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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-05-88/2-A

Date: 24 July 2014

Original: English

**THE PRESIDENT OF THE TRIBUNAL**

**Before: Judge Theodor Meron, President**

**Registrar: John Hocking**

**Decision of: 24 July 2014**

**PROSECUTOR**

**v.**

**ZDRAVKO TOLIMIR**

***CONFIDENTIAL AND EX PARTE***

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**DECISION ON REQUEST FOR REVIEW**

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**Registrar**

Mr. John Hocking

**Head of OLAD**

Ms. Susan Stuart

**The Self-Represented Appellant**

Mr. Zdravko Tolimir

1. **I, THEODOR MERON**, 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”), am seised of the confidential and *ex parte* “Request for Review of the Decision of the Registry”, filed by Zdravko Tolimir (“Tolimir”) on 5 May 2014 (“Request for Review”). The Deputy Registrar of the Tribunal (“Deputy Registrar”) filed a submission pursuant to Rule 33(B) of the Tribunal’s Rules of Procedure and Evidence (“Rules”) on 15 May 2014,<sup>1</sup> Tolimir a reply to the Deputy Registrar’s Submission on 19 May 2014,<sup>2</sup> the Deputy Registrar a second submission on 28 May 2014,<sup>3</sup> and Tolimir a response to the Deputy Registrar’s Second Submission on 2 June 2014.<sup>4</sup>

## I. BACKGROUND

2. On 12 December 2012, Trial Chamber II of the Tribunal (“Trial Chamber”) convicted Tolimir of genocide, conspiracy to commit genocide, murder as a violation of the laws or customs of war, as well as extermination, persecutions, and inhumane acts through forcible transfer as crimes against humanity.<sup>5</sup> Tolimir was sentenced to life imprisonment.<sup>6</sup> Tolimir filed a notice of appeal on 11 March 2013.<sup>7</sup>

3. At trial, Tolimir was self-represented, but assisted in the proceedings by a legal associate, Mr. Aleksandar Gajić (“Gajić”). Gajić was granted rights of audience limited to

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

(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.<sup>8</sup>

During the trial proceedings, Gajić was remunerated as co-counsel, because he had been granted rights of audience that “amplified his role beyond that of [...] a legal associate” and had “a higher level of responsibility [...] which more closely resemble[d] that of co-counsel.”<sup>9</sup>

<sup>1</sup> Deputy Registrar’s Submission Regarding Request for Review of the Decision of the Registry of 28 April 2014, 15 May 2014 (confidential and *ex parte*) (“Deputy Registrar’s Submission”).

<sup>2</sup> Reply to the Deputy Registrar’s Submission Regarding Request for Review of the Decision of the Registry of 28 April 2014, 19 May 2014 (confidential and *ex parte*) (“Reply”).

<sup>3</sup> Deputy Registrar’s Second Submission Regarding Request for Review of the Decision of the Registry of 28 April 2014, 28 May 2014 (confidential and *ex parte*) (“Deputy Registrar’s Second Submission”).

<sup>4</sup> Response to the Deputy Registrar’s Second Submission, 2 June 2014 (confidential and *ex parte*) (“Response”).

<sup>5</sup> *Prosecutor v. Zdravko Tolimir*, Case No. IT-05-88/2-T, Judgement, 12 December 2012 (“Trial Judgement”), para. 1239.

<sup>6</sup> Trial Judgement, para. 1242.

<sup>7</sup> Notice of Appeal, 11 March 2013.

<sup>8</sup> *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, 28 April 2010 (confidential), p. 11.

4. After the filing of Tolimir's notice of appeal and following Tolimir's notification to the Registry that on appeal he wished to remain self-represented with Gajić as his legal adviser, the Office of Legal Aid and Defence Matters ("OLAD") informed Tolimir on 9 May 2013 that Gajić would be considered a legal associate for remuneration purposes during the appeal proceedings.<sup>10</sup> Gajić would thus be entitled to remuneration at the rate of 23.1 euros per hour for assistance provided to Tolimir for purposes of his appeal, pursuant to the Directive on the Assignment of Defence Counsel.<sup>11</sup> The OLAD Letter invited Tolimir to nominate another support staff member to assist him during the appeal proceedings and also informed him that his appeal was ranked at complexity level 1 (difficult).<sup>12</sup>

5. In response to the OLAD Letter, Tolimir requested on 25 May 2013 that Gajić be remunerated at the co-counsel rate for work performed during the appeal proceedings, given his substantial experience and "demanding" responsibilities as legal assistant to a self-represented defendant who does not understand English.<sup>13</sup> Tolimir pointed out that Gajić was remunerated as co-counsel at trial because of his "exceptional responsibilities and role" during the trial proceedings.<sup>14</sup> Tolimir also requested a reclassification of his pending appeal to complexity level 3.<sup>15</sup>

6. On 5 July 2013, the Appeals Chamber advised the Deputy Registrar that an upgrade of Tolimir's appeal to complexity level 2 was warranted in light of Tolimir's convictions, the fact-intensive nature of the Trial Judgement, and the scope of Tolimir's appeal.<sup>16</sup> During a status conference held on the same day, 5 July 2013, Gajić was granted a right of audience before the Appeals Chamber limited to addressing legal or administrative issues at status conferences.<sup>17</sup> Tolimir was explicitly invited to submit a written request to the Appeals Chamber if he wished Gajić to be granted a broader right of audience.<sup>18</sup>

7. On 27 November 2013, six months after the submission of Tolimir's Request to the Registry, the Deputy Registrar requested the bench of the Appeals Chamber assigned to Tolimir's

<sup>9</sup> *Prosecutor v. Zdravko Tolimir*, Case No. IT-05-88/2-T, Decision on Appeal against Registrar's 10 February 2010 Decision, 13 July 2010 (confidential and *ex parte*) ("Decision of 13 July 2010"), para. 42.

<sup>10</sup> Letter from OLAD to Tolimir, dated 9 May 2013 ("OLAD letter").

<sup>11</sup> OLAD Letter, referring to Directive on the Assignment of Defence Counsel (Directive No. 1/94), IT/73/REV.11, 11 July 2006 ("Directive"). According to the OLAD Letter, Gajić was then preparing, but had not yet submitted, an application for admission to the list of eligible Tribunal counsel. See OLAD Letter.

<sup>12</sup> OLAD Letter.

<sup>13</sup> Letter from Tolimir to OLAD, dated 25 May 2013 ("Request").

<sup>14</sup> Request (pointing out that on appeal Gajić, as Tolimir's legal adviser, will bear the main burden of preparing Tolimir's written submissions).

<sup>15</sup> Request.

<sup>16</sup> Internal Memorandum from Judge Theodor Meron, Pre-Appeal Judge, to Kate Mackintosh, Deputy Registrar, dated 5 July 2013, para. 4.

<sup>17</sup> Status Conference, T. 5 July 2013 pp. 2-3.

appeal to provide its views as to Gajić's role in the appeal proceedings.<sup>19</sup> The Deputy Registrar specified that such guidance was requested because, under the Remuneration Scheme for Persons Assisting Indigent Self-Represented Accused,<sup>20</sup> Gajić was only entitled to remuneration as a support staff member unless the Appeals Chamber accorded him a level of responsibility akin to the role of co-counsel.<sup>21</sup>

8. On 20 January 2014, the Appeals Chamber responded to the Deputy Registrar that, since Tolimir had not submitted any request regarding Gajić's rights of audience before the Appeals Chamber, Gajić had not yet been granted a higher level of responsibility beyond the limited right of audience to address administrative or legal issues at status conferences.<sup>22</sup> The Appeals Chamber, thus, advised the Deputy Registrar that only the work performed by Gajić "in making representations on administrative and legal issues during status conferences, including the work performed by him in preparation for status conferences, goes beyond the coordination and legal consultation function of a legal associate to self-represented accused."<sup>23</sup>

9. Having received this guidance from the Appeals Chamber, OLAD eventually issued its decision on Tolimir's Request on 28 April 2014.<sup>24</sup> The Impugned Decision granted the Request in part, allowing Gajić to be remunerated at the co-counsel rate for work performed at and in preparation for status conferences, but not for any other work performed throughout the appeal proceedings, which would remain reimbursable at the support staff rate.<sup>25</sup> OLAD further determined that (i) Gajić's office costs cannot affect his remuneration rate for work done as legal associate, which only depended on his years of experience; and that (ii) under the Remuneration Scheme, a legal associate cannot claim remuneration at a higher rate unless the Chamber seized of the case formally assigns to the associate a higher level of responsibility, irrespective of whether the associate *de facto* performs higher duties (such as drafting the appeal brief) or not.<sup>26</sup> Tolimir challenges these determinations in the Request for Review.

<sup>18</sup> Status Conference, T. 5 July 2013 p. 3.

<sup>19</sup> Internal Memorandum from Kate Mackintosh, Deputy Registrar, to the Appeals Chamber, dated 27 November 2013 (confidential) ("November 2013 Memorandum"), para. 8.

<sup>20</sup> Remuneration Scheme for Persons Assisting Indigent Self-Represented Accused, 1 April 2010 ("Remuneration Scheme").

<sup>21</sup> November 2013 Memorandum, paras 2-3, 7-8, referring to Remuneration Scheme, para. 6.

<sup>22</sup> Internal Memorandum from Judge Theodor Meron, Pre-Appeal Judge, to Kate Mackintosh, Deputy Registrar, dated 20 January 2014 (confidential) ("January 2014 Memorandum"), paras 4-5. The January 2014 Memorandum was also attached as confidential and *ex parte* Annex I to the Deputy Registrar's Submission.

<sup>23</sup> January 2014 Memorandum, para. 6.

<sup>24</sup> Deputy Registrar's Submission, Annex II (confidential and *ex parte*), Letter by Susan Stuart, Head of OLAD, to Tolimir, dated 28 April 2014 ("Impugned Decision").

<sup>25</sup> Impugned Decision.

<sup>26</sup> Impugned Decision.

10. After the filing of the Request for Review, Tolimir requested the Appeals Chamber to grant Gajić a broader right of audience “including [the] possibility to present oral arguments at the [appeal] hearing”.<sup>27</sup> On 20 June 2014, the Appeals Chamber granted Gajić the right to make oral submissions at the appeal hearing.<sup>28</sup> The Appeals Chamber explained that this right of audience extended to “any question of a legal nature that may arise in the presentation of arguments on alleged errors of fact or law in [the] trial judgement”.<sup>29</sup>

## II. STANDARD OF REVIEW

11. The following standard has been set for the review of administrative decisions made by the Registrar:

A judicial review of [...] 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 [...] 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.<sup>30</sup>

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

- (a) failed to comply with [...] legal requirements [...], 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).<sup>31</sup>

12. 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.”<sup>32</sup> The party challenging the administrative decision bears the burden of demonstrating that “(1) an error of the nature enumerated above has occurred, and (2) [...] such an error has significantly affected the administrative decision to his detriment”.<sup>33</sup>

<sup>27</sup> Request to the Bench of the Appeals Chamber to Grant a Right of Audience to Mr. Aleksandar Gajić, 23 May 2014 (confidential), paras 1, 13-14.

<sup>28</sup> Decision on Tolimir’s Request to Grant a Right of Audience to Mr. Aleksandar Gajić, 20 June 2014 (“Decision on Right of Audience”), p. 2.

<sup>29</sup> Decision on Right of Audience, p. 2.

<sup>30</sup> *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 (“Žigić Decision”), para. 13. See also *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Request for Review of Decision on Defence Team Funding, 31 January 2012 (“Karadžić Decision”), para. 6.

<sup>31</sup> Karadžić Decision, para. 6. See also Žigić Decision, paras 13-14.

<sup>32</sup> Žigić Decision, para. 13. See also Karadžić Decision, para. 7.

<sup>33</sup> Karadžić Decision, para. 7. See also Žigić Decision, para. 14.

### III. APPLICABLE LAW

13. Under the Remuneration Scheme, the role of legal associates to self-represented defendants is to “facilitate[] the management of the accused’s case through coordinating work and related legal consultation.”<sup>34</sup> In particular,

the typical tasks of a legal associate include conducting legal research and drafting memoranda, selecting, analysis and classifying documents as requested by the accused and attending working sessions with the accused at the United Nations Detention Unit [...]. 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.<sup>35</sup>

14. Under paragraph 6 of the Remuneration Scheme, legal associates are remunerated at the hourly rate for support staff set out in Annex I to the Directive. The latter provides that legal assistants with up to 4 years of professional experience are remunerated at a gross hourly rate of 16.80 Euros per hour, those with 5 to 9 years of professional experience at a gross hourly rate of 23.10 Euros, and those with 10 years of professional experience or more at a gross hourly rate of 28.40 Euros.<sup>36</sup> Co-counsel are remunerated at a fixed hourly rate of 78.80 Euros per hour.<sup>37</sup> The remuneration of legal assistants at the support staff rate is based on the Appeals Chamber’s admonition that the remuneration of legal associates to self-represented accused “should not be comparable to that paid to counsel for represented accused [...], but nonetheless should adequately reimburse the legal associates for their coordinating work and for related legal consultation”.<sup>38</sup>

15. According to paragraph 26 of the Remuneration Scheme, “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.” That Article states that

[w]here the dispute involves a sum greater than 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.

<sup>34</sup> Remuneration Scheme, para. 20(a)(ii).

<sup>35</sup> Remuneration Scheme, para. 20(a)(ii). According to the Guidelines on the Submission of Invoices and the Activities of Assistants to Self-Represented Accused which may be Remunerated, which are attached to the Remuneration Scheme, the tasks for which legal associates may claim remuneration from the Registry include assistance in drafting motions and submissions and in the preparation for hearings, attendance of hearings, and review of Prosecution submissions. See Guidelines on the Submission of Invoices and the Activities of Assistants to Self-Represented Accused which may be Remunerated, 25 September 2007 (“Invoicing Guidelines”), Section A(ii).

<sup>36</sup> Directive, Annex 1, effective as of 1 January 2013 (“Annex 1 to Directive”).

<sup>37</sup> Annex 1 to Directive.

<sup>38</sup> *Prosecutor v. Momčilo Krajišnik*, Case No. IT-95-5/18/PT, Decision on Krajišnik Request and on Prosecution Motion, 11 September 2007 (“*Krajišnik* Decision”), para. 42. The Remuneration Scheme is based on the *Krajišnik* Decision. See Remuneration Scheme, p. 1.



#### IV. SUBMISSIONS

16. Tolimir requests that the Impugned Decision be quashed and that the Registry be ordered to remunerate Gajić at the co-counsel rate.<sup>39</sup> Tolimir asserts that the Impugned Decision is premised on a wrong assessment of Gajić's level of responsibility and failed to take into account Gajić's qualifications and role in the appeal proceedings, particularly his substantial involvement in drafting Tolimir's appeal and reply briefs, which, according to Tolimir go beyond the functions of a legal associate.<sup>40</sup> Tolimir further submits that Gajić's higher level of responsibility in the appeal proceedings is evidenced by the fact that he was granted rights of audience at status conferences, which, in Tolimir's view, is exceptional and indicative of duties and functions that go beyond the typical duties of legal associates.<sup>41</sup> Tolimir thus argues that the decision to remunerate Gajić at the co-counsel rate only for work performed at and in preparation for status conferences was unreasonable, as the very basis on which the Appeals Chamber granted a right of audience to Tolimir were his increased responsibilities in the appeal.<sup>42</sup> Finally, Tolimir argues that the Impugned Decision was unreasonable in denying remuneration for Gajić's office expenses, which, Tolimir argues, are significantly higher than those borne by legal advisors.<sup>43</sup>

17. The Deputy Registrar responds that the Impugned Decision complied with the relevant legal requirements of the Remuneration Scheme and settled jurisprudence and was procedurally fair.<sup>44</sup> In particular, the Deputy Registrar contends that only on the basis of specific judicial authorization can Gajić be remunerated at a higher rate and in this case, such authorization exists solely with respect to work performed during and in preparation for status conferences.<sup>45</sup> According to the Deputy Registrar, other factors such as Gajić's qualifications, purported drafting responsibilities, rights of audience at status conferences, and office expenses, are not relevant as to whether Gajić is entitled to remuneration at the co-counsel rate, in light of the explicit requirement that only judicial authorisation may justify a departure from the Remuneration Scheme.<sup>46</sup> The Deputy Registrar, therefore, argues that the Impugned Decision was issued after consideration of all relevant

<sup>39</sup> Request for Review, para. 21.

<sup>40</sup> Request for Review, paras 4, 8-14.

<sup>41</sup> Request for Review, paras 15-21.

<sup>42</sup> Request for Review, para. 21. Tolimir explains that a request to grant Gajić a broader right of audience in the appeal proceedings, which Tolimir was invited to submit to the Appeals Chamber, was premature at the time when the Request for Review was submitted. Request for Review, para. 18. However, I note that not long after the filing of the Request for Review, Tolimir indeed submitted a request for Gajić to be accorded broader audience rights, which was granted on 20 June 2014. *See supra*, para. 10.

<sup>43</sup> Request for Review, paras 22-23.

<sup>44</sup> Response, paras 12-16.

<sup>45</sup> Deputy Registrar's Submission, paras 13-15, 17-18.

<sup>46</sup> Deputy Registrar's Submission, paras 17-18.

materials, *i.e.*, the Tribunal's jurisprudence, the Remuneration Scheme, and guidance provided by the Appeals Chamber, and was not only reasonable, but mandated by such materials.<sup>47</sup>

18. In his Reply, Tolimir contends that the Deputy Registrar does not respond to arguments related to the essence of rights of audience and the purpose of status conferences and misunderstands the role of Gajić in drafting the appeal briefs and motions.<sup>48</sup> Tolimir points out that even though he does not speak English, the time limits for filing appeal submissions were not extended by the Appeals Chamber, effectively requiring Tolimir to delegate the task of drafting to Gajić, who thus performed work more akin to that performed by counsel to an appellant who does not understand English.<sup>49</sup> Tolimir further argues that in not reimbursing Gajić's office expenses, the Registry failed to acknowledge that most of the work undertaken by Gajić is completed in Belgrade, Serbia.<sup>50</sup>

19. In the Deputy Registrar's Second Submission, the Deputy Registrar notes that, even though Tolimir was notified that he was entitled to be represented by counsel on appeal, he chose to represent himself.<sup>51</sup> The Deputy Registrar adds that the Remuneration Scheme allows for the assignment of a language assistant to a self-represented appellant and thus "the Tribunal should not be disbursing public legal aid funds at the co-counsel remuneration rate to remunerate work resulting from [...] [Tolimir]'s lack of understanding of the English language."<sup>52</sup>

20. In his Response to the Deputy Registrar's Second Submission, Tolimir challenges the Deputy Registrar's arguments as unreasonable and unfounded.<sup>53</sup> Tolimir rejects the Deputy Registrar's contention that his lack of English competence is relevant in understanding Gajić's role in the appeal proceeding.<sup>54</sup> In that respect, Tolimir argues that, given the "very limited" number of hours available to a self-represented accused for the entire duration of the appeal proceedings, the addition of a language assistant to the defence team would be time-consuming, costly, and inefficient, as it would not guarantee the completion of the translation of the relevant filings faster than the Tribunal's translation services.<sup>55</sup>

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<sup>47</sup> Deputy Registrar's Submission, paras 17-19.

<sup>48</sup> Reply, paras 2-4.

<sup>49</sup> Reply, paras 5-6.

<sup>50</sup> Reply, para. 7.

<sup>51</sup> Deputy Registrar's Second Submission, para. 3.

<sup>52</sup> Deputy Registrar's Second Submission, para. 3.

<sup>53</sup> Response, para. 1.

<sup>54</sup> Response, para. 2.

<sup>55</sup> Response, para. 4.



## V. DISCUSSION

21. The issue before me is whether OLAD, in issuing the Impugned Decision, (a) failed to comply with the applicable legal requirements of the Directive and the Remuneration Scheme; (b) failed to observe any basic rules of natural justice or to act with procedural fairness towards Tolimir; (c) took into account irrelevant material or failed to take into account relevant material; or (d) reached a conclusion that no sensible person who has properly applied his mind to the issue of Gajić's remuneration could have reached.<sup>56</sup> After careful consideration of the circumstances of this case,<sup>57</sup> I am not convinced that Tolimir has met his burden to establish that, in denying to remunerate Gajić at the co-counsel rate for work unrelated to status conferences, OLAD committed any error of the nature enumerated above.

22. Indeed, I recall that, before deciding Tolimir's Request for higher remuneration to Gajić, the Deputy Registrar requested the "views" of the Appeals Chamber on "Gajić's role" in the appeal proceedings.<sup>58</sup> On 20 January 2014, the Appeals Chamber provided the requested guidance to the Deputy Registrar, specifying that "at present, Mr. Gajić ha[d] not been granted a higher level of responsibility in the appeal proceedings beyond the limited right of audience to address administrative or legal issues at status conferences."<sup>59</sup> The Appeals Chamber advised the Deputy Registrar that only the work performed by Gajić "during status conferences, including the work performed by him in preparation for status conferences" goes beyond the typical functions of a legal associate to a self-represented defendant.<sup>60</sup> The Impugned Decision was consistent with the guidance received from the Appeals Chamber: OLAD granted Tolimir's Request that Gajić be remunerated at the co-counsel rate, but only for work analogous to work undertaken by co-counsel, which, per the Appeals Chamber's direction, only encompassed Gajić's duties in relation to status conferences.<sup>61</sup> In accordance with the description of Gajić's functions provided by the Appeals Chamber, OLAD denied Tolimir's Request with respect to any other duties fulfilled by Gajić.<sup>62</sup> In deciding so, OLAD did not act unreasonably. OLAD faithfully implemented the views of the Appeals Chamber as to Gajić's role in Tolimir's appeal.

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<sup>56</sup> See *supra*, para. 11.

<sup>57</sup> See *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Request for Review of OLAD Decision on Trial Phase Remuneration, 19 February 2010 ("Karadžić 2010 Decision"), para. 47 (stating that decisions relating to the defence of self-represented defendants "can only be made on a case-by-case basis after careful consideration of the particular circumstances of each self-represented accused").

<sup>58</sup> November 2013 Memorandum, para. 2.

<sup>59</sup> January 2014 Memorandum, para. 5.

<sup>60</sup> January 2014 Memorandum, para. 6.

<sup>61</sup> Impugned Decision.

<sup>62</sup> Impugned Decision.

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23. Tolimir argues that Gajić has assumed greater responsibilities and duties in the appeal proceedings than the typical legal associate to a self-represented accused and thus his work must be remunerated at the co-counsel rate.<sup>63</sup> Tolimir also intimates that the limited audience rights Gajić was granted in July 2013 also serve as proof of his expanded role in the appeal proceedings.<sup>64</sup> These arguments, however, have been superseded by the Appeals Chamber's January 2014 Memorandum. The latter provides a clear assessment of Gajić's involvement in Tolimir's appeal, taking into account the audience rights granted to Gajić at that time.<sup>65</sup> In the January 2014 Memorandum, the Appeals Chamber directly addressed the issue of whether Gajić's overall role corresponds to that of a legal assistant or co-counsel and further clarified which specific duties assumed by Gajić are more akin to co-counsel functions.<sup>66</sup> In the Impugned Decision, OLAD acted consistently with the Appeals Chamber's specific guidance on this issue. It cannot be said that in doing so, OLAD acted unreasonably in any way or committed a reversible error. In my view, it would have been unreasonable for OLAD to disregard the Appeals Chamber's views.

24. Equally reasonable was, in my view, OLAD's refusal to reimburse Gajić's office expenses. The Remuneration Scheme does not provide for the reimbursement of office expenses incurred by legal assistants to self-represented accused. OLAD thus did not act unreasonably or erroneously in denying coverage of such expenses. I also recall, in this regard, that "[w]hile Article 21(1) [of the Tribunal's Statute] may require that accused in similar circumstances receive roughly comparable treatment, it does not require that an accused who opts for self-representation receive all the benefits held by an accused who opts for counsel."<sup>67</sup>

25. Accordingly, I conclude that the Impugned Decision was reasonable at the time it was issued and that OLAD did not commit a reversible error.

26. I note, however, that subsequent to the Impugned Decision and the filing of the Request for Review, Gajić was granted a much broader right of audience before the Appeals Chamber than the rights he had when the Impugned Decision was issued. On 20 June 2014, the Appeals Chamber accorded to Gajić the right to represent Tolimir at the appeal hearing and make submissions on "any question of a legal nature that may arise in the presentation of arguments on alleged errors of fact or law in [the] trial judgement".<sup>68</sup> The Appeals Chamber granted such a broad right of audience in recognition of Gajić's significant participation in Tolimir's defence "at the pre-trial, trial and

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<sup>63</sup> See *supra*, para. 16.

<sup>64</sup> See *supra*, para. 16.

<sup>65</sup> January 2014 Memorandum, paras 3, 5-6.

<sup>66</sup> January 2014 Memorandum, paras 5-6.

<sup>67</sup> *Krajišnik* Decision, para. 41.

<sup>68</sup> Decision on Right of Audience, p. 2.

appellate phases” and his “close[] assist[ance]” to Tolimir “in preparing for the appeal hearing”.<sup>69</sup> This recognition and the expanded right of audience granted to Gajić constitute new circumstances that were not (nor could they have been) taken into account by OLAD when the Impugned Decision was issued and warrant revisiting the issue of Gajić’s remuneration.

27. In that respect, I am mindful of the Appeals Chamber’s instruction that legal associates must receive adequate compensation “for their coordinating work and for related legal consultation”<sup>70</sup> and that the appropriate remuneration rate should be determined not only on the basis of the years of their experience, but also “the functions and tasks undertaken by legal associates, as well as the level of responsibility assumed”.<sup>71</sup> Given Gajić’s expanded audience rights and his substantial involvement in all the phases of Tolimir’s case – including the appeal proceedings – as recognized by the Appeals Chamber, I am of the view that Gajić’s role and responsibilities in Tolimir’s appeal go “beyond the tasks, functions, and level of responsibility of legal associates” and “more closely reflect[] work normally undertaken by co-counsel”.<sup>72</sup> I, therefore, consider it appropriate in the interests of justice that Gajić be remunerated at the co-counsel rate for his oral submissions to the Appeals Chamber during the appeal hearing and for work performed in preparation for that hearing, as well as any other work Gajić has performed during the appeal proceedings, including the drafting of written submissions to the Appeals Chamber, such as the appeal and reply briefs.<sup>73</sup>

28. Under the circumstances of this case, there is ample justification for Gajić’s remuneration at the co-counsel rate, even though OLAD did not commit a reversible error in issuing the Impugned Decision. In determining what constitutes adequate remuneration for Gajić in this case, due regard should be given, in addition to Gajić’s expanded audience rights, to the very nature of the appeal process and the increased responsibilities *de facto* assumed by a legal associate to a self-represented appellant with a limited knowledge of the Tribunal’s working languages. On appeal, the parties’ submissions to the Appeals Chamber are mostly in writing; a single hearing takes place only after the completion of the briefing in a given case and then for a limited amount of time.<sup>74</sup> Notably, appellate review focuses on errors of law and fact committed by a trial chamber; legal determinations are examined *de novo* while factual findings and conclusions are treated with

<sup>69</sup> Decision on Right of Audience, p. 2.

<sup>70</sup> *Krajišnik* Decision, para. 42.

<sup>71</sup> *Karadžić* 2010 Decision, para. 51. *See also Krajišnik* Decision, para. 42.

<sup>72</sup> *Karadžić* 2010 Decision, para. 51. I note that during Tolimir’s trial too, the then-President of the Tribunal ordered that Gajić be remunerated at the co-counsel rate after the Trial Chamber granted Gajić a right of audience “which amplified his role beyond that of ‘coordinating work’ and providing ‘related legal consultation’, which ordinarily characterises the function of a legal associate.” Decision of 13 July 2010, para. 42. I find that the same outcome is warranted on appeal as well: the broad right of audience granted to Gajić by the Appeals Chamber on 20 June 2014 justifies his remuneration at the co-counsel rate.

<sup>73</sup> *See also Karadžić* 2010 Decision, para. 52.

<sup>74</sup> *See* Rules 111-114 of the Rules.

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considerable deference to the Trial Chamber's discretion in addressing such issues.<sup>75</sup> In view of the primarily legal nature of the appeal process, "on appeal the main burden lies on counsel in preparing submissions as he has the legal expertise to advise the appellant whether there exist any potential errors of law and fact".<sup>76</sup> A legal adviser to a self-represented defendant with a limited command of the Tribunal's official languages, like Gajić, assumes an even more substantial role on appeal as he has less help from the defendant in analysing the Trial Judgement and detecting errors of law or fact.<sup>77</sup> I cannot ignore these factors in deciding which rate adequately compensates Gajić for work done in connection with Tolimir's appeal.<sup>78</sup>

29. That the Impugned Decision was not unreasonable or erroneous at the time when it was issued does not alter my conclusion. As stated in previous review decisions, even where the Registrar of the Tribunal has not committed reversible error in exercising his discretion on defence compensation matters, the allocation of defence funding may be increased "in order to serve the interests of justice and to meet the Tribunal's obligation to provide for the rights of the accused and ensure fair trials."<sup>79</sup> Having carefully reviewed the particular circumstances of this case and all the relevant materials on the record, I am of the view that Gajić should be remunerated at the co-counsel rate for all the work he has performed in relation to Tolimir's appeal.

<sup>75</sup> See Article 25(1) of the Statute of the Tribunal; *Prosecutor v. Vlastimir Đorđević*, Case No. IT-05-87/1-A, Judgement, 27 January 2014, paras 13-21, and authorities cited therein.

<sup>76</sup> *Prosecutor v. Popović et al.*, Case No. IT-05-88-A, Decision on Motions for Extension of Time and For Permission to Exceed Word Limitations, 20 October 2010, p. 4, and authorities cited therein.

<sup>77</sup> The Deputy Registrar does not contest Gajić's substantial drafting responsibilities during the appeal proceedings, but submits that "the fact that Mr. Gajić has drafted submissions does not increase [his] role and responsibilities beyond that of a typical legal associate." Deputy Registrar's Submission, fn. 26, citing Invoicing Guidelines, Section A(ii). The Invoicing Guidelines, however, provide that a legal associate may be reimbursed for "[a]ssist[ing] the accused in drafting motions and submissions", not for drafting such submissions primarily on his or her own. Invoicing Guidelines, Section A(ii). In my view, a legal associate who does not only assist an appellant in drafting submissions to the Appeals Chamber, but in fact drafts such submissions himself or herself, even with the assistance of the appellant, assumes responsibilities that go beyond those of a typical legal assistant.

<sup>78</sup> I also note that by the time the Deputy Registrar sought guidance from the Appeals Chamber as to Gajić's duties on appeal, *i.e.*, 27 November 2013, the briefing on appeal had almost been completed: Tolimir's Reply Brief was filed on 7 November 2013. See Brief in Reply, 7 November 2013 (confidential). An amended Reply Brief was filed on 27 February 2014 (see Amended Brief in Reply, 27 February 2014), but even though the Appeals Chamber had provided the requested guidance to the Deputy Registrar, the Impugned Decision was only issued in late April 2014, almost a year after Tolimir's Request was submitted. See *supra*, paras 5, 9. In other words, Gajić fulfilled his drafting and other responsibilities in relation to Tolimir's appeal without receiving word from OLAD as to the applicable remuneration rate on appeal. Given his remuneration at the co-counsel rate during the trial proceedings and in light of his continued high responsibilities in connection with Tolimir's appeal (which the Deputy Registrar does not essentially contest, see Deputy Registrar's Submission, para. 18 and fn. 26), it is not unreasonable to infer that Gajić assumed substantial duties as assistant to Tolimir on appeal under the belief or even expectation that his work would be remunerated at the co-counsel rate. OLAD's delay in responding to Tolimir's Request and the completion of briefing on appeal before the issuance of the Impugned Decision are additional factors that weigh in favour of Gajić's remuneration at the co-counsel rate for all work performed on appeal.

<sup>79</sup> *Prosecutor v. Goran Hadžić*, IT-04-75-T, Decision on Request for Review of OLAD Decision on Trial Funding, 20 June 2013, para. 35, citing *Karadžić* Decision, para. 37.

*Mugi*

## VI. DISPOSITION

30. In view of the foregoing, I hereby **ORDER** the Registrar to remunerate Gajić at the hourly co-counsel rate for all work related to the appeal proceedings in this case and **DENY** the Request for Review in all other respects.

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

Done this 24th day of July 2014,  
At The Hague,  
The Netherlands.

*Theodor Meron*

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Judge Theodor Meron  
President

[Seal of the Tribunal]