

**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-T  
Date: 2 July 2014  
Original: English

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**IN THE TRIAL CHAMBER**

**Before:** Judge Guy Delvoie, Presiding  
Judge Burton Hall  
Judge Antoine Kesia-Mbe Mindua

**Registrar:** Mr. John Hocking

**Decision:** 2 July 2014

**PROSECUTOR**

v.

**GORAN HADŽIĆ**

**PUBLIC**

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**DECISION ON REQUEST FOR ACCESS TO AND COMMUNICATION WITH  
COUNSEL DURING GORAN HADŽIĆ'S TESTIMONY**

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**The Office of the Prosecutor:**

Mr. Douglas Stringer

**Counsel for Goran Hadžić:**

Mr. Zoran Živanović

Mr. Christopher Gosnell

1. **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”) is hereby seized of the Defence “Request for Access to and Communication with Counsel During Goran Hadžić’s Testimony”, filed confidentially on 23 June 2014 (“Motion”). The “Prosecution Response to Hadžić Request for Access to and Communication with Counsel During his Testimony” was filed confidentially on 25 June 2014 (“Response”). The Defence filed confidentially its “Reply to Prosecution Response to Hadžić Request for Access to and Communication with Counsel During his Testimony” on 26 June 2014 (“Reply”).

2. The Trial Chamber notes that the parties’ filings in the present matter have all been confidential. By virtue of Rule 78 of the Rules of Procedure and Evidence (“Rules”), however, all proceedings before the Tribunal shall be public unless there are exceptional reasons for keeping them confidential.<sup>1</sup> The Trial Chamber does not consider the general privacy concerns of witnesses taking the stand,<sup>2</sup> in this instance the Accused, without more detailed submissions, an exceptional basis warranting the confidentiality of this decision. By virtue of the same, the Trial Chamber does not consider it necessary to maintain the confidential status of the Motion, Response, and Reply and will therefore lift the confidentiality of these filings.

#### **A. Submissions**

3. In the Motion, the Defence requests that the Trial Chamber affirm Hadžić’s right to meet and communicate with counsel throughout his testimony.<sup>3</sup> The Defence argues that depriving Hadžić of counsel for the full month he is expected to take the stand would “endanger the integrity and fairness of the proceedings as a whole.”<sup>4</sup> The Defence further argues that preparation of the Defence case with respect to subsequent witnesses would be substantially impeded if Hadžić does not have contact with his counsel for the period in which he is testifying.<sup>5</sup> In addition, the Defence submits that the complexity of direct examination, which will entail the use of a large number of documents, justifies ongoing contact between Hadžić and his counsel.<sup>6</sup> The Defence proposes that the following guidelines be adopted during Hadžić’s testimony: (i) Hadžić shall have unrestricted access to his counsel throughout his testimony; (ii) during cross-examination and re-direct,

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<sup>1</sup> See *Prosecutor v. Milan Lukić and Sredoje Lukić*, IT-98-32/1-AR65.1, Decision of Defence Appeal Against Trial Chamber’s Decision on Sredoje Lukić’s Motion for Provisional Release, 16 April 2007, fn. 2.

<sup>2</sup> See Reply, fn. 1.

<sup>3</sup> Motion, paras 1-2, citing *Prosecutor v. Prlić et al.*, Case No. IT-04-74-AR73.10, Decision on Prosecution’s Appeal Against Trial Chamber’s Order on Contact Between the Accused and Counsel During an Accused’s Testimony Pursuant to Rule 85(C), 5 September 2008, paras 12, 14, and 16 (“*Prlić Decision*”).

<sup>4</sup> Motion, para. 3, citing *Prlić Decision*, para. 16.

<sup>5</sup> Motion, para. 3.

<sup>6</sup> Motion, para. 3.

communication shall not include discussion of the substance of Hadžić's testimony, save by leave of the Trial Chamber; and (iii) at all times, counsel is free to communicate any filings, including exhibit lists, to Hadžić.<sup>7</sup>

4. The Prosecution responds that the Trial Chamber "should limit the extent to which Hadžić and his counsel may discuss his testimony during the period he is testifying."<sup>8</sup> The Prosecution submits that Hadžić and his counsel should be prohibited from discussing the substance of Hadžić's evidence, save by leave of the Trial Chamber, during direct examination as well as during cross-examination and re-direct.<sup>9</sup> The Prosecution argues that the Appeals Chamber and the *Popović* Trial Chamber have both stated that communications between counsel and the accused during the accused's testimony must be carried out in an appropriate manner.<sup>10</sup> The Prosecution submits that Judge Shahabuddeen and Judge Vaz have defined "appropriate" to mean that "counsel is not permitted to advise an accused, testifying on the witness stand, how he should reply to a question or line of questioning."<sup>11</sup> The Prosecution argues that communications or discussions between counsel and his client about his client's testimony, during the course of testimony, "may have the effect of influencing the Accused's evidence, even when no influence is intended."<sup>12</sup> The Prosecution further argues that, in order to ensure the integrity of cross-examination, the Trial Chamber should prohibit the Defence from providing or discussing with Hadžić the Prosecution's list of anticipated cross-examination documents ("Prosecution's Document List").<sup>13</sup>

5. The Defence replies that the extended length and scope of Hadžić's testimony justifies contact with counsel.<sup>14</sup> The Defence argues that reference to "appropriate" communications between an accused and his counsel by the Appeals Chamber and the *Popović* Trial Chamber did not place any limitation on the scope of contact during the direct examination of an accused.<sup>15</sup> The Defence further argues that prohibiting discussion of the Prosecution's Document List during direct examination is neither practical nor fair as many of the documents are likely to overlap with documents on the Defence's own list of anticipated direct examination documents ("Defence's Document List").<sup>16</sup> The limitation proposed by the Prosecution with regard to exhibit lists would therefore prohibit discussion of documents that also appear on the Defence's Document List, but

<sup>7</sup> Motion, paras 4-5, *citing Prosecution v. Popović et al.*, Case No. IT-05-88-T, Hearing, 26 January 2009, T. 30637-30638 ("*Popović* Decision").

<sup>8</sup> Response, para. 3.

<sup>9</sup> Response, paras 5, 7.

<sup>10</sup> Response, para. 3, *referring to Prlić* Decision, para. 18 and *Popović* Decision.

<sup>11</sup> Response, para. 3, *citing Prlić* Decision, Joint Declaration of Judge Shahabuddeen and Judge Vaz.

<sup>12</sup> Response, para. 5.

<sup>13</sup> Response, paras 6-7.

<sup>14</sup> Reply, para. 2.

<sup>15</sup> Reply, paras 3-4, *referring to Prlić* Decision, para. 18 and *Popović* Decision, T. 30637.

<sup>16</sup> Reply, para. 6.

unworkably allow discussion of the issues that might be addressed in those documents.<sup>17</sup> The Defence asserts the *Popović* Trial Chamber considered the issue of communicating exhibit lists in the context of contact between counsel and the accused during the accused's testimony, and refrained from imposing the restriction currently proposed by the Prosecution.<sup>18</sup> In relation to the Prosecution's Document List, the Defence asserts that the element of surprise before cross-examination is substantially less important in respect of a defendant who is and should be fully apprised of the Prosecution's case as a result of being present throughout trial.<sup>19</sup> The Defence further argues that the element of surprise "may damage the cause of truth-seeking" where an accused is testifying in his own case.<sup>20</sup>

### **B. Applicable Law**

6. Article 21(4)(d) of the Statute of the International Tribunal ("Statute") provides that the accused has a right to legal assistance. Article 21(4)(b) of the Statute provides that the accused shall be entitled "to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing."

7. Rule 85(C) of the Rules provides that, "[i]f the accused so desires, the accused may appear as a witness in his or her own defence."

8. Rule 90(F) of the Rules provides that "[t]he Trial Chamber shall exercise control over the mode and order of interrogating witnesses and presenting evidence so as to (i) make the interrogation and presentation effective for the ascertainment of the truth; and (ii) avoid needless consumption of time."

9. The Appeals Chamber has affirmed that it is a fundamental right of an accused to have access to counsel at any stage of the proceedings.<sup>21</sup> The Appeals Chamber found that the general prohibition of contact between a witness and the parties does not *per se* bar communications between an accused testifying in his own defence and his counsel, as there is a fundamental difference between an accused testifying on his own behalf and any other witness.<sup>22</sup>

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<sup>17</sup> Reply, para. 6.

<sup>18</sup> Reply, para. 7, citing *Prosecution v. Popović et al.*, Case No. IT-05-88-T, Hearing, 26 January 2009, T. 30633.

<sup>19</sup> Reply, para. 8.

<sup>20</sup> Reply, para. 8.

<sup>21</sup> *Prlić* Decision, paras 14, 19; see also *Popović* Decision, T. 30637.

<sup>22</sup> *Prlić* Decision, paras 11-12; *Prosecutor v. Galić*, Case No. IT-98-29-A, Judgement, 30 November 2006, para. 17 ("*Galić* Judgement").

10. The Appeals Chamber found that a decision on the extent of contact between counsel and an accused who chooses to testify in his own case is within the Trial Chamber's discretion.<sup>23</sup> The Appeals Chamber also affirmed that, pursuant to Rule 90(F) of the Rules, a Trial Chamber controls the mode and order of interrogating witnesses in order to make interrogation effective for the ascertainment of truth.<sup>24</sup> A Trial Chamber, however, "must bear in mind that there is a presumption in favour of the right to consult with counsel."<sup>25</sup> In applying these legal standards, the Appeals Chamber considered the complexity and length of proceedings before the Tribunal and the fact that an accused must often consult with counsel during trial on the appropriate defence strategy, or the significance of what is happening in the courtroom, and found that taking away the right to counsel for an extended period of time "could potentially undermine one of the most important basic rights of an accused and endanger the integrity and fairness of the proceedings as a whole."<sup>26</sup>

11. The Appeals Chamber was not persuaded that the reliability of an accused's testimony could only be preserved by prohibiting contact between counsel and the accused during the accused's testimony.<sup>27</sup> According to the Appeals Chamber, "a Trial Chamber should generally presume, absent evidence to the contrary, that conversations between an accused and his counsel will be appropriate."<sup>28</sup>

### C. Discussion

12. As a preliminary matter, the Trial Chamber notes that the Defence did not request leave to file the Reply. The Trial Chamber will, in this instance, *proprio motu* grant the Defence leave to file the Reply because the matter at hand merits full discussion by the parties. However, the Trial Chamber reminds the Defence that it is required to seek leave to file any reply as prescribed under Rule 126 *bis* of the Rules.

13. The Trial Chamber is mindful of the difference between an accused testifying on his own behalf and any other witness. One such difference is that while witnesses are ordinarily prohibited from contacts with parties during the course of their testimony, a testifying accused retains his fundamental right to counsel at any stage of the proceedings.<sup>29</sup>

14. Hadžić is expected to take the stand for 30 hours during direct examination and a further 30 hours during cross-examination, amounting to almost a full month of testimony. The Trial Chamber

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<sup>23</sup> *Prlić* Decision, paras 15-16.

<sup>24</sup> *Prlić* Decision, para. 16.

<sup>25</sup> *Prlić* Decision, para. 16.

<sup>26</sup> *Prlić* Decision, para. 16.

<sup>27</sup> *Prlić* Decision, para. 17.

<sup>28</sup> *Prlić* Decision, para. 18.

is cognisant that taking away Hadžić's access to counsel for such an extended period of time would undermine an important right of an accused and could endanger the integrity and fairness of the proceedings. The Trial Chamber is also cognisant of its responsibility to manage the proceedings in a way that is effective for the ascertainment of the truth and the role that effective cross-examination of witnesses plays in this regard.

15. In order to strike the appropriate balance between these factors, the Trial Chamber will order that Hadžić shall have access to his counsel throughout the course of his testimony. However, during the course of cross-examination and re-direct, communications between Hadžić and his counsel shall not include discussion of the substance of his testimony, save by leave of the Trial Chamber, which may, if necessary, be requested on an *ex parte* basis.

16. As to the issue of provision of the Prosecution's Document List, the Trial Chamber considers that this list is created based on the substance and strategy of the Prosecution's cross-examination of the Accused. The Trial Chamber considers that whilst Hadžić is aware of the evidence and case against him, he is not necessarily aware of the line of questioning that the Prosecution intends to pursue on cross-examination. In this regard, the Trial Chamber considers that the Prosecution's Document List forms part of the substance of Hadžić's testimony and will therefore prohibit counsel from providing Hadžić with the Prosecution's Document List or discussing with Hadžić the documents on that list, save by leave of the Trial Chamber. However, the Trial Chamber recognises that there may be overlap between the Defence's Document List and the Prosecution's Document List, and considers that such overlapping documents would properly form part of the examination-in-chief, during which time the Accused and his counsel are at liberty to communicate routinely.

17. The Trial Chamber will presume, absent evidence to the contrary, that throughout Hadžić's testimony, communications between Hadžić and his counsel will be appropriate and therefore not involve any 'coaching' of Hadžić on how he should reply to a question or a line of questioning, whether that line of questioning involves a document or not.<sup>30</sup> In the Trial Chamber's view, all references to counsel in this decision include all members of Hadžić's defence team.

#### **D. Disposition**

18. Accordingly, the Trial Chamber, pursuant to Article 21(4)(b) and (d) of the Statute and Rules 54, 78, 85(C), 90(F), and 126 *bis* of the Rules hereby:

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<sup>29</sup> See *Prlić* Decision, paras 11-12; *Galić* Judgement, para. 17.

<sup>30</sup> See also *Prlić* Decision, Joint Declaration of Judge Shahabuddeen and Judge Vaz.

**GRANTS**, *proprio motu*, the Defence leave to file the Reply;

**DIRECTS** the Registry to lift the confidential status of the Motion, Response, and Reply;

**GRANTS** the Motion, in part; and

**DECIDES** as follows:

- (a) Goran Hadžić shall have access to his counsel throughout the course of his testimony;
- (b) During the course of cross-examination and re-direct, communications between Hadžić and his counsel shall not include discussions of the substance of Hadžić's testimony, save by leave of the Trial Chamber, which may, if necessary, be requested on an *ex parte* basis;
- (c) Defence counsel shall not provide Hadžić with the Prosecution's Document List or discuss with Hadžić the documents on that list or their substance throughout the course of Hadžić's testimony, except as set out in (d) below or by leave of the Trial Chamber, which may be requested, if necessary, on an *ex parte* basis; and
- (d) Documents that appear on both the Defence's Document List and the Prosecution's Document List would properly form part of the examination-in-chief, during which time discussion of such overlapping documents shall be permitted; but during cross-examination and re-direct, discussion of such overlapping documents shall not be permitted, save by leave of the Trial Chamber, which may be requested, if necessary, on an *ex parte* basis.

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

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



Judge Guy Delvoic  
Presiding

[Seal of the Tribunal]