* the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, UN Doc A/Res/67/187, 28 March 2013 (“UN Guidelines on Access to Legal Aid”), para. 41(f) and the equivalent provision in the European Union Commission Recommendation of 27 November 2013 on the right to legal aid for suspects or accused persons in criminal proceedings (2013/C 378/03).

⁶ Motion, paras. 3, 14, 31-38.

⁷ Order Related to a Motion for Review of the Registrar’s Decision on Indigence, 8 June 2016, pp. 1, 2.

NOTING the Prosecution's response to the Motion filed on 9 June 2016, in which the Prosecution takes no position on the request for review of the Impugned Decision;⁸

NOTING the Registry's submission filed on 13 June 2016, in which the Registry maintains that the Impugned Decision reflects a fair and reasonable determination of Karadžić's indigence status given that: (i) the Registry was obliged to recognise the previous indigency determination made by the ICTY in the absence of new information concerning Karadžić's ability to contribute to the costs of his defence, in accordance with the Remuneration Policy for Persons Representing Indigent Accused in Appeals Proceedings before the Mechanism;⁹ (ii) Karadžić's submission that his spouse remains unwilling to contribute to his defence was considered and dismissed by the ICTY Trial and Appeals Chambers, his reliance on the UN Guidelines on Access to Legal Aid was made for the first time in the Motion and, in any event, his claim that he and his spouse are in conflict is unsubstantiated;¹⁰ and (iii) the allocation of full legal aid to an accused who has sufficient means to contribute to the cost of his own defence contravenes the interests of justice and the Registrar's fiduciary duty to safeguard public funds;¹¹

NOTING Karadžić's reply filed on 15 June 2016, in which he submits that: (i) the Registry's submission that no fresh determination of indigency was required is "fallacious";¹² (ii) the existence of international instruments holding that it is inappropriate to consider a spouse's income or assets, where the spouse and the accused are in conflict over the issue, was duly brought to the Registrar's attention in the judicial review proceedings of the ICTY indigency determination, was not relied upon in Karadžić's request for a fresh determination as the Registrar invited him to make submissions only on the issue of "new circumstances", and the existence of a conflict with his spouse over the issue is demonstrated by her statement submitted in support of his request for

⁸ Prosecution's Response to Motion for Review of Registrar's Decision on Indigence, 9 June 2016, para. 1.

⁹ Registrar's Submission on Defence Motion for Review of Registrar's Decision on Indigence, 13 June 2016 ("Registry Submission"), paras. 9, 15-17, referring to Remuneration Policy for Persons Representing Indigent Accused in Appeals Proceedings before the Mechanism for International Criminal Tribunals, 21 March 2016 ("Remuneration Policy"), para. 7.

¹⁰ Registry Submission, paras. 18-20, referring to *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Accused's Request for Review of Registrar's Decision on Indigence, 25 February 2014 (confidential and *ex parte*), public redacted version issued on 3 December 2014 ("Karadžić ICTY Trial Chamber Decision of 25 February 2014"), *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5-5/18-AR73.13, Decision on Appeal from Decision on Indigence, 25 July 2014 (confidential and *ex parte*), public redacted version issued on 2 December 2014 ("Karadžić ICTY Appeals Chamber Decision of 25 July 2014").

¹¹ Registry Submission, paras. 14, 21, 22.

¹² Reply Re: Motion for Review of Registrar's Decision on Indigence and Motion to Set Deadlines for Registrar's Submissions, 15 June 2016 ("Reply"), paras. 3, 4. The Appeals Chamber notes that there is no express right of response or reply to submissions made by the Registrar pursuant to Rule 31(B) of the Rules of Procedure and Evidence of the Mechanism ("Rules"). However, it will nonetheless consider the Reply in the interests of justice and on an exceptional basis.

review of the ICTY indigency determination;¹³ and (iii) the Registrar's consideration of the interests of justice is "myopic" as it ignores the reality that there is no prospect of Karadžić having access to the funds that the Registrar claims he must contribute to his defence and the result of the Registrar's approach will be "an appeal that is delayed and deficient";¹⁴

RECALLING the Directive on the Assignment of Defence Counsel providing that an accused who has been found to have sufficient means to remunerate counsel in part may file a motion to the Chamber before which he is due to appear for review of the Registrar's decision and the Chamber may: (i) confirm the decision; (ii) quash the decision; or (iii) direct the Registrar to reconsider the extent to which the accused is able to remunerate counsel;¹⁵

RECALLING that judicial review of an administrative decision made by the Registrar in relation to legal aid is concerned initially with the propriety of the procedure by which the decision was made and that the decision may be quashed if the Registrar: (i) has failed to comply with the relevant legal requirements; (ii) failed to observe any basic rules of natural justice or to act with procedural fairness towards the person affected by the decision; (iii) took into account irrelevant material or failed to take into account relevant material; or (iv) reached a conclusion which no sensible person who has properly applied his mind to the issue could have reached;¹⁶

RECALLING FURTHER that the party contesting the administrative decision bears the onus to show an error in the decision and that the error has significantly affected the decision to his detriment;¹⁷

¹³ Reply, paras. 5, 6, referring to the statement by Ms. Ljiljana Karadžić dated 16 March 2012 in *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Request for Review of Indigence Decision, Annex C, Registry Pagination ("RP.") 68268.

¹⁴ Reply, para. 7. Karadžić also submits that the Registrar is delaying every step of the funding process in this appeal and requests that the Registrar be ordered to comply with the time limits set forth in the relevant Practice Directions of the Mechanism when making submissions in his case. See Reply, paras. 9-12. The Appeals Chamber considers that where the Rules and relevant Practice Directions are silent as to the time available to submit a response or reply, the matter will be decided as appropriate on a case-by-case basis. The Appeals Chamber therefore rejects Karadžić's request to fix prospective deadlines.

¹⁵ Directive on the Assignment of Defence Counsel, MICT/5, 14 November 2012 ("Directive"), Article 13(B).

¹⁶ See *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-A, Decision on Ntahobali's Request for Review of Registrar's Decisions, 21 February 2014 (confidential and *ex parte*), public redacted version issued on 23 May 2016 ("*Nyiramasuhuko et al.* Decision"), para. 16; *Karadžić* ICTY Appeals Chamber Decision of 25 July 2014, para. 4; *Prosecutor v. Jadranko Prlić et al.*, Public Redacted Version of the 25 July 2013 Decision on Slobodan Praljka's Motion for Review of the Registrar's Decision on Means, 28 August 2013 ("*Prlić et al.* Decision"), paras. 6, 30; *Prosecutor v. Zdravko Tolimir*, Case No. IT-05-88/2-AR73.2, Decision on Zdravko Tolimir's Appeal Against the Decision of Trial Chamber II on the Registrar's Decision Concerning Legal Aid, 12 November 2009 (confidential and *ex parte*), public redacted version filed on 28 February 2013 ("*Tolimir* Decision"), para. 8; *Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30/1-A, Decision on Review of Registrar's Decision to Withdraw Legal Aid from Zoran Žigić, 7 February 2003 ("*Kvočka et al.* Decision"), para. 13.

¹⁷ *Tolimir* Decision, para. 9 and references cited therein.

NOTING the Registry's submission that the Impugned Decision complied with applicable law as, under the Remuneration Policy, the Registry was obliged to recognise the previous indigency determination made by the ICTY and that there was no requirement for the Registrar to make a fresh indigency determination in the absence of new information concerning Karadžić's ability to contribute to the costs of his defence;¹⁸

RECALLING the Remuneration Policy, which provides that "[f]or the purpose of this Policy, the [Mechanism] shall recognise the determination of indigency of an Accused made by the ICTR and the ICTY, unless new information is obtained which establishes that the Accused has sufficient means to remunerate Counsel";¹⁹

NOTING that this provision of the Remuneration Policy addresses only a situation where a determination was made that an accused person is indigent, as is clear from the last part of the provision which refers to "new information" establishing that the accused person "has sufficient means" to remunerate counsel, not a situation where the determination was that an accused person is not indigent;

CONSIDERING, therefore, that the Remuneration Policy does not require the Registry to recognise a determination made by the ICTY that an accused is able to contribute to the costs of his defence in part;

FINDING, therefore, that the Registry erred in its interpretation of the relevant legal requirements and consequently (i) considered itself obliged to recognise the ICTY determination that Karadžić was able to contribute to the costs of his defence in part, and (ii) failed to reassess such determination in light of the information provided by Karadžić as to his alleged inability to contribute to the costs of his defence;

FINDING FURTHER that this error significantly affected the Impugned Decision to Karadžić's detriment;

RECALLING that the Registry has the primary responsibility for matters relating to remuneration of counsel in respect of which it enjoys a margin of appreciation;²⁰

¹⁸ Registry Submission, paras. 9, 15-17. *See also* Motion, Annex C, p. 1.

¹⁹ Remuneration Policy, para. 7.

²⁰ Decision on the Registry's Request for Observations Regarding Preparation of the Notice of Appeal, 4 May 2016, p. 1 ("the Registry has the primary responsibility in the determination of matters relating to remuneration of counsel"); *Nyiramasuhuko et al.* Decision, para. 17; *Tolimir* Decision, paras. 8, 9 and referenced cited therein.

REITERATING, however, that the Appeals Chamber has the inherent power to review matters affecting the rights of persons in proceedings before it, including the right to have adequate time and facilities for the preparation of defence, pursuant to its statutory obligation to ensure the fairness of the proceedings;²¹

CONSIDERING that the inherent power to review such matters encompasses the power to make determinations concerning such matters where necessary to give full effect to statutory rights;²²

RECALLING the statutory right of an accused to have legal assistance assigned to him where the interests of justice so require and without payment if he does not have sufficient means to pay for it;²³

RECALLING that the Directive was established to ensure legal assistance to indigent accused in the most efficient, economical, and equitable manner in order to safeguard the rights afforded under the Statute and the Rules;²⁴

CONSIDERING the UN Guidelines on Access to Legal Aid, which provide that “[a] court may, having regard to the particular circumstances of a person and after considering the reasons for denial of legal aid, direct that that person be provided with legal aid, with or without his or her contribution, when the interests of justice so require”;²⁵

FINDING that, in the interests of justice and in order to give full effect to Karadžić’s statutory right to legal assistance and the fair and expeditious progress of the appeal proceedings, it is appropriate for the Appeals Chamber to determine whether Karadžić is able to contribute to the costs of his defence;

CONSIDERING that the burden of proof is on the applicant for legal aid to demonstrate his inability to remunerate counsel and that once the applicant has provided information regarding his

²¹ See Article 19 of the Statute of the Mechanism (“Statute”). See also *Nyiramasuhuko et al.* Decision, para. 14; *Prosecutor v. Nikola Šainović et al.*, Case No. IT-05-87-A, Decision on Nebojša Pavković’s Motion for Stay of Proceedings, 2 March 2010, para. 12; *In Re. André Ntagerura*, Case No. ICTR-99-46-A28, Decision on Motion for Leave to Appeal the President’s Decision of 31 March 2008 and the Decision of Trial Chamber III Rendered on 15 May 2008, 11 September 2008, para. 12.

²² *Nyiramasuhuko et al.* Decision, para. 21 (“[t]he Appeals Chamber is of the view that judicial economy is best served in the particular circumstances of this case by disposing of the merits of this part of the Request for Review rather than remitting the matter to the Registrar”).

²³ Article 19(4)(d) of the Statute. See also Rule 43 of the Rules of Procedure and Evidence of the Mechanism.

²⁴ Directive, Article 1. The Appeals Chamber also recalls that, under Articles 6(B) and 6(C) of the Directive, an accused who lacks the means to remunerate counsel shall have the right to have counsel assigned to him and paid for by the Mechanism and that, for an accused who has the means to partially remunerate counsel, the Mechanism shall pay that portion of his defence costs which the accused does not have sufficient means to cover, as determined in accordance with the Registry Policy for Determining the Extent to which an Accused is able to Remunerate Counsel.

²⁵ UN Guidelines on Access to Legal Aid, para. 41(e).

inability to do so the burden of proof shifts to the Registry to prove otherwise based on the balance of probabilities;²⁶

CONSIDERING that, in support of his request for a determination that he is not able to contribute to the costs of his defence, Karadžić relied on his spouse's continuing refusal to assist him in obtaining funds from the Properties, and submitted that he is unable to obtain the funds and contribute to the costs of his defence as required by the Registry;²⁷

CONSIDERING that the Registry has not demonstrated that Karadžić has access to any funds from the Properties and that he is, therefore, in a position to contribute to the costs of his defence despite the existence of a conflict with his spouse on this matter;²⁸

FINDING, therefore, that Karadžić does not appear to be in a position to obtain funds from the Properties and thus be able to contribute to the costs of his defence;

PURSUANT to Article 19(4)(d) of the Statute, Rules 43, 55, and 131 of the Rules and Article 13(B)(II) of the Directive

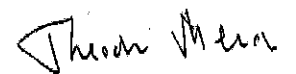
HEREBY GRANTS the Motion;

QUASHES the Impugned Decision; and

ORDERS that the amount of EUR 146,501 not be deducted from the funds available to Karadžić's defence on appeal.

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

Done this 24th day of June 2016,
At The Hague,
The Netherlands



Judge Theodor Meron
Presiding

[Seal of the Mechanism]

²⁶ *Prlić et al* Decision, para. 35; *Kvočka et al.* Decision, para. 12.

²⁷ Motion, Annex B. Karadžić submits that the Properties are owned by his spouse. *See* Motion, para. 3. The Appeals Chamber notes however that the ICTY has treated them as "marital property" for the purposes of the application of the relevant means test. *See* Motion, Annex C, p. 2, n. 8, referring to Karadžić ICTY Trial Chamber Decision of 25 February 2014, paras. 18, 20-22. *See also* Impugned Decision, p. 1, n. 2 referring to Karadžić ICTY Appeals Chamber Decision of 25 July 2014, paras. 23-26.

²⁸ *Cf.* UN Guidelines on Access to Legal Aid, para. 41(f) ("[i]f the means test is calculated on the basis of the household income of a family, but individual family members are in conflict with each other or do not have equal access to the family income, only the income of the person applying for legal aid is used for the purpose of the means test"). *See also* European Union Commission Recommendation of 27 November 2013 on the right to legal aid for suspects or accused persons in criminal proceedings (2013/C 378/03), Section 2, para. 7.