

**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: 15 December 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: 15 December 2015

PROSECUTOR

v.

GORAN HADŽIĆ

PUBLIC

DECISION ON MOTION TO MODIFY TERMS OF PROVISIONAL RELEASE

The Office of the Prosecutor:

Mr. Douglas Stringer

Counsel for Goran Hadžić:

Mr. Zoran Živanović

Mr. Christopher Gosnell

TRIAL CHAMBER II 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 (“Chamber” and “Tribunal”, respectively);

NOTING that, on 21 May 2015, the Chamber issued its “Decision on Urgent Motion for Provisional Release Filed on 28 April 2015” (“Decision on Provisional Release”), granting, in part, Hadžić’s request for provisional release and ordering, *inter alia*, that during his provisional release:

Hadžić shall have no contact whatsoever or in any way interfere with victims or witnesses or otherwise interfere in any way with the proceedings of the Tribunal or the administration of justice;¹

NOTING that, on 16 July 2015, the Chamber denied a Defence motion to modify this condition and thus denied Hadžić’s request to have social contact with individuals who are listed as his witnesses;²

NOTING that on 26 October 2015, when ordering a stay of the proceedings in this case for an initial period of three months,³ the Chamber ordered the continuation of Hadžić’s provisional release under the same terms and conditions as set out in the Decision on Provisional Release,⁴ but stated that “[s]hould the Defence seek amendments to the conditions of Hadžić’s provisional release, such as allowing contact with witnesses, the Defence may file a motion requesting that Hadžić be allowed to have contact with certain enumerated witnesses or request any other amendment it deems appropriate”;⁵

BEING SEISED OF the “Motion to Modify Terms of Provisional Release”, filed confidentially by the Defence on 3 November 2015 (“Motion”), in which the Defence requests that the Chamber modify the conditions of provisional release to permit Hadžić to have social interaction with witnesses DGH-016, DGH-045, and DGH-099 (witnesses who have already testified) and witnesses DGH-009, DGH-010, and DGH-011 (witnesses who have not yet testified);⁶

¹ Decision on Provisional Release, para. 36(5)(f).

² Decision on Motion to Modify Terms of Provisional Release (confidential), 16 July 2015, (“Decision of 16 July 2015”). The Trial Chamber subsequently denied a request for reconsideration of this decision. Decision on Urgent Request for Reconsideration of Decision on Motion to Modify Terms of Provisional Release (confidential), 24 August 2015.

³ Consolidated Decision on the Continuation of Proceedings, 26 October 2015 (“Decision of 26 October 2015”) para. 69(a).

⁴ Decision of 26 October 2015, para. 69(g). The Chamber notes that it made a modification in relation to the requirement that the Reporting Medical Officer of the United Nations Detention Unit report to the Chamber on the medical condition of Hadžić. Decision of 26 October 2015, para. 69(f).

⁵ Decision of 26 October 2015, para. 67.

⁶ Motion, paras 1, 5.

NOTING the Defence submissions that (a) the Rules do not explicitly prohibit contact between an accused and his witnesses;⁷ (b) “[i]n light of Mr. Hadžić’s health condition, precluding contact with witnesses—especially those who have already testified—is no longer necessary to prevent interference with the ‘administration of justice’”;⁸ and (c) “permitting such social contacts is humane and reasonable, given the unlikelihood that proceedings will ever resume”;⁹

NOTING the “Prosecution’s Response to Motion to Modify Terms of Provisional Release”, filed confidentially on 13 November 2015 (“Response”), in which it opposes the Motion, submitting that because, *inter alia*, Hadžić has been found fit to stand trial,¹⁰ there remains a possibility of proceedings resuming in this case,¹¹ and that as long as such a possibility remains, the condition that Hadžić refrain from “contacting witnesses—both past and prospective—is essential to preserving the integrity of the proceedings and preventing interference with the administration of justice”;¹²

NOTING the Prosecution’s submission that allowing Hadžić to communicate with the witnesses enumerated in the Motion would “unduly create the risk of interference with the administration of justice and diminish the integrity of these proceedings”¹³ because (a) there has been “highly incriminating” evidence adduced at trial linking Hadžić and DGH-009, DGH-010, DGH-011, as well as DGH-099 to crimes charged in the Indictment;¹⁴ and (b) allowing Hadžić to communicate with DGH-045 would enable Hadžić to “circumvent the restriction on discussing his case with anyone, including the media, by channelling his communications through [DGH-045]”;¹⁵

NOTING the Prosecution’s submission that “the distinction the Accused seeks to draw between past and prospective witnesses is inapposite”, because (a) the restriction on witness contact is included as a condition of provisional release even in cases in which all witnesses have been heard and (b) it is possible that a witness may be recalled;¹⁶

⁷ Motion, para. 3.

⁸ Motion, para. 4.

⁹ Motion, para. 4.

¹⁰ The Prosecution also notes that the Chamber denied the Defence motion to terminate the proceedings and that the Prosecution is appealing the Chamber’s decision to stay the proceedings for three months. Response, para. 4.

¹¹ Response, paras 2, 4.

¹² Response, para. 2.

¹³ Response, paras 8, 9.

¹⁴ Response, paras 7-8.

¹⁵ Response, para. 9, *internal citations omitted*.

¹⁶ Response, para. 6.

NOTING the Prosecution's further submission that Hadžić's ill health does not justify him contacting any of his witnesses, and he has failed to show sufficient reasons to justify reconsideration of this condition and to permit him to have contact with Defence witnesses;¹⁷

NOTING the "Reply to Prosecution Response to Motion to Modify Terms of Provisional Release", filed confidentially by the Defence on 20 November 2015 ("Reply"), in which the Defence requests leave to reply¹⁸ and that the parties be ordered to file public redacted versions of all filings in relation to the Motion;¹⁹

NOTING the Defence submission that the standard for reconsideration of a decision should not be applied in this case because the Chamber "expressly invited the Defence to request modification of the terms of provisional release" in the Decision of 26 October 2015, but that, in any event, the Decision of 26 October 2015 constitutes a new fact justifying the requested relief;²⁰

NOTING the Defence submission that the Chamber's finding in the Decision of 26 October 2015 that Hadžić is not unfit to stand trial does not suggest that trial proceedings could re-commence as the Chamber also held that "this trial cannot continue in a manner consistent with the full and fair adjudication of this case without detriment to the fundamental principles of respect for the inherent human dignity of an accused and the presumption of innocence";²¹

NOTING the Defence submissions that the chance that Hadžić could influence the evidence of the three prospective witnesses is "virtually non-existent" because (a) it is improbable that the proceedings will resume; (b) Hadžić's current health is incompatible with witness coaching; (c) Hadžić has "documented pre-occupations with the future, which do not include the need to coach witnesses to ensure that their testimony conforms to any particular narrative";²² and (d) even if there was strong evidence linking Hadžić and enumerated witnesses to crimes charged in the Indictment, which there is not, this would not establish a particular risk of coaching;²³

NOTING the Defence submission that the Prosecution has not shown that Hadžić would use DGH-045 to channel information to the media;²⁴

¹⁷ Response, para. 5.

¹⁸ Reply, para. 1.

¹⁹ Reply, para. 16.

²⁰ Reply, paras 3-4.

²¹ Reply, para. 14, *quoting* Decision of 26 October 2015, para. 65.

²² Reply, para. 7.

²³ Reply, paras 8-9.

²⁴ Reply, paras 10-13.

NOTING the Defence submissions that (a) the recall of Defence witnesses is extremely rare; (b) it waives its right to recall the three witnesses who have previously testified who are the subject of the Motion; (c) Hadžić has not requested a variation of the obligation not to discuss the content of the case with anyone; and, (d) therefore, the risk that testimony in this case could be affected by Hadžić’s contact with the witnesses who have already testified is “zero”;²⁵

NOTING that Rule 65(C) of the Tribunal’s Rules of Procedure and Evidence (“Rules”) provides that a “Trial Chamber may impose such conditions upon the release of the accused as it may determine appropriate”;

CONSIDERING that even if the Defence “waives its right to recall” the three witnesses who have previously testified,²⁶ the Prosecution may request, or the Chamber may order, the recall of these witnesses and, thus, the Chamber sees no reason to distinguish between past and prospective witnesses;

CONSIDERING that there is currently an appeal pending before the Appeals Chamber in which the Prosecution challenges the Trial Chamber’s decision to grant a three-month stay of proceedings rather than order that the trial resume,²⁷ and that, as such, there remains the possibility of the proceedings in this case continuing;

CONSIDERING that as long as there is a possibility that the proceedings in this case will continue, in order to safeguard the integrity of the proceedings and the administration of justice, Hadžić’s current health condition notwithstanding,²⁸ it would not be appropriate for Hadžić to engage in contact with Defence witnesses;²⁹

CONSIDERING, moreover, that the Defence’s submission that “permitting such social contacts is humane and reasonable”,³⁰ without further explanation,³¹ does not satisfy the Chamber that it is appropriate to allow Hadžić contact with the enumerated Defence witnesses;

²⁵ Reply, paras 5-6.

²⁶ Reply, para. 5.

²⁷ *Prosecutor v. Hadžić*, Case No. IT-04-75-AR73.1, Prosecution’s Urgent Interlocutory Appeal from Consolidated Decision on the Continuation of Proceedings, 1 December 2015. *See also* Decision on Prosecution Request for Certification to Appeal Consolidated Decision on the Continuation of Proceedings, 24 November 2015.

²⁸ *Contra* Motion, para. 4; Reply, para. 7.

²⁹ *See* Decision of 16 July 2015, para. 9.

³⁰ Motion, para. 4.

³¹ The Chamber notes that the Defence relies only on the “unlikelihood that proceedings will ever resume” to support this submission. Motion, para. 4.

FINDING that, under these circumstances, it is not in the interest of justice to modify the conditions of provisional release so as to allow Hadžić social contact with DGH-009, DGH-010, DGH-011, DGH-016, DGH-045, or DGH-099;

CONSIDERING that proceedings before the Tribunal shall be public unless there are exceptional reasons for keeping them confidential;³² and that there are no exceptional reasons for keeping the Motion or Reply confidential;

PURSUANT to Rules 54, 65, 78, and 126 *bis* of the Rules, hereby:

GRANTS the Defence leave to file the Reply;

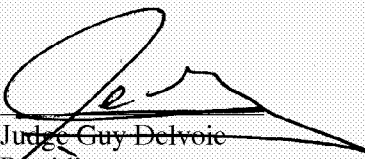
ORDERS the Prosecution—by 22 December 2015—to file a public redacted version of the Response removing any information which could identify protected witness DGH-009;

INSTRUCTS the Registry to lift the confidentiality of the Motion and Reply; and

DENIES the Motion, without prejudice.

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

Done this fifteenth day of December 2015,
At The Hague,
The Netherlands.



Judge Guy Delvoie
Presiding

[Seal of the Tribunal]

³² Rule 78 of the Rules; Decision on Request for Reclassification of Expert Medical Reports, 9 April 2015, p. 1; Decision on Defence Request for Reclassification of Filings Related to Hadžić's Health Condition as Public and Prosecution Motion for Reclassification of Testimony as Public, 13 March 2015, para. 6; *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.