



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-05-88/2-T

Date: 27 August 2010

Original: English

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D 9066- D 9058
27 AUGUST 2010

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IN TRIAL CHAMBER II

Before: Judge Christoph Flügge, Presiding
Judge Antoine Kesia-Mbe Mindua
Judge Prisca Matimba Nyambe

Registrar: Mr. John Hocking

Decision of: 27 August 2010

PROSECUTOR

v.

ZDRAVKO TOLIMIR

PUBLIC

**DECISION ON ZDRAVKO TOLIMIR'S REQUEST FOR TRANSCRIPTS
IN A LANGUAGE WHICH HE UNDERSTANDS**

Office of the Prosecutor

Mr. Peter McCloskey

The Accused

Zdravko Tolimir

THIS TRIAL 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 (“Tribunal”);

BEING SEISED OF “Zdravko Tolimir’s Request for Transcripts in a Language which he Understands”, submitted by Zdravko Tolimir (“Accused”) on 9 July 2010 and filed in the English version on 12 July 2010 (“Request”), seeking the issuance of an order “for all transcripts to be submitted within an appropriate timeframe in a language which the [A]ccused understands”,¹ and suggesting that he be provided with a translator whose work hours will not be counted toward the monthly quota of remunerated hours allocated to the members of the team supporting the Accused (“Support Team”);²

NOTING the argument of the Accused that his request is justified by Articles 21(4)(b) and 21(4)(f) of the Statute, as “audio and video material cannot be used for efficient preparation for the trial because the very examination of video and audio material is time consuming” and because he cannot provide specific transcript references during cross-examination having reviewed only the audio and video material which he currently receives;³

RECALLING that, during the pre-trial phase of the present case, the Pre-Trial Judge denied the Accused’s request to receive all relevant documents “in [the] Serbian [language and written] in Cyrillic [script]”,⁴ determining that the right of an accused to receive relevant material in a language he understands does not entail “a right for an accused . . . to come before this Tribunal and demand the production of documents in any language . . . he chooses”,⁵ and that this holding was later upheld by the Appeals Chamber;⁶

¹ Request, para. 6.

² Request, para. 7.

³ Request, para. 4.

⁴ Specifically, the Accused’s request referred to the operative indictment and accompanying material, the statements of all witnesses, “copies of all statements and the other transcripts of ongoing trials; any potentially extenuating judicial material in accordance with Rule 68; [and] judg[e]ments [*sic*] for all those who have been sentenced so far by this Tribunal”. Motion to the Pre-Trial Chamber and the Registry Concerning Assistance in Appointing a Legal Advisor, Disclosure of Material in a Language the Accused Understands and Notification of Special Defence on the Charges of the Indictment, Case No. IT-05-88/2-PT, submitted on 16 November 2007 and filed in the English version on 20 November 2007.

⁵ T. 114 (11 December 2007) (“11 December 2007 Oral Decision”).

⁶ Decision on Interlocutory Appeal Against Oral Decision of the Pre-Trial Judge of 11 December 2007, Case No. IT-05-88/2-AR73.1, 28 March 2008 (“28 March 2008 Appeals Chamber Decision”).

NOTING the “Response to Zdravko Tolimir’s Request for Transcripts in a Language which he Understands” (“Response”), filed by the Prosecution on 23 July 2010, arguing, *inter alia*, that the Motion constitutes a motion for reconsideration of the 11 December 2007 Oral Decision;⁷

NOTING the Prosecution’s further submission that the Accused has not incurred any actual prejudice,⁸ highlighting the fact that despite not being provided with BCS transcripts of prior proceedings to this point, the Accused has nevertheless been able to provide line and page references to the English transcripts during cross-examination at numerous points during the trial;⁹

NOTING the Prosecution’s additional claim that any difficulty that does exist in this respect arises “as a direct consequence of [the Accused’s] decision to represent himself”;¹⁰

NOTING that, according to the Prosecution, the logistical resources required to provide BCS transcripts of current and prior proceedings far exceeds the capabilities of a single typist, as proposed by the Accused, and would “cripple the capacity of the Registry”,¹¹ rendering the proposal of the Accused “untenable and manifestly unreasonable”;¹²

NOTING the Prosecution’s contention that the resources that have been and are now allocated to the Accused are more than adequate to allow him to devote part of his resources to language-related issues, particularly since he receives funding assistance commensurate with a Level III case designation;¹³

NOTING the “Submission Pursuant to Rule 33(B) Concerning the Motion for Transcripts in B/C/S” of the Registrar, filed on 30 July 2010 (“Rule 33(B) Submission”), in which the Registrar submits that providing the Accused with BCS transcripts of the current and prior proceedings is not necessary to protect the right of the accused to be informed of the nature and cause of the charges against him, as well as his right to a fair and expeditious trial,¹⁴ and, moreover, that the customary practice of providing audio recordings, rather than transcripts, in BCS of current and prior proceedings has been deemed sufficient to protect the rights of the Accused as set out in Article 21 of the Statute;¹⁵

⁷ Response, paras. 6–8.

⁸ Response, para. 9.

⁹ Response, para. 9.

¹⁰ Response, para. 3.

¹¹ Response, para. 12.

¹² Response, para. 12.

¹³ Response, paras. 13–14.

¹⁴ Rule 33(B) Submission, para. 11.

¹⁵ Rule 33 (B) Submission, para. 16.

NOTING the further assertion of the Registrar that the resources currently available to the Accused are sufficient to safeguard his statutory rights without requiring the provision of BCS transcripts,¹⁶ particularly in light of the decision of 5 July 2010 upgrading the complexity level of the *Tolimir* case to Level III, as a result of which the Accused is entitled to retain up to five staff members who may each bill up to 150 hours per month,¹⁷ and the fact that the Remuneration Scheme for Persons Assisting Indigent Self-Represented Accused indicates that support teams assisting self-represented accused may include a language assistant, who may be tasked with assisting “with interpretation and translation of case-related material, as required to supplement the interpretation and translation services normally provided by the Tribunal”;¹⁸

NOTING the Registrar’s additional submissions that (i) although an “Interpreter” was assigned to the Support Team in June 2009, this person remains inactive;¹⁹ (ii) the Accused has previously submitted a response to a Prosecution motion prior to the BCS translation being provided to him, thereby indicating his own and/or a member of the Support Team’s ability to work in English;²⁰ and (iii) although Mr. Gajić, a member of the Support Team, was made aware of the possibility that transcripts of the *Popović et al.* case might be available through the War Crimes Justice Project (“WJCP”) and was encouraged to submit requests pertaining thereto, Mr. Gajić has yet to do so;²¹

NOTING the clarification of the Registrar that the Accused’s request would actually require the assistance of qualified transcribers in order to transcribe the BCS audio tapes into written form, as well as the further submission that such resources are not available at the Tribunal, and that while one court day represents, on average, 4.5 hours of courtroom time, a transcriber can transcribe, on average, 0.5 hours of audio recording per day;²²

NOTING the “Reply to the Responses of the Registrar and the Prosecutor and a Request Regarding the Trial Schedule”, submitted on 11 August 2010 and filed in the English version on 13 August 2010 (“Reply”) in which the Accused responds to the submissions of the Prosecution and the Registrar, and appends a request to reduce the number of sitting days per week scheduled during the trial (“Additional Request”);

¹⁶ Rule 33 (B) Submission, para. 11.

¹⁷ Rule 33 (B) Submission, para. 18.

¹⁸ Rule 33 (B) Submission, paras. 18–19 (quoting Remuneration Scheme, para. 19(d)(ii)).

¹⁹ Rule 33 (B) Submission, para. 19.

²⁰ Rule 33 (B) Submission, para. 20 (referring to the Response to the Prosecution’s Supplemental Motion for Leave to Amend its 65 *ter* Exhibit List With One Additional Exhibit and Attached Appendix A, submitted on 5 July 2010 and filed on 8 July 2010).

²¹ Rule 33(B) Submission, paras. 24–25.

²² Rule 33 (B) Submission, paras. 22–23.

NOTING the Accused's clarification that he requests the provision of BCS transcripts of the current trial proceedings, as well as transcripts from other proceedings which are admitted as evidence under Rules 92 *bis* and 92 *ter*,²³

NOTING the Accused's contention that "the right to a fair trial can only be understood as the right to be informed promptly and in detail about all the materials used during the trial, to have the free assistance of an interpreter and to have enough time and resources for the preparation of the trial",²⁴

NOTING the Accused's submission, in relation to the use of the resources allocated to the Support Team, that the language assistant referenced by the Registrar "is currently inactive . . . due to the shortage of resources in the very demanding pre-trial phase of the proceedings and the limited total number of hours" allocated to the Support Team,²⁵ and that, at the rate of transcription described by the Registrar, "it would take one person five to six days, or else five team members would have to work one day solely on transcription, neglecting all other duties . . . [which] is certainly not only impracticable in a case with a Level 3 designation (complexity), but would also be irresponsible",²⁶

NOTING the clarification of the Accused that "the Defence has been informed about [the existence of the WCJP] and will be grateful for any such transcript",²⁷

NOTING the reply of the Accused to the submissions of the Prosecution, claiming that "the Prosecution is impermissibly mixing together the issue[s]" of the Accused's right to represent himself as set out in Article 21(4)(d) and his right to a fair trial;²⁸

NOTING that, according to the Accused, the Prosecution's statement that a transcription project of this size would be beyond the capability of a single typist illustrates that the Request is justified, as well that it is not feasible for the Accused to use his own resources to support such a project;²⁹

NOTING the Accused's assertion that, read together, Articles 21(4)(b) and 21(4)(f) justify the Request to "enabl[e] the Defence to engage a person whose sole duty would be to transcribe the

²³ Reply, para. 3.

²⁴ Reply, para. 6.

²⁵ Reply, para. 8.

²⁶ Reply, para. 10.

²⁷ Reply, para. 11.

²⁸ Reply, para. 13.

²⁹ Reply, para. 16.

necessary audio material (with the work of this person not included in the hours at the disposal of the defence team)”;³⁰

NOTING the further request of the Accused to hold hearings on only three days per week,³¹ based on his assertions that (i) he and the Support Team require additional time to prepare for the cross-examination of witnesses testifying pursuant to Rules 92 *bis* and 92 *ter*, who comprise the vast majority of the Prosecution’s witnesses, particularly in light of the Chamber’s direction to provide exact transcript references, as specified in paragraph 9 of the Order Concerning Guidelines on the Presentation of Evidence and Conduct of Parties During Trial, and the problem with transcripts outlined previously;³² (ii) he suffers from sleep deprivation as a result of the nightly monitoring which occurs at the UNDU; and (iii) he and the Support Team require additional time to review the recently-issued judgement in the *Popović et al.* case, as well as a “large quantity of material” disclosed by the Prosecution during June and July;³³

NOTING the Prosecution’s oral response to the Reply, in which the Prosecution submitted that a hearing schedule of only three days per week poses significant logistical challenges in terms of scheduling witness testimony, but that the Prosecution would reiterate its support for a cessation of the nightly monitoring procedure currently in place at the UNDU;³⁴

NOTING Article 21(4) of the Statute, which provides, in relevant part:

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; [. . .]

(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; [. . .]

(f) to have the free assistance of an interpreter if he cannot understand or speak the language used in the International Tribunal;

NOTING that Rule 66(A) of the Rules requires the Prosecutor to provide “within the time-limit prescribed by the Trial Chamber or by the pre-trial Judge . . . copies of all transcripts and written

³⁰ Reply, para. 20.

³¹ Reply, para. 21.

³² Reply, para. 23.

³³ Reply, paras. 25–26.

statements taken in accordance with Rule 92 *bis*, Rule 92 *ter*, and Rule 92 *quater*³⁵ in a language which the Accused understands;

CONSIDERING that, because the Request pertains to the receipt of BCS transcripts of the current, as well as prior, proceedings, the Request does not pertain to the language of disclosure, but to the form in which disclosure occurs, and thus that it does not constitute a request for reconsideration of the 11 December 2007 Oral Decision;

CONSIDERING that the rights of the Accused under Article 21(4) “are fully protected by ensuring that all evidence submitted at trial is provided in his language”,³⁶ but that transcripts are “a particular kind of record of the evidence presented in the course of the present proceedings[;] they are not themselves the evidence”,³⁷

CONSIDERING, therefore, that although the guarantees of Article 21(4) require that the evidence submitted at trial, including the testimony of the current proceedings as well as prior testimony submitted pursuant to Rules 92 *bis*, 92 *ter*, and 92 *quater*, be provided to the Accused in a language which he understands, nothing in the Statute or the Rules requires that such evidence be provided in written form;³⁸

CONSIDERING that although Article 21(4) does not expressly state that an accused is entitled to receive transcripts in a language which he understands, the Appeals Chamber has determined that, when read together, Article 21(4)(a) and Rule 66(A) “create an obligation to provide relevant material in a language which the accused understands sufficiently in order to allow for the effective exercise of his right to conduct his defence”;³⁹

CONSIDERING further that, pursuant to the plain language of Article 21(4)(b), the Accused has the right to adequate time and facilities for the preparation of his defence;

CONSIDERING that the trial chamber which declined to provide the testimony of prior proceedings to the accused in written form did so notwithstanding the fact that such transcriptions might be easier to use, as the accused had not demonstrated that any inefficiency resulting from

³⁴ T. 3970–3972 (17 August 2010).

³⁵ Rule 66(A)(ii).

³⁶ *Prosecutor v. Delalić et al.*, Case No IT-96-21-T, Decision on Defence Application for Forwarding the Documents in the Language of the Accused (“*Delalić et al.* Decision”), 25 September 1996, para. 8.

³⁷ *Prosecutor v. Krajišnik*, Case No. IT-00-39-T, T. 4996 (30 July 2004).

³⁸ *Prosecutor v. Krajišnik*, Case No. IT-00-39-T, T. 4998 (30 July 2004). As explained by the Registrar, the Request would actually entail the transcription of the audio recordings of the BCS interpretation of current and prior proceedings, rather than a translation of the transcripts, which are produced in the working languages of the Tribunal. See Rule 33(B) Submission, para. 21 and *supra* p. 3.

reliance on the audio recordings had compromised his right to a fair trial, or that any exceptional circumstances justified the translation of particular documents;⁴⁰

CONSIDERING that, although using the BCS audio recordings during his preparation for cross-examination may be more “time consuming”, as noted by the Registrar, the Accused has yet to avail himself of a number of resources presently available to him, including (i) the active services of the person listed as the Interpreter of his support team;⁴¹ (ii) the ability to retain up to five staff members pursuant to the recent designation of the case as “Level III”; and (iii) the possibility that certain transcripts from the *Popović et al.* case may be available upon request from the WCJP;

NOTING that the Chamber recently issued an order for the cessation of the nightly monitoring regime which was in place at the UNDU, provided that, in the presence of a witness, the Accused signed a written statement confirming his refusal to be monitored through nightly checks;⁴²

CONSIDERING, that while Article 21(4)(d) does set out the Accused’s fundamental right to represent himself, contrary to the assertion of the Accused, that right is not absolute,⁴³ and, moreover, that the Chamber has a duty to safeguard the Accused’s additional right to both a fair and expeditious trial, and that not only does the Tribunal currently lack the resources to grant the Request, but so doing would also result in a significant delay in the trial schedule;

CONSIDERING therefore that, at this point in time, the Accused has not demonstrated that the additional time required to use the audio recordings of the testimony is so significant as to compromise either his ability to effectively exercise his right to conduct his defence or his right to have adequate time and facilities for the preparation of his defence pursuant to Article 21(4)(b);

CONSIDERING that, in the view of the Chamber, holding hearings on a fourth day each week would fulfil the Chamber’s duty to ensure to a fair and expeditious trial, particularly in light of the fact that the Chamber already deviates from the normal schedule of five sitting days per week;

CONSIDERING that, at this point in time, the Accused has not demonstrated that the additional burden of holding hearings on a fourth day each week is so significant as to compromise either his

³⁹ 28 March 2008 Appeals Chamber Decision, para. 15.

⁴⁰ *Prosecutor v. Krajišnik*, T. 4999 (30 July 2004).

⁴¹ The Chamber notes in this regard that the Accused’s explanation of the Interpreter’s inactive status pertains to the pre-trial phase of the case rather than to the ongoing trial phase.

⁴² Order Regarding the Nightly Monitoring of the Accused, Case No. IT-05-88/2, filed confidentially and *ex parte* on 25 August 2010.

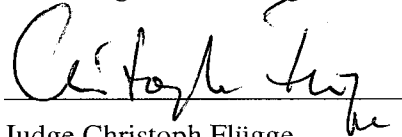
⁴³ *Prosecutor v. Milošević*, Case No. IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber’s Decision on the Assignment of Defence Counsel, 1 November 2004, para. 13; *Prosecutor v. Šešelj*, Case No. IT-03-67-AR73.3, Decision on the Appeal Against the Trial Chamber’s Decision on the Assignment of Counsel, 20 October 2006, paras. 22–23.

ability to effectively exercise his right to conduct his defence or his right to have adequate time and facilities for the preparation of his defence pursuant to Article 21(4)(b);

HEREBY DENIES

- (i) the Request; and
- (ii) the Additional Request, without prejudice.

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



Judge Christoph Flügge

Presiding Judge

Dated this 27th day of August 2010
At The Hague
The Netherlands

[Seal of the Tribunal]