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THE INTERNATIONAL CRIMINAL TRIBUNAL  
FOR THE FORMER YUGOSLAVIA

CASE No. IT-99-37-AR73

IN THE APPEALS CHAMBER

Before: The Appeals Chamber

Registrar: Mr. Hans Holthuis

Date Filed: 23 July 2003

THE PROSECUTOR

v.

MILAN MILUTINOVIC

NIKOLA SAINOVIC

DRAGOLJUB OJDANIC

GENERAL OJDANIC'S APPEAL OF  
DECISION ON MOTION FOR ADDITIONAL FUNDS

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## **Introduction**

1. General Dragoljub Ojdanic, pursuant to Rule 73 of the Rules of Procedure and Evidence, respectfully appeals the *Decision on Motion for Additional Funds* by Trial Chamber III on 8 July 2003. Certification to appeal this decision was granted by the Trial Chamber on 16 July 2003.

2. This is an important appeal. The maximum funds allocated by the Registry to defend General Ojdanic (and others at this Tribunal) are inadequate. Despite the best efforts of experienced lawyers, General Ojdanic's defence team has been unable to even read all of the material disclosed by the prosecution with the resources allocated by the Registry, let alone obtain material from third parties or conduct its own investigation.

3. Having exhausted the allocated funds as of 1 April 2003, General Ojdanic's trial preparation, litigation of pretrial motions, and an appeal of a preliminary motion have come to a complete halt. Trial is a year or more away. There is much to be done to defend General Ojdanic, but no resources with which to do it.

4. This crisis has now reached the Appeals Chamber. Its resolution will determine whether General Ojdanic will receive the fair trial and equality of arms guaranteed to an accused by the Tribunal's Statute and common notions of justice.

## **Summary of Proceedings**

5. On 15 April 2003, General Ojdanic filed an *ex parte* and confidential Motion for Additional Funds with the Trial Chamber after the Registry had advised his defence team that no additional funds would be allocated for his defence during the pretrial stage. He contended that:

- a. as a result of the scope of his case, including the volume of disclosure materials, widespread territory over which the crimes were allegedly committed, and the nature of his defence, the funds allocated for pretrial preparation by the Registrar are inadequate;

- b. despite the reasonable and best efforts of General Ojdanic's experienced defence team, the work required to provide him with an effective defence has not been able to be completed with the resources allocated by the Registrar;
- c. unless additional funds are allocated in the pretrial stage, General Ojdanic will commence his trial with his counsel not having reviewed much of the relevant material disclosed by the Prosecutor, not having obtained relevant material from third parties, not having had witnesses interviewed and not having conducted adequate investigation; and
- d. the result will be a denial of his right to a fair trial, which encompasses the notions of an adequate defence and equality of arms.<sup>[1]</sup>

6. On 21 May 2003, the Trial Chamber issued an *Invitation to Registry to Comment on Defence Motion for Additional Funds*. The Registry filed its *Comments on Defence Motion for Additional Funds* on 13 June 2003. After obtaining leave, General Ojdanic filed his *Reply to Registry's Comments on Defence Motion for Additional Funds* on 27 June 2003.

7. The Trial Chamber denied the Motion in its *Decision on Motion for Additional Funds* on 8 July 2003. Its holding was as follows:

**CONSIDERING** that the Registrar has the primary responsibility in the determination of matters relating to remuneration of counsel under the legal aid system of the Tribunal, in accordance with the relevant provisions of the Rules of Procedure and Evidence ("Rules"), and the Directive on Assignment of Defence Counsel issued by the International Tribunal

(“Directive”),

**CONSIDERING** however, that questions relating to the legal representation of an accused may affect the conduct of a trial, that in the exercise of its powers under Rule 54 of the Rules and the Trial Chamber’s statutory obligation to ensure a fair and expeditious conduct of the proceedings with full respect for the rights of the accused, the Trial Chamber is undoubtedly empowered to review the Registrar’s decision, albeit only upon exceptional circumstances being shown,

**CONSIDERING** that the Registrar, in consultation with the Judges, has elaborated a system of renumberation paid to counsel assigned to indigent accused, according to which the costs of legal representation of the accused necessarily and reasonably incurred is met by the Tribunal, in accordance with the budgetary provisions, rules and regulations, and practice set by the United Nations,

**CONSIDERING** that the current legal aid system

provides for a flat fee (lump sum) for the pretrial stage for all indigent accused before the Tribunal, taking into account the complexity of the cases, guided as always by the need to ensure full respect for the rights of all indigent accused while, at the same time, implementing an efficient use of the limited resources of the Tribunal's legal aid system,

**CONSIDERING** that counsel who have *agreed* to represent indigent accused before the Tribunal are fully aware of the system of remuneration for assigned counsel, including the basis for calculating the costs of legal representation, the billing arrangement, and the *maximum* allotment for the pre-trial stage according to the particular circumstances of the case,

**ACCEPTING** as valid the Registrar's Comment that while the Registry is open to a certain flexibility in considering requests for additional resources, the Defence should demonstrate exceptional circumstances or circumstances beyond its control if such requests are to be granted,

**CONSIDERING** that no such circumstances have been shown,

**PURSUANT TO** Rule 54 of the Rules,

**HEREBY DENIES** the Motion.”

8. General Ojdanic filed a request for certification to appeal this decision on 11 July 2003. On 14 July 2003, the ICTY Association of Defence Counsel filed an amicus curiae brief in support of the request for certification. Co-accused Nikola Sainovic also filed a memorandum in support of certification. The Trial Chamber granted certification on 16 July 2003.

### **Grounds for Appeal**

9. General Ojdanic respectfully presents the following grounds for appeal:

- a. The Trial Chamber misdirected itself as a matter of law when it failed to consider the impact of the Registry’s decision on the right of the accused to adequate time and facilities for the preparation of his defence, as provided in Article 21(4)(b);
- b. The Trial Chamber misdirected itself as a matter of law when it failed to consider the impact of the Registry’s decision on the right of the accused to “equality of arms” with the prosecution, as provided in Article 20(1); and

- c. The Trial Chamber misdirected itself as a matter of law by deferring to the Registry despite the Registry's failure to (1) take into account the duration of the pre-trial phase, (2) adapt the allotment when the pre-trial phase was substantially longer than estimated; and (3) consult the Trial Chamber and/or Advisory Panel when the defence disagreed with the allotment, all required by Article 22(A) of the Directive on the Assignment of Defence Counsel.

### **Statement of Facts**

10. On 24 May 1999, General Dragoljub Ojdanic was indicted, along with Slobodan Milosevic, Milan Milutinovic, Nikola Sainovic, and Vljko Stojiljkovic for Crimes Against Humanity and Violations of the Laws or Customs of War in Kosovo. The indictment was amended on 29 June 2001, 29 October 2001, and 5 September 2002.

11. The Third Amended Indictment charges General Ojdanic, as Chief of the General Staff of the Armed Forces of the Federal Republic of Yugoslavia, with being a member of a joint criminal enterprise whose purpose was “the expulsion of a substantial portion of the Kosovo Albanian population from the territory of the province of Kosovo.”<sup>[2]</sup> It is further alleged that General Ojdanic was individually responsible, as well as responsible as a superior, for the deportation of approximately 800,000 people from 13 separate municipalities and dozens of villages throughout the territory of Kosovo<sup>[3]</sup>; the “widespread and systematic” murder of hundreds of Kosovo Albanian citizens<sup>[4]</sup>; sexual assaults of women in Kosovo<sup>[5]</sup>; and the destruction of Kosovo Albanian religious sites in at least 14 villages throughout the territory.<sup>[6]</sup>

12. The case against General Ojdanic is a complex one. The prosecution has already disclosed more than 200,000 pages of documents from its own investigation, and archives of the Federal Republic of Yugoslavia, Republic of Serbia, NATO and its member states, Organization for Security and Cooperation in Europe (OSCE), European Union, Kosovo Liberation Army, and

humanitarian organizations. Additional disclosures are being made monthly and significantly more are expected to be made before trial.<sup>[7]</sup>

13. In addition to being document intensive, the case against General Ojdanic is broad in scope. It covers crimes committed throughout the territory of Kosovo by a variety of persons alleged to be affiliated with the Army, Ministry of Interior (MUP), paramilitary groups, and civilian volunteers. During the period involved in the indictment, well in excess of 100,000 soldiers, policemen, paramilitaries, and volunteers were active in the territory of Kosovo.

14. There is no direct evidence that General Ojdanic instigated, ordered, committed, or otherwise aided and abetted any war crime. In addition, there is no direct evidence that he had knowledge of a war crime which he failed to prevent or punish. Rather, it is the Prosecutor's case that because the expulsions and killings were so widespread in Kosovo, that by its very nature, the actions must have been planned at General Ojdanic's level and he must have known of such a plan.<sup>[8]</sup>

15. Therefore, unlike many cases where the defence may accept the crime base evidence and argue the individual responsibility of the accused, General Ojdanic's defence team has been forced to take on the crime base evidence with great force in order to diminish or defeat the Prosecutor's theory that the widespread nature of the crimes, in and of itself, proves General Ojdanic's guilt.<sup>[9]</sup>

16. As a result, during the pretrial stage, the defence is required to carefully investigate the "crime base" evidence in each municipality to attempt to show that the scope of the activity was not as the Prosecutor alleges, but that events in different municipalities were either not a war crime at all, were committed by persons acting on their own, or by paramilitary or other troops not under General Ojdanic's command.

17. Therefore, the task of reviewing the disclosures and preparing the factual issues in this case has been monumental.

18. General Ojdanic's defence team endeavored to work efficiently and effectively, and to divide the work to avoid duplication of effort. In the first few months following General

Ojdanic's surrender, the defence went about reviewing the 15 binders of supporting materials, as well as transcripts and exhibits from the *Milosevic* trial in an effort to quickly learn the case and be able to make decisions about the strategy and direction of the defence.

19. After a few months, in consultation with General Ojdanic, some decisions were made as to the scope of the defence and the work needed to be done. It was concluded that, as discussed in paragraphs 15-16, the crime base evidence could not be ignored or stipulated to, and that significant resources would have to be focused on determining what had occurred, who was responsible in the field, and how the chain of command had operated on a *de facto* basis among the Army, Ministry of Interior, and paramilitary forces. Legal avenues to challenge the indictment and pursue disclosure from the Prosecutor and third parties were also decided upon in consultation with General Ojdanic.

20. The defence team thereafter divided its tasks. As lead counsel, Mr. Visnjic was responsible for obtaining, reviewing, and organizing the material from the Prosecutor, as well as material from the Registry such as transcripts and exhibits from the *Milosevic* case. In addition, he was primarily responsible for the military part of the case, and the murder allegations. He directed the investigators, liaised with governmental authorities, and supervised the office staff in Belgrade where the production of defence documents and analysis of materials took place. It was envisioned that at the trial, he would be primarily responsible for cross-examining the military witnesses and experts, and for presenting the bulk of the defence witnesses in chief, and he concentrated on this aspect of the case when reviewing the materials.

21. Co-counsel Peter Robinson has been responsible for the research and preparation of the pleadings filed in the case, and, being from the common law system, is expected to bear the largest burden of cross-examination during the trial, focusing on international witnesses, so-called "insiders", and expert witnesses. In addition to the legal issues, Mr. Robinson has focused his trial preparation efforts on a detailed review of the transcripts and exhibits from the *Milosevic* trial. This review is essential for the defence to have an understanding of the Prosecutor's case, as well as to make decisions on which witnesses or evidence to stipulate to or admit, to provide for a more efficient trial.

22. Legal consultant Vojislav Selezan has been responsible for the deportation aspect of the case. His efforts have been directed towards reviewing and analyzing the testimony and interviews of thousands of Kosovo Albanians who are alleged to have been displaced during the war<sup>[10]</sup>. Mr. Selezan, as a long-time attorney to General Ojdanic, has also been responsible for liaising with him and his family on technical issues relating to his detention, the General's review of disclosure materials, and contacts with potential character witnesses, for both provisional release and the trial.

23. The defence team is an experienced one, and has not had to devote resources to learning the law and procedure of the Tribunal. Mr. Visnjic was co-counsel in the *Krstic*<sup>[11]</sup> case and before that worked on the *Simic*<sup>[12]</sup> case as a legal assistant. Mr. Robinson has 25 years experience in criminal law as a prosecutor with the United States Department of Justice and as a defence counsel, worked as a legal assistant and consultant on the *Krstic* case, and is lead counsel in a case at the ICTR<sup>[13]</sup>. Despite this experience, and working as efficiently as possible, the defence team was only able to review about 50% of the material received in this case within the resources allocated by the Registry.<sup>[14]</sup>

24. The legal issues in this case have likewise been extended and complex. The defence prepared and filed approximately 40 motions, responses, or replies so far in this case. The issues have included:

25. *Provisional release*: General Ojdanic's legal team has filed 16 separate pleadings trying to gain his provisional release—an issue of great importance to the accused and his defence. Provisional release was initially granted by the Trial Chamber<sup>[15]</sup>, denied by the Appeals Chamber over a dissent<sup>[16]</sup>, and then denied again by the Trial Chamber<sup>[17]</sup>, with leave to appeal refused.<sup>[18]</sup>

26. *Rule 54 disclosure from NATO and States*: Unlike the war in Bosnia and Croatia, the events in Kosovo involved the full might and resources of NATO and its member States being brought to bear upon the Federal Republic of Yugoslavia. This included the greatest and most sophisticated intelligence gathering operation in the world. The material gathered by those forces is of great relevance to this case. General Ojdanic has already filed one motion to require

NATO, its twenty-one member states, and six neighboring countries, to produce copies of recorded conversations relating to him. Seven States have filed briefs in opposition to the motion and an oral hearing has been ordered.<sup>[19]</sup> The tension between the national security interests of the States and the right of an accused to obtain material relevant to his defence is likely to result in contentious and protracted litigation over this motion.

27. *Preliminary motions*: General Ojdanic filed two preliminary motions concerning jurisdiction: one which challenged jurisdiction over crimes committed in Kosovo, and a second which challenged jurisdiction over crimes committed by a “joint criminal enterprise.” Both motions required significant research and writing time. The joint criminal enterprise motion was denied by the Trial Chamber<sup>[20]</sup> and affirmed by the Appeals Chamber<sup>[21]</sup>. The Kosovo jurisdiction motion was denied by the Trial Chamber<sup>[22]</sup> and has been suspended on appeal pending resolution of the issue presented in this appeal.<sup>[23]</sup>

28. *Disclosure issues*: There have also been numerous legal issues relating to disclosure. General Ojdanic has made it a practice to attempt to resolve legal issues relating to disclosure informally with the Prosecutor before raising them in the form of a motion with the Trial Chamber. This has resulted in a time and cost savings on several issues, but motions for disclosure have been filed where the parties were unable to agree.<sup>[24]</sup>

29. Therefore, the work required in researching, drafting, and responding to the myriad legal issues in this case has been extensive and time-consuming.

30. After the Registry denied his detailed request for additional funds,<sup>[25]</sup> General Ojdanic filed the Motion for Additional Funds with the Trial Chamber.

31. In *Prosecutor v Krajisnik & Plavsic*, Trial Chamber III confronted the issue of adequacy of defence resources.<sup>[26]</sup> The Trial Chamber, in denying the motion, noted that:

“the Krajisnik Defence has not, apart from listing generally the tasks required to be carried out, provided an explicit and detailed breakdown of its needs or sufficiently justified how the provision of two additional legal consultants (with allotments of at least 175 hours) and an additional 200 hours for a case

manager and additional supporting staff would improve the preparation of the case for trial, nor has it specified the prejudice alleged.”

32. General Ojdanic therefore provided the Trial Chamber with an explicit and detailed breakdown of the needs of his defence, how those needs were essential for him to be adequately prepared for the trial, and how he would be prejudiced if his Motion for Additional Funds was denied<sup>[27]</sup>.

33. *Review of material*: He advised the Trial Chamber that some 100,000 pages of material presently in the possession of the defence remained to be reviewed and an estimated 200,000 pages more to come. To proceed to trial without someone reviewing this material is simply unthinkable. If additional funds are allocated, the responsibility for this review would be assumed by the lead counsel, in conjunction with investigators and support staff. The co-counsel would continue his review of the *Milosevic* transcripts and exhibits, for which he had so far completed 5150 of the more than 10,000 pages. It was estimated that the material provided by the Prosecutor could be reviewed by the lead counsel working 175 hours per month and investigators and support staff working at 225 hours per month for six additional months. The review of the transcripts by co-counsel was estimated to take 25 hours per month over a six month period, with an additional 50 hours per month for legal research, motions, appeals, and negotiations with the Prosecutor and third parties relating to disclosure issues.<sup>[28]</sup> Working at this pace, the defence estimated it would be able to complete review of the disclosure by the Prosecutor and *Milosevic* trial materials by December, 2003.<sup>[29]</sup>

34. *Defence investigation*: The defence team advised the Trial Chamber that it had made the decision not to undertake any significant investigation until it had reviewed and understood the disclosure materials. To have done otherwise would have been inefficient, as it would likely result in having to re-interview witnesses when additional information was reviewed or obtained. The defence contemplated beginning its investigation in earnest in January, 2004, after it completed review of the disclosure materials.

35. If additional funds were allocated, the lead counsel would coordinate and supervise the work of the investigators, as well as to select and work closely with the military experts who

would analyze the military documents and interview military personnel. In addition, the lead counsel would personally be involved in interviews of high-level witnesses for whom interview by an investigator would not be appropriate. The co-counsel would focus on interviews and document collection from international witnesses, such as OSCE personnel who served as part of the Kosovo Verification Mission. The legal consultant would supervise the identification, location, and interviews of Serb civilian and military personnel who were present in the areas alleged to have been the sites of forced deportations.

36. It was estimated that the investigation phase of the case would take approximately six months, lasting until June, 2004, and that 175 hours per month for lead counsel, 75 hours per month for co-counsel, and 350 hours per month for legal consultant and investigator hours would be needed to adequately complete these necessary tasks. The defence represented that it is essential that a defence investigation be undertaken prior to trial in order for General Ojdanic to be adequately represented.<sup>[30]</sup>

37. *Final trial preparation*: The third and final phase of the defence pre-trial preparation would be to focus on shortening the trial by admitting certain undisputed testimony and acts, as well as seeking reciprocal admissions from the Prosecutor. This phase, which was expected to last two months, from June-August, 2004, would require 175 hours per month for lead counsel and 175 hours per month for co-counsel, as well as 225 hours per month for investigators and legal consultant, to organize the pretrial materials for cross examination, provide a meaningful pre-trial brief, and otherwise conduct final trial preparation.<sup>[31]</sup>

38. *Prejudice*: In the *Krajisnik* decision, the Trial Chamber noted that the defence had already received \$885,750 in pre-trial fees, and that the Registrar had already agreed to continue to allot 175 hours per month for lead counsel, a maximum of 700 hours for the co-counsel/legal consultant and 450 hours per month for investigators and legal assistants. In this case, the total pretrial fees are less than half of that, and the Registrar has refused to allocate any additional hours.

39. Defence counsel for General Ojdanic, each of whom have solo law practices, advised the Trial Chamber that they were simply unable to work *pro bono* for General Ojdanic over the

next year or more to accomplish what needed to be done before the General could receive adequate representation and a fair trial. Absent the allocation of sufficient additional resources, they advised that disclosure would remain unreviewed, necessary materials from third parties not obtained, and investigation not undertaken. When the trial began, and additional funds became available, the defence advised that these activities could be reinstated. However, this would result in requests for delays during the trial to obtain and review relevant materials and conduct investigation prior to being required to cross-examine a witness. In addition to the disruption of the trial proceedings, the lack of coherent preparation would diminish General Ojdanic's success in mounting a credible defence. Delaying the investigation until the trial began would also strain defence resources during the trial to a breaking point.<sup>[32]</sup>

40. The Registry, after being invited to comment on the motion by the Trial Chamber, advised that it had allocated the maximum funds to General Ojdanic's defence team based on its estimate of the resources needed to defend a "Level 3" case—a case of the greatest complexity at the Tribunal. It argued that to authorize additional funds would establish a precedent that would undermine its administration of the payment system.<sup>[33]</sup>

41. The Registry has never disputed that the hours worked by the defence team were reasonable and necessary for General Ojdanic's defence, and has approved the detailed invoices submitted each month since May 2002 by each defence team member. It has never disputed the reasonableness and necessity of the further work that the defence has represented needs to be done to adequately prepare for General Ojdanic's trial. It simply refuses to acknowledge that its estimate of the resources needed to defend General Ojdanic's case was, is, and will be insufficient to provide for an adequate defence.

## **Argument**

### **First Ground of Appeal: Article 21(4)(b)**

42. General Ojdanic contends that the Trial Chamber misdirected itself as a matter of law when it failed to consider the impact of the Registry's decision on the right of the accused to adequate time and facilities for the preparation of his defence, as provided in Article 21(4)(b).<sup>[34]</sup>

43. Article 21(4) provides:

“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:

- (a) to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
- (b) to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
- (c) to be tried without undue delay;
- (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 the International Tribunal;
- (g) not to be compelled to testify against himself or confess guilt.”

44. These rights are based upon the enumeration of rights set forth in Article 6 of the European Convention on Human Rights and Article 14 of the International Covenant on Civil and Political Rights. They are also found in Article 67 of the Statute of the International Criminal Court.

45. In Artico v Italy, (13 May 1980), the European Court of Human Rights said that the rights listed above derive from the fundamental right to a fair trial. It said that these rights cannot be theoretical or illusory; they must be practical and effective. It ruled that the accused’s rights in that case were violated by the failure of the courts to take positive action insuring that counsel appointed to defend the accused fulfilled those duties.<sup>[35]</sup>

46. The Court held that:

“Two courses were open to the authorities: either to replace

Mr. Della Rocca, or, if appropriate, to cause him to fulfill his obligations. They chose a third course—remaining passive—whereas compliance with the Convention called for positive action on their part.”<sup>[36]</sup>

47. Similarly, the Trial Chamber in this case failed to take positive action to discharge its duty to see that General Ojdanic receives a fair trial, including the provision of adequate resources for his defence. While recognizing its power to review the Registry’s decision<sup>[37]</sup>, the Trial Chamber never considered the adverse impact the failure to allot additional funds will have upon these rights of the accused.<sup>[38]</sup>

48. Thus the Trial Chamber has remained passive in the face of uncontradicted submissions that the defence is unable to fulfill its obligations to adequately defend General Ojdanic. Just as this was found to violate Article 6 of the European Convention on Human Rights in *Artico*, it violates the same provisions found in Article 21 of the Tribunal’s Statute.

49. The case of *Cuscani v United Kingdom*, (24 September 2002) is also instructive. The European Court of Human Rights found in that case that the fair trial rights of the accused were violated when the court proceeded to take his guilty plea in the absence of an interpreter, even where counsel for the accused said they could “mend and make do”.

50. The Court said that:

“It is true that the conduct of the defence is essentially a matter between the defendant and his counsel, whether counsel be appointed under a legal aid scheme as in applicant’s case or be privately financed...However, the ultimate guardian of the fairness of the proceedings was the trial judge who had been clearly apprised of the real difficulties which the absence of interpretation might

create for the applicant.”<sup>[39]</sup>

51. Similarly, in General Ojdanic’s case, it was the duty of the Trial Chamber to see that adequate resources are made available to General Ojdanic’s defence in its role as the ultimate guardian of the fairness of the proceedings. Proceeding to trial without reading the disclosure materials provided by the Prosecutor, obtaining needed materials from third parties, interviewing witnesses and investigating the facts, and pursuing pre-trial motions and appeals is, it is submitted, even more deleterious to an accused’s fair trial rights than taking a plea without an interpreter. And the defence for General Ojdanic has never pretended that it can “mend and make do” under these circumstances.

52. The failure of the Trial Chamber to evaluate the impact of the lack of additional funds upon the right to a fair trial for General Ojdanic is thus the type of legal error which the European Court of Human Rights has found violated the fair trial rights of the accused.

53. The European Court of Human Rights has also held that:

“The right to an adversarial trial means, in a criminal case, that both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party.”<sup>[40]</sup>

54. In General Ojdanic’s case, there are more than 100,000 documents disclosed by the prosecution that the defence team has been unable to read and will be unable to read within the resources allotted by the Registry. The defence team lacked the resources to comment on the most recent motion filed by the prosecution in his case<sup>[41]</sup>, and any will continue to lack resources for subsequent motions that may be filed. The right to act upon and comment upon the prosecution’s evidence and submissions, recognized as fundamental to a fair trial, is being abridged by the failure to provide adequate facilities and resources to General Ojdanic’s defence team. The Trial Chamber erred in not addressing this issue.

55. The United States Supreme Court has likewise recognized that:

“Mere access to the courthouse doors does not by itself assure a proper functioning of the adversary process, and that a criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making certain he has access to the raw materials integral to the building of an effective defence.”<sup>[42]</sup>

56. In that case, *Ake v Oklahoma*, the United States Supreme Court held that the State’s failure to appoint and pay for a psychiatric expert to assist in the defence violated his right to due process of law. In General Ojdanic’s case, there are 11 expert witnesses to be called by the prosecution, including a military expert who has spent thousands of hours on this case.<sup>[43]</sup> General Ojdanic lacks the resources to evaluate their reports, investigate their qualifications and conclusions, and engage his own experts to consult with the defence and testify on his behalf.<sup>[44]</sup>

57. The Trial Chamber’s failure to consider the impact of the Registry’s decision on General Ojdanic’s right to adequate facilities for his defence, such as access to experts like those found fundamental in *Ake*, was an error of law that should be corrected by this Appeals Chamber.

### **Second Ground of Appeal: Article 20(1)**

58. General Ojdanic contends that the Trial Chamber misdirected itself as a matter of law when it failed to consider the impact of the Registry’s decision on the right of the accused to “equality of arms” with the prosecution, as provided in Article 20(1).<sup>[45]</sup>

59. Article 20(1) provides that:

“The Trial Chambers 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 and due regard for the protection of victims and witnesses.”

60. The Appeals Chamber has held that “the right to a fair trial guaranteed by the Statute covers the principle of equality of arms.”<sup>[46]</sup> General Ojdanic specifically invoked this right in his Motion for Additional Funds<sup>[47]</sup> and reiterated it in his Reply.<sup>[48]</sup> Yet the Trial Chamber completely failed to address this issue in its decision.

61. In *Tadic*, the Appeals Chamber held that:

“under the Statute of the International Tribunal, the principle of equality of arms must be given a more liberal interpretation than that normally upheld with regard to proceedings before domestic courts. This principle means that the Prosecution and the Defence must be equal before the Trial Chamber. It follows that the Chamber shall provide every practicable facility it is capable of granting under the Rules and Statute when faced with a request by a party for assistance in presenting its case.”<sup>[49]</sup>

(emphasis added)

62. The Appeals Chamber further noted, after reviewing the jurisprudence of the European Court of Human Rights<sup>[50]</sup>, that “equality of arms obligates a judicial body to ensure that neither party is put at a disadvantage when presenting its case.”<sup>[51]</sup> In a more recent case

from that Court, it was held that the principle of equality of arms contributes not only to the principle that justice be done, but that justice be seen to be done.<sup>[52]</sup>

63. By ignoring this issue in General Ojdanic's case, the Trial Chamber neither did justice nor contributed to the appearance of justice. The imbalance of resources between the prosecution and defence in General Ojdanic's case is enormous. While there are no figures available showing exactly how much money prosecution has spent in its investigation of the events in Kosovo, the public record of the Kosovo portion of the trial in *Prosecutor v Milosevic*, No. IT-02-54-T, speaks to the tremendous resources the prosecution has already devoted to this matter.

64. Taking just the number of hours the prosecution has represented to the Pre-Trial Judge in General Ojdanic's case that is necessary merely to search for relevant material to disclose to General Ojdanic's defence team, one sees that the prosecution will devote over 10,000 hours to this process alone.<sup>[53]</sup> This dwarfs the available hours allotted to the defence for all tasks during the entire pretrial stage including reading the material disclosed, obtaining material from third parties, conducting its own interviews and investigation, litigating pre-trial motions and appeals including seeking the provisional release of the accused, as well as full trial preparation, including preparation for cross examination of more than 120 witnesses.

65. General Ojdanic recognizes that "equality of arms" does not entitle him to the same amount of money to conduct his defence as his opponent has to conduct its prosecution.<sup>[54]</sup> The nature of the responsibilities of the prosecution, including its burden of proof, and its obligation of disclosure, make it logical that it have more resources than the defence.

66. However, as Judge Vohrah recognized in another proceeding in the *Tadic* case, the principle of equality of arms is intended to elevate the defence to the level of the prosecution as much as possible in its ability to prepare and present its case.<sup>[55]</sup> Certainly, at a bare minimum, the principle of equality of arms must require that the defence be given the resources to at least read the exculpatory materials disclosed by the prosecution pursuant to Rule 68.

67. That bare minimum will not be met in this case if the Trial Chamber's ruling is allowed to stand. There are more than 100,000 pages of Rule 68 material which the defence has

been and will be unable to review within the resources granted by the Registry.<sup>[56]</sup> That stark fact alone demonstrates that the Trial Chamber erred as a matter of law when it failed to consider the issue of “equality of arms”.

### **Third Ground of Appeal: Article 22(A) of the Directive**

68. General Ojdanic contends that the Trial Chamber misdirected itself as a matter of law by deferring to the Registry despite the Registry’s failure to (1) take into account the duration of the pre-trial phase; (2) adapt the allotment when the pre-trial phase was substantially longer than estimated, and (3) consult the Trial Chamber and/or Advisory Panel when the defence disagreed with the allotment, all required by Article 22(A) of the Directive on the Assignment of Defence Counsel.

69. Article 22(A) provides:

“Where counsel has been assigned, the costs of legal representation of the suspect or accused necessarily and reasonably incurred shall be met by the Tribunal subject to the budgetary provisions, rules and regulations, and practice set by the United Nations. All costs are subject to prior authorization by the Registrar. If authorization was not obtained, the Registrar may refuse to meet costs. The Registrar establishes maximum allotments for each defence at the beginning of every stage of the procedure taking into account his estimate of the duration of the phase. In the event that a stage of the procedure is substantially longer or shorter than estimated,

the Registrar may adapt the allotment. In the event of disagreement on the maximum allotment, the Registrar shall make a decision, after consulting the Chamber, and, if necessary, the Advisory Panel.”

70. The Appeals Chamber has explained the nature of the review required of a decision of the Registry concerning legal aid provided to an accused. In *Prosecutor v Kvočka et al*, No. IT-98-30/1-A (7 February 2003), concerning the Registrar’s Decision to Withdraw Legal Aid from Zoran Zigic, the Appeals Chamber observed:

“A judicial review of an administrative decision made by the Registrar in relation to legal aid is concerned initially with the propriety of the procedure by which the Registrar reached the particular decision and the manner in which he reached it. The 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)”<sup>[57]</sup>

71. In General Ojdanic's case, the Registry failed to comply with the legal requirements of Article 22(A) of the directive in three respects.

72. Article 22(A) specifies that when establishing maximum allotments for each stage of the procedure, including the pre-trial phase, the Registrar must "take into account his estimate of the duration of the phase." However, the Registrar admitted to the Trial Chamber that:

"The eight months estimate used to calculate the lump sum in this case, therefore, is not an estimate of the length of the pre-trial stage, but an estimate of the amount of work required. As a consequence, the actual duration of the pre-trial stage is not a relevant factor to be taken into account in order to assess the resources that are granted to a case; they depend on the substance of a case, and not on the number of months the pre-trial period lasts."<sup>[58]</sup> (emphasis added)

73. Thus, the Registry has decided not to follow an explicit directive of the Judges enacted at a plenary session.

74. The duration of the pre-trial stage is, as the Judges recognized, a relevant consideration when considering the resources to be allocated to an accused. First, with the advent of the *ad litem* judges, the Trial Chambers are now able to commence a trial when the pre-trial preparation is complete. Therefore the duration of the pre-trial stage bears a direct relationship to the amount of work required for trial preparation. This is particularly true in General Ojdanic's case, where the volume of disclosure and length of time for the prosecution to complete it, has resulted in the prosecution's pre-trial brief not even likely to be filed in the first 20 months of the pre-trial stage.

75. The duration of the pre-trial stage is also relevant because the defence continues to have duties and expenses throughout the pre-trial period. The duties to consult and work with the accused, respond to requests of the prosecution and Trial Chamber, maintain contact with witnesses, and keep abreast of current developments in related cases and the jurisprudence of the Tribunal continues throughout the pre-trial stage regardless of the complexity of the case. The expenses for the defence of maintaining the overhead of an office and staff continue throughout the pre-trial period as well.

76. Therefore, the Registry's failure to take into account the duration of the pre-trial phase in making its estimate of the resources needed for General Ojdanic's defence was in contravention of Article 22(A). The Trial Chamber's failure to recognize this, and quash the decision of the Registrar, was error.

77. The Registry violated Article 22(A) in a second way. It failed to adapt the allotment when the pre-trial phase was substantially longer than it estimated. It estimated eight months for the pre-trial phase in General Ojdanic's case.<sup>[59]</sup> In fact, the phase has already lasted 15 months and is likely to last at least 24 months, some three times greater than the Registrar's estimate.

78. By refusing to consider the duration of the pre-trial phase, the Registrar erroneously refused to adapt the allotment when the phase is indisputably longer than his estimate. As such, he violated the formula set forth in Article 22(A) of the Directive.

79. The Trial Chamber erred in not quashing the decision of the Registrar for failing to follow the procedure set forth in the Directive. It compounded its error by determining that defence counsel had agreed to represent the accused knowing of the maximum allotment set by the Registry for the pre-trial stage.<sup>[60]</sup> The defence team of General Ojdanic never agreed to the completely unrealistic estimate of eight months to prepare the case, and was never consulted by the Registry.<sup>[61]</sup> Rather, the defence team relied upon the expectation that the Registrar would apply Article 22(A) and adapt the allotment when the pre-trial stage substantially exceeded his eight month estimate. The Trial Chamber should have quashed the Registrar's decision for failing to apply the proper standards in determining whether to adapt the allotment.

80. The Registry violated Article 22(A) in yet a third way by failing to consult the Trial Chamber and/or the Advisory Panel before refusing to adapt the allotment. Article 22(A) requires that “In the event of disagreement on the maximum allotment, the

Registrar shall make a decision, after consulting the Chamber, and, if necessary, the Advisory Panel.”

81. As recognized by the Registry, in a letter dated 5 March 2003, General Ojdanic’s defence team indicated its disagreement with the maximum allotment granted in his case and requested that the allotment be adapted.<sup>[62]</sup> The Registrar denied the request in a letter of 3 April 2003 without consulting the Trial Chamber or Advisory Panel.

82. This violation of Article 22(A) prejudiced General Ojdanic because the Trial Chamber only weighed in on this disagreement after the Registrar’s decision was made and did so with an extremely deferential standard of review, requiring General Ojdanic to show “exceptional circumstances” to obtain review of the Registrar’s decision.<sup>[63]</sup> This was not the procedure envisioned by Article 22(A), which provides for consultation with the Trial Chamber, and the Advisory Panel, if necessary, before a final decision was made.<sup>[64]</sup>

83. Therefore, because the Registrar violated the provisions in Article 22(A), the Trial Chamber erred in not quashing the decision.

## **Conclusion**

84. General Ojdanic’s defence team regrets that its efforts on his behalf have been affected by the lack of funds, and that the Trial Chamber and Appeals Chamber have been forced to deal with the unpleasant subject of money. Were it a matter of an insubstantial number of hours or amount of money needed to complete the pre-trial preparation, the defence team would be willing to absorb these costs. However, General Ojdanic’s defence team is simply not in a position to devote *pro bono* the additional thousands of hours of counsel time needed to prepare for trial, or pay, out of its own pockets, the estimated \$150,000 in needed investigator and assistant staff funds. It is unreasonable to expect them to do so.

85. The greatest injustice in this situation is that General Ojdanic is innocent. He never ordered, planned, instigated, committed, or aided and abetted a single war crime, nor was he a member of any joint criminal enterprise. His standing orders were that all of the humanitarian provisions of international law were to be obeyed and he went to great lengths to see that those orders were followed.

86. This is not a challenge to the payment system adopted by the Judges in Article 22(A), or a complaint by defence counsel about their compensation. It is a motion for a fair trial for an innocent man.

87. As Justice Robert H. Jackson said at Nuremburg more than fifty years ago:

“We must never forget that the record on which we judge these defendants today is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our own lips as well.”<sup>[65]</sup>

Respectfully submitted,

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<sup>[1]</sup> Motion for Additional Funds (“Motion”) at para. 3

<sup>[2]</sup> Third Amended Indictment at para. 16.

<sup>[3]</sup> Third Amended Indictment at para. 63

<sup>[4]</sup> Third Amended Indictment at para. 66

<sup>[5]</sup> Third Amended Indictment at para. 68c

<sup>[6]</sup> Third Amended Indictment at para. 68d

<sup>[7]</sup> See, for example, the disclosures ordered from Serbia and Montenegro in *Prosecutor v Milosevic*, No. IT-02-54-T (12 June 2003); those anticipated from NATO and other States which are the subject of Rule 54 *bis* proceedings. *Prosecutor v Milutinovic et al*, No. IT-99-37-PT, *Scheduling Order* (26 November 2002), and the searches still to be completed from the prosecution’s archives. Annex 1 to *General Ojdanic’s Request for Certification to Appeal Decision on Motion for Additional Funds*.

<sup>[8]</sup> See, for example, testimony of military expert Sir Peter de la Billiere in *Prosecutor v Milosevic*, No. IT-02-54-T (4 September 2002) at pg. 9562.

<sup>[9]</sup> The defence has the benefit of the testimony in the *Milosevic* case, but in that case, it is not central to either the Prosecution or the Defence to identify with certainty which of the Serbian forces were responsible for the particular event, since as President of the FRY, Milosevic was responsible for all of its forces. On the other hand, General Ojdanic was responsible only for the Army, and it is important to his defence to investigate and present evidence on the issue of whether the crimes were committed by the Army, or by Ministry of Interior or paramilitary forces over which he had no control.

<sup>[10]</sup> The concentration of humanitarian agencies on interviewing and documenting the stories of refugees from the war in Kosovo has been described as the largest such effort of its kind in history.

<sup>[11]</sup> *Prosecutor v Krstic*, No. IT-98-33-T

<sup>[12]</sup> *Prosecutor v Simic et al*, No. 95-9-PT

<sup>[13]</sup> *Prosecutor v Nzirorera et al*, No. ICTR-98-44-I

<sup>[14]</sup> See Motion for Additional Funds, paras. 11-14, 21-26

<sup>[15]</sup> *Decision on Provisional Release* (26 June 2002)

<sup>[16]</sup> *Decision on Provisional Release* (30 October 2002), *Decision on Motion for Modification of Decision on Provisional Release and Motion to Admit Additional Evidence* (12 December 2002)

<sup>[17]</sup> *Decision on Second Applications for Provisional Release* (29 May 2003)

<sup>[18]</sup> *Decision Refusing Ojdanic Leave to Appeal* (27 June 2003)

<sup>[19]</sup> *Scheduling Order* (20 November 2002). In addition, General Ojdanic planned on making a second request for documents from NATO and its members once he had completed his review of the complete disclosure to be obtained from the Prosecutor and was in a position to make as narrow and specific a request as possible concerning issues such as the identity of forces perpetrating the alleged crimes, the chain of command of those forces, NATO activity in Kosovo, and the activities of the KLA.

<sup>[20]</sup> *Decision on Dragoljub Ojdanic's Preliminary Motion to Dismiss for Lack of Jurisdiction: Joint Criminal Enterprise* (13 February 2003)

<sup>[21]</sup> *Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction: Joint Criminal Enterprise* (22 May 2003)

<sup>[22]</sup> *Decision on Motion Challenging Jurisdiction* (6 May 2003)

<sup>[23]</sup> *Order* (15 July 2003)

<sup>[24]</sup> See *General Dragoljub Ojdanic's Motion for Access to Transcripts and Documents* (1 May 2002); *Motion for Disclosure of Ex Parte Filing and for Order Regulating Future Filings* (14 June 2002); *Motion to Require Full Compliance with Rule 66(a)(i) and for Unsealing of Ex Parte Materials* (23 July 2002); *General Ojdanic's Motion to Require Disclosure of Rule 68 Material Obtained Pursuant to Rule 70* (29 October 2002); and *General Ojdanic's Application for Disclosure of Ex Parte Submissions* (15 November 2002)

<sup>[25]</sup> See letter of Registrar dated 3 April 2003 attached as Annex 1 to the Motion for Additional Funds.

<sup>[26]</sup> *Prosecutor v Krajisnik & Plavsic*, No. IT-00-39&40-PT, "Decision on Momcilo Krajisnik's Motion to Dismiss or for Alternative Relief" (18 October 2002)

<sup>[27]</sup> In Annex 2 to the Motion for Additional Funds, the defence provided a detailed example of the tasks needed to be completed in the next month and indicated that it

would be willing to provide such a detailed program on a monthly basis if necessary to justify the allocation of additional funds.

<sup>[28]</sup> Additional motions to be filed include resolution of disputes with the prosecution over the timing and scope of Rule 68 disclosures, the failure of Rule 70 providers to consent to the disclosure of exculpatory material, access to closed sessions and sealed exhibits in the Kosovo portion of the *Milosevic* trial, a second Rule 54 *bis* motion for specific material possessed by NATO and its member states, Rule 54 motions for interviews with recalcitrant witnesses. *Prosecutor v Krstic*, No. 98-33-A (1 July 2003), and for exclusion of certain expert testimony. The defence must also perfect its appeal of the *Decision on Motion Challenging Jurisdiction* which is suspended at the moment.

<sup>[29]</sup> Motion for Additional Funds, at para. 29.

<sup>[30]</sup> Motion for Additional Funds at paras. 30-32.

<sup>[31]</sup> The timetable described above assumed funding of the pre-trial stage recommencing in April 2003, resulting in the defence being ready for trial beginning in September, 2004. Motion for Additional Funds, at para. 33. Since funding of the pre-trial stage has been suspended since April, these dates must now be adjusted by adding the months for which pretrial preparation has been interrupted.

<sup>[32]</sup> Motion for Additional Funds at para. 35

<sup>[33]</sup> *Registry Comments on Defence Motion for Additional Funds* (13 June 2003) at para. 12

<sup>[34]</sup> This section is relied upon as the most specific provision which applies. However, General Ojdanic also asserts his fair trial rights under Articles 20 and 21 in general.

<sup>[35]</sup> para 33

<sup>[36]</sup> para 36

<sup>[37]</sup> *Decision on Motion for Additional Funds*, pg 5, first paragraph

<sup>[38]</sup> General Ojdanic's defence team made it clear that, due to the lack of resources, it would not be able to review the disclosure material, obtain needed documents from third parties, conduct its own investigation into the facts, and pursue pretrial motions and appeals. Motion for Additional Funds, para. 35; Reply to Registry's Comments on Defence Motion for Additional Funds, para.10

<sup>[39]</sup> para. 39

<sup>[40]</sup> *Dowsett v United Kingdom* (24 June 2003)

<sup>[41]</sup> *Prosecution's Third Motion for Protective Measures* (18 June 2003), decided by the Trial Chamber on 17 July 2003.

<sup>[42]</sup> *Ake v Oklahoma*, 470 U.S. 68,77 (1985)

<sup>[43]</sup> Transcript of Status Conference (4 June 2003) at pg. 642; testimony of Philip Coo in *Prosecutor v Milosevic*, No. IT-02-54-T (9-11 September 2002)

<sup>[44]</sup> The Trial Chamber and Prosecutor also have an institutional interest in seeing that the defence is adequately funded. Absent the resources to investigate and prepare, the defence will be unable to agree to stipulations, admissions, and Rule 92 bis procedures which would shorten the trial and lessen the burden upon victims and witnesses. General Ojdanic had already begun this process and was the first accused to present the prosecution with admissions to certain paragraphs in the indictment.

<sup>[45]</sup> General Ojdanic cites this Article for the source of the "equality of arms" guarantee, but asserts his rights to such equality found in other sections of the statute, such as Article 21(4).

<sup>[46]</sup> *Prosecutor v Tadic*, No. IT-94-1-A (15 July 1999) at para. 44.

<sup>[47]</sup> Para. 36

<sup>[48]</sup> Paras. 12-13

<sup>[49]</sup> *Prosecutor v Tadic*, No. IT-94-1-A (15 July 1999) at para, 52

<sup>[50]</sup> *Dombo Beheer B.V. v The Netherlands*, (27 October 1993) and *Delcourt v Belgium*, (17 January 1970).

<sup>[51]</sup> *Tadic, supra*, at para. 48.

<sup>[52]</sup> *Lanz v Austria* (31 January 2002)

<sup>[53]</sup> See Annex 1 to *General Ojdanic's Request for Certification to Appeal Decision on Motion for Additional Funds* (11 July 2003)

<sup>[54]</sup> *Prosecutor v Kayishema & Ruzidana*, No. ICTR-95-1-A (1 June 2001) at para. 69

<sup>[55]</sup> *Prosecutor v Tadic*, No. IT-94-1 (27 November 1996) Separate Opinion of Judge Vohrah,

<sup>[56]</sup> At the Registry's own established rate of 2 minutes per page, this amounts to over 3000 hours needed just to review this material.

<sup>[57]</sup> Para. 13

<sup>[58]</sup> *Registry Comments on Defence Motion for Additional Funds* (13 June 2003) at para. 5

<sup>[59]</sup> *Registry Comments on Defence Motion for Additional Funds* (13 June 2003) at para. 5

<sup>[60]</sup> Decision, at page 5, fourth paragraph

<sup>[61]</sup> Motion for Additional Funds at fn. 2

<sup>[62]</sup> *Registry Comments on Defence Motion for Additional Funds* (13 June 2003) at para. 8

<sup>[63]</sup> Decision at page 5, first paragraph

<sup>[64]</sup> The Registrar has never explained why he did not deem it necessary to consult with the Advisory Panel, which is the only organ which includes representatives of the defence bar.

<sup>[65]</sup> Opening Statement of Justice Robert H. Jackson (1945)