

D-04-75-PT
D7569 - D7562
26 September 2012

7569
SP

**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: 26 September 2012
Original: English

THE PRESIDENT OF THE TRIBUNAL

Before: Judge Theodor Meron, President

Registrar: Mr. John Hocking

Decision: 26 September 2012

PROSECUTOR

v.

GORAN HADŽIĆ

CONFIDENTIAL AND EX PARTE

**DECISION ON SECOND URGENT REQUEST FOR REVIEW
OF OLAD DECISION ON PRE-TRIAL FUNDING**

Counsel for the 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 seized of the confidential and *ex parte* "Second Urgent Request for Review of OLAD Decision on Pre-Trial Funding", filed by Goran Hadžić ("Hadžić") on 24 August 2012 ("Second Request").¹ The Registrar of the Tribunal ("Registrar") filed a confidential and *ex parte* response on 28 August 2012.² Hadžić did not file a reply.

I. BACKGROUND

2. On 23 January 2012, the Registry of the Tribunal ("Registry") informed Hadžić that the pre-trial phase of his case would be classified at a complexity level two.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," placing his case "at the middle level of the complexity spectrum."⁴ On 26 April 2012, Hadžić requested that the Registry's complexity assessment for the pre-trial phase of the case be revised and upgraded to level three, arguing, *inter alia*, that the expansion of his case as a result of the filing of the Second Amended Indictment,⁵ the large volume of newly disclosed documents and the extensive geographic scope of the Office of the Prosecutor's ("Prosecution") case merited such an upgrade.⁶

3. On 5 June 2012, the Registry rejected the Upgrade Request.⁷ In relevant part, the Registry submitted that the Second Amended Indictment did not materially change the scope of the case against Hadžić, that "extensive disclosure is not a valid justification on its own" to warrant a complexity level upgrade,⁸ that "the Registry has no reason to believe that the volume of disclosed material, transcripts or victim-related information is exceptional in comparison with other cases to

¹ The Second Request was originally filed publicly with a confidential Annex. Pursuant the confidential and *ex parte* "Order to the Registry to Reclassify Second Urgent Request for Review of OLAD Decision on Pre-Trial Funding", filed on 30 August 2012, the Second Request was reclassified as confidential and *ex parte* on 4 September 2012.

² Registrar's Submission Pursuant to Rule 33(B) of the Rules Regarding the Defence "Second Urgent Request for Review of OLAD Decision on Pre-Trial Funding", 28 August 2012 (confidential and *ex parte*) ("Second Response").

³ Urgent Request for Review of OLAD Decision on Pre-Trial Funding, 19 June 2012 (confidential) ("First Request"), Confidential Annex A, Letter from Jaimee Campbell, Head, Office for Legal Aid and Detention Matters of the Tribunal ("OLAD"), to Zoran Živanović, Lead Counsel, Goran Hadžić, 23 January 2012 ("Complexity Decision"), p. 1. A public and redacted version of the First Request was filed on 17 August 2012, however the Annexes of the First Request remained confidential in their entirety.

⁴ Complexity Decision, p. 1.

⁵ 24 March 2012 ("Second Amended Indictment").

⁶ First Request, Confidential Annex C, Letter from Zoran Živanović, Lead Counsel, Goran Hadžić, to Jaimee Campbell, Head, OLAD, 26 April 2012 ("Upgrade Request").

⁷ First 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.

⁸ Upgrade Decision, p. 2.

such a degree so as to warrant a level three [complexity] determination”,⁹ and that “other related cases covering a larger geographical scope” had similarly been classified at complexity level two at the same pre-trial phase.¹⁰

4. On 19 June 2012, Hadžić requested that I review both the Complexity Decision and the Upgrade Decision, and 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.¹¹ Hadžić asserted, *inter alia*, that with the exception of one case referred to in the Upgrade Decision, the Registry did not explain which cases it had relied on to inform its decision.¹²

5. On 17 August 2012, I granted the First Request in part, and ordered the Registrar to submit a revised Upgrade Decision, explicitly citing comparable cases it relied on in reaching its Complexity Decision.¹³ On 22 August 2012, the Registry reissued its decision in regards to Hadžić’s pre-trial funding, including references to the specific cases it relied on in its analysis.¹⁴

II. STANDARD OF REVIEW

6. 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.¹⁵

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

⁹ Upgrade Decision, p. 2.

¹⁰ Upgrade Decision, p. 3.

¹¹ First Request, paras 1, 42.

¹² First Request, para. 11. *See also* Upgrade Decision, p. 3, n. 10.

¹³ Decision on Request for Review of Decision on Pre-Trial Funding, 17 August 2012 (confidential and *ex parte*) (“Decision on First Request”), paras 19-20.

¹⁴ Second Request, Confidential Annex A, Letter from Jaimee Campbell, Head, OLAD, to Zoran Živanović, Lead Counsel, Goran Hadžić, 22 August 2012 (“Revised Upgrade Decision”), pp. 1, 4, nn. 1-2, 12-13.

¹⁵ *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.

(d) reached a conclusion which no sensible person who has properly applied his mind to the issue could have reached (the "unreasonableness" test).¹⁶

7. 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."¹⁷ 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."¹⁸

III. APPLICABLE LAW

8. Article 24(A) of the Directive on the Assignment of Defence Counsel¹⁹ establishes that remuneration for the pre-trial phase shall be determined in accordance with the Defence Counsel Pre-Trial Legal Aid Policy.²⁰

9. 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 seised 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.²¹

10. Paragraph 35 of the Legal Aid Policy allows a Defence team working on a case determined to be of a complexity level one or two to submit a request for a change in the complexity level. Such a 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."²²

IV. SUBMISSIONS

11. Hadžić asserts, *inter alia*, that the Revised Upgrade Decision "is manifestly deficient, does not comply with the [Decision on First Request], and is still not a decision that any sensible

¹⁶ Karadžić Decision, para. 6. See also Žigić Decision, paras 13-14.

¹⁷ Žigić Decision, para. 13. See also Karadžić Decision, para. 7.

¹⁸ Karadžić Decision, para. 7. See also Žigić Decision, para. 14.

¹⁹ IT/73/Rev. 11, 11 July 2006.

²⁰ 1 May 2006 ("Legal Aid Policy").

²¹ Legal Aid Policy, para. 22.

²² Legal Aid Policy, para. 35.

decision-maker could have reached.”²³ To this end, Hadžić requests that I direct the Registrar to authorise pre-trial funding at complexity level three and order the Registrar to file any response within four days of the Second Request.²⁴

12. Specifically, Hadžić contends that the Revised Upgrade Decision: (i) errs by assuming that cases involving multiple accused are more complicated to prepare than single accused cases;²⁵ (ii) fails to address the fact that “at this stage in the Tribunal’s history,” documentary evidence is being produced at an earlier stage, and that the accumulated disclosure from other major sources that was not available in earlier cases tends to increase the relative complexity of current cases;²⁶ (iii) fails to address Hadžić’s argument that the geographic scope of the charges against him expanded beyond that considered in the Complexity Decision;²⁷ (iv) does not address the increase in the number of Prosecution witnesses from 115 to 141;²⁸ and (v) is excessively vague.²⁹

13. The Registrar submits that he has complied with the Decision on First Request.³⁰ Specifically, the Registrar contends that the Revised Upgrade Decision includes citations to the cases relied upon in both the Upgrade Decision and the Complexity Decision.³¹ The Registrar also submits that the ranking of the Hadžić’s case at complexity level two was “within [his] margin of appreciation.”³²

V. DISCUSSION

14. At the outset, I note that the Registry includes various references to mid-level cases in the Revised Upgrade Decision, with comparable counts,³³ geographic scope³⁴ and Prosecution witnesses.³⁵ I consider the newly added references sufficient to instruct Hadžić on the cases that informed the Registry’s complexity determination and therefore find that the Registrar complied

²³ Second Request, para. 3.

²⁴ Second Request, para. 11.

²⁵ Second Request, para. 5. *See also* Revised Upgrade Decision, p. 4; Upgrade Decision, p. 3.

²⁶ Second Request, para. 6.

²⁷ Second Request, para. 7. *See also* First Request, paras 29-32.

²⁸ Second Request, para. 4. *See also* Reply to Registrar’s Submissions on Urgent Request for Review of OLAD Decision on Pre-Trial Funding, 10 July 2012 (confidential and *ex parte*) (“Reply”), paras 1, 5-6.

²⁹ Second Request, para. 8. Hadžić further incorporates by reference all previous relevant submissions. *See* Second Request, para. 9.

³⁰ Second Response, para. 2.

³¹ Second Response, para. 3.

³² Second Response, para. 5.

³³ Revised Upgrade Decision, p. 1, n. 1.

³⁴ Revised Upgrade Decision, pp. 1, 4, nn. 2, 12.

³⁵ Revised Upgrade Decision, p. 4, n. 13.

with the Decision on First Request in this regard.³⁶ I shall address the remainder of Hadžić's concerns in turn.

A. Single Accused Case

15. Hadžić is unconvincing in asserting that the Registry materially erred in assessing his status as a single accused.³⁷ As an initial matter, I note that Hadžić suggests that workload should be assumed to be greater in single-accused cases, while the Registrar suggests that workload should be assumed to be greater in multiple-accused cases.³⁸ I would underscore that principles of procedural fairness demand that each case be assessed individually, based on the factors enumerated in paragraph 22 of the Legal Aid Policy.³⁹ In these circumstances, Hadžić does not demonstrate that the Registry erred in not considering his status as a single accused a circumstance which in itself supported an upgrade to the complexity level of his case.

B. Documentary Evidence

16. I do not find that Hadžić has demonstrated that the Registry failed to consider relevant material in regards to the disclosure of documents in his case or that the Registry's analysis was unreasonable in this regard.⁴⁰ Specifically, the Registry noted that it takes into account the ongoing nature and scope of document disclosure when reaching complexity level determinations.⁴¹ The Registry determined that "extensive disclosure is not a valid justification on its own for upgrading the level of complexity."⁴² Hadžić does not demonstrate any error by the Registry in its determination that he did not show that "the volume of disclosed material, transcripts or victim-related information is exceptional in comparison with other cases to such a degree so as to warrant a level three determination."⁴³

³⁶ Given that the Second Response was filed by the Registrar on 28 August 2012, Hadžić's request that I order the Registrar to respond to the Second Request within four days has been rendered moot. See Second Request (filed on 24 August 2012), para. 11.

³⁷ Second Request, para. 5.

³⁸ See Reply, para 26; Revised Upgrade Decision, p. 4; 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*) ("First Response"), para. 51, n. 55.

³⁹ Cf. *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, para. 47.

⁴⁰ See Second Request, para. 6.

⁴¹ Revised Upgrade Decision, p. 3.

⁴² Revised Upgrade Decision, p. 3.

⁴³ Revised Upgrade Decision, p. 3.

C. Geographic Scope

17. Hadžić is unconvincing in asserting that the Registry materially erred in assessing the geographic scope of the case.⁴⁴ I note that in the Complexity Decision, the Registry took into account relevant material, including the First Amended Indictment,⁴⁵ the Work Plan, other similarly situated cases and, after consultation with the Trial Chamber, concluded that the geographic scope was consistent with complexity level two.⁴⁶ I consider that the Registry also acted reasonably in relying on the Trial Chamber Decision on Leave to Amend the Indictment to support its conclusion that the Second Amended Indictment did not expand the geographic scope of the case.⁴⁷ Finally, I observe that the Registry also provided two examples of cases with comparable geographic spread which were classified at complexity level two during the pre-trial stage.⁴⁸ In these circumstances, I consider that the Registry acted within the scope of its discretion in determining that issues relating to geographic scope did not impact the conclusions of the Complexity Decision.⁴⁹

D. Prosecution Witnesses

18. I observe that the Registrar fails to address Hadžić's arguments in regards to the increase in the number of Prosecution witnesses from 115 to 141,⁵⁰ notwithstanding the Registrar's submissions noting his knowledge of this change.⁵¹ I further observe that the Revised Upgrade Decision fails to cite to a single-accused case that was allocated level two funding where 141 or more Prosecution witnesses were heard.⁵²

19. The Registry need not justify every individual determination, nor is it under an obligation to make available (redacted) versions of previous complexity decisions.⁵³ Nevertheless, I believe that it is important to achieve consistency in the ranking of cases.⁵⁴ In context, I consider that the increase in Prosecution witnesses to 141 would, on its face, "affect[] the preparation of the defence

⁴⁴ Specifically, Hadžić asserts that the Work Plan, based on the First Amended Indictment, did not include the municipalities of western Krajina, which the Trial Chamber seized of Hadžić's case ("Trial Chamber") has since clarified are encompassed by the totality of the Second Amended Indictment. See First Request, para. 31, n. 23; Decision on Motion for Leave to Amend the First Amended Indictment, 14 March 2012 ("Trial Chamber Decision on Leave to Amend the Indictment"), para. 33. See also Upgrade Request.

⁴⁵ *Prosecutor v. Goran Hadžić*, Case No. IT-04-75-I, First Amended Indictment, 22 July 2011.

⁴⁶ See First Response, paras 32-33, 38, n. 27.

⁴⁷ Revised Upgrade Decision, pp. 3-4, citing Trial Chamber Decision on Leave to Amend the Indictment, para. 33. See also Upgrade Decision, p. 3; First Response, para. 48.

⁴⁸ Revised Upgrade Decision, p. 4, n. 12.

⁴⁹ See Revised Upgrade Decision, pp. 3-4.

⁵⁰ See Revised Upgrade Decision, p. 4.

⁵¹ See First Response, para. 39, n. 38. I note that while the Registrar stated that he would consider the increased number of Prosecution witnesses in regards to a request for an adjustment of a lump sum, see First Response, para. 39, n. 38, citing Legal Aid Policy, paras 37-39, he failed to provide a reasoned opinion as to why he did not consider the increased number of Prosecution witnesses pursuant to the First or Second Request for a change in complexity level.

⁵² See Revised Upgrade Decision, p. 4, n. 13. See also Reply, para. 11.

⁵³ See, e.g., Second Request, para. 8.

case”, and potentially impact the complexity level of the case.⁵⁵ Thus, I consider the Registrar’s failure to address Hadžić’s relevant arguments in regards to an increased number of Prosecution witnesses constitutes a failure to provide a reasoned opinion.


20. Accordingly, I find that the Revised Upgrade Decision violated Hadžić’s right to procedural fairness. I believe that the most appropriate remedy for this error is for the Registrar to either prepare a Second Revised Upgrade Decision, which addresses the increased number of Prosecution witnesses, or to upgrade Hadžić’s pre-trial case complexity.

VI. DISPOSITION

21. In view of the foregoing, I hereby **GRANT** the Second Request, in part, and **ORDER** the Registrar to either (i) submit, within ten days of the filing of this decision, a new complexity decision which addresses the increase in the number of Prosecution witnesses; or (ii) upgrade Hadžić’s pre-trial case to complexity level three.

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

Done this 26th day of September 2012,
At The Hague,
The Netherlands.



Judge Theodor Meron
President

[Seal of the Tribunal]

⁵⁴ Cf. *Prosecutor v. Rasim Delić*, Case No. IT-04-83-PT, Decision on Request for Review, 9 June 2005, para. 13.

⁵⁵ Legal Aid Policy, para. 35. See also *supra*, para. 19.