

IT-98-32/1-R77.1 1148
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18 March 2010

**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-98-32/1-R77.1

Date: 18 March 2010

Original: English

IN TRIAL CHAMBER II

Before: Judge Kevin Parker, Presiding
Judge Burton Hall
Judge Howard Morrison

Registrar: Mr John Hocking

Judgement of: 18 March 2010

PROSECUTOR

v.

ZUHDIJA TABAKOVIĆ

PUBLIC

SENTENCING JUDGEMENT

The Office of the Prosecutor:

Mr Paul Rogers
Mr Kyle Wood

Counsel for the Accused:

Mr Steven Powles

I. INTRODUCTION AND PROCEDURAL HISTORY

1. The Indictment charged Zuhdija Tabaković (“Accused”) with six counts of Contempt of the Tribunal punishable under Rule 77(A) and (B) of the Rules of Procedure and Evidence (“Rules”) for his conduct in October 2008.¹ The Accused was alleged to have been given a bribe of 1,000 Euros on or about 20 October 2008 by the then case manager for the Milan Lukić Defence, Jelena Rašić, for signing a false statement to be used in the case of The Prosecutor v. Milan Lukić and Sredoje Lukić (“*Lukić case*”) then being tried by this Tribunal. It was also alleged that at the request of Jelena Rašić, the Accused located two other men who were prepared to sign false statements for the same purpose and to have introduced these men to Jelena Rašić on or about 23 October 2008. False statements were made by these two men. A summary of the material parts of these statements was then included in the Lukić Defence Rule 65*ter* Witness List and filed in this Tribunal and the substance of them was served on the Prosecution.

2. In compliance with an arrest warrant issued on 17 November 2009, the Accused was arrested in Sarajevo, Bosnia and Herzegovina, on 23 November 2009.² Prior to his transfer to the Tribunal, the Accused was detained in Sarajevo and then released subject to conditions imposed by the Court of Bosnia and Herzegovina.³ He remained in Sarajevo under those conditions until his transfer to the United Nations Detention Unit in The Hague on 18 December 2009.⁴ On 22 December 2009, the Accused made his initial appearance before the Tribunal and pleaded “Not Guilty” to all charges.

3. The case was listed to be tried on 15 March 2010.⁵ However, on 11 March 2010, the Prosecution and Counsel for the Accused filed a “Joint Motion for Consideration of Plea Agreement” (“Joint Motion”) whereby the Accused agreed to plead guilty to three counts of Contempt of the Tribunal (Counts 1, 3 and 4 of the Indictment).⁶ The Joint Motion contained, *inter alia*, a detailed declaration by the Accused acknowledging that he entered the plea agreement freely, voluntarily, and unconditionally, and a statement of facts signed by the Accused which forms the factual basis for the Joint Motion.

¹ *Prosecutor v. Zuhdija Tabaković*, Case No. IT-98-32/1-R77.1, Indictment of 30 October 2009. The Indictment against the Accused was confirmed on 17 November 2009, and the public redacted version was issued on 22 December 2009.

² *Prosecutor v. Zuhdija Tabaković*, Case No. IT-98-32/1-R77.1, *Confidential* Warrant of Arrest and Order for Surrender, 17 November 2009; *See also Prosecutor v. Zuhdija Tabaković*, Case No. IT-98-32/1-R77.1, *Confidential* Defence Mitigation, 17 March 2010 (“Defence Mitigation”), para 18.

³ Defence Mitigation, paras 18-20.

⁴ Defence Mitigation, para 20.

⁵ *Prosecutor v. Zuhdija Tabaković*, Case No. IT-98-32/1-R77.1, Scheduling Order, 5 March 2010.

⁶ The public redacted version of the Joint Motion was issued on 15 March 2010 (*Prosecutor v. Zuhdija Tabaković*, Case No. IT-98-32/1-R77.1, Notice of Filing of Public Redacted Plea Agreement, 15 March 2010).

4. When the case came on for hearing on 15 March 2010, the Trial Chamber dealt with the Joint Motion. Having considered the detailed declarations of the Accused and of his Counsel and the factual basis agreed, and having questioned the Accused as to his change of plea, the Trial Chamber, in accordance with Rule 62*bis* of the Rules, determined it was satisfied that the guilty pleas proffered by the Accused were (a) made voluntarily, (b) informed, (c) not equivocal, and (d) based on an adequate factual basis to constitute the crimes charged and evidence the Accused's participation in them.⁷ With the concurrence of the Trial Chamber, the pleas of the Accused to Counts 1, 3 and 4 of the Indictment (Contempt of the Tribunal) were changed to pleas of "Guilty", and the Prosecution moved to withdraw Counts 2, 5 and 6 of the Indictment.⁸ The Trial Chamber entered a finding of guilt on Counts 1, 3 and 4 of the Indictment, and dismissed the remaining charges. The Trial Chamber heard detailed submissions as to penalty and then proceeded to sentence the Accused to three months imprisonment.⁹ In its oral ruling, the Trial Chamber indicated that written reasons for its sentencing would follow. The present judgement records the Trial Chamber's findings and reasoning.

II. RELEVANT FACTS

5. By the agreed factual basis and the submissions in mitigation advanced by his Counsel, the Accused admitted that, on 20 October 2008, in exchange for a sum of 1,000 Euros, he signed a false statement for use by the Milan Lukić Defence in the *Lukić case*.¹⁰ The money and an unsigned statement were provided to him by a former case manager of the Milan Lukić Defence team, Jelena Rašić.¹¹ The Accused admitted that he had not seen or been involved in any of the events referred to in the statement he signed.¹²

6. The Accused also acknowledged that, shortly after signing the false statement dated 20 October 2008, he contacted two men, identified with the pseudonyms X and Y,¹³ who each agreed to sign an additional false statement for use in the Milan Lukić Defence, and introduced these two men to Jelena Rašić on 23 October 2008.¹⁴ On that same day, in exchange for 1,000 Euros each, X and Y respectively signed false statements to be used in the case *Lukić case*.¹⁵ Because of an error related to a date mentioned in the false statements as first signed, and at the

⁷ *Prosecutor v. Zuhdija Tabaković*, Case No. IT-98-32/1-R77.1, Contempt Hearing, 15 March 2010 ("Contempt Hearing"), T 27-30.

⁸ Contempt Hearing, T 23.

⁹ Contempt Hearing, T 31, 71.

¹⁰ Joint Motion, Factual Basis for Plea Agreement, paras 1, 3.

¹¹ Joint Motion, Factual Basis for Plea Agreement, paras 1, 7.

¹² Joint Motion, Factual Basis for Plea Agreement, para 8.

¹³ Joint Motion, paras 12-16, 21; *See Prosecutor v. Zuhdija Tabaković*, Case No. IT-98-32/1-R77.1, Request to Use of Pseudonyms in Public Redacted Version of Plea Agreement, 12 March 2010; *See also* Contempt Hearing, T 22.

¹⁴ Joint Motion, Factual Basis for Plea Agreement, paras 11-15.

request of Jelena Rašić, on 5 December 2008, the three men signed revised false statements with the changed date.¹⁶

7. On 30 December 2008, the Accused voluntarily handed a copy of his signed false statement dated 20 October 2008 to an investigator at the ICTY field office in Sarajevo, Bosnia and Herzegovina.¹⁷ The provision of his false statement to the Prosecution on 30 December 2008 marks the beginning of the Accused's cooperation with the Prosecution which resulted in his participation in eight interviews with the Prosecution, the identification of X and Y and other individuals involved in the events relevant to the Indictment, and the provision of other relevant material.¹⁸

8. The names of the Accused, X and Y were included on the Milan Lukić Defence Rule 65ter List in the *Lukić case*, together with a summary of the issues their evidence would cover, in a filing made to the Trial Chamber on 19 November 2008,¹⁹ and the false statements signed by the Accused, X and Y, as amended on 5 December 2008, were provided to the Prosecution by the Milan Lukić Defence on 20 January 2009. However, on 23 January 2009, the Defence for Milan Lukić filed an application to remove the Accused, X and Y from its Rule 65ter Witness List²⁰ and they did not, in fact, testify for the Defence in the *Lukić case*. Based in part on the information provided by the Accused, the Prosecution then sought and obtained leave to call the Accused and X and Y as rebuttal witnesses.²¹ Y testified for the Prosecution as a rebuttal witness on 3 April 2009. The Accused ultimately did not testify.²²

III. SENTENCING

9. Rule 77 (G) of the Rules provides that the maximum penalty that may be imposed on a person found to be in contempt of the Tribunal shall be a term of imprisonment not exceeding seven years, or a fine not exceeding 100,000 Euros, or both.

10. The Prosecution, in accordance to Rule 62ter(ii) of the Rules, submitted that a single term of imprisonment within the range of four to six months and no fine is appropriate in the present case.²³

¹⁵ Joint Motion, Factual Basis for Plea Agreement, paras 11-15.

¹⁶ Joint Motion, Factual Basis for Plea Agreement, para 16.

¹⁷ Joint Motion, Factual Basis for Plea Agreement, paras 3, 17.

¹⁸ Joint Motion, Factual Basis for Plea Agreement, paras 10, 15, 17-18, 23; Defence Mitigation, Schedule of Tabaković's Conduct and Cooperation with OTP.

¹⁹ *Prosecutor v Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-T, *Confidential* Milan Lukić's Submissions pursuant to 65ter(G) with Confidential Annexes, 19 November 2008.

²⁰ *Prosecutor v Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-T, *Confidential* Milan Lukić's Second Motion to Amend Rule 65ter List, 23 January 2009.

²¹ *Prosecutor v Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-T, *Confidential* Decision on Rebuttal Witnesses, 25 March 2009.

²² *Prosecutor v Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-T, Hearing 3 April 2009, T 6739.

²³ Joint Motion, para 3; Contempt Hearing, T 23.

Counsel for the Accused submitted that a reprimand or a modest fine is appropriate, and urged the Trial Chamber to impose a sentence that would ensure the Accused's immediate release.²⁴

11. In accordance with Article 24(2) of the Statute of this Tribunal and Rule 101(B) of the Rules, in determining the appropriate sentence to be imposed against the Accused, the Trial Chamber is required to take into account *inter alia* such factors as the gravity of the offence, the personal circumstances of the convicted person, and aggravating and mitigating circumstances, if any, including any substantial cooperation with the Prosecutor by the convicted person before or after conviction.

12. In the view of the Trial Chamber, an offence of contempt involving bribery of a potential witness would normally warrant a significant term of imprisonment. In the circumstances of the present case, however, there are powerful mitigating circumstances which, in the Trial Chamber's view weigh heavily in favour of the Accused. First, the guilty pleas themselves. Secondly, after his signing of a false statement and involving two others in the same conduct, the Accused himself appears to have recognized the gravity of what he had done and acted to counter the potential harm of his conduct to the administration of justice. By notifying the Office of the Prosecutor and cooperating with them in a number of ways, the false evidence contemplated in the statements of the Accused and X and Y was not led before the Chamber dealing with the *Lukić case* and, by the evidence of Y, that Chamber was informed of the steps taken to adduce the false evidence. While aspects of the conduct of the Accused, especially when he sought financial advantage when first contacting the Office of the Prosecutor,²⁵ are not to his credit, it is nevertheless clear that, at potential risk to himself, the Accused's conduct was, in the end, responsible and calculated to avoid any risk of a miscarriage of justice.

13. The Trial Chamber is also satisfied that the financial circumstances of the Accused preclude the imposition of a fine appropriate to his conduct. He has a wife and children who remain dependant on him for some financial support. Account has also been taken of a previous conviction of the Accused in Bosnia and Herzegovina in 2003.²⁶

14. The Accused has emphasized his apologies and his remorse for his conduct,²⁷ although the Trial Chamber notes that his conduct in bringing the matter to the attention of the Office of the Prosecutor and his guilty pleas had already served to demonstrate the genuineness of the remorse he felt.

²⁴ Defence Mitigation, para 35; Contempt Hearing, T 64.

²⁵ Joint Motion, Factual Basis for Plea Agreement, para 17.

²⁶ Contempt Hearing, T 46-47 (Private Session).

²⁷ Defence Mitigation, para 10; Contempt Hearing, T 55.

15. The Chamber has had the benefit of a summary of penalties in cases of contempt dealt with in this Tribunal and the International Criminal Tribunal for Rwanda. For the most part the circumstances of these offences differed materially from those of the present case and little guidance could properly be drawn from these earlier cases.

16. At the time of the hearing on 15 March 2009, the Accused had spent 87 days in the custody of the Tribunal and had been detained on the Indictment in Bosnia and Herzegovina for three days. Having regard to all the circumstances, and in particular to the matters more expressly considered in these reasons, and in accordance with Rule 101 of the Rules, the Trial Chamber was persuaded that it should impose a single sentence of imprisonment for three months in respect of the three convictions.

17. The Trial Chamber records that the motion for the provisional release of the Accused pending trial has been rendered moot.²⁸

18. It should also be noted that the Trial Chamber received much assistance from the careful and comprehensive submissions of Counsel for the Prosecution and Counsel for the Accused.

²⁸ *Prosecutor v. Zuhdija Tabaković*, Case No. IT-98-32/1-R77.1, *Confidential* Application for Provisional Release, 4 January 2010.

IV. DISPOSITION

19. For the foregoing reasons, the Trial Chamber, having found Zuhdija Tabaković **GUILTY** on three counts of Contempt of the Tribunal (Counts 1, 3, and 4 of the Indictment) pursuant to Rule 77(A) of the Rules, and having **DISMISSED** Counts 2, 5, and 6 of the Indictment,

SENTENCES Zuhdija Tabaković to a single term of three months of imprisonment;

ORDERS that credit be given pursuant to Rule 101(C) of the Rules for the periods the Accused was detained on the Indictment;

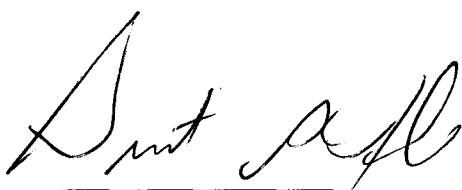
ORDERS that, on completion of his sentence, the Accused be released from custody as soon as the necessary formalities can be completed.

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

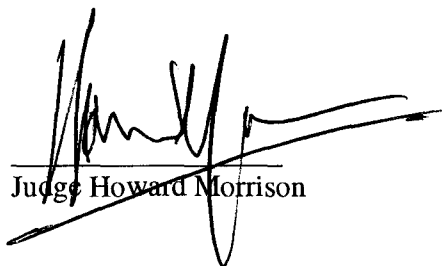
Dated this 18th day of March 2010
At The Hague
The Netherlands



Judge Kevin Parker
Presiding



Judge Burton Hall



Judge Howard Morrison

[Seal of the Tribunal]