



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: 25 August 2010

Original: English

**IN TRIAL CHAMBER II**

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

**Registrar:** Mr. John Hocking

**Order of:** 25 August 2010

**PROSECUTOR**

**v.**

**ZDRAVKO TOLIMIR**

***PUBLIC REDACTED VERSION***

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**ORDER REGARDING THE NIGHTLY MONITORING OF THE  
ACCUSED**

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**The Accused**  
Zdravko Tolimir

**THIS TRIAL CHAMBER** of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (“Tribunal”) hereby issues an order on the nightly monitoring of the Accused Zdravko Tolimir (“Accused”) in the United Nations Detention Unit (“UNDU”).

## I. INTRODUCTION

1. On 26 May 2010 the Chamber ordered the Registrar to provide the Chamber with updated medical reports from the Medical Officer of the UNDU and neurologist Dr. Menno B. M. Vermeulen, or if Dr. Vermeulen is not available, from another independent neurologist, regarding the health status and need for medical monitoring of the Accused.<sup>1</sup> The Chamber also ordered that these medical reports include, but not be limited to, the following information: (1) a summary of the current health condition of the Accused; and (2) an assessment of the necessity of the nightly medical monitoring of the Accused.<sup>2</sup>

2. In the hearing of 27 May 2010, the Accused complained that he was woken up by UNDU staff “every 10 or 20 minutes, which is many times a night” and indicated his wish that this monitoring be stopped.<sup>3</sup> The Accused submitted that this practice has been applied since he was transferred to the UNDU three years ago and that he does not see any medical benefit in it.<sup>4</sup> The Accused concluded that the lack of sleep might affect his ability to stand trial.<sup>5</sup>

3. On 24 June the Registrar, confidentially and *ex parte*, made a submission pursuant to Rule 33(B) of the Rules of Procedure and Evidence (“Rules”), to which a report dated 14 June 2010 by the reporting Medical Officer of the UNDU, Dr. Michael J. Eekhof was attached.<sup>6</sup> [REDACTED].<sup>7</sup> [REDACTED].<sup>8</sup> [REDACTED].<sup>9</sup> [REDACTED].<sup>10</sup> He concludes that, in his medical opinion, the nightly monitoring is still indicated.<sup>11</sup>

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<sup>1</sup> Order Regarding Medical Reports, 26 May 2010

<sup>2</sup> *Ibid.*, p. 1.

<sup>3</sup> T. 2044 (27 May 2010).

<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.*

<sup>6</sup> Confidential and *Ex Parte* Registrar’s Submission pursuant to Rule 33(B) Regarding the Medical Status of the Accused, 24 June 2010 (“Submission of 24 June 2010”).

<sup>7</sup> *Ibid.*, Annex 1, para. 2

<sup>8</sup> *Ibid.*, Annex 1, para. 3.

<sup>9</sup> *Ibid.*, Annex 1, paras. 2–3.

<sup>10</sup> *Ibid.*, Annex 1, para. 5.

<sup>11</sup> *Ibid.*

4. On 6 July 2010, the Registrar, pursuant to Rule 33(B), submitted Dr. Menno Vermeulen's report dated 23 June 2010 and his Addendum to the Report dated 5 July 2010 ("Addendum").<sup>12</sup> In the Addendum, regarding the nightly monitoring, Dr. Vermeulen states that "there is no rationale for monitoring every half hour the vital signs, whether or not Mr. Tolimir takes medication. [REDACTED]."<sup>13</sup>

5. On 12 July 2010 the Registrar made a further submission pursuant to Rule 33(B) to which a report by Dr. Paulus Falke, UNDU Medical Officer who reviewed the report and Addendum by Dr. Vermeulen, was attached.<sup>14</sup> In his report dated 12 July 2010, Dr. Falke states that he concurs with Dr. Vermeulen in the sense that the nightly monitoring, in essence, has no effect on the Accused's health situation.<sup>15</sup> However, he submits that, as medical officer in the UNDU, he remains responsible even for those detainees he cannot prevail upon to take the prescribed medication and that controlling the Accused's state is made necessary by the specific detention situation.<sup>16</sup> [REDACTED].<sup>17</sup> Dr. Falke writes: "The shorter the response time the better treatment/intervention results will be."<sup>18</sup> Dr. Falke concludes that the nightly monitoring should stay in place and will not influence the Accused's health condition in a negative way.<sup>19</sup>

## II. BACKGROUND

### A. The health condition of the Accused upon his arrival at the UNDU

6. Upon the Accused's transfer to the Tribunal, Dr. Falke stated that he was admitted to the Penitentiary Hospital where he underwent a preliminary examination by Dr. Falke himself. [REDACTED].<sup>20</sup>

7. On 27 July 2007, Dr. Falke submitted a detailed report on the Accused's state of health, evaluating the risks the Accused faced due to his health condition at the time.<sup>21</sup>

<sup>12</sup> Registrar's Submission pursuant to Rule 33(B) Regarding the Medical Status of the Accused, confidential and *ex parte* 6 July 2010 ("Submission of 6 July 2010").

<sup>13</sup> Submission of 6 July 2010, Addendum, p.1.

<sup>14</sup> Registrar's Submission pursuant to Rule 33(B) regarding the Medical Status of the Accused, 12 July 2010 ("Submission of 12 July 2010").

<sup>15</sup> Submission of 12 July 2010, Annex, para. 1.

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*, para. 2.

<sup>18</sup> *Ibid.*

<sup>19</sup> *Ibid.*, para. 3.

<sup>20</sup> Medical Correspondence, 4 June 2007.

<sup>21</sup> 27 July 2007 Memorandum.

**B. Complaints by the Accused since the beginning of his detention**

8. The Accused raised the issue of nightly monitoring at a very early stage in the trial. During the first Status Conference, the Accused submitted: “There is a light on in my cell even at night, and the guards insist upon waking me up every half-hour to check up on my health and on my situation in the cell.”<sup>22</sup> Ever since, the Accused complained about the fact that he is woken up every half-hour on several occasions.<sup>23</sup> The Accused specified that the guards knock on the window in order to wake him up so that he can make a gesture that lets them know that he is alive.<sup>24</sup>

**C. The Position of the Prosecution**

9. The Prosecution stated that the sleep monitoring was a practice known to them and that “the banging of the window” caused problems for some of their witnesses to whom this monitoring applied.<sup>25</sup>

**D. Medical Recommendations in the past**

10. [REDACTED].<sup>26</sup> In this same report, Dr. Falke recommended that the Accused should be submitted to checks at a thirty minute interval (day and night) and that he himself be “consulted before any decision to stop the checks is made”.<sup>27</sup>

11. On 30/31 July 2009, the Accused submitted a “Specialist Physician’s Report” from Professor Gordana Ocić, a neurologist at the Bel Medic General Hospital in Belgrade.<sup>28</sup> This report, which was based solely on the consideration of the medical documents relating to Mr. Tolimir’s health condition, stated that his established neurological condition did not require continual nightly monitoring which disturbed the vitally important function of sleep.<sup>29</sup> Dr. Ocić recommended submitting the Accused to regular check-ups with a neurologist every six months.<sup>30</sup>

12. On 18 August 2009 the Registry made a submission pursuant to Rule 33(B), attaching a report by the UNDU Medical Officer, which recommended that Mr. Tolimir be further monitored

<sup>22</sup> T. 121-122 (11 December 2007).

<sup>23</sup> T. 199 (30 July 2008); T.227–228 (31 October 2008); T. 245–246 (27 February 2009); T. 259–260 (25 June 2009); T. 288–289 (22 October 2009).

<sup>24</sup> T. 228 (31 October 2008).

<sup>25</sup> T. 246 (25 June 2009).

<sup>26</sup> 27 July 2007 Memorandum.

<sup>27</sup> *Ibid.*

<sup>28</sup> Annex to Zdravko Tolimir’s Submission seeking the Cessation of so-called medical supervision measures which lead to Sleep Deprivation, submitted 30/31 July 2009 and filed 12 August 2009.

<sup>29</sup> *Ibid.*

through the half-hourly checks. The report, however, did indicate that Mr. Tolimir was sleeping most of the time when the UNDU personnel were checking on him during the night and that these checks did not wake him up and that the logbooks did not indicate that he was wakened. When monitoring, the staff had been ordered repeatedly “to respect the rights and dignity of the detainee” and “cause as little disturbance to the detainee as possible”.<sup>31</sup>

13. On 9 October 2009, the Registry, at the instigation of Pre-Trial Judge Prost, submitted a report of a third independent doctor, neurologist Dr. Menno B. M. Vermeulen.<sup>32</sup> [REDACTED].<sup>33</sup>

14. Mr. Tolimir was offered a low-frequency device attached to his finger that would allow his blood pressure to be continuously checked without the nightly monitoring.<sup>34</sup> Mr. Tolimir however refused to wear this device on the grounds that, in his opinion, the device would be used to send signals to his brain in order to influence his thinking.<sup>35</sup>

15. At the Status Conference of 22 October 2009, Judge Prost informed the Accused that, if he assented to take his prescribed medication and allowed his blood pressure to be monitored by weekly checks, the Chamber would order that the half-hourly monitoring cease.<sup>36</sup> However, the Accused refused to take the prescribed medication.<sup>37</sup>

### III. DISCUSSION

16. The Chamber notes that Articles 20(1) and 21(2) of the Statute of the Tribunal (“Statute”) provide for a fair trial. Article 20 of the Statute, on the commencement and conduct of trial proceedings, in paragraph 1 provides:

The Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

Article 21(2) of the Statute stipulates:

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<sup>30</sup> *Ibid.*

<sup>31</sup> Registry Submission, 18 August 2009.

<sup>32</sup> Registrar’s Submission Pursuant to Rule 33(B) regarding the Medical Status of the Accused, 9 October 2009 (“Submission of 9 October”).

<sup>33</sup> Submission of 9 October, Appendix, p. 6.

<sup>34</sup> T. 261–262 (25 June 2009).

<sup>35</sup> T. 262–263 (25 June 2009).

<sup>36</sup> T. 286–287 (22 October 2009).

<sup>37</sup> T. 290 (22 October 2009).

In the determination of charges against him, the accused shall be entitled to a fair and public hearing, subject to article 22 of the Statute.

Article 21(4) of the Statute regulates the rights of the accused and insofar as relevant stipulates:

In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:

[...]

(d) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

17. The Chamber notes that the Accused has chosen to represent himself pursuant to Article 21(4)(d).<sup>38</sup> The Chamber accepts that self-representation puts an additional burden on the Accused in the sense that he has to prepare his defence himself.<sup>39</sup> The Chamber deems it important to reiterate that the Accused freely chose to submit himself to this additional workload and that the status of self-representation does not, *per se*, entail more rights than the regular status of being an Accused in the sense of the Statute.<sup>40</sup> However, the Chamber considers that the principle of a fair trial, in the specific circumstances of self-representation, demands that the Accused is provided the conditions that fairly allow him to prepare his defence and that lack of sleep resulting from the nightly monitoring might impinge detrimentally on the ability of the Accused to represent himself.

18. Furthermore, it is the duty of the Chamber to ensure the well-being of Accused held in the UNDU.<sup>41</sup> This is, for example, reflected in Articles 20(1), 20(3) and 21 of the Statute, where the Trial Chamber is, *inter alia*, requested to satisfy itself that the rights of the accused are respected. Moreover, Rule 65 *bis*, explicitly foresees that Status Conferences have to be organized in order to, *inter alia*, allow the Accused to raise issues in relation to his mental and physical condition. As outlined above, in the present case, the Accused complained about the negative effects the nightly monitoring had on his health in several Status Conferences.<sup>42</sup> Finally, the Chamber notes that Rule 74 *bis* allows the Chamber to order, *proprio motu* or at the request of a party, a medical, psychiatric or psychological examination of the Accused.

<sup>38</sup> Submission by the Accused to the Registrar for Leave to Conduct his own Defence or to Appoint Counsel of his own Choosing Pursuant to Article 21.4(d), and Rule 45(F) and Amended Rule 62(C) of the Rules, filed 6 August 2007 in BCS and 10 August 2007 in the English version. *See also* Notification by the Deputy Registrar, 27 August 2007.

<sup>39</sup> T. 317–318 (25 February 2010).

<sup>40</sup> See e.g. *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-AR73.2, Decision on Interlocutory Appeal of the Trial Chamber's Decision on Adequate Facilities, 7 May 2009, para. 23.

<sup>41</sup> Decision on Tolimir's Submission on Violation of his Rights Submitted on 7 September 2007, 10 October 2007, p. 3.

<sup>42</sup> T. 199 (30 July 2008); T.227–228 (31 October 2008); T. 245–246 (27 February 2009); T. 259–260 (25 June 2009); T. 288–289 (22 October 2009).

19. The Chamber, for the above reasons, considers that both the Statute and the Rules require a Chamber to concern itself with the physical and mental well-being of an Accused detained in the UNDU. This power, in order to be exercised effectively, necessarily entails the power of the Chamber to issue orders it considers indispensable, following medical examinations it has the power to order. The Chamber does not consider that the exercise of this power is restricted by the responsibility of the medical officer at the UNDU for the care of the physical and mental health of detainees as set forth in Rule 34(B) of the Rules governing the Detention of Persons Awaiting Trial or Appeal before the Tribunal or Otherwise Detained on the Authority of the Tribunal (“Rules governing the Detention of Persons awaiting Trial”).<sup>43</sup>

20. When considering the medical reports, the Chamber notes that there is no medical consensus on the necessity of the nightly monitoring [REDACTED]. Whereas the medical officers of the UNDU, Dr. Falke and Dr. Eekhof, support the nightly monitoring of the Accused,<sup>44</sup> Dr. Vermeulen for his part considers that it has “no rationale” and points out the possible negative effects it may have, *inter alia*, on the blood pressure of the Accused.<sup>45</sup> Furthermore, the Chamber notes that the Prosecution agrees with the Accused on the negative impact the nightly checks at the UNDU have.

21. Article 2 of the UN Detention Unit Services and Facilities Agreement provides that medical services for those detained in the UNDU shall be provided by the Host State. Given that the Netherlands, besides being a member state of the United Nations, is a member state of the Council of Europe, the Chamber considers it appropriate to examine the present situation under the UN- as well as the European system regarding the treatment of prisoners. In this respect, the Chamber is of the opinion that the European Prison Rules and the UN Standard Minimum Rules of the Treatment of Prisoners (“Standard Minimum Rules”) provide useful guidance in considering the issue at hand. Rules 40.1 and 40.2 of the European Prison Rules as well as Rule 22 of the Standard Minimum Rules stipulate that medical services shall be organised in close relation with the general health administration of the community or nation and that the health policy in prison shall be integrated into, and compatible with, national health policy. Although the specific objective of these Rules is to ensure the provision of sufficient health services to detainees, the overarching aim of the Rules is not to treat detained patients differently from non-detained patients if such discrimination is not made strictly necessary by the detention itself. In this respect the Chamber notes that every person has the right to freely consent to medical examination and treatment. The negative component of this

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<sup>43</sup> Rule 34(B) provides: “The medical officer shall have the care of the physical and mental health of detainees and shall see, on a regular basis or as is necessary, all sick detainees, all who complain of illness and any detainee to whom his attention is specially directed.”

<sup>44</sup> Submission of 24 June 2010, Annex, para. 5; Submission of 12 July 2010, Memorandum from Dr. Falke, para. 2.

<sup>45</sup> Submission of 6 July, Annex 2.

right is to refuse examination and/or treatment. Therefore, although the autonomy of persons in detention is, *per definitionem*, restricted, detainees generally continue to benefit from the freedom of consent. This principle is also reflected in the standards for detention set out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (“CPT”) in which the CPT emphasizes that while the availability of a prison health care service is crucial, freedom of consent to medical treatment is one of the fundamental rights of detained individuals.<sup>46</sup> The CPT standards specify that patients need to be provided with all relevant information concerning their condition, the course of their treatment and the medication prescribed for them.<sup>47</sup> Importantly, the CPT further states: “[E]very patient capable of discernment is free to refuse treatment or any other medical intervention. Any derogation from this fundamental principle should be based upon law and only relate to clearly and strictly defined exceptional circumstances which are applicable to the population as a whole.”<sup>48</sup> This possible conflict of interest is also addressed by Penal Reform International (“PRI”), commenting on the Standard Minimum Rules. In this regard, PRI indicates that “if possible however, doctors should leave prisoners a choice and a responsibility, so that they can decide for themselves to allow the examination or not.”<sup>49</sup>

22. Furthermore, the Committee of Ministers of the Council of Europe in its Recommendation No. R (98) 7, addressing the possibly conflicting expectations from the prison administration and prisoners that medical personnel may face in detention facilities, expressly states that informed consent shall be obtained in the case of, “for example refusal of treatment”.<sup>50</sup> The Committee of Ministers further states that “[a]ny derogation from the principle of freedom of consent has to be based upon law and be guided by the same principles which are applicable to the population as a whole”.<sup>51</sup> Finally, the Chamber notes that the Council of Europe has stated that particular importance has to be attributed to the detainees’ right to privacy at night times.<sup>52</sup> This principle is also expressed in the Minimum Standard Rules.<sup>53</sup>

<sup>46</sup> The CPT Standards, CPT/Inf/E (2002) 1 – Rev. 2009, paras. 30, 45.

<sup>47</sup> *Ibid.*, para. 47.

<sup>48</sup> *Ibid.*

<sup>49</sup> Making Standards Work, Penal Reform International, The Hague, 1995, para. 78.

<sup>50</sup> Recommendation No. R. (98) 7 of the Committee of Ministers to Member States Concerning the Ethical and Organisational Aspects of Health Care in Prison, adopted by the Committee of Ministers on 8 April 1998 at the 27<sup>th</sup> meeting of the Ministers’ Deputies (“Recommendation 98/7”), paras. 14–15.

<sup>51</sup> *Ibid.*, para. 16.

<sup>52</sup> “18.7 As far as possible, prisoners shall be given a choice before being required to share sleeping accommodation.”, Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules, Adopted by the Committee of Ministers on 11 January 2006 at the 952nd meeting of the Ministers’ Deputies.



23. The Chamber, for the above reasons, considers that the necessity of medical treatment and the freedom of consent to medical treatment of an accused person in detention on remand must be weighed against each other. In this context it must be emphasised that the right to refuse medical treatment and preventive observation is subject to the condition that the person is capable of discernment, in other words, able to responsibly take decisions on his own behalf. This condition would not be met if the competent authority were to find that the person willingly puts his or her life in danger or has suicidal intentions. In such an instance, the right to freely consent to medical treatment must be restrained and substituted by the decisions of the medical authorities in the detention facility.

24. While the Chamber considers that the particular situation of detention makes some degree of control necessary, a risk of deterioration of the medical condition of detainees always persists. In the present case the Chamber is thus required to determine whether the restriction of the Accused's negative freedom of consent is justified when balanced against the beneficial effects that the nightly monitoring [REDACTED] may have, particularly in the light of the negative effects reported by the Accused as well as by Prosecution witnesses who have been subjected to the same monitoring. As elaborated above,<sup>54</sup> any monitoring that constitutes an intervention in the Accused's rights and freedoms needs to be based upon law and justified by the circumstances of the case.

25. In order to assess the impact of the nightly monitoring on the Accused, the Chamber must take into consideration the conditions under which those checks occur. The Chamber notes that, in order to enable the UNDU staff to check the health condition of the Accused, the lamp inside the Accused's cell must remain on throughout the night.<sup>55</sup> In addition, the Accused must spend every night with the awareness that a guard observes him, during his sleep, at a half-hourly interval. The Chamber considers that the constant artificial light during the night, combined with the intrusion in the Accused's privacy through the nightly observance, is likely to cause stress or, at least, hinder or considerably exacerbate the desired restorative effect of a night of sleep. Accordingly, the Chamber considers that the nightly monitoring of the Accused constitutes an encroachment on his rights and freedoms. The Chamber is mindful of Dr. Vermeulen's statement that the nightly monitoring could indeed have negative effects on the Accused, in particular on his blood pressure.<sup>56</sup> The Chamber finds that the encroachment is therefore of a certain importance.

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<sup>53</sup> "Untried prisoners shall sleep singly in separate rooms, with the reservation of different local custom in respect of the climate", Standard Minimum Rule 86; *see*, Human Rights and Pre-Trial Detention, UN Centre for Human Rights, Crime Prevention and Criminal Justice Branch.

<sup>54</sup> *See supra*, para. 22.

<sup>55</sup> T. 121-122 (11 December 2007).

<sup>56</sup> Submission of 6 July 2010, Addendum, p. 1.

26. Although the justification of the monitoring is based on Rule 34(B) of the Registry's Rules governing the Detention of Persons awaiting Trial, notwithstanding the question of the nature of those Rules, the Chamber stresses that such an intervention must in any event be justified by the circumstances of the case. When weighing the conflicting arguments, the Chamber finds that the Accused's well-being is impaired in a way that, for the time being, is not justified by the beneficial effects an intervention resulting from the nightly checks may have on him.

27. The Chamber, however, recalls that medical treatment was made and continues to be made available to the Accused. As set out above, the Accused refuses the medication offered to him at the UNDU and wishes the nightly checks to be discontinued. The Accused has been fully informed of the respective recommendations of the Medical Officer Dr. Falke and the neurologist Dr. Vermeulen, the detrimental effects of his refusal of the prescribed medication, and the differing opinions of both doctors concerning the value of the nightly monitoring. Therefore, the Chamber considers that the Accused's position is "informed" in the sense of Recommendation 98/7.<sup>57</sup> Furthermore, the Chamber has no indication that the Accused lacks the soundness of mind required to give such informed consent.

28. Whereas the Chamber is of the opinion that this refusal is covered by the Accused's freedom of consent, the Chamber deems necessary to emphasise that this freedom of consent, if exercised against the recommendation of the medical officer of the UNDU implies a shift of responsibility. In other words, if the Accused continues to refuse treatment, the responsibility for a medical incident rests with him. [REDACTED]. Notwithstanding the increased responsibility sought by the Accused for his own health, the Chamber trusts that the medical staff of the UNDU will continue to be attentive to the Accused's health and will keep available any medicine and treatment they deem appropriate in light of the Accused's medical condition. In order to provide the Accused with the necessary technical equipment to call UNDU medical staff in a case of emergency, the UNDU shall install a "panic button" next to the Accused's bed, if the latter so wishes.

29. Furthermore, the Chamber notes that the Recommendation 98/7 provides that "[i]n the case of refusal of treatment, the doctor should request a written statement signed by the patient in the presence of a witness".<sup>58</sup> Finally, the Chamber reserves the right to order the UNDU staff to recommence the nightly monitoring if there are any indications that the Accused willingly puts his life at risk, ceases to take a responsible attitude towards his own health, or if the Chamber is otherwise convinced that the nightly monitoring becomes necessary.

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<sup>57</sup> Recommendation 98/7, Paras. 14–16.

<sup>58</sup> *Ibid.*, para. 60.

#### IV. DISPOSITION

For these reasons, the Trial Chamber hereby **ORDERS** that the staff of the UNDU discontinue the nightly half-hourly checks on the Accused provided that the Accused, in the presence of a witness, signs a written statement in which he confirms his refusal to be monitored through nightly checks.

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

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Judge Christoph Flügge  
Presiding Judge

Dated this twenty-fifth day of August 2010  
At The Hague  
The Netherlands

**[Seal of the Tribunal]**

**I. JUDGE ANTOINE MINDUA'S SEPARATE AND CONCURRING  
OPINION ON THE ORDER REGARDING THE NIGHTLY MONITORING  
OF THE ACCUSED**

1. This Chamber's Order Regarding the Nightly Monitoring of the Accused has been decided unanimously and I share the views expressed by my fellow Judges. However, I attach this separate and concurring opinion in order to emphasize some aspects of the Order that I feel are particularly important.

2. The questions before the Chamber regarding the nightly monitoring of the Accused present a complex set of competing factors that must be weighed and balanced against one another. On the one hand, the Chamber and the Registry share an obligation to ensure the health and safety of those in custody at the UNDU. On the other hand, the Chamber has a responsibility to ensure the rights of the Accused as enshrined in the Statue and the Rules of the Tribunal, as well as other international and regional legal instruments. These rights include the right to a fair trial and the right to consent to medical treatment.

3. The Chamber's responsibility for the health and safety of a detainee stems primarily from the rights and interests of the individual accused who is presumed innocent until proven guilty. Moreover, the Chamber has a responsibility to protect the health and wellbeing of an accused so that justice may be done — not only justice for the accused, but also justice for the alleged victims and the international community as a whole. Thus, the right of an accused to consent to medical treatment is not unlimited. This right has to be exercised bearing in mind the obligation of the accused, unlike a non-accused, to be alive and in good health so that justice may be done. In other words, an accused's right to consent to medical treatment shall not put his life and health in jeopardy.

4. It is important to note that the opinions expressed by the medical doctors consulted by the Chamber were not unanimous concerning the need for the nightly monitoring. [REDACTED]. While I would like to emphasize that as a Judge and Jurist, I have no significant knowledge in the medical field to question the opinions expressed by competent medical doctors, it seems quite reasonable to me that nightly monitoring of the Accused would greatly increase the likelihood of such prompt treatment in the event of a health emergency. I believe that it is important to also note that the nightly monitoring was established precisely because the Accused refused the routine diagnostics and treatments proposed by the UNDU Medial Officer. I believe the above reasons

weigh heavily in favour of continuing the nightly monitoring. However, these are not the only factors that must be considered by the Chamber.

5. Turning to the Chamber's responsibility to ensure the individual rights of the Accused, it is clear that the Chamber must implement the Tribunal's Statute and Rules, but must also apply, in the interests of justice, other international and regional legal instruments where appropriate. In this respect, it becomes clear that the Accused has a right to consent to medical treatment. This factor weighs in favour of discontinuing the nightly monitoring. However, the factors that I believe weigh heavily in favour of discontinuing the nightly monitoring include the Accused's responsible behaviour, his very active participation in his own defence, and his special commitment expressed several times orally, to take care of his health, but to do so in a manner that he deems appropriate.

6. After balancing all of the factors above, I am in agreement with my fellow Judges that the UNDU discontinue the nightly half-hourly checks on the Accused provided that the Accused, in the presence of a witness, signs a written statement in which he confirms his refusal to be monitored through the nightly checks. However, I stress that the Chamber reserves the right to order the UNDU staff to recommence the nightly monitoring if there are any indications that the Accused willingly puts his life at risk, ceases to take a responsible attitude towards his own health, or if the Chamber is otherwise convinced that the nightly monitoring becomes necessary.

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

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Judge Antoine Kesia-Mbe Mindua

Dated this twenty-fifth day of August 2010  
At The Hague  
The Netherlands

**[Seal of the Tribunal]**