

IT-95-5/18-AR73.13
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UNITED
NATIONS



International Tribunal for the
Prosecution of Persons
Responsible for Serious Violations of
International Humanitarian Law
Committed in the Territory of the
Former Yugoslavia since 1991

Case No.: IT-95-5/18-AR73.13

Date: 2 December 2014

Original: English

IN THE APPEALS CHAMBER

Before:

Judge Khalida Rachid Khan, Presiding
Judge William H. Sekule
Judge Mehmet Güney
Judge Bakhtiyar Tuzmukhamedov
Judge Koffi Kumelio A. Afande

Registrar:

Mr. John Hocking

Decision of:

2 December 2014

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**PUBLIC REDACTED VERSION OF THE 25 JULY 2014 DECISION ON
APPEAL FROM DECISION ON INDIGENCE**

The Accused:

Mr. Radovan Karadžić

1. The Appeals Chamber 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 (“Appeals Chamber” and “Tribunal”, respectively) is seised of an appeal filed confidentially and *ex parte* by Radovan Karadžić (“Karadžić”) on 17 April 2014¹ against the “Decision on Accused’s Request for Review of Registrar’s Decision on Indigence” rendered confidentially and *ex parte* by Trial Chamber III (“Trial Chamber”) on 25 February 2014 (“Impugned Decision”).² On 9 May 2014, the Registry of the Tribunal filed submissions regarding the Appeal pursuant to Rule 33(B) of the Rules of Procedure and Evidence (“Rules”).³ Karadžić replied to the Registry’s Submissions on 20 May 2014.⁴

I. BACKGROUND

2. On 29 September 2008, Karadžić submitted, as a self-represented accused, a declaration of means to the Registry, requesting funding for his defence on the basis that he lacked the means to remunerate counsel.⁵ On 2 March 2012, after having undertaken an inquiry into Karadžić’s financial means pursuant to the Directive on the Assignment of Defence Counsel (“Directive”),⁶ the Registry sent Karadžić a letter providing him the opportunity to comment on the Registrar’s findings and to provide additional documentation.⁷ On 11 April 2012, Karadžić responded that he did not have any disposable means with which to fund his defence, and provided documentation in support of this claim.⁸ In a decision rendered on 11 October 2012, the Registrar found that Karadžić was able to remunerate his defence in part and that he shall contribute 146,501 Euros to the cost of his defence before the Tribunal.⁹ The Registrar further decided that the contribution shall be deducted from future allotments issued to Karadžić’s defence team, and that the remainder of the relevant expenses shall be borne by the Tribunal.¹⁰

¹ Appeal from Decision on Indigence, confidential and *ex parte*, 17 April 2014 (“Appeal”).

² *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Accused’s Request for Review of Registrar’s Decision on Indigence, confidential and *ex parte*, 25 February 2014.

³ Deputy Registrar’s Submission Regarding Radovan Karadžić’s Appeal from Decision Upholding Decision on Means, confidential and *ex parte*, 9 May 2014 (“Registry’s Submissions”).

⁴ Reply Brief, confidential and *ex parte*, 20 May 2014 (“Reply”). See also Decision on Motion to Strike Registrar’s Submission and for Extension of Time to Reply, confidential and *ex parte*, 16 May 2014, p. 3 (authorizing Karadžić to file his Reply within four days of the filing of the Decision, and dismissing the motion in all other respects).

⁵ See *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Request for Review of Indigence Decision, confidential and *ex parte*, 7 November 2012 (“Request for Review”), para. 2, Annex A (declaration of means). See also Impugned Decision, para. 1.

⁶ Directive on the Assignment of Defence Counsel (Directive No. 1/94), IT/73/Rev. 11, as amended on 29 June 2006.

⁷ See Request for Review, para. 3, Annex B. See also Impugned Decision, paras 2-3.

⁸ See Request for Review, para. 4, Annex C (“Response Letter”). See also Impugned Decision, para. 4.

⁹ *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision, with public Appendix I and confidential and *ex parte* Appendix II, 11 October 2012 (“Registrar’s Decision”), p. 4.

¹⁰ Registrar’s Decision, p. 4.

3. Karadžić sought judicial review of the Registrar's Decision in a request filed before the Trial Chamber on 7 November 2012.¹¹ On 25 February 2014, the Trial Chamber denied Karadžić's request and confirmed the Registrar's Decision.¹² On 10 April 2014, the Trial Chamber granted Karadžić's application for certification to appeal the Impugned Decision.¹³

II. STANDARD OF REVIEW

4. Before turning to the appellate standard of review, the Appeals Chamber recalls the following standard for a judicial review of an administrative decision made by the Registrar:

A judicial review of such an administrative decision is not a rehearing. Nor is it an appeal, or in any way similar to the review which a Chamber may undertake of its own judgment in accordance with Rule 119 of the Rules of Procedure and Evidence. 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.¹⁴

The administrative decision may be quashed if the Registrar: (i) failed to comply with the legal requirements of the Directive; (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 (the "unreasonableness" test).¹⁵

5. Unless unreasonableness has been established, there can be no interference with the margin of appreciation of the facts or merits of that case to which the maker of such an administrative decision is entitled.¹⁶ The party challenging the administrative decision bears the burden of demonstrating that: (i) an error of the nature described has occurred; and (ii) such error has significantly affected the impugned decision to his detriment.¹⁷ Only when both matters are shown,

¹¹ Request for Review.

¹² Impugned Decision, para. 57.

¹³ *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Application for Certification to Appeal Chamber's Decision on Indigence, confidential and *ex parte*, 10 April 2014, p. 4.

¹⁴ *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-A, Public Redacted Version of the 25 July 2013 Decision on Slobodan Praljak's Motion for Review of the Registrar's Decision on Means, 28 August 2013 ("*Prlić et al.* Decision"), para. 6; *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.

¹⁵ *Prlić et al.* Decision, para. 6; *Tolimir* Decision, para. 8; *Kvočka et al.* Decision, para. 13.

¹⁶ *Prlić et al.* Decision, para. 7; *Tolimir* Decision, para. 8; *Kvočka et al.* Decision, para. 13.

¹⁷ *Prlić et al.* Decision, para. 7; *Tolimir* Decision, para. 9; *Kvočka et al.* Decision, para. 14.

may the administrative decision be quashed.¹⁸ If the accused fails to demonstrate either of these matters, the Registrar's decision will be confirmed.¹⁹

6. The Appeals Chamber further recalls that the standard of review to be applied on appeal against a judicial review by a trial chamber of an administrative decision is the standard of review of a trial chamber's discretionary decision.²⁰ In order to successfully challenge a discretionary decision, a party must demonstrate that the trial chamber has committed a discernible error.²¹ The Appeals Chamber will only overturn a trial chamber's discretionary decision where it is found to be: (i) based on an incorrect interpretation of governing law; (ii) based on a patently incorrect conclusion of fact; or (iii) so unfair or unreasonable as to constitute an abuse of the trial chamber's discretion.²²

III. APPLICABLE LAW

7. The Appeals Chamber recalls that Article 21(4)(d) of the Statute provides that an accused is entitled "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". Rule 45(A) of the Rules confirms that "[w]henver the interests of justice so demand, counsel shall be assigned to suspects or accused who lack the means to remunerate such counsel", and provides that such assignments "shall be treated in accordance with the procedure established in a Directive set out by the Registrar and approved by the permanent Judges". Under the legislative authority enshrined in the Directive,²³ the Registry enacted a policy to determine the extent to which an accused is able to remunerate counsel ("Registry Policy").²⁴

IV. DISCUSSION

8. Karadžić submits that he is unable to fund his defence and requests the Appeals Chamber to reverse the Impugned Decision.²⁵ He alleges that the Trial Chamber erred in: (i) the application of

¹⁸ *Prlić et al.* Decision, para. 7; *Tolimir* Decision, para. 9; *Kvočka et al.* Decision, para. 14.

¹⁹ *Kvočka et al.* Decision, para. 14.

²⁰ See, e.g., *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-AR73.6, Decision on Radovan Karadžić's Appeal from Decision on Motion to Vacate Appointment of Richard Harvey, 12 February 2010, para. 9; *Tolimir* Decision, para. 10; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-AR73.2, Decision on Interlocutory Appeal of the Trial Chamber's Decision on Adequate Facilities, 7 May 2009, para. 11.

²¹ See, e.g., *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-AR15bis, Decision on Appeal Against Decision on Continuation of Proceedings, 6 June 2014 ("*Šešelj* Decision"), para. 34; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-AR73.11, Decision on Appeal Against the Decision on the Accused's Motion to Subpoena Zdravko Tolimir, 13 November 2013 ("*Karadžić* Decision"), para. 29; *Tolimir* Decision, para. 10.

²² See, e.g., *Šešelj* Decision, para. 34; *Karadžić* Decision, para. 29; *Tolimir* Decision, para. 10.

²³ See *Tolimir* Decision, para. 24.

²⁴ Registry Policy for Determining the Extent to which an Accused is Able to Remunerate Counsel, entered into force on 8 February 2007.

²⁵ Appeal, paras 1, 3, 129, 130; Reply, para. 44.

the burden of proof;²⁶ (ii) the valuation of his real properties;²⁷ (iii) the determination of “readily disposable” assets;²⁸ (iv) refusing to consider liabilities arising from foreign judgements;²⁹ (v) rejecting his offer to assign the interest in his properties to the Tribunal;³⁰ and (vi) refusing a remedy for undue delay.³¹

9. The Registry submits that the Appeal should be dismissed as the Trial Chamber correctly exercised its discretion in upholding the Registrar’s Decision in relation to the above matters, and because Karadžić merely repeats arguments that were unsuccessful before the Trial Chamber without demonstrating that the Trial Chamber committed any error.³²

A. Alleged Error Relating to Burden of Proof

10. Karadžić submits that the Trial Chamber erred in interpreting governing law by incorrectly applying the burden of proof.³³ He contends that once he had provided information concerning his inability to remunerate counsel, the Trial Chamber erroneously placed the burden on him, instead of shifting it to the Registrar, to provide evidence: (i) that the funds used to buy the [REDACTED] property were a gift made exclusively to his spouse;³⁴ (ii) that the Registrar’s appraisals of the value of his property were outdated; (iii) that a property in Pale cannot be bought for 7,000 Euros; and (iv) to support his claim that his wife’s pension constitutes a government welfare payment.³⁵ He contends that in doing so, the Trial Chamber arrived at erroneous conclusions.³⁶

11. The Registry submits that the Trial Chamber correctly found that Karadžić failed to meet his burden of proof, and that he has failed to provide any evidence establishing his inability to pay for his defence.³⁷

12. Article 7 of the Directive provides that an accused who requests the assignment of counsel must submit a declaration of his means and update this declaration whenever a relevant change occurs. Under Article 8 of the Directive, entitled “Burden of proof”, a legal aid applicant “must

²⁶ Appeal, paras 2, 25, 109-117; Reply, paras 35-42.

²⁷ Appeal, paras 2, 25, 118-128; Reply, paras 39-42.

²⁸ Appeal, paras 2, 25, 54-81; Reply, paras 13-24.

²⁹ Appeal, paras 2, 25, 32-53; Reply, paras 2-12.

³⁰ Appeal, paras 2, 25, 82-88; Reply, paras 25-28.

³¹ Appeal, paras 2, 25, 89-108; Reply, paras 29-34.

³² Registry’s Submissions, paras 1-3, 6, 31.

³³ Appeal, paras 109-117. *See also* Reply, paras 35-42.

³⁴ The Registrar identified the [REDACTED] property as Karadžić’s principal family home. *See* Impugned Decision, para. 12.

³⁵ Appeal, paras 112-115. *See also* Reply, paras 39-41.

³⁶ Appeal, paras 116, 117. Karadžić contends that the Trial Chamber erroneously concluded that: (i) the [REDACTED] property was jointly owned; (ii) the value of two properties was higher than their actual value at the time of the Registrar’s Decision; (iii) his family could purchase an adequate residence for 7,000 Euros; (iv) his spouse’s pension was not a government welfare payment; and therefore (v) he was able to remunerate his defence team.

produce evidence establishing that he is unable to remunerate counsel” and, once an inquiry has been opened, “provide or facilitate the production of information required to establish his ability to remunerate counsel”.³⁸ Therefore, the burden of proof is on the applicant to demonstrate his inability to remunerate counsel.³⁹ Once the applicant has provided information regarding his inability to remunerate counsel, the burden of proof shifts to the Registrar to prove otherwise, based on the balance of probabilities.⁴⁰

13. The Appeals Chamber considers that in order to demonstrate his inability to remunerate counsel, the burden was on Karadžić to: (i) provide evidence that a property constitutes marital property; (ii) provide updated information on the value of the properties;⁴¹ and (iii) demonstrate that his wife’s pension does not constitute disposable means.⁴² The Registry was then required to determine whether the relevant information given by Karadžić was more probably true than not.⁴³ If Karadžić disagreed with the Registry’s conclusions, it was his burden to demonstrate to the Trial Chamber that the Registrar’s Decision was erroneous.⁴⁴

14. The Appeals Chamber therefore finds that the Trial Chamber did not commit a discernible error in the application of the burden of proof by concluding that: (i) “[i]n the absence of evidence that the actual funds used to purchase the [REDACTED] Property were from a gift made exclusively” to Karadžić’s spouse, “it was not unreasonable for the Registrar to reject [Karadžić’s statements] that the [REDACTED] Property was the separate property of his spouse;”⁴⁵ (ii) it was “insufficient for [Karadžić] to merely state that the Registrar relied on ‘outdated appraisals’ without adducing evidence to substantiate his claim [as] the burden is on [Karadžić] to provide alternative valuations for consideration;”⁴⁶ (iii) although Karadžić “alleges that the Registrar failed to consider that a property cannot be purchased for 7,000 euro in Pale, [he] has failed to adduce evidence in support of his contention;”⁴⁷ and (iv) Karadžić had not “provided material in support of his claim

³⁷ Registry’s Submissions, paras 23-25.

³⁸ Directive, Articles 8(A)-(B).

³⁹ *Prlić et al.* Decision, para. 35.

⁴⁰ *Prlić et al.* Decision, para. 35; *Kvočka et al.* Decision, para. 12.

⁴¹ *Cf. Prlić et al.* Decision, paras 35, 58; *Tolimir* Decision, para. 40.

⁴² *Cf. Tolimir* Decision, para. 31 (“[T]he Appellant has failed to prove that any ‘social benefits’ or ‘government welfare payments’ that cannot be included in disposable means [...] form part of his pension.”).

⁴³ *See, e.g., Prlić et al.* Decision, paras 35, 40.

⁴⁴ *See, e.g., Prlić et al.* Decision, para. 40; *Tolimir* Decision, para. 40 (finding that “the Trial Chamber correctly ruled [that] it was not sufficient for the Appellant to merely assert that the data [...] relied upon by the Registry is ‘obviously unreasonable’ and ‘unreliable’, without providing any evidence to substantiate this claim. If the Appellant believes that the data [...] represent living standards below subsistence level in the in the area where his household resides, he should have provided evidence to support this allegation.”) (citation omitted).

⁴⁵ Impugned Decision, para. 20 (taking into account as well “the actual use of the [REDACTED] Property”).

⁴⁶ Impugned Decision, para. 26.

⁴⁷ Impugned Decision, para. 29.

that his spouse's pension constitutes a 'government welfare payment'".⁴⁸ His arguments are therefore dismissed.

B. Alleged Error Relating to Valuation of Real Properties

15. Karadžić submits that the Trial Chamber made patently incorrect determinations of fact in relation to the Registrar's assessment of the value of his real properties,⁴⁹ which allegedly disregarded: (i) the costs of a sale of real property;⁵⁰ (ii) the devaluation of property since 2009 in the world financial crisis;⁵¹ and (iii) the fact that "a substitute property could not be purchased for the amount calculated by the square meter formula".⁵² He alleges that this and other errors have resulted in the "overvaluing" of the amount that he could reasonably contribute.⁵³

16. The Registry maintains that the Trial Chamber correctly upheld the Registry's property valuation, which was based on extensive evidence.⁵⁴ The Registry further submits that Karadžić never challenged its valuations during the inquiry and provided no evidence to contradict them.⁵⁵

17. The Appeals Chamber recalls that pursuant to Section 5(a) of the Registry Policy, the equity in the principal family home of an accused may be included in his disposable means to the extent that the property exceeds the reasonable needs of the accused, his spouse, and others with whom he habitually resides.⁵⁶ The excess value is calculated in accordance with the formula provided in Section 9 of the Registry Policy.⁵⁷

18. In relation to the submission that the Registrar failed to deduct costs associated with the sale of property, the Trial Chamber noted that Karadžić never provided an estimation of these costs or any evidence to support his contention, which he raised for the first time before the Trial Chamber.⁵⁸ The Trial Chamber concluded that it was not unreasonable for the Registrar not to consider hypothetical costs which were not put before him by Karadžić.⁵⁹ As discussed above, Karadžić bore the burden of proof to demonstrate his inability to remunerate counsel.⁶⁰ Therefore, by failing to raise this issue before the Registrar, it was not unreasonable for the Trial Chamber to

⁴⁸ Impugned Decision, fn. 82.

⁴⁹ Appeal, paras 118-128. *See also* Reply, para. 41.

⁵⁰ Appeal, paras 118-121.

⁵¹ Appeal, paras 118, 122-124.

⁵² Appeal, paras 118, 125-128.

⁵³ Appeal, para. 129. Karadžić requests the Appeals Chamber to reverse the Impugned Decision in this respect and remand the matter to the Registrar for a proper determination of his property's value.

⁵⁴ Registry's Submissions, paras 26, 29.

⁵⁵ Registry's Submissions, paras 27-28, 30.

⁵⁶ *See also* Directive, Article 10(A).

⁵⁷ Registry Policy, Sections 5(a), 9.

⁵⁸ Impugned Decision, para. 25.

⁵⁹ Impugned Decision, para. 25.

⁶⁰ *See supra*, paras 12-13.

uphold the Registrar's determination. Karadžić has not demonstrated that the Trial Chamber committed a discernible error.

19. As for the alleged error regarding the valuation of properties, the Appeals Chamber recalls that pursuant to Article 7(E) of the Directive and as discussed above, Karadžić bore the burden to "update his declaration of means at any time a change relevant to his declaration of means occurs", including to provide updated information on the value of the properties.⁶¹ Despite having been given the opportunity to do so, as observed by the Trial Chamber, Karadžić had not challenged nor provided alternative valuations to the Registrar's determination of property values in 2012.⁶² The Appeals Chamber therefore finds that Karadžić has not demonstrated that the Trial Chamber committed a discernible error in upholding the Registrar's determination on this matter.

20. With regard to his submission that the Registrar failed to consider whether a residence could be purchased in Pale for 7,000 Euros, the Appeals Chamber finds no error in the Trial Chamber's conclusion that the Registrar correctly applied the formula set forth in Section 9 of the Registry Policy in finding that his property exceeded the reasonable means of Karadžić and his wife.⁶³ On appeal, Karadžić merely disagrees with the Trial Chamber's conclusion without demonstrating any discernible error.

21. Karadžić's mere repetition on appeal of arguments which the Trial Chamber already addressed⁶⁴ fails to demonstrate any discernible error by the Trial Chamber. His arguments are therefore dismissed.

C. Alleged Error Relating to Disposable Means

22. Karadžić submits that the Trial Chamber erred in interpreting governing law both by upholding the Registrar's inclusion of assets and income of "an unwilling spouse" in the determination of readily disposable assets, and in concluding that the lack of consent of an accused's spouse to the dissolution of marital property is irrelevant to his obligation to contribute to his defence.⁶⁵ He contends that the plain reading of the Registry Policy suggests that separate property of, or joint property owned with, "an unwilling spouse" does not qualify as a readily

⁶¹ See *supra*, paras 12-13. The Appeals Chamber recalls its finding that the Trial Chamber did not commit a discernible error in the application of the burden of proof in upholding the Registrar's valuation of Karadžić's property. See *supra*, para. 14.

⁶² See Impugned Decision, para. 26. See also Response Letter.

⁶³ Impugned Decision, para. 28. The Appeals Chamber recalls its finding that the Trial Chamber did not commit a discernible error in the application of the burden of proof in relation to this conclusion. See *supra*, para. 14.

⁶⁴ See Impugned Decision, para. 23.

⁶⁵ Appeal, paras 54-81.

disposable asset because it cannot be “sold, mortgaged, or leased” to raise funding for his defence.⁶⁶ He submits that since his wife is unwilling to contribute to his defence, their joint property is “simply not available” as her consent is required for its dissolution in accordance with the Family Law of the Republika Srpska (“RS”).⁶⁷ He further points to case law and regulations of regional or domestic jurisdictions which, he claims, exclude the property of an unwilling spouse when determining eligibility for legal aid.⁶⁸

23. The Registry submits that the Trial Chamber correctly upheld the inclusion of joint marital property and spouse’s income in the valuation of the disposable means in accordance with the Tribunal’s jurisprudence and practice.⁶⁹ It contends that the determination of readily disposable assets under the Registry Policy is an objective one and the willingness of the owner to dispose of such assets is irrelevant, otherwise “legal aid would be a matter of election not financial need, allowing individuals to simply opt out from contribution [and setting] a precedent signaling to any other accused, his spouse or member of household an easy way to obtain public funds.”⁷⁰ It further submits that Karadžić’s reference to case law and national sources is inapposite.⁷¹

24. The Appeals Chamber recalls that pursuant to Article 10(A) of the Directive:

The Registrar shall determine whether and to what extent the suspect or accused is able to remunerate counsel by taking into account means of all kinds of which the suspect or accused has direct or indirect enjoyment or freely disposes, including but not limited to direct income, bank accounts, real or personal property, pensions, and stocks, bonds, or other assets held, but excluding any family or social benefits to which he may be entitled. In assessing such means, account shall

⁶⁶ Appeal, paras 55, 60, 61, referring to Registry Policy, Section 4 (defining “Readily disposable asset” as “an asset owned by the applicant, the applicant’s spouse or the persons with whom he habitually resides that can be sold, mortgaged or leased in order to raise money for the applicant’s defence”). See also Reply, paras 14-15.

⁶⁷ Appeal, paras 56, 61-63, 75, referring to Family Law of the RS, Articles 271(1)-(2) (which Karadžić describes as stating, respectively, that “joint property shall be consensually disposed of by the spouses” and that “one spouse may not independently dispose of his or her part in the joint property, nor charge it with legal transactions *inter vivos*”). See also Reply, paras 16-17, 24.

⁶⁸ Appeal, paras 64-74, 76-77, referring to, *inter alia*, *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-PT, Decision on the Defence’s Motion for an Order Setting Aside the Registrar’s Decision Declaring Momčilo Krajišnik Partially Indigent for Legal Aid Purposes, 20 January 2004 (“*Krajišnik Decision*”), para. 34; *The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-0/08, Redacted Version of “Decision on Legal Assistance for the Accused”, 26 November 2009 (“*Bemba Decision*”), para. 103; *R. v. Eid*, [2013] ONSC 7084 (Ontario Superior Court of Justice) (“*Eid Case*”); *United States v. Lexin*, 434 F.Supp.2d 836 (Southern District of California, 2006) (“*Lexin Case*”), pp. 841-843; *Nwobu v. R.*, [2004] EWCA Crim. 105 (England and Wales Supreme Court of Judicature Court of Appeal) (“*Nwobu Case*”); *R. v. Reid*, [1998] 1 VR 224 (Supreme Court of Victoria) (“*Reid Case*”); European Commission, *Commission Recommendation on the Right to Legal Aid for Suspects or Accused Persons in Criminal Proceedings*, 2013 (“*European Commission Recommendation*”), p. 5; United Kingdom Legal Aid Agency, *Criminal Legal Aid Manual*, 27 January 2014 (“*United Kingdom Legal Aid Manual*”), pp. 19, 21; Government of Ireland, *Criminal Legal Aid Review Committee Final Report*, February 2002 (“*Ireland Committee Report*”), p. 79; Legal Aid Commission of Tasmania, *National Means Test*, Last Revised 13 April 2010 (“*Tasmania National Means Test*”). See also Reply, para. 20. Karadžić also attributes a quotation to a guide of the Administrative Office of the United States Courts published in 2013, The Appeals Chamber is unable to confirm this quotation based on the reference he cited. See Appeal, para. 66, fn. 52.

⁶⁹ Registry’s Submissions, paras 13, 16.

⁷⁰ Registry’s Submissions, para. 14.

⁷¹ Registry’s Submissions, para. 15.

also be taken of the means of the spouse of a suspect or accused, as well as those of persons with whom he habitually resides, provided that it is reasonable to take such means into account.

As such, the equity in marital property jointly owned by an accused and his spouse (and exceeding their reasonable needs) is to be considered when calculating an accused's disposable means.⁷² Whether assets constitute joint marital property is to be determined in accordance with the marital property regime of the State in which the accused and his spouse were wed or reside.⁷³

25. The Appeals Chamber finds no discernible error in the Trial Chamber's conclusion that the Registrar reasonably considered the full value of the joint marital assets of Karadžić and his spouse when determining his disposable means.⁷⁴ In reaching this conclusion, the Trial Chamber found that the Registrar correctly considered the relevant marital property regime in Bosnia and Herzegovina ("BiH") and particularly the Family Law of the RS, and noted that the latter was in line with the Registry Policy.⁷⁵ The Trial Chamber considered that the Registrar was entitled to ignore the provisions of the Family Law of the RS referred to by Karadžić since they concern the division of property and liabilities owed by a spouse to a creditor, rather than the determination of whether the assets constitute joint marital property.⁷⁶ Therefore, these provisions are irrelevant for the purpose of Section 6(e) of the Registry Policy in determining whether assets constitute marital property according to the marital property regime of RS.⁷⁷

26. The Appeals Chamber further finds no discernible error in the Trial Chamber's observation in this case that "the lack of consent of the Accused's spouse to the dissolution of marital property is not a basis upon which the Accused can avoid his obligation to contribute towards his defence".⁷⁸ Indeed, the Appeals Chamber has previously found no error in a trial chamber's upholding a Registry decision where the issue of the lack of spousal consent to dispose of marital property was raised.⁷⁹ The Appeals Chamber is also not persuaded by the applicability and reasoning of the cases and regulations cited by Karadžić, which, in any event, do not specifically address the question of whether a spouse's consent to the disposal of marital property is a relevant factor to be considered in the determination of disposable means.⁸⁰ His arguments are therefore dismissed.

⁷² *Tolimir* Decision, para. 24, referring to Registry Policy, Sections 5-6.

⁷³ Registry Policy, Section 6(e).

⁷⁴ Impugned Decision, para. 22.

⁷⁵ Impugned Decision, para. 17, referring to Registrar's Decision, Appendix II, confidential and *ex parte*, paras 24, 57 ("Pursuant to Article 270(5) and (6) of the Family Law of the Republika Srpska, property that a spouse acquires through work during marriage and earnings gained from that property, as well as gifts received from third parties during the marriage, unless the purpose of the gift shows otherwise, shall be joint of the spouses.").

⁷⁶ Impugned Decision, para. 18.

⁷⁷ Impugned Decision, para. 18, referring to Family Law of the RS, Articles 271(1)-(2), 272(1).

⁷⁸ Impugned Decision, para. 18.

⁷⁹ Cf. *Tolimir* Decision, paras 15, 21, 24.

⁸⁰ See, e.g., *Krajišnik* Decision, paras 27-28, 33-34 (finding the Registrar's determination on disposable income unreasonable since properties were under the administration of the municipality); *Bemba* Decision, paras 68, 71, 94,

D. Alleged Error Relating to Liability Arising from Foreign Judgements

27. Karadžić submits that the Trial Chamber erred in interpreting governing law in upholding the Registrar's decision to exclude as liabilities two judgements arising out of civil lawsuits against him in the United States of America and France.⁸¹ He submits that the Trial Chamber erred in considering their enforceability solely in BiH, while ignoring whether they are enforceable in the Netherlands.⁸² He contends that under the "EEX Regulation",⁸³ the French Judgement would be immediately enforceable in the Netherlands,⁸⁴ and the United States Judgement would be *de facto* recognised in the courts of the Netherlands.⁸⁵ He asserts that even if he was able to liquidate or obtain a loan for his properties, he would have to transfer the payment for his defence team to the Netherlands, where they reside.⁸⁶ He asserts that such funds would be subject to attachment by the holders of the Foreign Judgements,⁸⁷ and it would be unreasonable to expect his defence team to accept remuneration from Karadžić since a "third party who accepts funds from a judgment debtor with knowledge of a judgment becomes liable for returning those funds to a judgment creditor".⁸⁸

103 (excluding frozen assets as means "available to the accused immediately or in the near future"); *Eid* Case, para. 66 (stating that assistance by family members, and a spouse's family members, to contribute to the defence of an accused should be voluntary); *Lexin* Case, p. 843 (finding that any asset jointly held and individually disposable is appropriately considered in the evaluation of means); *Nwobu* Case, paras 43-45 (stating that although the appellant had equity in the home he had purchased with his partner, that equity could not be released without the sale of that home which would have rendered the appellant's family homeless, thus finding that the appellant did not have the means to pay the prosecution costs or the costs of his own defence); *Reid* Case, p. 232 (finding it inappropriate to require that the source of income of both the applicant and his wife be disposed of in order to fund his legal costs); European Commission Recommendation, Section 2(7) (stating that the household income of families is taken into account in the means test, but where 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 should be used); United Kingdom Legal Aid Manual, p. 19 (stating that a determination of contribution from capital and/or equity to an applicant's defence cost will only be made following conviction); Ireland Committee Report, p. 79 (stating that due to the personal nature of the right to counsel, the income of relatives or friends should not be taken into account in determining eligibility for legal aid); Tasmania National Means Test (providing that the assets and income of any financially associated person may be taken into account when determining means).

⁸¹ See Appeal, paras 32-53; Reply, paras 2-12. See also Impugned Decision, para. 47, referring to Request for Review, Annex D, *Kadic et al. v. Radovan Karadžić*, 93 Civ. 1163, Judgment (Southern District of New York, 16 August 2000) ("United States Judgement"), Annex E, *Zuhra Kovač et al. v. Radovan Karadžić et al., Jugement (Tribunal de grande instance de Paris*, 14 March 2011) ("French Judgement") (together "Foreign Judgements"). The Trial Chamber noted that under the Foreign Judgements, Karadžić was ordered to pay damages in the amount of 775 million United States Dollars and 215,000 Euros, respectively. Karadžić noted that this exceeded the amount the Registrar had expected him to contribute to the cost of his defence. See Appeal, para. 32.

⁸² Appeal, paras 37, 38, 50. See also Reply, paras 2, 9, 12.

⁸³ The Appeals Chamber understands that Karadžić refers to the European Council Regulation governing the recognition and enforcement of judgements between member states of the European Union. See European Council Regulation (EC) 44/2001, 22 December 2000 ("EEX Regulation"), Article 33. See also Registry's Submissions, fn. 20.

⁸⁴ Appeal, paras 43, 45.

⁸⁵ See Appeal, para. 46.

⁸⁶ Appeal, para. 37.

⁸⁷ Appeal, paras 44, 47. See also Reply, paras 3-8.

⁸⁸ Appeal, paras 47-49. See also Reply, paras 3, 5-7. Karadžić also argues that the Trial Chamber erred in considering that he could not rely on judgements which he has not attempted to satisfy. Appeal, paras 51-52; Reply, paras 10-11. See also Registry's Submissions, para. 11. Although the Trial Chamber made an observation to this effect, the Appeals Chamber notes that it was not relied upon by the Trial Chamber in reaching its conclusion. See Impugned Decision, paras 49 (finding that "it was also not unreasonable for the Registrar to exclude from his consideration whether the Foreign Judgements were enforceable in The Netherlands"), 50 (making the observation that Karadžić has failed to

28. The Registry submits that the Trial Chamber correctly found that the Registrar acted reasonably in excluding the Foreign Judgments as liabilities.⁸⁹ It maintains that absent proof of enforceability, the Foreign Judgements are irrelevant to the valuation of Karadžić's property.⁹⁰ The Registry contends that the claim that holders of the Foreign Judgements could use enforcement proceedings to recover funds paid to his defence team in the Netherlands is speculative and Karadžić fails to provide any evidence that these funds would be subject to such attachment.⁹¹ It argues that should new material evidence become available, the proper avenue is for Karadžić to seek an appropriate remedy at that point.⁹²

29. The Appeals Chamber recalls that in accordance with the Registry practice, any personal debts on behalf of an accused and members of his household are included as an offset in the calculation of his disposable means, reducing the total contribution to the cost of his defence.⁹³ In the Impugned Decision, the Trial Chamber found that it was not unreasonable for the Registrar to exclude the Foreign Judgements as liabilities.⁹⁴ In reaching this finding, the Trial Chamber considered that since the majority of Karadžić's assets are located in BiH, the Registrar correctly limited his consideration to the legal framework governing the enforceability of the Foreign Judgements in BiH.⁹⁵ The Appeals Chamber considers that, in so finding, the Trial Chamber acted within its discretion.

30. The Appeals Chamber also finds no discernible error in the Trial Chamber's conclusion that the Registrar reasonably excluded from consideration whether the Foreign Judgements were enforceable in the Netherlands since Karadžić had not provided any evidence that payment to his defence team would be subject to attachment.⁹⁶ Even if the Foreign Judgements were enforceable in the Netherlands, the Trial Chamber reasonably found that in the absence of evidence that recognition of the Foreign Judgements in the Netherlands had been sought, the Registrar's decision to exclude the Foreign Judgements as liabilities was not unreasonable.⁹⁷ Karadžić merely repeats on

adduce evidence that he himself has taken steps to satisfy the Foreign Judgements against him, before making the finding that in the absence of evidence that recognition has been sought or granted by a court in BiH the Registrar had not acted unreasonably in excluding Foreign Judgements as liabilities).

⁸⁹ Registry's Submissions, para. 12.

⁹⁰ Registry's Submissions, paras 7-10.

⁹¹ Registry's Submissions, para. 10.

⁹² Registry's Submissions, para. 10.

⁹³ Registrar's Decision, p. 3.

⁹⁴ Impugned Decision, para. 49. *See also* Impugned Decision, para. 50.

⁹⁵ Impugned Decision, para. 49.

⁹⁶ Impugned Decision, para. 49.

⁹⁷ Impugned Decision, para. 49.

appeal arguments which the Trial Chamber already addressed,⁹⁸ without demonstrating any discernible error by the Trial Chamber. His arguments are therefore dismissed.

E. Alleged Error Relating to Assignment of Interest

31. Karadžić submits that the Trial Chamber erroneously interpreted governing law in upholding the Registrar’s decision to reject his offer to assign his interest in two properties to the Registrar, as an offset to the amount of his contribution.⁹⁹ He submits that the absence of provisions in the Tribunal or Registry Policy does not “excuse the Registrar from taking reasonable steps” to enforce an order of contribution, or prevent the United Nations (“UN”) from recovering funds in other circumstances, for example, when a contract is breached or when funds are erroneously or fraudulently disbursed.¹⁰⁰ Karadžić claims that by the assignment of interest in the properties, the Registrar could recover the funds he could actually contribute without jeopardizing the legitimacy of the proceedings.¹⁰¹

32. The Registry submits that the Trial Chamber correctly rejected Karadžić’s offer to assign the interest in his properties to the Tribunal as the UN has no legal capacity to act as Karadžić’s agent, creditor or successor in interest.¹⁰² It contends that the UN enjoys such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes, which allows it to conclude contracts exclusively to satisfy its own operational needs.¹⁰³

33. The Trial Chamber noted that although the Directive and Registry Policy do not regulate the manner in which an accused can contribute to his defence, neither provides the Registrar with the authority to reassign Karadžić’s property interest to the Tribunal to cover the costs associated with his defence. The Trial Chamber further concurred with the Registrar’s assertion that the Tribunal is not a creditor and does not enter into agreements for the transfer of real or personal property with persons indicted by the Tribunal.¹⁰⁴ The Trial Chamber concluded that the assignment of Karadžić’s property interest to the Registrar was therefore not an available option and that it was not unreasonable for the Registrar to have disregarded it.¹⁰⁵

34. The Appeals Chamber finds that Karadžić has not demonstrated a discernible error in this approach, and accordingly dismisses this aspect of his appeal.

⁹⁸ See Impugned Decision, para. 47.

⁹⁹ Appeal, paras 82-88. See also Reply, paras 25-28.

¹⁰⁰ Appeal, paras 84-86; Reply, para. 27.

¹⁰¹ Appeal, para. 87.

¹⁰² Registry’s Submissions, para. 17.

¹⁰³ Registry’s Submissions, para. 17, referring to Article 104 of the UN Charter.

¹⁰⁴ Impugned Decision, para. 53.

¹⁰⁵ Impugned Decision, para. 53.

F. Alleged Error Relating to Delay

35. Karadžić submits that the Trial Chamber erroneously interpreted governing law in determining that the four-year delay in the Registrar's Decision did not warrant a remedy.¹⁰⁶ He submits that the Trial Chamber erred in only examining the existence of prejudice, and failed to consider other factors relevant to the determination of undue delay.¹⁰⁷ He asserts that had the Trial Chamber considered these other factors, it would have concluded that the four-year delay was undue since the determination of his legal aid eligibility was "not particularly complex", he and his family have cooperated throughout the process, and there "were years of inactivity" by the Registry.¹⁰⁸ He contends that he was prejudiced by the delay since: (i) he could have spread out the amount of his contribution throughout the trial by reducing the number of people assisting him; and (ii) his legal aid will be withdrawn and he will have no funds for his defence on appeal.¹⁰⁹ Finally, he claims that the Trial Chamber's rendering of the Impugned Decision after 15 months also amounted to undue delay.¹¹⁰

36. The Registry submits that Karadžić's "new claim of prejudice" should be rejected as it is raised for the first time on appeal, and is not based on any evidence.¹¹¹ It submits that the Trial Chamber correctly found that Karadžić was not prejudiced by the timing of the Registrar's Decision as he received legal aid funds throughout the duration of the Registrar's inquiry.¹¹² The Registry asserts that Karadžić's claim of prejudice reveals a misunderstanding of the Tribunal's legal aid system, as he would only be responsible for the full amount he can pay, regardless of the amount of legal aid support that he uses.¹¹³ The Registry adds that, in any event, there was no undue delay because indigency inquiries are "lengthy and exhaustive processes", which include making multiple requests for documentation from government authorities and waiting for their translation and analysis, while protecting the rights of the accused and safeguarding public funds.¹¹⁴ The Registry

¹⁰⁶ Appeal, paras 89-108. *See also* Reply, paras 29-34.

¹⁰⁷ Appeal, paras 96-99, 106, referring to *Justin Mugenzi and Prosper Mugiraneza v. The Prosecutor*, Case No. ICTR-99-50-A, Judgement, 4 February 2013, para. 30 (setting out a number of considerations relevant to assessing an alleged violation of the right to be tried without undue delay, including: (i) the length of the delay; (ii) the complexity of the proceedings; (iii) the conduct of the parties; (iv) the conduct of the authorities involved; and (v) the prejudice to the accused, if any). *See also* Reply, paras 29-30, 34.

¹⁰⁸ Appeal, paras 99-103. *See also* Reply, paras 31, 32.

¹⁰⁹ Appeal, paras 104-105, 107.

¹¹⁰ Appeal, paras 94, 105, 107-108. *See also* Reply, paras 29, 33-34.

¹¹¹ Registry's Submissions, paras 19, 22.

¹¹² Registry's Submissions, para. 18.

¹¹³ Registry's Submissions, para. 19 ("If he uses fewer hours, the Tribunal's bill is lowered first, not his.").

¹¹⁴ Registry's Submissions, para. 20. The Registry maintains that Karadžić has not demonstrated that "the Registrar was remiss in his duties, prioritised his workload inappropriately or otherwise neglected to fulfil his responsibilities."

also claims that any undue delay or prejudice was caused by Karadžić's own "tactics and decisions".¹¹⁵

37. The Appeals Chamber finds no discernible error in the Trial Chamber's conclusion that since Karadžić continued to receive funds covering the costs of his defence throughout the duration of the inquiry, he did not suffer any prejudice as a result of the substantial amount of time the Registrar took in issuing the Registrar's Decision.¹¹⁶ The Appeals Chamber rejects Karadžić's claims of prejudice raised for the first time on appeal, that he would not have sufficient funds on appeal and that he could have spread out the amount of his contribution.¹¹⁷ In any event, his claims are without merit as the Tribunal shall pay that portion of the cost which he does not have sufficient means to cover.¹¹⁸

38. The Appeals Chamber further finds no discernible error in the Trial Chamber's conclusion that in the absence of prejudice, there was no reason to examine whether the delay in issuing the Registrar's Decision was reasonable.¹¹⁹ The Appeals Chamber recalls that the Trial Chamber may quash an administrative decision if the Registrar failed to observe any basic rules of natural justice or to act with procedural fairness towards the person affected by the decision.¹²⁰ Karadžić bore the burden to demonstrate before the Trial Chamber both that such an error had occurred, *and* that it had significantly affected the decision to his detriment.¹²¹ Since Karadžić failed to establish that any error had significantly affected the Registrar's Decision to his detriment, the Appeals Chamber finds that the Trial Chamber acted within its discretion in not examining the reasonableness of the delay.

39. With regard to Karadžić's claim of undue delay in relation to the issuance of the Impugned Decision, the Appeals Chamber recalls that trial chambers enjoy considerable discretion in relation to the management of proceedings before them.¹²² As recalled above, in order to successfully challenge a discretionary decision, a party must demonstrate that the trial chamber has committed a

¹¹⁵ Registry's Submissions, para. 21. In this respect, the Registry asserts that Karadžić: (i) failed to timely provide evidence substantiating his indigency claims; (ii) transferred assets to family members to place them out of the Registry's reach, which necessitated further investigations; (iii) requested the deferral of the implementation of the Registrar's Decision pending the issuance of the Impugned Decision; and (iv) repeated this request for deferral until the resolution of this Appeal.

¹¹⁶ Impugned Decision, para. 56.

¹¹⁷ See Impugned Decision, para. 54. Cf. *Prosecutor v Zdravko Tolimir et al.*, Case No. IT-04-80-AR65.1, Decision on Interlocutory Appeal Against Trial Chamber's Decisions Granting Provisional Release, 19 October 2005, para. 32.

¹¹⁸ Directive, Article 6(C).

¹¹⁹ Impugned Decision, para. 56.

¹²⁰ See *supra*, para. 4.

¹²¹ See *supra*, para. 5.

¹²² See, e.g., *Šešelj* Decision, para. 34; *Prosecutor v Ratko Mladić*, Case No. IT-09-92-AR73.3, Decision on Mladić's Interlocutory Appeal Regarding Modification of Trial Sitting Schedule Due to the Health Concerns, 22 October 2013, filed publicly on 31 October 2013, para. 11; *Prosecutor v Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-A, Judgement, 4 December 2012, para. 17.

discernible error.¹²³ Karadžić's cursory submissions fail to demonstrate that the length of time the Trial Chamber took in issuing the Impugned Decision was so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion. Karadžić has therefore failed to demonstrate any discernible error by the Trial Chamber, and his arguments are dismissed.

G. Conclusion


40. Karadžić has not demonstrated that the Trial Chamber committed a discernible error in upholding the Registrar's Decision.

V. DISPOSITION

41. For the foregoing reasons, the Appeals Chamber **DISMISSES** the Appeal.

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

Dated this 2nd day of December 2014
At The Hague
The Netherlands



Judge Khalida Rachid Khan
Presiding Judge

[Seal of the Tribunal]

¹²³ See *supra*, para. 6.