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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-04-75-PT

Date: 17 August 2012

Original: English

THE PRESIDENT OF THE TRIBUNAL

Before: Judge Theodor Meron, President

Registrar: Mr. John Hocking

Decision: 17 August 2012

PROSECUTOR

v.

GORAN HADŽIĆ

CONFIDENTIAL AND EX PARTE

**DECISION ON REQUEST FOR REVIEW OF DECISION ON
PRE-TRIAL FUNDING**

Counsel for Goran Hadžić:

Mr. Zoran Živanović

Mr. Christopher Gosnell

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 "Urgent Request for Review of OLAD Decision on Pre-Trial Funding", filed confidentially with confidential annexes by Goran Hadžić ("Hadžić") on 19 June 2012 ("Request"). The Registrar of the Tribunal ("Registrar") filed a response on 4 July 2012,¹ and Hadžić filed a reply on 10 July 2012.²

I. BACKGROUND

2. Hadžić was arrested in the Republic of Serbia on 20 July 2011 and was transferred to the Tribunal on 22 July 2011.³ On 23 January 2012, the Office of Legal Aid and Detention Matters of the Tribunal ("OLAD") informed Hadžić's counsel that the pre-trial phase of Hadžić's case would be classified at complexity level two.⁴

3. The Complexity Decision noted, *inter alia*, the weight of the charges against Hadžić and the fact that "the geographical and temporal scope of the *Hadžić* case is not as extensive as in other comparable cases".⁵ The Complexity Decision further noted that the parties were not yet in a position to provide exact information about the nature of witnesses that the Office of the Prosecutor ("Prosecution") intended to call at trial.⁶

4. On 26 April 2012, Hadžić requested that the Registry's complexity assessment for the pre-trial phase of his case be revised and upgraded to level three, arguing, *inter alia*, that the large volume of disclosed documents and the extensive geographic scope of the Prosecution's case merited such an upgrade.⁷ On 5 June 2012, OLAD rejected the Upgrade Request.⁸ In relevant part, OLAD reasoned that "extensive disclosure is not a valid justification on its own" to warrant a complexity level upgrade,⁹ that "the Registry [of the Tribunal] has no reason to believe that the volume of disclosed material, transcripts or victim-related information is exceptional in comparison

¹ Registrar's Submission Pursuant to Rule 33(B) of the Rules Regarding the Defence "Urgent Request for Review of OLAD Decision on Pre-Trial Funding", 4 July 2012 (confidential and *ex parte*) ("Response"). A public redacted version of the Response was filed on 30 July 2012.

² Reply to Registrar's Submissions on Urgent Request for Review of OLAD Decision on Pre-Trial Funding, 10 July 2012 (confidential and *ex parte* with a confidential annex) ("Reply").

³ *Prosecutor v. Goran Hadžić*, Case No. IT-04-75-I, Scheduling Order for Further Appearance, 17 August 2011, p. 2.

⁴ Request, Confidential Annex A, Letter from Jaimee Campbell, Head, OLAD, to Zoran Živanović, Lead Counsel, Goran Hadžić, 23 January 2012 ("Complexity Decision"), p. 1.

⁵ Complexity Decision, p. 1.

⁶ Complexity Decision, p. 1.

⁷ Request, Confidential Annex C, Letter from Zoran Živanović, Lead Counsel, Goran Hadžić, to Jaimee Campbell, Head, OLAD, 26 April 2012 ("Upgrade Request").

⁸ Request, Confidential Annex B, Letter from Jaimee Campbell, Head, OLAD, to Zoran Živanović, Lead Counsel, Goran Hadžić, 5 June 2012 ("Upgrade Decision"), pp. 3-4.

with other cases to such a degree so as to warrant a level three determination",¹⁰ and that "other related cases covering a larger geographical scope" have similarly been classified at complexity level two at the same pre-trial phase.¹¹

II. STANDARD OF REVIEW

5. 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.¹²

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).¹³

6. 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."¹⁴ 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."¹⁵

⁹ Upgrade Decision, p. 2.

¹⁰ Upgrade Decision, p. 2.

¹¹ Upgrade Decision, p. 3.

¹² *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.

¹³ Karadžić Decision, para. 6 (citation omitted). See also Žigić Decision, paras 13-14.

¹⁴ Žigić Decision, para. 13. See also Karadžić Decision, para. 7.

¹⁵ Karadžić Decision, para. 7 (citation and internal quotations omitted). See also Žigić Decision, para. 14.

III. APPLICABLE LAW

7. Article 24(A) of the Directive on the Assignment of Defence Counsel (“Directive”)¹⁶ establishes that remuneration for the pre-trial phase shall be determined in accordance with the Defence Counsel Pre-Trial Legal Aid Policy.¹⁷

8. Pursuant to paragraph 22 of the Legal Aid Policy, the Registrar will make a determination as to the complexity of the pre-trial stage of a case after consulting with the Chamber seized of the case and with the Defence team. The complexity level determination shall be based on, *inter alia*, an assessment of the following six factors: (i) the position of the accused within the political/military hierarchy; (ii) the number and nature of counts in the indictment; (iii) whether the case raises any novel issues; (iv) whether the case involves multiple municipalities (geographical scope); (v) the complexity of legal and factual arguments involved; and (vi) the number and type of witnesses and documents involved.¹⁸

9. Paragraph 35 of the Legal Aid Policy allows a Defence team working on a case determined to be of complexity level one or two to submit a request for a change in the complexity level. This request must “include a description of a change in the criteria specified in paragraph 22 [of the Legal Aid Policy] and the manner in which that change affects the preparation of the defence case.”¹⁹

IV. SUBMISSIONS

10. Hadžić asserts, *inter alia*, that the Complexity Decision and Upgrade Decision (collectively, “Impugned Decisions”) did not provide reasonable explanations justifying their conclusions.²⁰ He requests that I order the Registrar to either: (i) assign complexity level three funding for the pre-trial stage of the case; or (ii) issue a new decision on pre-trial funding.²¹

11. Hadžić contends that the Upgrade Decision was improperly characterized as a decision regarding “[r]econsideration”, suggesting that the Registry applied an erroneously elevated standard of review.²² He also contends that the Registry improperly relied on a memorandum from the Trial

¹⁶ IT/73/Rev. 11, 11 July 2006.

¹⁷ 1 May 2006 (“Legal Aid Policy”).

¹⁸ Legal Aid Policy, para. 22.

¹⁹ Legal Aid Policy, para. 35.

²⁰ See Request, paras 1, 10-13, 18, 30, 34; Reply, paras 8, 15, 18-22.

²¹ Request, para. 42.

²² Request, para. 14. See also Request, paras 15-18.

Chamber setting out its views on the appropriate funding level, noting that this memorandum was not disclosed to him.²³

12. Hadžić submits that the “vagueness” of the initial Complexity Decision makes it very difficult “to determine what factors had, or had not, already been taken into account” by OLAD.²⁴ In particular, with the exception of one case referred to in the Upgrade Decision, Hadžić asserts that the Registry does not explain which cases it relied on to inform its decision.²⁵

13. The Registrar responds, *inter alia*, that the Impugned Decisions were made in compliance with appropriate standards of law and administrative decision-making.²⁶ He asserts that the Impugned Decisions “outlined in detail” his consideration of Hadžić’s position and relevant criteria, and that “the reasoning was presented in such a way as to indicate to the Defence which factors heightened the difficulty of trial preparation and which did not have a significant effect.”²⁷ The Registrar maintains that the Complexity Decision was based on a consideration of relevant factors individually and collectively, that the comparison of Hadžić’s case to other Tribunal cases was “meant to ensure consistency in the ranking of cases across the Tribunal”,²⁸ and that “basic information about all Tribunal indictments and proceedings is publicly available”.²⁹ The Registrar also provides additional analysis of ten other Tribunal cases with respect to the counts charged, geographic scope, and number of witnesses.³⁰

14. Hadžić replies, *inter alia*, that the Response is “vague and non-responsive”.³¹ Hadžić challenges the Registrar’s analysis of other Tribunal cases as a basis for his conclusion that his case falls in the “mid-range” of complexity,³² and maintains that “the Defence has still not been able to reliably ascertain the level of funding assigned to all similarly-situated cases.”³³ He adds that the Registrar’s reliance on an undisclosed memorandum from the Trial Chamber in the Complexity Decision was improper.³⁴

²³ See Reply, paras 21-22.

²⁴ Request, para. 18.

²⁵ See Request, para. 11. See also Upgrade Decision, p. 3, n. 10.

²⁶ Response, para. 20.

²⁷ Response, para. 57 (internal citation omitted).

²⁸ Response, para. 59. See also Response, paras 27, 36-41.

²⁹ Response, para. 59.

³⁰ Response, paras 37-39.

³¹ Reply, para. 8. See also Reply, para. 15; Request, para. 10.

³² Reply, para. 7 (internal quotations omitted). See also Reply, paras 8-11.

³³ Reply, para. 19.

³⁴ See Reply, paras 21-22.

V. DISCUSSION

A. Preliminary Matter

15. I note that while the title of the Upgrade Decision mistakenly characterizes Hadžić's submission as a "Request for Reconsideration",³⁵ nothing in the Impugned Decisions other than the erroneous title indicates that the Registrar applied an elevated standard of review. I further note that the Upgrade Decision explicitly and appropriately considers the Upgrade Request in the context of paragraphs 22 and 35 of the Legal Aid Policy.³⁶ Accordingly I am satisfied that the Registrar properly considered the Upgrade Request as a request for a change in the complexity level.

B. Analysis

16. One core factor underlying the analysis of the Impugned Decisions was the complexity of comparable cases.³⁷ However, despite the Registrar's explicit reliance on a comparative analysis of other cases before the Tribunal in reaching its determination, the Impugned Decisions provide almost no indication of what those "comparable cases"³⁸ might be.³⁹

17. I note the Registrar's contention that he is "not obligated to provide the Defence with his research analysis of all (publicly available) contextual information that forms the basis of his decisions in other cases."⁴⁰ However procedural fairness demands that he provide those subject to his authority with information about the public precedents on which his decisions regarding their cases are based. Without citations to particular cases underlying the Registry's reasoning in the Impugned Decisions, Hadžić cannot be sure which cases informed the Registry's complexity determination.

18. The Response does provide more complete explanations than the Impugned Decisions concerning comparable cases.⁴¹ However, this *post hoc* rationalisation is insufficient to demonstrate the propriety of the Impugned Decisions.⁴² I recall that "insufficient explanations in the Impugned Decision[s]" may prevent a defendant "from preparing a focused application for review."⁴³ In my

³⁵ Upgrade Decision, p. 1.

³⁶ See generally Upgrade Decision.

³⁷ See Complexity Decision, p. 1; Upgrade Decision, pp. 2-3.

³⁸ Complexity Decision, p. 1.

³⁹ See generally Complexity Decision; Upgrade Decision.

⁴⁰ Response, para. 60.

⁴¹ See Response, paras 37-39.

⁴² Cf. *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on the Request for Review of Registrar Decision and for Summary Reversal, 7 May 2012 ("Second Karadžić Decision"), para. 10.

⁴³ Second Karadžić Decision, para. 11.

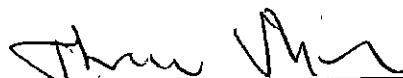
view, the Registry's failure to specify relevant comparable cases in the Impugned Decisions constituted such an insufficient explanation, and thus caused detriment to Hadžić.⁴⁴

19. Accordingly, I find that the Impugned Decisions violated Hadžić's right to procedural fairness and, in these circumstances, need not address other arguments raised by Hadžić and the Registrar. I believe the most appropriate remedy for this error is for the Registrar to prepare a revised Upgrade Decision which explicitly cites the comparable cases it relies on. Should Hadžić disagree with this revised decision, he can submit a new application for review.

VI. DISPOSITION

20. For the foregoing reasons, I hereby **GRANT** the Request, in part, and **ORDER** the Registrar to submit within five days of the filing of this decision, a revised Upgrade Decision which explicitly cites comparable cases relied on.

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



Judge Theodor Meron
President

Dated this 17th day of August 2012
At The Hague,
The Netherlands

[Seal of the Tribunal]

⁴⁴ I note that Hadžić's submissions suggest that he did not feel fully informed about the context within which OLAD took its decision. *See Reply*, paras 21-22. I would underscore to OLAD the importance of respecting relevant processes by which defendants can set out their arguments and learn about inputs to Registry decisions. With respect to requests for upgrades in complexity levels, these processes should include, where appropriate, a meeting with Defence counsel, representatives of the Prosecution, and relevant Chambers representatives in order to allow Defence counsel to orally explain the rationale for their requests and to clarify procedural issues on which they are uncertain.

