

**UNITED
NATIONS**

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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: 21 April 2015
Original: English

IN THE TRIAL CHAMBER

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

Registrar: Mr. John Hocking

Decision: 21 April 2015

PROSECUTOR

v.

GORAN HADŽIĆ

PUBLIC

**DECISION ON MOTION FOR VOLUNTARY WITHDRAWAL OR
DISQUALIFICATION OF JUDGES FROM ADJUDICATION OF MOTION TO
PROCEED WITH THE DEFENCE CASE**

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 seised of the “Motion for Voluntary Withdrawal or Disqualification of Judges from Adjudication of Motion to Proceed with the Defence Case”, filed on 24 March 2015 (“Disqualification Motion”). The “Prosecution Response to Motion for Voluntary Withdrawal or Disqualification of Judges from Adjudication of Motion to Proceed with the Defence Case” was filed on 1 April 2015 (“Response”). The Defence filed its “Reply Regarding Motion for Voluntary Withdrawal or Disqualification of Judges from Adjudication of Motion to Proceed with the Defence Case” on 8 April 2015 (“Reply”).

A. Background and Submissions

2. On 2 March 2015, the “Prosecution Motion to Proceed with the Defence Case” (“Motion to Proceed”) was filed. The Prosecution “requests that the Trial Chamber order the resumption of the trial in order to complete the Defence case, including, if necessary, conducting trial proceedings when the Accused is unable to attend.”¹ The Prosecution asserts that “[g]iven the advanced stage of trial proceedings and the Accused’s current ill-health, it is in the interests of justice for the Trial Chamber to proceed expeditiously with the Defence case in a manner that will ensure the fairness and integrity of the trial.”² The Defence opposes the Motion to Proceed, asserting that there is no discretion to dispense with an accused’s right to be present during trial proceedings.³

3. In the Disqualification Motion, the Defence asserts that the three Judges hearing the *Hadžić* case have an appearance of bias in adjudicating the Motion to Proceed and requests that, pursuant to Rule 15(A) of the Tribunal’s Rules of Procedure and Evidence (“Rules”), each Judge voluntarily withdraw from considering it.⁴ In the alternative, the Defence requests that the Presiding Judge report to the President of the Tribunal, in accordance with Rule 15(B)(i) of the Rules, that any Judge who does not voluntarily withdraw should be disqualified.⁵

4. In support of its request, the Defence first submits that the “current tenure of the Judges is both short and closely related to the continuation of the trial.”⁶ According to the Defence, an absence of security of tenure is relevant to an appearance of bias.⁷ The Defence further submits that

¹ Motion to Proceed, para. 1.

² Motion to Proceed, para. 1.

³ Response to Motion to Proceed with the Defence Case, 16 March 2015, paras 1, 7. *See also* Prosecution Request for Leave to Reply and Reply to Defence Response to Motion to Proceed with Defence Case, 24 March 2015.

⁴ Motion, paras 1-2.

⁵ Motion, para. 2.

⁶ Motion, paras 1, 13.

⁷ Motion, paras 7-8. The Defence clarifies that it does not suggest that the insecurity of judicial tenure gives rise to an appearance of bias that disqualifies the Judges from adjudicating the guilt or innocence of *Hadžić*. Motion, para. 14.

the “practical consequence” of the Motion to Proceed “would be to permit continuation of the trial not only when Mr. Hadžić is unfit to participate, but even when he is beyond the point of recovery.”⁸ As such, it argues, the Motion to Proceed “has a substantial impact on the continuation of the present proceedings and, in turn, on the Judges’ own tenure.”⁹ This, the Defence asserts, creates in the Judges a financial, economic, and professional interest in the disposition of the Motion to Proceed.¹⁰ The Defence, citing cases from the European Court of Human Rights (“ECHR”) and domestic jurisdictions, further asserts that a financial interest in litigation gives rise to an appearance of bias for which disqualification is automatic.¹¹ Finally, the Defence submits that the presumption of impartiality that attaches to Tribunal Judges is not relevant in instances where disqualification is automatic.¹² Even when disqualification is not automatic, it argues, this presumption does not necessarily overcome the other ground for disqualification, a “reasonable apprehension of bias”.¹³

5. In the Response, the Prosecution opposes the Disqualification Motion, describing it as “cynical and fundamentally flawed.”¹⁴ It first asserts that the presumption of impartiality of Tribunal Judges is not derived from the nature of the alleged bias and therefore applies to all disqualification motions.¹⁵ It asserts that the presumption of impartiality sets a high threshold for disqualification so as to protect against Judges disqualifying themselves on the basis of unfounded and unsupported allegations of apparent bias, which would be a potential threat to the interests of the impartial and fair administration of justice.¹⁶

6. Next, the Prosecution notes that the likelihood that this trial might extend beyond the current tenure of the Judges is the result of Hadžić’s unforeseen illness, and that it submitted the Motion to Proceed so as to accelerate the completion of the Defence case. The alternative, it suggests, is to continue the indefinite suspension of the trial until such time as Hadžić is able, if ever, to be present.¹⁷ The Prosecution further notes that by opposing the Motion to Proceed, the Defence is advocating a position that will delay the completion of the case even further, thereby increasing the

⁸ Motion, para. 14.

⁹ Motion, para. 14.

¹⁰ Motion, paras 1, 15-16.

¹¹ Motion, paras 9-11.

¹² Motion, para. 9.

¹³ Motion, para. 9.

¹⁴ Response, para. 1.

¹⁵ The Prosecution submits that the presumption arises from (a) the requirement that judges elected to the Tribunal are of “high moral character, impartiality and integrity”; (b) the oath Tribunal judges take to perform their duties honourably, faithfully, impartially, and conscientiously; and (c) the fact that professional judges are presumed to be able to “disabuse their minds of any irrelevant personal beliefs or predispositions.” Response, para. 2.

¹⁶ Response, para. 3.

¹⁷ Response, paras 5-6.

likelihood of extending the Judges' tenure.¹⁸ It submits that the Defence “fails to articulate how considering a motion intended to *expedite* the trial creates the appearance of bias” and asserts that there is no basis for suggesting that the Judges must be disqualified from considering measures intended to bring the trial to a conclusion.¹⁹

7. The Prosecution further submits that (a) the practice of extending the temporary tenure of Judges at the Tribunal—an *ad hoc* institution—when necessary to enable the Judges to complete trials is efficient and is consistent with the practice of permanent international courts;²⁰ (b) the Defence's argument suggests the absurd result that none of the remaining Judges at the Tribunal would be able to participate in a decision that has the potential of lengthening the completion of the case to which they are assigned;²¹ (c) the ECHR and domestic cases cited by the Defence only support a finding of bias where the financial interest of a judge relates to the outcome of a case, not the length of the case;²² and (d) the Defence's Rule 15(B)(i) request should have been filed before the Presiding Judge of Trial Chamber II.²³ Finally, the Prosecution asserts that the Disqualification Motion is “a poorly veiled attempt to hinder the expeditious completion of the Defence case by delaying resolution of the Motion to Proceed”, lacks any basis in law or fact, is frivolous and an abuse of process, and the Defence should therefore be sanctioned under Rule 73(D) of the Rules.²⁴

8. In the Reply,²⁵ the Defence asserts that (a) cases from the ECHR, Special Court for Sierra Leone, and domestic courts support a finding of bias where a judge has a “financial interest in the *matter* being decided”, regardless of whether it is a final determination of guilt of innocence;²⁶ (b) there are two distinct categories of “appearance of bias”, one of which—where a judge has a relevant interest in the outcome of a case—leads to automatic disqualification;²⁷ (c) the appearance of bias in this situation arises from the nature of the Judges' tenure combined with the Motion to Proceed “whose primary consequence is to radically extend the duration of proceedings”;²⁸ (d) the Judges withdrawing from consideration of the Motion to Proceed does not suggest that all Judges at the Tribunal will be required to withdraw from all motions that may have an impact on the duration of proceedings;²⁹ (e) the Motion to Proceed will not shorten the proceedings;³⁰ and (f) the Defence

¹⁸ Response, para. 5.

¹⁹ Response, paras 1, 4, 6.

²⁰ Response, paras 7-8.

²¹ Response, para. 9.

²² Response, para. 9.

²³ Response, para. 10.

²⁴ Response, paras 1, 11.

²⁵ The Chamber notes that the Defence has not sought leave to file a reply, as is required by Rule 126 *bis* of the Rules. The Trial Chamber will, in this instance, *proprio motu* grant the Defence leave to file the Reply.

²⁶ Reply, paras 1-3.

²⁷ Reply, paras 4-8.

²⁸ Reply, para. 9.

²⁹ Reply, paras 11-13.

should not be sanctioned for its filing of the Disqualification Motion.³¹ The Defence also withdraws its alternative request pursuant to Rule 15(B)(i) that the Presiding Judge report to the President of the Tribunal, and instead requests that the Judges voluntarily withdraw from consideration of the Motion to Proceed and request that the President of the Tribunal appoint a special panel to adjudicate the Motion to Proceed.³²

B. Applicable Law

9. Rule 15(A) of the Rules provides that “[a] Judge may not sit on a trial or appeal in any case in which the Judge has a personal interest or concerning which the Judge has or has had any association which might affect his or her impartiality.” It stipulates that a Judge in any such circumstance shall withdraw.

10. Noting that there is a general rule that a Judge should not only be subjectively free from bias, but also that there should be nothing in the surrounding circumstances which objectively gives rise to an appearance of bias, the Appeals Chamber has enunciated the following principles to guide the interpretation and application of Rule 15(A):

A. A Judge is not impartial if it is shown that actual bias exists.

B. There is an unacceptable appearance of bias if:

i) a Judge is a party to the case, or has a financial or proprietary interest in the outcome of a case, or if the Judge’s decision will lead to the promotion of a cause in which he or she is involved, together with one of the parties. Under these circumstances, a Judge’s disqualification from the case is automatic; or

ii) the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.³³

The reasonable observer “must be an informed person, with knowledge of all the relevant circumstances, including traditions of judicial integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties that the Judges swear to uphold”.³⁴

³⁰ Reply, paras 14-15.

³¹ Reply, paras 18-27.

³² While it is not clear from the Reply, the Chamber interprets the Defence to be requesting that the Chamber ask the President to appoint a special panel. Reply, paras 16-17, 28. *See also* Disqualification Motion, para. 17. The Chamber considers the Defence’s alternative request pursuant to Rule 15(B) to be moot.

³³ *Prosecutor v. Šainović et al.*, Case No. IT-05-87-A, Judgement, 23 January 2014 (“*Šainović et al.* Appeal Judgement”), para. 180; *Prosecutor v. Furundžija*, Case No. IT-95-17/1-A, Judgement, 21 July 2000 (“*Furundžija* Appeal Judgement”), paras 189, 191.

³⁴ *Šainović et al.* Appeal Judgement, para. 181; *Furundžija* Appeal Judgement, para. 190.

11. The Appeals Chamber has further held that Judges enjoy a presumption of impartiality and that there is a high threshold to reach in order to rebut this presumption.³⁵ This high threshold is required because “just as any real appearance of bias [on] the part of a judge undermines confidence in the administration of justice, it would be as much of a potential threat to the interests of the impartial and fair administration of justice if judges were to disqualify themselves on the basis of unfounded and unsupported allegations of apparent bias.”³⁶

C. Discussion

12. As a preliminary matter, the Chamber notes that in the Disqualification Motion the Defence requests only that the Judges withdraw from consideration of the Motion to Proceed, not from the case as a whole.³⁷ Rule 15(A) of the Rules, which refers only to “a trial or appeal”, does not expressly encompass such a situation. However, the Chamber considers that it is in the interests of justice to apply the provisions of Rule 15 of the Rules to such a request,³⁸ and notes that there is precedence within the Tribunal’s jurisprudence for doing so.³⁹

13. Turning to the Defence’s request pursuant to Rule 15(A), the crux of the Defence’s submissions is that the Judges should withdraw from consideration of the Motion to Proceed because the Judges have an appearance of bias due to a combination of the following factors: (a) “judicial tenure that depends on the continuation of this case”⁴⁰ and (b) “the substantial lengthening of the proceedings that would be occasioned by granting the Motion to Proceed”.⁴¹

14. In relation to the second factor, the Defence submits:

The Prosecution’s premise is that this case must continue until the day Mr. Hadžić dies. Indeed, that is exactly the purpose of the Motion to Proceed. The medical evidence, on the other hand, attests that a point will arrive when Mr. Hadžić’s health condition becomes irretrievable. The effect of the Motion to Proceed, however, is to erase the significance of such a medical threshold and proceed until the very day of Mr. Hadžić’s death. Contrary to the Prosecution claim, the consequence of the Motion to Proceed will be to substantially extend, not reduce, the duration of trial proceedings.⁴²

³⁵ *Šainović et al.* Appeal Judgement, para. 181; *Furundžija* Appeal Judgement, paras 196-197.

³⁶ *Prosecutor v. Delalić et al.*, Case No. IT-96-21-A, Judgement, 20 February 2001, para. 707.

³⁷ Motion, paras 14, 18.

³⁸ See *Prosecutor v. Šešelj*, Case No. IT-03-67-R77.3, Decision on Vojislav Šešelj’s Motion to Disqualify Judge Alphons Orie, 7 October 2010, para. 15.

³⁹ See *Prosecutor v. Stanišić and Župljanin*, Case No. IT-08-91-A, Order Assigning Motions to a Judge, 22 October 2013; *Prosecutor v. Stanišić and Župljanin*, Case No. IT-08-91-A, Order Assigning Motions to a Judge, 23 October 2013; *Prosecutor v. Stanišić and Župljanin*, Case No. IT-08-91-A, Order Assigning a Motion to a Judge, 25 October 2013; *Prosecutor v. Stanišić and Župljanin*, Case No. IT-08-91-A, Order Replacing a Judge in Respect of Motions Before the Appeals Chamber, 28 November 2013.

⁴⁰ Motion, para. 1.

⁴¹ Reply, para. 12.

⁴² Reply, para. 15.

This points to a fundamental misunderstanding on the part of the Defence as to the possible impact of the Motion to Proceed. In point of fact, the legal proceedings against Hadžić will continue until either (a) a judgement is rendered or (b) the legal proceedings are terminated. The effect of granting the Motion to Proceed would be to resume hearings in this case. The result of denying the Motion to Proceed, on the other hand, would be to continue to suspend hearings until such time as Hadžić is able to attend or the legal proceedings are otherwise terminated. In this respect, the Chamber notes that it is not the practice of this Tribunal to terminate legal proceedings due to an indefinite suspension of hearings arising from an accused's ill health and inability to attend.⁴³

15. The Chamber notes the Prosecution's submission that denying the Motion to Proceed will delay the completion of the case and thereby *increase* the likelihood of extending the Judges' tenure.⁴⁴ The Chamber considers, however, that the date of the completion of this case is dependent on many factors, not least of which is the health of Hadžić. Any possible impact on the date of completion arising from the outcome of the Motion to Proceed is therefore hypothetical and uncertain. Accordingly, the Chamber finds that the outcome of the Motion to Proceed will not have a "substantial and direct"⁴⁵ impact on the continuation of the case. Nor will its outcome affect the likelihood of an extension of the tenure of the Judges.

16. Having rejected the basic premise of the Defence's argument, the Chamber does not need to further consider the Defence's assertion that Tribunal Judges have a financial, economic, or professional interest in the outcome of motions that will have an impact on the duration of a case on which they are serving, or its assertion that such an interest would give rise to an unacceptable appearance of bias requiring a Judge's automatic disqualification. It is worth noting however, that trial management falls squarely within the purview of Trial Judges.⁴⁶ While the resolution of such issues may have an impact on the ultimate length of a case, and as such possibly on the tenure of those Judges, it must be recalled that:

All Judges have, as a matter of course, an interest in ensuring the integrity of the proceedings in which they are involved. Such an interest is not ... a personal interest, but a professional interest. It includes the interest to ensure that all proceedings before the Tribunal are conducted impartially and in accordance with international standards of due process and fair trial rights. The interest of

⁴³ See *Prosecutor v. Đukić*, Case No. IT-96-20-T, Decision Rejecting the Application to Withdraw the Indictment and Order for Provisional Release, 24 April 1996; *Prosecutor v. Đukić*, Case No. IT-96-20-A, Order Terminating the Appeal Proceedings, 29 May 1996; *Prosecutor v. Brdanin and Talić*, Case No. IT-99-36-T, Decision on the Motion for Provisional Release of the Accused Momir Talić, 20 September 2002; *Prosecutor v. Talić*, Case No. IT-99-36/1-T, Order Terminating Proceedings Against Momir Talić, 12 June 2003.

⁴⁴ Response, para. 5.

⁴⁵ Motion, para. 1.

⁴⁶ *Prosecutor v. Karadžić*, Case No. IT-95-5/18-AR73.10, Decision on Appeal from Decision on Duration of Defence Case, 29 January 2013, para. 7; *Prosecutor v. Prlić et al.*, Case No. IT-04-74-AR73.7, Decision on Defendant's Appeal Against "Décision portant attribution du Temps à la Défense pour la présentation des moyens à décharge", 1 July 2008, para. 15.

Judges is not just to get the trial done, but rather to get it done fairly It is expected that Judges will not shy away from making the appropriate finding whatever it may be.⁴⁷

17. For the above reasons, the Chamber does not find that any of the Judges hearing the *Hadžić* case has an appearance of bias that necessitates his withdrawal, pursuant to Rule 15(A) of the Rules, from adjudication of the Motion to Proceed.

D. Disposition

18. Accordingly, the Trial Chamber, pursuant to Rules 15, 73(D), and 126 *bis* of the Rules, hereby:

GRANTS the Defence leave to file the Reply;

DENIES the Disqualification Motion; and

DENIES the Prosecution request to order the Registrar to withhold payment of fees associated with the production of the Disqualification Motion and/or costs thereof.

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

Done this twenty-first day of April 2015,
At The Hague,
The Netherlands.


Judge Guy Delvoic
Presiding

[Seal of the Tribunal]

⁴⁷ *Prosecutor v. Brdanin*, Case No. IT-99-36-R77, Decision on Application for Disqualification, 11 June 2004, para. 19.