

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-05-88/2-T

Date: 13 July 2010

Original: English

THE PRESIDENT OF THE INTERNATIONAL TRIBUNAL

Before: Judge Patrick Robinson, President

Registrar: Mr. John Hocking

Decision: 13 July 2010

THE PROSECUTOR

v.

ZDRAVKO TOLIMIR

CONFIDENTIAL AND EX PARTE

**DECISION ON APPEAL AGAINST REGISTRAR'S 10
FEBRUARY 2010 DECISION**

The Accused:

Mr. Zdravko Tolimir

I, PATRICK ROBINSON, President 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"), render the following decision in relation to the "Appeal Against the Registrar's Decision of 10 February 2010", filed before me in English by Zdravko Tolimir ("Tolimir") on 24 February 2010.¹

I. BACKGROUND

1. On 30 November 2009, Tolimir submitted a request ("30 November 2009 Request") to the Registry to: (1) apply the Defence Travel and DSA Policy², Part II, Section B, to his legal associate Mr. Aleksander Gajić ("Mr. Gajić"), for the trial phase allowing him to receive daily subsistence allowance ("DSA") for days spent in court and for days spent in The Netherlands performing case-related work for at least four hours,³ and (2) to increase the maximum number of remunerable hours per month allotted to his defence team during the trial from 150 hours to 300 hours.⁴

2. In a letter to Tolimir dated 10 February 2010 ("10 February 2010 Decision"), the Registry denied Tolimir's request for the DSA Policy to be applied to his legal associate, reasoning that the Policy does not entitle defence team members of self-represented accused to receive DSA for days spent outside the courtroom. Regarding Tolimir's request for an increase in the monthly allotment of hours for his defence team, the Registry advised that:

[...] your legal associate Mr. Gajić indicated to me that your team preferred to wait for the outcome of a request for review of the Registry's payment policy during trial for persons assisting self-represented accused. This application was filed before the President by another self-represented accused and a decision is awaited. I will therefore [...] revisit your [...] request when brought up again by either your team or after the President's decision is issued.⁵

3. Tolimir subsequently filed the Appeal, in which he requests that I reverse the 10 February 2010 Decision and decide that his legal associate Mr. Gajić, is entitled to DSA not only for days spent in court but also for days spent in The Netherlands working on his case outside the courtroom ("Tolimir's First Request").⁶ Tolimir further submits that the Registry only partially ruled on his 30 November 2009 Request, and asks that I consider the arguments contained in that Request as part of this Appeal.⁷ Although Tolimir does not specifically identify the arguments concerned, it is clear

¹ *Prosecutor v. Zdravko Tolimir*, Case No. IT-05-88/2-PT, Appeal Against the Registrar's Decision of 10 February 2010, 24 February 2010 ("Appeal"). Tolimir submitted the original, B/C/S version of the Appeal to the Registry on 18 February 2010.

² 1 January 2007 ("DSA Policy").

³ Appeal, pp. 6015-6013.

⁴ *Id.*, pp. 6013-6011.

⁵ 10 February 2010 Decision.

⁶ Appeal, para. 2.

⁷ *Id.*, paras 2-3.

from his Appeal that he is referring to his request for an increase in the maximum allocation of hours for his defence team from 150 hours to 300 hours ("Tolimir's Second Request").⁸

4. On 3 March 2010, Tolimir filed before Trial Chamber II ("Trial Chamber") a motion requesting that the Trial Chamber grant Mr. Gajić the right:

[...] after consulting with the Accused, to present legal arguments, make recommendations and raise objections in the case and [...] to appear in the courtroom, address other issues in court during the trial, in particular, cross-examine or examine witnesses.⁹

5. On 4 March 2010, the Prosecution filed a submission concerning the Appeal.¹⁰ On 17 March 2010, the Registrar filed a submission pursuant to Rule 33(B) of the Rules of Procedure and Evidence concerning the Appeal ("First Rule 33(B) Submission").¹¹

6. On 25 March 2010, I issued a decision in which I: (1) determined that the Prosecution has no standing in this matter and that accordingly, the Prosecution Submission would not be considered; (2) stayed Tolimir's Appeal in relation to Tolimir's First Request, pending the Trial Chamber's decision on Tolimir's 3 March 2010 Motion; and (2) requested the Registrar to file a submission pursuant to Rule 33(B) of the Rules of Procedure and Evidence of the Tribunal ("Second Rule 33(B) Submission") by 1 April 2010 in relation to Tolimir's Second Request.¹²

⁸ Appeal, pp. 6013-6011.

⁹ *Prosecutor v. Zdravko Tolimir*, Case No. IT-05-88/2-T, Request to the Trial Chamber, filed confidentially in English on 3 March ("3 March 2010 Motion"), para. 1.

¹⁰ *Prosecutor v. Zdravko Tolimir*, Case No. IT-05-88/2-T, Prosecution Submission Concerning Tolimir's Appeal Against the Registrar's Decision of 10 February 2010, 4 March 2010 ("Prosecution Submission").

¹¹ *Prosecutor v. Zdravko Tolimir*, Case No. IT-05-88/2-T, Registrar's Submission Pursuant to Rule 33 Regarding Zdravko Tolimir's Appeal Against the Registrar's Decision of 10 February 2010, filed confidentially on 17 March 2010.

¹² *Prosecutor v. Zdravko Tolimir*, Case No. IT-05-88/2-T, Decision on Appeal Against Registrar's 10 February 2010 Decision, 25 March 2010 ("25 March 2010 Decision"), paras 7, 8 and 11. See Tolimir's Appeal, pp. 6013-6011. The Registrar subsequently filed three requests for extension of time in which to file the Second Rule 33(B) Submission: (1) *Prosecutor v. Zdravko Tolimir*, Case No. IT-05-88/2-T, Registrar's Request for Extension to File Submission Pursuant to Rule 33 Regarding the President's Decision on Appeal Against Registrar's 10 February 2010 Decision, filed confidentially on 1 April 2010 ("First Request for Extension"). The Acting President granted the First Request for Extension on 6 April 2010. See: *Prosecutor v. Zdravko Tolimir*, Case No. IT-05-88/2-T, Decision on Registrar's Request for Extension of Time, issued confidentially on 6 April 2010. (2) *Prosecutor v. Zdravko Tolimir*, Case No. IT-05-88/2-T, Registrar's Request for a Further Extension to File Submission Pursuant to Rule 33 Regarding the President's Decision on Appeal Against Registrar's 10 February 2010 Decision, filed confidentially on 8 April 2010 ("Second Request for Extension"). The Acting President granted the Second Request for Extension on 9 April 2010. See: *Prosecutor v. Zdravko Tolimir*, Case No. IT-05-88/2-T, Decision on Registrar's Request for Further Extension of Time, issued confidentially on 9 April 2010. (3) *Prosecutor v. Zdravko Tolimir*, Case No. IT-05-88/2-T, Corrigendum to Registrar's Request for a Further Extension to Respond to the Accused's Appeal of Registrar's Decision of 10 February 2010 and Stay, 23 April 2010 ("Third Request for Extension"). On 29 April 2010, I issued a decision in which I, *inter alia*, granted the Third Request for Extension and requested the Registrar to include in the Second Rule 33(B) Submission: (i) a response to Tolimir's Submission; (ii) any response to the Appeal and Tolimir's Submission that was included in the Third Request for Extension and Stay, which the Registrar wished me to consider in my final decision on Tolimir's Appeal; and (iii) a copy of all requests from Tolimir and decisions by the Registry that are relevant to my determination of the arguments raised in the Appeal and Tolimir's Submission. See: *Prosecutor v. Zdravko Tolimir*, Case No. IT-05-88/2-T, Decision on Registrar's Request for Further Extension of Time and Stay", issued confidentially on 29 April 2010, p. 3.

7. On 9 April 2010, Tolimir filed a further submission in which he raises new issues concerning his Appeal.¹³ Tolimir states that in an appeal to the Registry dated 24 February 2010 ("24 February 2010 Appeal") he amended his Second Request asking that the Registry: (1) increase Mr. Gajić's hourly rate of pay from 25 to 71 Euros; (2) allocate Mr. Gajić "150 hours of work per month outside court on top of the working hours in the courtroom"; and (3) permit Tolimir to hire support staff to work under Mr. Gajić for a total of 600 hours per month at a rate of 25 Euros per hour.¹⁴ Tolimir also notes that on 12 February 2010, he submitted a request to the Registry for an additional 195 pre-trial hours for his defence team ("12 February 2010 Request").¹⁵

8. On 28 April 2010, the Trial Chamber issued its decision on Tolimir's 3 March 2010 Motion, in which it granted Mr. Gajić a right of audience limited to:

(i) addressing the Chamber on legal issues that arise during the proceedings, upon a specific request for such by the Accused being granted by the Chamber.

(ii) addressing the Chamber on administrative issues arising out of Mr. Gajić's correspondence with the Prosecution and relating to the conduct of the proceedings.¹⁶

9. On 5 May 2010 the Registrar issued a decision concerning the 30 November 2009 Request, and the 24 February 2010 Appeal ("5 May 2010 Decision"). Regarding the Amended Second Request for an increase in support staff, and the allocation of a total of 600 remunerable hours for the Tolimir Defence Team, the Registry advised Tolimir that the final decision on the remuneration due to his defence team depended on the complexity level assigned to the *Tolimir* Case. The Registry noted that pending submissions by Tolimir to the Registry on the complexity issue, and the Registry's final determination on the matter, remuneration comprising a maximum of 150 hours per month per team member for up to three team members, would be made provisionally available to the Tolimir Defence Team, at the hourly rates set by the Directive on the Assignment of Defence Counsel.¹⁷

10. Regarding the Amended Second Request for an increase in the rate of pay for Mr. Gajić from 25 Euros per hour to 71 Euros per hour, the Registry noted that: (1) pursuant to Annex I of the Directive, the rate of remuneration for legal associates with ten or more years of experience is 25 Euros per hour, and (2) the rights of audience granted by the Trial Chamber in the 28 April 2010

¹³ *Prosecutor v. Zdravko Tolimir*, Case No. IT-05-88/2-T, Submission by Zdravko Tolimir Appealing to the President to Urgently Issue a Decision, filed confidentially in English on 9 April 2010 ("Tolimir's Submission"). Tolimir filed the original, B/C/S version of the Submission on 6 April 2010.

¹⁴ Tolimir's Submission, paras 2-5.

¹⁵ *Id.*, para. 6.

¹⁶ *Prosecutor v. Zdravko Tolimir*, Case No. IT-05-88/2-T, Decision on Accused's Request to the Trial Chamber Concerning Assistance of His Legal Advisor, issued confidentially on 28 April 2010 ("28 April 2010 Decision"), p. 11.

¹⁷ 5 May 2010 Decision, p. 2. Directive on the Assignment of Defence Counsel, IT/73/REV.11 ("Directive").

Decision were “very limited”.¹⁸ The Registry thereby determined that there was “no basis within the Trial Chamber’s 28 April 2010 [decision] to justify payment to Mr. Gajić at 71 Euros per hour, the rate applicable to co-counsel”.¹⁹ The Registry further determined that Mr. Gajić’s qualifications failed to meet those of co-counsel practicing before the Tribunal, and that consequently, “Mr. Gajić shall continue to be remunerated under the gross hourly rates applicable to legal associates under the Remuneration Scheme and Annex I of the Directive”.²⁰

11. With regard to Tolimir’s First Request that Mr. Gajić receive DSA for defence-related work performed in The Netherlands on non-sitting days, the Registry stated that based, *inter alia*, on the limited right of audience granted in the 28 April 2010 Decision, and its resulting impact on Mr. Gajić’s need to remain in The Netherlands on non-court days, Mr. Gajić would be permitted to claim DSA “for each day spent in the Hague on days spent attending court hearing and on days in which at least four hours of reasonable and necessary work was performed”.²¹ Regarding the 12 February 2010 Request for an additional 195 pre-trial hours, the Registry stated that following a consultation between the Registry and the Trial Chamber “an increase of 319.5 hours” was granted by the Registry in a letter to Tolimir dated 9 April 2010.²²

12. On 6 May 2010, the Registrar filed the Second Rule 33(B) Submission.²³ On 7 May 2010, noting that a response from Tolimir to the Second Rule 33(B) Submission would facilitate the final determination of the Appeal and Tolimir’s Submission, the Acting President ordered Tolimir to file a response to the Rule 33(B) Submission within one week from the date that Tolimir received the B/C/S translation of both the Rule 33(B) Submission and the Acting President’s order.²⁴ Tolimir filed his reply to the Second Rule 33(B) Submission on 28 May 2010.²⁵

13. On 7 July 2010, the Registry filed a submission providing new information concerning Tolimir’s Appeal.²⁶

¹⁸ 5 May 2010 Decision, p. 2.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*, p. 3.

²² *Id.*, p. 1. See also, 5 May 2010 Decision, footnote 2.

²³ *Prosecutor v. Zdravko Tolimir*, Case No. IT-05-88/2-T, Registrar’s Submission Pursuant to Rule 33 Regarding Zdravko Tolimir’s Appeal Against the Registrar’s Decision of 10 February 2010, filed confidentially and *ex parte* on 6 May 2010 (“Second Rule 33(B) Submission”).

²⁴ *Prosecutor v. Zdravko Tolimir*, Case No. IT-05-88/2-T, Order to Respond to Registrar’s Submission Pursuant to Rule 33(B) of the Rules, issued confidentially on 7 May 2010, p. 2.

²⁵ *Prosecutor v. Zdravko Tolimir*, Case No. IT-05-88/2-T, Reply to the Registrar’s Submission of 6 May 2010, filed confidentially and *ex parte* in English on 28 May 2010 (“Reply to Second Rule 33(B) Submission”).

²⁶ *Prosecutor v. Zdravko Tolimir*, Case No. IT-05-88/2-T, Registrar’s Submission of New Information Regarding Zdravko Tolimir’s Appeal Against the Registrar’s Decision of 10 February 2010, filed confidentially and *ex parte* on 7 July 2010 (“Registry Submission of 7 July 2010”).

II. SUBMISSIONS

A. Appeal

14. As noted above, the Appeal contains two requests. Tolimir's First Request asks that I reverse the 10 February 2010 Decision and decide that his legal associate, Mr. Gajić, is entitled to DSA payments for days spent in court and for days spent conducting defence-related work in The Netherlands on non-court days.²⁷ Tolimir's Second Request asks that I order the Registrar to increase the maximum number of remunerable hours per month allotted to his defence team for the trial phase from 150 hours to 300 hours.²⁸

15. With regard to Tolimir's First Request, it is submitted, *inter alia*, that as Tolimir's legal associate, Mr. Gajić performs numerous functions critical to the conduct of the defence case, which require him to perform defence-related work in The Netherlands, on days when there are no scheduled court sittings.²⁹ It is argued that "the success and quality of work in the courtroom depends on out-of-court preparations, which imply not only sitting days but primarily non-sitting days".³⁰ Tolimir thus requests that I "decide that a legal adviser be given daily subsistence allowance not only for sitting days but also for non-sitting days, during which he or she is engaged in necessary activities and preparing for trial for a minimum of six hours".³¹

16. With regard to Tolimir's Second Request, it is submitted, *inter alia*, that an increase in the maximum allotment of remunerable hours for the entire Tolimir Defence Team from 150 hours per month to 300 hours per month is by necessitated the complexity of the *Tolimir Case*.³² It is argued that the complexity of the *Tolimir Case* is attributable, *inter alia*, to the following factors: (1) "the accused was a member of a military leadership occupying very high position [*sic*] in the VRS", (2) the fact that the case involves numerous crime scenes, (3) the gravity of the charges in the case and the complex legal and factual issues resulting therefrom, (4) the number of witnesses, and (5) the "enormous quantum of documents".³³

²⁷ Appeal, paras 2 and 10.

²⁸ *Id.*, pp. 6013-6011.

²⁹ *Id.*, paras 4-8. Tolimir states at paras 4-8 of the Appeal, that defence-related tasks requiring Mr. Gajić's presence in The Hague on non-sitting days include: document disclosures, the drafting of submissions, preparation for witness examinations and the processing of disclosed documents require extensive out-of-court preparation on the part of his legal advisor.

³⁰ Appeal, para. 4.

³¹ *Id.*, para. 10.

³² *Id.*, p. 6013. *Prosecutor v. Zdravko Tolimir*, Case No. IT-05-88/2-T ("*Tolimir Case*").

³³ Appeal, p. 6013. See also Appeal, pp. 6012-6011.

B. Tolimir's Submission

17. As noted above, Tolimir's Submission refers to the 24 February 2010 Appeal, containing his Amended Second Request asking that the Registry: (1) increase the hourly rate of remuneration for Mr. Gajić from 25 Euros to 71 Euros, (2) "approve payment of 150 hours of work per month outside the court on top of the working hours in the courtroom", and (3) permit Tolimir to hire additional support staff to work under the supervision of Mr. Gajić "who would be paid for a total of 600 working hours per month (each a maximum of 150 hours) at the rate of 25 Euros per hour".³⁴ Tolimir's Submission also notes the 12 February 2010 Request to the Registry for an additional 195 remunerable hours for the pre-trial phase.³⁵

18. Tolimir's Submission repeats the arguments made in support of the Amended Second Request in the 24 February 2010 Appeal, specifically: (1) the complexity of the legal issues involved in the *Tolimir Case*,³⁶ (2) the large number and volume of materials in the case, the analysis of which could not, as a result, be completed during the pre-trial phase of the case; and (3) the numerous responsibilities of Mr. Gajić as Tolimir's legal associate, which include: (a) the management of the defence office in The Netherlands, "which presupposes enormous expenses", (b) the supervision of all communications between the Tolimir Defence Team and the various organs of the Tribunal, (c) the supervision of any legal assistants retained to the Tolimir Defence Team, (d) the analysis of all materials related to the case, (e) the drafting of all defence submissions, (f) the formulation of the defence's legal strategy, and (g) the need to personally consult with Tolimir on a regular basis.³⁷

C. Second Rule 33(B) Submission

19. The Registry states that a number of the requests submitted in the Appeal and Tolimir's Submission are not properly before me for determination.³⁸ In this regard, the Registry notes Tolimir's First Request for the payment of DSA to Mr. Gajić, and submits that subsequent to the 28 April 2010 Decision granting limited rights of audience to Mr. Gajić, the Registry revisited its 10 February 2010 Decision denying the request, and granted the DSA in its 5 May 2010 Decision.³⁹ The Registrar thus submits that "although the 5 May 2010 decision [...] is not technically before the

³⁴ Tolimir's Submission, paras 3-5.

³⁵ *Id.*, para. 6.

³⁶ Tolimir's Submission, p. 3. Regarding the complexity level of the *Tolimir Case*, it is submitted at p. 3 of Tolimir's Submission, that the *Tolimir Case* is comparable to the case of *Prosecutor v. Popović, et al.* "in which every individual was treated as a case of extreme complexity".

³⁷ Tolimir's Submission, p. 3.

³⁸ Second Rule 33(B) Submission, para. 23.

President for review, as the relief sought by the Accused with respect to DSA for Mr. Gajić has been granted, this issue is now resolved".⁴⁰ The Registry also states that the 12 February 2010 Request to the Registry for an additional 195 remunerable hours for the pre-trial phase was granted on 9 April 2010.⁴¹

20. With regard to the Amended Second Request for an increase in support staff and the allocation of 600 hours per month to the Tolimir Defence Team, the Registrar states that pursuant to the Revised Remuneration Scheme,⁴² cases ranked at a complexity level of two are allocated a maximum of three support staff, each entitled to a maximum of 150 remunerable hours per month, resulting in a maximum allocation of 450 hours per month to the entire defence team.⁴³ It is submitted that in making a final determination on the complexity level of a particular case, the Registry considers the written submissions of an accused on the issue.⁴⁴ The Registrar notes that in the 5 May 2010 Decision, the Registry informed Tolimir that pending his written submissions on the complexity of the *Tolimir* Case, the case would be provisionally ranked at Level Two, with the resources prescribed under the Revised Remuneration Scheme for Level Two cases being allocated accordingly.⁴⁵ The Registrar further argues that:

Should the case remain ranked at level two following a submission by the Accused, if the Accused is dissatisfied with the number of support staff to which he is eligible [...] the Registrar is authorised to increase the maximum number of support staff (while maintaining the level of complexity) if the Accused demonstrates the circumstances underlying the need for such increase.⁴⁶

21. With regard to the Amended Second Request for the payment to Mr. Gajić of all hearing hours in addition to the 150 hours allocated per month, the Registry notes that pursuant to the Former Remuneration Scheme, the entire defence team of a self-represented accused was required to share a set allotment of 150 hours per month for the trial phase, plus the payment of all hearing hours to the members of the defence team granted a leave to attend court sittings.⁴⁷ The Registry notes however that the Revised Remuneration Scheme allocates 150 hours per month to each defence team member inclusive of all hearing hours.⁴⁸ The Registrar submits that this allotment is based on "past practice for legal assistants" working on behalf of both represented and self-

³⁹ *Id.*, paras 52-54. The Registry specified, at paras 52-54 of the Second Registry Submission, that in view of the limited rights of audience granted to Mr. Gajić in the 28 April 2010 Decision, the Registry granted Mr. Gajić the requested DSA "in order to facilitate the administration of justice, and in the interests of fairness".

⁴⁰ Second Rule 33(B) Submission, para. 55.

⁴¹ *Id.*, para. 23.

⁴² Remuneration Scheme for Persons Assisting Indigent Self-Represented Accused, 1 April 2010 ("Revised Remuneration Scheme").

⁴³ Second Rule 33(B) Submission, para. 29.

⁴⁴ *Id.*, paras 27-28.

⁴⁵ *Id.*, para. 30.

⁴⁶ *Id.*, para. 31.

⁴⁷ *Id.*, para. 35.

represented accused, that it “approximates a full time working month” and “is both reasonable and appropriate” remuneration.⁴⁹ It is further submitted, *inter alia*, that should an increased allocation to Mr. Gajić be considered necessary, Tolimir may submit a request to the Registry demonstrating the circumstances necessitating an increase.⁵⁰

22. Regarding the Amended Second Request that the hourly rate of remuneration to Mr. Gajić be increased from 25 Euros to 71 Euros, the Registrar submits, *inter alia*, that the experience, qualifications, role and functions of a support staff member, are the determining factors in assessing the rate of remuneration due.⁵¹ The Registrar argues that in view of the limited nature of the right of audience granted to Mr. Gajić in the 28 April 2010 Decision, and “the fact that a preliminary determination reveals that Mr. Gajić would not be qualified to serve as counsel or co-counsel before the Tribunal”, the 5 May 2010 Decision denying the request for the payment of Mr. Gajić at the rate ordinarily prescribed for co-counsel under Annex I of the Directive, was reasonable.⁵²

D. Reply to Second Rule 33(B) Submission

23. In the Reply to the Second Rule 33(B) Submission, Tolimir states that in a submission to the Registry dated 18 May 2010 concerning the complexity level of the *Tolimir* Case, he indicated that the *Tolimir* Case warranted the ranking and resources of a Level Three case.⁵³ Regarding the Amended Second Request for an increase in the number of hours per month allocated to the Tolimir Defence Team to 600 hours per month, and an increase in the number of support staff, the Reply to the Second Rule 33(B) Submission repeats in substance the supporting factors outlined in Tolimir’s Submission.⁵⁴

24. With regard to the Amended Second Request that Mr. Gajić’s hearing hours be paid in addition to the 150 hours allocated to him per month, Tolimir submits that 150 hours per month is inadequate given the demands of trial preparation.⁵⁵ Tolimir further submits, *inter alia*, that “[a]n allotment of 150 hours plus hearing hours will greatly reduce the need to constantly address the Registrar, thereby saving the resources of both the Defence and the Registry”.⁵⁶

25. Regarding Tolimir’s Amended Second Request that the rate of remuneration for Mr. Gajić be increased from 25 Euros to 71 Euros per hour, Tolimir submits, *inter alia*, that Mr. Gajić

⁴⁸ *Id.*, para. 36.

⁴⁹ *Id.*, para. 37.

⁵⁰ *Id.*, paras 39-40.

⁵¹ *Id.*, para. 50.

⁵² *Id.*, paras 45-47.

⁵³ Reply to Second Rule 33(B) Submission, paras 9-10.

⁵⁴ *Id.*, paras 11-15. See Tolimir’s Submission, p. 3. See also Appeal, pp. 6011-6013.

⁵⁵ Reply to Second Rule 33(B) Submission, paras 16-18.

possesses the experience and qualifications, and performs numerous functions and responsibilities in facilitating the conduct of Tolimir's defence, which entitle him to payment at the rate of 71 Euros per hour.⁵⁷ Tolimir also submits that the functions performed by Mr. Gajić are akin to those undertaken by the legal associate to Radovan Karadžić, to whom I granted remuneration at the rate of 71 Euros.⁵⁸ It is thereby submitted that "[t]he principle of fairness requires that persons undertaking the same or essentially similar work [...] be adequately reimbursed considering the nature of the work they are discharging and the responsibilities they hold".⁵⁹

26. With regard to Tolimir's First Request for payment of DSA to Mr. Gajić, Tolimir submits that in granting DSA to Mr. Gajić for days spent in court and for non-sitting days in which Mr. Gajić performs more than four hours of defence-related work in The Netherlands, the 5 May 2010 Decision only partially resolved the issue. Tolimir states, *inter alia*, that while the 5 May 2010 Decision granted DSA to Mr. Gajić for the period following the 28 April 2010 Decision, it failed to provide Mr. Gajić with DSA for the period from the start of trial in the *Tolimir* Case to the 28 April 2010 Decision. Tolimir thus requests that I grant DSA to Mr. Gajić for the period commencing from the start of trial to 28 April 2010.⁶⁰

E. Registry Submission of 7 July 2010

27. In the Registry Submission of 7 July 2010, the Registry stated, *inter alia*, that in a decision issued on 5 July 2010 ("5 July 2010 Decision") it upgraded the complexity level of the *Tolimir* Case to Level Three, determined that Tolimir is entitled to retain two additional team members, and allocated pursuant to the Revised Remuneration Scheme "a maximum of 150 hours per month" per team member "for a total of five team members and a total maximum allotment of 750 hours per month".⁶¹ The Registry further noted that the rate of remuneration for each member of the Tolimir Defence Team is subject to Annex I of the Directive.⁶²

⁵⁶ *Id.*, para. 19.

⁵⁷ *Id.*, paras 28-38.

⁵⁸ *Id.*, para. 23. See *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Request for Review of Decision on OLAD Decision on Trial Phase Remuneration, 19 February 2010 ("*Karadžić* Decision of 19 February 2010").

⁵⁹ *Id.*, para. 23.

⁶⁰ *Id.*, paras 40-42.

⁶¹ Registry Submission of 7 July 2010, para. 10. See also 5 July 2010 Decision, p. 1.

⁶² *Id.*

III. APPLICABLE LAW

A. Revised Remuneration Scheme

28. The Revised Remuneration Scheme provides under paragraph 2, that the Registry shall provide remuneration for persons supporting a self represented accused in the following capacities: (a) legal associate, (b) case manager, (c) investigator, and (d) language assistant. The remuneration for these persons is subject to the “qualification requirements” defined under Revised Remuneration Scheme, and to “the allocation of hours determined per stage of the proceedings”.⁶³ Paragraph 3 provides that:

The maximum allotment of remunerable hours and the maximum number of remunerated defence team members shall be dependent on the level of complexity attributed to the case for each stage of the proceedings [...]

Paragraph 7 states, *inter alia*, that the level of complexity is “determined by the Registrar for each stage of the proceedings, after reviewing a written submission of the accused regarding the matter and consulting with the Chamber seized of the case”.⁶⁴

29. The Revised Remuneration Scheme further provides under paragraph 12 that:

For the trial stage of the proceedings, the Remuneration Scheme is based on a maximum allocation of hours to the accused’s defence team per team member per month for the duration of the stage, depending on the level of complexity, as follows:

- i) Complexity Level One: A maximum of 150 hours per month per team member for up to two (2) team members, for a total maximum of up to 300 hours per month.
- ii) Complexity Level Two: A maximum of 150 hours per month per team member for up to three (3) team members, for a total maximum of up to 450 hours per month.
- iii) Complexity Level Three: A maximum of 150 hours per month per team member for up to four (5) team members, for a total maximum of 750 hours per month.

The maximum allocation of hours prescribed, includes “all hearing hours for one defence team member (provided the accused has obtained leave from the Chamber for that person to attend the hearings)”.⁶⁵ Paragraph 6 provides that “the defence team members and experts assigned by the

⁶³ Revised Remuneration Scheme, para. 2.

⁶⁴ Paragraph 7 of the Revised Remuneration Scheme further provides that the following factors, *inter alia*, are relevant in determining the complexity of a particular case: (1) “the position of the accused within the political/military hierarchy”, (2) “the number and nature of counts in the indictment”, (3) “whether the case raises any novel issues”, (4) “whether the case involves multiple municipalities (geographical scope of case)”, (5) “the complexity of legal and factual arguments involved”, and (6) “the number and type of witnesses and documents involved”. Paragraph 9 provides that the prescribed complexity level case rankings are as follows: “Level 1 (difficult), Level 2 (very difficult), or Level 3 (extremely difficult/leadership)”.

⁶⁵ Revised Remuneration Scheme, para. 10.

Registrar shall be remunerated at the hourly rates for support staff and experts set out in Annex I to the Directive”.

30. Pursuant to paragraph 26 of the Revised Remuneration Scheme “[a]ny disputes over remuneration or reimbursement of expenses arising from the application of this Remuneration Scheme shall be settled in accordance with Article 31 of the Directive”.

B. Directive on the Assignment of Defence Counsel

31. Annex I of the Directive provides that legal assistants and investigators with 0-4 years’ professional experience shall be remunerated at a gross hourly rate of 15 Euros per hour; that those with 5-9 years’ professional experience are to be remunerated at a gross hourly rate of 20 Euros per hour, and that persons having 10 years’ or more professional experience shall be remunerated at a gross rate of 25 Euros per hour. Annex I further provides that the fixed gross hourly rate for Co-counsel amounts to 71 Euros per hour. The hourly rate of 71 Euros is also applicable in respect of Lead Counsel, Counsel and Experts having up to nine years’ professional experience.

32. Article 31(C) of the Directive provides that where a dispute arises concerning a sum in excess of 4,999 Euros:

[...] an aggrieved party may file a request for review with the Registrar, who shall refer the matter to the President for his determination. Before making a determination the President shall request submissions from the aggrieved party and the respondent. The President’s determination shall be final and binding upon the parties.

C. Defence Travel and DSA Policy

33. Section (B) paragraph (a) of the DSA Policy provides in relevant part as follows:

- 1) During trial, DSA is paid for days spent on trial-related work in The Netherlands. Counsel is not entitled to receive DSA for days spent outside the Netherlands on private trips or days spent in the Netherlands on which Counsel did not work at least four hours on case-related matters.
- 2) At the end of each month during the Trial Stage, lead and co-counsel whose place of residence is not The Netherlands, are entitled to receive a General DSA allotment of 22 days, subject to paragraphs 5 to 8 of this sub-section.
- 3) The **first** General Allotment shall be paid automatically at the start of trial.
- 4) The **second and subsequent** General Allotments shall be paid upon submission by counsel of a duly filled ‘Trial DSA Form’ (see Annex 3). On the Trial DSA Form, lead and co-counsel shall claim a number of days of DSA for the preceding month and account for those days by declaring, for each day, that they either:
 - a. attended or otherwise followed court proceedings; or
 - b. worked on case-related matters in The Netherlands for a minimum of four hours, including, but not limited to preparing written submissions,

preparing for the examination of witnesses, meetings with the Prosecution, meetings with counsel of co-accused in the case, etc. Counsel shall provide sufficient detail on the work performed. [...]

Section (B) paragraph (a)(9) provides that review and appeal of decisions made pursuant to section (B) paragraphs (a)(4) to (a)(8) shall be made pursuant to Article 31 of the Directive.

IV. STANDARD OF REVIEW

34. The following standard has been set for the review of administrative decisions 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 judgement 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.⁶⁶

Accordingly, an administrative decision may be quashed if the Registrar:

- (a) failed to comply with the legal requirements of the Directive, or
- (b) failed to observe any basic rules of natural justice or to act with procedural fairness towards the person affected by the decision, or
- (c) took into account irrelevant material or failed to take into account relevant material, or
- (d) reached a conclusion which no sensible person who has properly applied his mind to the issue could have reached (the "unreasonableness" test).⁶⁷

35. 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".⁶⁸ The onus of persuasion lies on the party challenging the administrative decision to show that: (1) an error of the nature enumerated above has occurred, and (2) that such an error has significantly affected the administrative decision to his detriment. An administrative

⁶⁶ *Prosecutor v. Miroslav Kvočka et al*, Case No. IT-98-30/I-A, Decision on Review of Registrar's Decision to Withdraw Legal Aid from Zoran Žigić, 7 February 2003 ("Žigić Decision"), para. 13. See also *Karadžić* Decision of 19 February 2010, para. 9; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Appeal of OLAD Decision in Relation to Additional Pre-Trial Funds, 17 December 2009 ("Karadžić Decision of 17 December 2009"), para. 18; *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 ("Karadžić Appeal Decision"), para. 10; *Prosecutor v. Vesselin Šljivančanin*, Case No. IT-95-13/1-PT, Decision on Assignment of Defence Counsel, 20 August 2003 ("Šljivančanin Decision"), para. 22.

⁶⁷ *Žigić* Decision, para. 13. See also *Karadžić* Decision of 19 February 2010, para. 9; *Karadžić* Decision of 17 December 2009, para. 18; *Karadžić* Appeal Decision, para. 10; *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-A, Decision on Krajišnik Request and on Prosecution Motion, 11 September 2007 ("Krajišnik Decision"), para. 30; *Šljivančanin* Decision, para. 22.

⁶⁸ *Žigić* Decision, para. 13. See also *Karadžić* Decision of 19 February 2010, para. 10; *Karadžić* Decision of 17 December 2009, para. 18; *Karadžić* Appeal Decision, para. 10; *Krajišnik* Decision, para. 30.

decision may only be quashed when both elements are shown.⁶⁹ Furthermore, in legal aid cases “[i]t is clear, from the implicit restriction that only the Registrar may determine the *extent* to which the accused has the means partially to remunerate counsel, that the power of the Chamber to substitute its own decision for that of the Registrar is limited”.⁷⁰

V. DISCUSSION

A. Outstanding Issues

36. The Registrar states that on 9 April 2010, the Registry granted Tolimir’s 12 February 2010 Request for an additional 195 pre-trial hours.⁷¹ As Tolimir does not contest this statement in his Reply to the Second Rule 33(B) Submission, I consider the issue resolved, and dismiss it as moot.

37. Regarding Tolimir’s Amended Second Request that he “be permitted to hire individuals to work under the supervision of Aleksander Gajić [...] who would be paid for a total of 600 working hours per month (each a maximum of 150 hours)”,⁷² I note that in its 5 July 2010 Decision, the Registry upgraded the complexity level of the *Tolimir* Case to Level Three. I also note that Tolimir “is now entitled to assign two additional team members [...] to be remunerated up to a maximum of 150 hours per month each, for a total of five team members and a total maximum allotment of 750 hours per month”.⁷³ I thus consider this aspect of Tolimir’s Amended Second Request resolved, and therefore dismiss it as moot.

38. The outstanding issues in the present matter are therefore as follows: (1) the Amended Second Request that the hourly rate of remuneration for Mr. Gajić be increased from 25 Euros per hour to 71 Euros per hour (“Hourly Rate Request”); (2) the Amended Second Request that Mr. Gajić’s hearing hours be paid in addition to, and not as part of the 150 remunerable hours allocated to him per month (“Hearing Hours Request”); and (3) Tolimir’s request for the payment of DSA to Mr. Gajić, for defence-related work performed in The Netherlands in excess of four hours on non-trial days, from the start of the trial in the *Tolimir* Case to 28 April 2010 (“Retroactive DSA Request”).

39. Regarding the Hourly Rate and Hearing Hours Requests, I note that: (1) both Requests were presented to the Registry for the first time in the 24 February 2010 Appeal; and (2) the Registry

⁶⁹ *Žigić* Decision, para. 14. See also *Karadžić* Decision of 19 February 2010, para. 10; *Karadžić* Decision of 17 December 2009, para. 18; *Karadžić* Appeal Decision, para. 10.

⁷⁰ *Žigić* Decision, para. 14. See also *Karadžić* Decision of 19 February 2010, para. 10; *Karadžić* Decision of 17 December 2009, para. 18.

⁷¹ Second Rule 33(B) Submission, para. 23 and 5 May 2010 Decision, p. 1, footnote 2.

⁷² Tolimir’s Submission, para. 5.

issued a decision on both Requests, *inter alia*, in the 5 May 2010 Decision. Both Requests were therefore the subjects of a first instance decision by the Registry issued subsequent to the Appeal and Tolimir's Submission. Thus, the 5 May 2010 Decision, and the Hourly Rate and Hearing Hours Requests which it addresses, are not strictly speaking before me for review. I note however, that in submissions post-dating the 5 May 2010 Decision, both parties presented detailed arguments on the Hourly Rate and Hearing Hours Requests.⁷⁴ Thus, in lieu of requiring Tolimir to file a fresh request for review on these issues, I consider it in the interests of judicial economy for both Requests to be addressed in the instant decision.

B. Hourly Rate Request

40. Relevant to Tolimir's Hourly Rate Request, is the standard articulated in the *Krajišnik* Appeal Decision for the assessment of remuneration for the legal associates of self-represented accused:

To the extent that the Registry requires or encourages indigent self-representing accused to coordinate their defences through designated legal associates, it is appropriate for the Tribunal to provide some funding for such associates. Such funding should not be comparable to that paid to counsel for represented accused (particularly since work such as the drafting of written filings should be considered the responsibility of the self-representing accused), but nonetheless should adequately reimburse the legal associates for their coordinating work and for related legal consultation.⁷⁵

Also significant is the statement in the *Karadžić* Appeal Decision that:

While the *Krajišnik* Appeal Decision does not contemplate the provision of legal consultation by a legal associate, it makes clear that this is not to be equated with the comprehensive work of counsel which is to be undertaken by the accused himself. The mere fact that a legal associate may provide legal consultation does not necessarily imply that he or she will undertake the functions and tasks for which counsel is normally responsible. Indeed, much of the work undertaken by legal assistants in a regular defence team, such as researching and preparing memoranda on legal issues, could fall within the meaning of legal consultation yet their role is to support and assist the assigned counsel.⁷⁶

The Appeals Chamber further noted that:

[...] experience alone does not determine the rate of pay; the functions and tasks undertaken are also important as is the level of responsibility assumed. For example, the Appeals Chamber notes that the Directive on the Assignment of Counsel contemplates the possibility of legal assistants with 10 years or more experience. A legal assistant with such experience could thus be considered to have comparable experience to counsel but is not paid at the same rate of pay as counsel because he or she fulfils a different function on the defence team.⁷⁷

⁷³ Registry Submission of 7 July 2010, para. 10. See also 5 July 2010 Decision, p. 1.

⁷⁴ See Second Rule 33(B) Submission, paras 34-50. See also Reply to Second Rule 33(B) Submission, paras 16-39.

⁷⁵ *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-A, Decision on Krajišnik Request and on Prosecution Motion, 11 September 2007 ("*Krajišnik* Appeal Decision"), para. 42.

⁷⁶ *Karadžić* Appeal Decision, para. 16.

⁷⁷ *Id.*, para. 18.

41. I note the Registry's finding in the 5 May 2010 Decision that Mr. Gajić is ill qualified to be remunerated at the rate of 71 Euros per hour, the rate prescribed for co-counsel under Annex I of the Directive, as he "has not yet applied to the Serbian Bar, has not applied for full membership with the Association of Defence Counsel, and has not applied as counsel under Rule 45 of the Directive".⁷⁸ I also note the Registry's finding that the limited nature of the right of audience granted to Mr. Gajić, also precluded him from the rate of remuneration normally prescribed for co-counsel.⁷⁹

42. Of significance however is the fact that the Trial Chamber's 28 April 2010 Decision granted a right of audience to Mr. Gajić which, though subject to limitations, amplified his role beyond that of "coordinating work" and providing "related legal consultation", which ordinarily characterises the function of a legal associate. Thus, the practical effect of the 28 April 2010 Decision, is that Mr. Gajić has been formally assigned a higher level of responsibility by the Trial Chamber, which more closely resembles that of co-counsel. Furthermore, in so doing, the Trial Chamber stated that:

The Chamber considers that on the basis of his qualifications, particularly his teaching experience in international law and the institutional knowledge that he has gained from working in this case as legal advisor for approximately two years, the assistance of Mr. Gajić in the courtroom to address specific legal issues, as granted by the Trial Chamber in the *Karadžić* Case to legal advisor Mr. Robinson, would be in the interests of justice.⁸⁰

I therefore consider that in its 5 May 2010 Decision, the Registry failed to reasonably factor these considerations into account. Thus, in view of the 28 April 2010 Decision, and given that in determining the rate of remuneration, "the functions and tasks undertaken are also important as is the level of responsibility assumed",⁸¹ I consider 71 Euros per hour a reasonable rate of remuneration for Mr. Gajić.

C. Hearing Hours Request

43. Regarding the Hearing Hours Request, I note paragraph 3.3(b) of the Former Remuneration Scheme which allotted:

A maximum of 150 out-of-court preparation hours for the entire defence team per month for the duration of the trial, plus all hearing hours for up to two defence team members, so long as they are given leave by the Chamber to attend the hearings.

⁷⁸ 5 May 2010 Decision, p. 2. See also *Prosecutor v. Zdravko Tolimir*, Case No. IT-05-88/2-T, Registrar's Submission Pursuant to Rule 33 Regarding Zdravko Tolimir's Request for the Trial Chamber, filed confidentially on 10 March 2010, paras 16-28. See also *Prosecutor v. Zdravko Tolimir*, Case No. IT-05-88/2-T, Registrar's Updated Submission Pursuant to Rule 33 on the Assessment of the Qualifications of Mr. Alexander Gajić Regarding Zdravko Tolimir's Request for the Trial Chamber, filed confidentially on 16 March 2010, paras 18-31.

⁷⁹ 5 May 2010 Decision, p. 2.

⁸⁰ 28 April 2010 Decision, para. 24.

⁸¹ *Karadžić* Appeal Decision, para. 18.

Under the Former Remuneration Scheme the Registry was required to “provide remuneration for up to four persons” in the capacities of legal associate, case manager, investigator, and language assistant.⁸² With a total prescribed allotment of 150 out-of-court hours per month for the entire defence team, each of the four team members was entitled to receive 37.5 out-of-court preparation hours per month. An allotment of “all hearing hours” was further prescribed under the former Scheme, in addition to the 37.5 out-of-court hours per month, for two members authorised to attend court sittings. Under the Revised Remuneration Scheme however, each member of the defence team of a self-represented accused is now entitled to a monthly allotment of 150 remunerable hours, with the hearing hours for one team member authorised to attend court sittings, being included in the 150 hours per month allotted to that individual.

44. Tolimir submits that “the Registrar does not take into consideration the plain fact that preparation for reduction of requests is a process and that as a rule [...] 150 hours per month proves to be insufficient, and depends of the pace of the trial”.⁸³ However, I consider that this submission fails to adequately demonstrate that the allotment to Mr. Gajić of 150 hours per month inclusive of in-court hours, pursuant to paragraphs 10 and 12 of the Revised Remuneration Scheme, constitutes inadequate and thus unreasonable remuneration. This is particularly so in view of the fact that the remaining support staff members on the Tolimir Defence Team, each of whom may submit invoices for up to 150 hours of work performed per month, are available to assist Mr. Gajić with various defence-related tasks. The Hearing Hours Request is therefore denied.

D. Retroactive DSA Request

45. Regarding the Retroactive DSA Request, I note that paragraph 20(a)(ii) of the Revised Remuneration Scheme, defines the role of legal associates of self represented accused as follows:

A legal associate to a self-represented accused facilitates the management of the accused’s case through coordinating work and related legal consultation. The typical tasks of a legal associate include conducting legal research and drafting memoranda, selecting, analysing and classifying documents as requested by the accused and attending working sessions with the accused at the United Nations Detention Unit (“UNDU”). The legal associate may also assist the accused in the preparation of evidence and the interviewing of witnesses on the accused’s instructions. Legal associates have no right of audience before the Court unless the Chamber seized of the case decides otherwise.

In delimiting the circumstances under which DSA may be claimed, section (B) paragraph (a)(4) of the DSA Policy refers to tasks normally performed by counsel, including attendance at court proceedings, the preparation of written submissions, preparation for the examination of witnesses, and meetings with the Prosecution and counsel of co-accused. I note at this point the statement in

⁸² Former Remuneration Scheme, para. 3.1.

⁸³ Reply to Second Rule 33(B) Submission, para. 18.

the *Krajišnik* Appeals Decision that “work such as the drafting of written filings should be considered the responsibility of the self-representing accused”.⁸⁴ I also note the following statement in the *Karadžić* Appeal Decision:

With regard to the Appellant’s submission that “even if an accused assumes full responsibility for written filings, there are hundreds of other tasks which [...] require the expertise of experienced lawyers”, the Appeals Chamber considers that the *Krajišnik* Appeal Decision’s reference to the Appellant drafting his own written filings was merely an example of the many tasks he is expected to undertake himself given his choice to be self-represented. While the Appeals Chamber acknowledges that by reason of his detention there are certain tasks normally undertaken by counsel which he will not be able to complete himself, in general a self-represented accused is expected to undertake all the tasks normally assumed by counsel. Acknowledgement of an appellant’s disadvantage based on his detention can reasonably be understood as one of the reasons for the provision of legal associates, but should not be confused with the role of counsel.⁸⁵

46. As noted above, the 28 April 2010 Decision expanded Mr. Gajić’s role as a legal associate, to include a limited right of audience, which allowed him, albeit in a restricted capacity, to perform tasks ordinarily reserved for counsel.⁸⁶ Recognising that “the limited and administrative rights of audience granted by the Trial Chamber will impact the necessity of his remaining in the Hague on non-court days”, the Registry reasonably permitted Mr. Gajić to claim DSA “for each day spent in the Hague [...] attending court hearings” and for “days at which at least four hours of reasonable and necessary work was performed”.⁸⁷ As the Trial Chamber’s decision which formally augmented Mr. Gajić’s role to incorporate certain tasks normally reserved for counsel, was issued on 28 April 2010, I consider Mr. Gajić ineligible for DSA payments, including payments for defence-related work performed in The Netherlands on non-sitting days, for the period pre-dating the 28 April 2010 Decision. The Retroactive DSA Request is therefore denied.

VI. DISPOSITION

47. In view of the foregoing I:

- (1) **GRANT** Tolimir’s Hourly Rate Request and order that the Registry remunerate Mr. Gajić at the rate of 71 Euros per hour for the trial phase;
- (2) **DISMISS** as moot, Tolimir’s Second Amended Request for additional support staff and the allocation of a total of 600 hours per month for the entire Tolimir Defence Team;

⁸⁴ *Krajišnik* Appeal Decision, para. 42.

⁸⁵ *Karadžić* Appeal Decision, para. 23.

⁸⁶ See 28 April 2010 Decision, paras 24-26, 31-32 and p. 11.

⁸⁷ 5 May 2010 Decision, p. 3.

- (3) **DISMISS** as moot, Tolimir's 12 February 2010 Request for an additional 195 pre-trial hours;
- (4) **DISMISS** Tolimir's Hearing Hours Request that Mr. Gajić's hearing hours be paid in addition to the 150 hours allocated to him per month under the Revised Remuneration Scheme; and
- (5) **DISMISS** Tolimir's Retroactive DSA Request for the payment of DSA to Mr. Gajić for defence-related work in excess of four hours conducted on non-sitting days in The Netherlands, for the period commencing from the start of trial in the *Tolimir* Case to 28 April 2010.

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



Judge Patrick Robinson
Presiding Judge

Dated this 13th day of July 2010,
At The Hague,
The Netherlands

[Seal of the Tribunal]