

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: 5 April 2016
Original: English

IN THE TRIAL CHAMBER

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

Registrar: Mr. John Hocking

Decision: 5 April 2016

PROSECUTOR

v.

GORAN HADŽIĆ

PUBLIC

**PUBLIC REDACTED VERSION OF 24 MARCH 2016
DECISION ON REMAND ON THE CONTINUATION OF PROCEEDINGS**

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 "Decision on Prosecution's Urgent Interlocutory Appeal from Consolidated Decision on the Continuation of Proceedings", rendered by the Appeals Chamber on 4 March 2016 ("Appeals Chamber Decision").

2. The Trial Chamber is also seized of the "Motion for Proposed Directions to Assess Medical Fitness", filed by the Defence on 9 March 2016 ("Motion"). The "Prosecution's Response to Defence Motion for Proposed Directions to Assess Medical Fitness" was filed on 10 March 2016 ("Response"). The Defence filed its "Reply Regarding Proposed Directions to Assess Medical Fitness" on 11 March 2016 ("Reply").

A. Background

3. Goran Hadžić was indicted before the Tribunal in May 2004,¹ but was not arrested and transferred to the Tribunal until July 2011.² The Indictment in this case charges Hadžić with eight counts of crimes against humanity and six counts of violations of the laws or customs of war.³ The trial commenced on 16 October 2012⁴ and the Prosecution completed the presentation of its case⁵ on 17 October 2013.⁶ The Defence began the presentation of its case on 3 July 2014.⁷

4. Since October 2014, the Trial Chamber has repeatedly suspended trial proceedings due to Hadžić's medical condition and his decision not to waive his right to be present at trial.⁸ Specifically, Hadžić was diagnosed in November 2014 with *glioblastoma multiforme*, a malignant brain tumour, with an estimated median survival rate of 12 months.⁹ Beginning in December 2014, Hadžić underwent a prescribed plan for palliative treatment including daily radiotherapy and

¹ Decision on Review of Indictment and Order for Non-Disclosure (confidential and *ex parte*), 24 May 2004; Decision on Review of Indictment and Order for Non-Disclosure (confidential and *ex parte*), 4 June 2004; Decision to Vacate the Order for Non-Disclosure Entered 4th June 2004, 16 July 2004.

² See Order for Detention on Remand, 21 July 2011; Initial Appearance, 25 July 2011, T. 1-8.

³ Specifically, Hadžić was charged with persecutions on political, racial, or religious grounds as a crime against humanity (Count 1), extermination as a crime against humanity (Count 2), murder as a crime against humanity (Count 3) and as a violation of the laws or customs of war (Count 4), imprisonment as a crime against humanity (Count 5), torture as a crime against humanity (Count 6) and a violation of the laws or customs of war (Count 8), inhumane acts as a crime against humanity (Count 7), cruel treatment as a violation of the laws or customs of war (Count 9), deportation as a crime against humanity (Count 10), inhumane acts (forcible transfer) as a crime against humanity (Count 11), wanton destruction of villages or devastation not justified by military necessity as a violation of the laws or customs of war (Count 12), destruction or willful damage done to institutions dedicated to education or religion as a violation of the laws or customs of war (Count 13), and plunder of public or private property as a violation of the laws or customs of war (Count 14). Notice of Filing of Second Amended Indictment, 22 March 2012, Annex ("Indictment").

⁴ See Prosecution Opening Statement, 16 October 2012, T. 75.

⁵ With the exception of one witness who was heard from 8 to 9 April 2014.

⁶ See Scheduling Order for Rule 98 *bis* Proceedings, 28 November 2013, para. 2.

⁷ Amended Scheduling Order for Preparation and Commencement of Defence Case, 30 May 2014.

⁸ Consolidated Decision on the Continuation of Proceedings, 26 October 2015 ("Decision of 26 October 2015"), para. 7.

chemotherapy, which was discontinued in March 2015.¹⁰ Hadžić has been on provisional release since April 2015 during which time the Reporting Medical Officer of the United Nations Detention Unit ("RMO" and "UNDU", respectively) has filed medical reports based on telephone interviews with Hadžić, his wife, and his treating physician in Serbia, as well as written reports received from Hadžić's treating team in Serbia ("RMO Reports").¹¹

5. Between March 2015 and June 2015, the Prosecution and Defence filed various motions before the Trial Chamber concerning the continuation of the trial proceedings.¹² The Prosecution requested, *inter alia*, that the trial be resumed whether or not Hadžić was present,¹³ and the Defence requested that the trial proceedings be terminated or stayed indefinitely.¹⁴ During the same months, a series of tests was conducted by Tribunal-appointed medical experts in neuro-oncology, Dr. Pol Specenier, and neuro-psychology, Dr. Daniel Martell, with medical reports prepared and filed on 15 July 2015 and 23 July 2015, respectively.¹⁵ The medical experts testified on 29 July 2015 and 21 August 2015.¹⁶

6. On 26 October 2015, the Trial Chamber issued its "Consolidated Decision on the Continuation of Proceedings" ("Decision of 26 October 2015") in which it, *inter alia*, found that the Defence had not discharged its burden of proving that Hadžić was unfit to stand trial, denied the Prosecution's motions to proceed with the Defence case, denied Hadžić's request for the termination of proceedings, and ordered that the trial proceedings be stayed for an initial period of three months.¹⁷

7. On 25 January 2016, the Appeals Chamber extended "the stay of trial proceedings until the Appeals Chamber has disposed of the Interlocutory Appeal."¹⁸

⁹ Decision of 26 October 2015, para. 7.

¹⁰ Deputy Registrar's Submission of Medical Report (confidential), 26 November 2014, confidential Annex, p. 1; Deputy Registrar's Submission of Medical Report (confidential), 12 February 2015, confidential Annex, para. 3; Deputy Registrar's Submission of Reports of Medical Experts (confidential), 13 February 2015, confidential Annex III, "Report medically examination of Mr. G. Hadzic", Tatjana Seute, MD, PhD, dated 12 February 2015, pp. 1-2, 3; Deputy Registrar's Submission of Medical Update (confidential), 2 March 2015, para. 1.

¹¹ Decision of 26 October 2015, paras 11, 67-69. *See Prosecutor v. Goran Hadžić*, Case No. IT-04-75-AR65.1, Decision on Urgent Interlocutory Appeal from Decision Denying Provisional Release, 13 April 2015 (public with confidential annex).

¹² Decision of 26 October 2015, paras 1, 4, 12, 21. *See* Prosecution Motion to Proceed with the Defence Case, 2 March 2015 ("First Motion to Proceed"); Prosecution's Second Motion to Proceed with the Defence Case (*Expedited Ruling Requested*), 19 June 2015 ("Second Motion to Proceed").

¹³ Decision of 26 October 2015, para. 12. *See* First Motion to Proceed, paras 21, 23; Second Motion to Proceed, para. 7.

¹⁴ Decision of 26 October 2015, paras 3, 18. *See* Urgent Motion to Terminate, or for Stay of, Proceedings, 17 June 2015 (public redacted version).

¹⁵ Decision of 26 October 2015, paras 8-10.

¹⁶ Decision of 26 October 2015, para. 10.

¹⁷ Decision of 26 October 2015, paras 55, 65-66, 69.

¹⁸ *Prosecutor v. Hadžić*, Case No. IT-04-75-AR73.1, Order in Relation to Prosecution's Urgent Interlocutory Appeal from Consolidated Decision on the Continuation of Proceedings, 25 January 2016, p. 2.

8. On 4 March 2016, the Appeals Chamber issued its “Decision on Prosecution’s Urgent Interlocutory Appeal from Consolidated Decision on the Continuation of Proceedings” (“Appeals Chamber Decision”) in which it quashed the Decision of 26 October 2015 and invited the Trial Chamber to “reassess, based on the available and updated medical records, whether Hadžić is fit for trial”, and if the Trial Chamber so finds, ordered the Trial Chamber (a) “to assess all reasonably available modalities for continuing the trial under the proportionality principle” and (b) to consider whether to continue or terminate the proceedings.¹⁹ The Appeals Chamber enjoined the Trial Chamber to “issue its decision on remand in a timely manner, preferably no later than 25 March 2016”.²⁰

B. Submissions

9. In the Motion, the Defence submits that the RMO Reports indicate that there has been substantial mental and physical decline in Hadžić’s condition since the last expert medical tests eight months ago.²¹ It further submits that the RMO Reports alone do not provide an adequate basis for determining that Hadžić is currently fit to participate in trial proceedings and that no finding of fitness can be made without an updated specialised expert medical opinion of Hadžić’s current condition.²² The Defence, therefore, requests that the Trial Chamber order that the RMO Reports be sent to Dr. Martell and Dr. Specenier requesting that they give updated expert opinions on Hadžić’s physical and cognitive capacities, and if considered necessary by Dr. Martell or Dr. Specenier, to allow them to travel to Serbia to conduct direct observations or tests.²³ Moreover, the Defence asserts that the Appeals Chamber’s invitation to the Trial Chamber to “‘reassess, based on the available and updated medical records, whether Hadžić is fit for trial’ [...] requires and permits the Trial Chamber to seek this additional expert evidence.”²⁴

10. The Prosecution responds that the Defence’s request is incompatible with the Appeals Chamber’s direction that the Trial Chamber promptly decide whether to continue or terminate the proceedings based on the available and updated medical records.²⁵ Specifically, it asserts that (a) the Appeals Chamber’s reference to available and updated information refers to the RMO Reports which were not before the Appeals Chamber, but have been provided to the Trial Chamber

¹⁹ Appeals Chamber Decision, para. 31.

²⁰ Appeals Chamber Decision, para. 31.

²¹ Motion, paras 2, 8-9.

²² Motion, para. 2. The Defence further submits that it does not have the resources to adduce expert medical evidence and therefore it is the Chamber’s duty to order impartial testing. Motion, paras 10-11.

²³ Motion, paras 1, 16, 17.

²⁴ Motion, para. 12, *citing* Appeal Chamber Decision, para. 31, *emphasis added*. *See also* Motion, paras 13-15.

²⁵ Response, para. 1.

following the Decision of 26 October 2015;²⁶ (b) the Appeals Chamber did not direct the Trial Chamber to obtain new reports from the medical experts;²⁷ and (c) the Appeals Chamber's concern about additional delay and further stays of the proceedings rules out the possibility of re-engaging the medical experts.²⁸ The Prosecution suggests, therefore, that if the Trial Chamber is "minded to obtain additional updated medical information within the parameters of the Appeals Chamber Decision" that it order the RMO "to travel to Serbia immediately in order to examine and observe [Hadžić] in person and consult with his treating physicians if necessary".²⁹

11. In its Reply,³⁰ the Defence asserts: (a) the Appeals Chamber's direction that "any further stay of proceedings for the purpose of assessing whether Hadžić's health conditions will improve must be avoided", did not encompass any reasonable delays necessary in order to determine Hadžić's current fitness;³¹ (b) the Appeals Chamber expressed the deadline in flexible terms indicating that it wished to "accord due deference to the Trial Chamber's 'organic familiarity with the case'";³² (c) the Appeals Chamber did not express a view as to the type of medical information necessary and sufficient to come to a finding on fitness;³³ (d) the Defence's proposal to start by obtaining information from the experts as to whether additional tests are required should take very little time;³⁴ (e) the Trial Chamber and Hadžić "cannot be held hostage" to the delays associated with engaging the medical experts;³⁵ and (f) the alternative methodology proposed by the Prosecution will take more time than the preliminary step proposed by the Defence.³⁶

12. On 18 March 2016, the Deputy Registrar provided information in relation to the proposals made by the Defence and Prosecution ("Registry Submission").³⁷

C. Applicable Law

13. While there is no express provision in the Statute of the Tribunal ("Statute") addressing the fitness of an accused to stand trial, the exercise of an accused's procedural rights found in Articles 20 and 21 of the Statute implicitly requires that an accused demonstrates a requisite level of mental

²⁶ Response, para. 4.

²⁷ Response, para. 4.

²⁸ Response, para. 5.

²⁹ Response, paras 6-7.

³⁰ The Defence seeks leave to file the Reply. Reply, para. 1.

³¹ Reply, para. 3.

³² Reply, para. 4.

³³ Reply, para. 5.

³⁴ Reply, para. 6.

³⁵ Reply, para. 7.

³⁶ Reply, para. 8.

³⁷ Deputy Registrar's Submission on Recent Proposals to Obtain Additional Medical Opinions, 18 March 2016.

and physical capacity.³⁸ Articles 20 and 21 of the Statute provide that the Trial Chamber must ensure a fair and expeditious trial (Article 20(1)), with the Accused understanding the indictment against him (Article 20(3)). The Accused is also entitled to, *inter alia*, be informed in a language which he understands of the nature and cause of the charges against him (Article 21(4)(a)), to have adequate facilities for the preparation of a defence and to communicate with counsel (Article 21(4)(b)), to be tried in his presence and to defend himself in person or through legal assistance (Article 21(4)(d)), and to examine the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him (Article 21(4)(e)). A necessary implication of the Statute is that, where there is any question whether an accused is fit to stand trial, a Trial Chamber is tasked with determining whether an accused possesses the necessary capacities to exercise his rights.³⁹

14. In determining the fitness of an accused to stand trial, the jurisprudence of the Tribunal has set out a non-exhaustive list of capacities to be evaluated. These capacities include an accused's ability to: (a) plead, (b) understand the nature of the charges, (c) understand the course of the proceedings, (d) understand the details of the evidence, (e) instruct counsel, (f) understand the consequences of the proceedings, and (g) testify.⁴⁰

15. In assessing an accused's capacities, the standard to be applied is that of "meaningful participation which allows the accused to exercise his fair trial rights to such a degree that he is able to participate effectively in his trial, and has an understanding of the essentials of the proceedings."⁴¹ An accused's ability to participate in his trial should be assessed by looking at whether his capacities are, "viewed overall and in a reasonable and commonsense manner, at such a level that it is possible for [him or her] to participate in the proceedings (in some cases with assistance) and sufficiently exercise the identified rights."⁴²

³⁸ *Prosecutor v. Strugar*, Case No. IT-01-42-A, Judgement, 17 July 2008 ("*Strugar* Appeal Judgement"), para. 41; *Prosecutor v. Strugar*, Case No. IT-01-42-T, Decision Re the Defence Motion to Terminate Proceedings, 26 May 2004 ("*Strugar* 26 May 2004 Decision"), paras 21, 36. See also *Prosecutor v. Popović et al.*, Case No. IT-05-88-A, Decision on Motion by Counsel Assigned to Milan Gvero Relating to His Present Health Condition (confidential), 13 December 2010, para. 11; *Prosecutor v. Kovačević*, Case No. IT-01-42/2-I, Public Version of the Decision on Accused's Fitness to Enter a Plea and Stand Trial, 12 April 2006 ("*Kovačević* 12 April 2006 Decision"), para. 21.

³⁹ See *Strugar* 26 May 2004 Decision, paras 24-26.

⁴⁰ *Strugar* Appeal Judgement, para. 55; *Strugar* 26 May 2004 Decision, para. 36. See also *Kovačević* 12 April 2006 Decision, para. 29; *Prosecutor v. Stanišić and Simatović*, Case No. IT-03-69-PT, Decision on Stanišić Defence's Motion on the Fitness of the Accused to Stand Trial with Confidential Annexes, 27 April 2006, p. 4.

⁴¹ Appeals Decision, para. 7; *Strugar* Appeal Judgement, para. 55.

⁴² *Strugar* Appeal Judgement, para. 55, citing *Strugar* 26 May 2004 Decision, para. 37. See also *Prosecutor v. Popović et al.*, Case No. IT-05-88-A, Public Redacted Version of 30 November 2012 Decision on Request to Terminate Appellate Proceedings in Relation to Milan Gvero, 16 January 2013 ("Public Redacted Version of *Popović* 30 November 2012 Decision"), para. 21.

16. The level at which an accused must be able to exhibit these capacities in order to exercise his rights need not be at his “notionally highest level, or at the highest level that a particular accused has ever enjoyed in respect of each capacity.”⁴³ Rather, the Accused must have an understanding of the “essentials” of the proceedings,⁴⁴ with the processing of the wealth of complex information inherent in international criminal proceedings remaining the role of defence counsel.⁴⁵ Consequently, there is no need for an accused to fully comprehend the course of proceedings.⁴⁶ An accused represented by counsel cannot be expected to have the same understanding of the material related to his case as a qualified and experienced lawyer.⁴⁷ “What is required from an accused to be deemed fit to stand trial is a standard of overall capacity allowing for a meaningful participation in trial, provided that he or she is duly represented by counsel.”⁴⁸ Effective participation requires a “broad understanding” of the trial process with a comprehension of the “general thrust” of what is said in court.⁴⁹

17. A finding that an accused has a certain health condition will not automatically render him unfit to stand trial, but rather the question must be directed to whether he “is able to exercise effectively his rights in the proceedings against him.”⁵⁰

18. An accused claiming to be unfit to stand trial bears the burden of so proving by a preponderance of the evidence.⁵¹ This burden is discharged if the party which alleges an accused’s unfitness to stand trial shows its claim on the balance of the probabilities.⁵²

19. Further, the Appeals Chamber has interpreted Article 21(4)(d) of the Statute as meaning that an accused has the right to be physically present at his trial.⁵³ This right, however, is not absolute.⁵⁴ An accused can waive or forfeit the right to be physically present at trial.⁵⁵ For example, under

⁴³ *Strugar* 26 May 2004 Decision, para. 37; *Strugar* Appeal Judgement, para. 55.

⁴⁴ *Strugar* Appeal Judgement, para. 55; *Karemera et al. v. The Prosecutor*, Case No. ICTR-98-44-T, Decision on Remand Regarding Continuation of Trial, 10 September 2009, para. 18.

⁴⁵ Public Redacted Version of *Popović* 30 November 2012 Decision, para. 22.

⁴⁶ *Strugar* Appeal Judgement, para. 60 (emphasis added).

⁴⁷ *Strugar* Appeal Judgement, para. 60.

⁴⁸ *Strugar* Appeal Judgement, para. 60.

⁴⁹ See *Strugar* Appeal Judgement, para. 47.

⁵⁰ *Strugar* 26 May 2004 Decision, para. 35.

⁵¹ *Strugar* Appeal Judgement, para. 56.

⁵² *Strugar* Appeal Judgement, para. 56.

⁵³ Appeals Decision, para. 8; *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-AR73.2, Decision on Defence Appeal of the Decision on Future Course of Proceedings, 16 May 2008 (“*Stanišić and Simatović* Decision of 16 May 2008”), para. 6; *Protais Zigiranyirazo v. The Prosecutor*, Case No. ICTR-2001-73-AR73, Decision on Interlocutory Appeal, 30 October 2006 (“*Zigiranyirazo* Decision of 30 October 2006”), paras 11-13.

⁵⁴ Appeals Decision, para. 8; *Stanišić and Simatović* Decision of 16 May 2008, para. 6; *Zigiranyirazo* Decision of 30 October 2006, para. 14.

⁵⁵ Appeals Decision, para. 8; *Stanišić and Simatović* Decision of 16 May 2008, para. 6; *Zigiranyirazo* Decision of 30 October 2006, para. 14, citing *S. Milošević v. Prosecutor*, Case No. IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber’s Decision on the Assignment of Defence Counsel, 1 November 2004, (“*S. Milošević* Decision of 1 November 2004”), para. 13.

Rule 80(B) of the Rules, a trial chamber may order the removal of an accused from the courtroom and continue the proceedings in his absence if he has persisted in disruptive conduct, following a warning that such conduct may warrant the removal. The Appeals Chamber has observed that the right of an accused to be present at trial pursuant to Rule 80(B) of the Rules can be restricted “on the basis of substantial trial disruptions”.⁵⁶ The Appeals Chamber has further found that this rule is not limited to intentional disruptions.⁵⁷ The Appeals Chamber has emphasised that in assessing a particular limitation on a statutory guarantee, such as the right to be physically present, the proportionality principle must be taken into account, pursuant to which any restriction of a fundamental right must be in service of a sufficiently important objective and must impair the right no more than is necessary to accomplish the objective.⁵⁸

D. Discussion

20. From the outset, the Trial Chamber notes that it is constrained by the Appeals Chamber’s instruction that a timely decision on this matter was to be issued “preferably no later than 25 March 2016”, in other words, within three weeks from the date of the Appeals Chamber Decision.⁵⁹ While the language used by the Appeals Chamber does not set a strict deadline for the filing of this decision, it does indicate that, in the Appeals Chamber’s view, further expert medical opinions are not warranted at this stage. Notably, the Appeals Chamber would have been aware that, as of the date of his appointment, more than three weeks were required for Dr. Martell to conduct the necessary medical tests in Serbia and to file his previous report,⁶⁰ and approximately five weeks were required for Dr. Specenier to file his report.⁶¹ Additionally, in remanding the decision to the Trial Chamber, the Appeals Chamber noted that information contained in the RMO Reports provided to the Trial Chamber every two weeks “may have an impact on whether Hadžić, at this stage, is fit to stand trial or what kind of accommodations, at this stage, could be instituted and would be appropriate”, and made no reference to the Trial Chamber seeking additional medical information.⁶² Therefore, the Trial Chamber considers that in inviting it to, within three weeks,

⁵⁶ Appeals Decision, para. 8; *Stanišić and Simatović* Decision of 16 May 2008, para. 6; *Zigiranyirazo* Decision of 30 October 2006, para. 14, citing *S. Milošević* Decision of 1 November 2004, para. 13.

⁵⁷ Appeals Decision, para. 8; *Stanišić and Simatović* Decision of 16 May 2008, para. 6; *S. Milošević* Decision of 1 November 2004, para. 14.

⁵⁸ Appeals Decision, para. 8; *Stanišić and Simatović* Decision of 16 May 2008, para. 6; *Zigiranyirazo* Decision of 30 October 2006, para. 14, citing *S. Milošević* Decision of 1 November 2004, para. 17.

⁵⁹ Appeals Chamber Decision, para. 31.

⁶⁰ Dr. Martell was appointed on 30 June 2015 and his medical report was filed on 23 July 2015. Deputy Registrar’s Notification of Appointment of Medical Expert (confidential), 3 July 2015, paras 1-2; Registrar’s Submission of Medical Report (confidential), 23 July 2015. See Decision of 26 October 2015, para. 10, fns 38-39.

⁶¹ Dr. Specenier was appointed on 11 June 2015 and his medical report was filed on 15 July 2015. Deputy Registrar’s Notification of Appointment of Medical Expert (confidential), 12 June 2015, paras 1-2; Deputy Registrar’s Submission of Medical Report (confidential), 15 July 2015. See Decision of 26 October 2015, para. 10, fns 35-36.

⁶² Appeals Chamber Decision, para. 30.

“reassess, based on the available and updated medical records, whether Hadžić is fit for trial”,⁶³ the Appeals Chamber did not envision that the Trial Chamber would seek additional medical information.

21. Moreover, the information provided in the Registry Submission demonstrates that it is not possible for the Trial Chamber to obtain additional medical information if it is to comply with the 25 March 2016 suggested deadline. In particular, the Registry has indicated that Dr. Martell would be available to travel to Serbia during the week of 4 April 2016, and Dr. Specenier would not be available to do so before 8 April 2016.⁶⁴ The Trial Chamber would not be assisted by medical reports prepared by either Dr. Martell or Dr. Specenier if they are not based on the experts’ own observations and tests. Thus, the Trial Chamber rejects the Defence proposal to send the RMO Reports to Dr. Martell and Dr. Specenier asking that they submit updated medical reports on the basis thereof. Further, while the Registry was unable to indicate how much time would be required to make the necessary arrangements to send the RMO to Serbia, the information it provides demonstrates that it clearly cannot be accomplished prior to 25 March 2016.⁶⁵ Therefore, in order to issue this decision within the timeframe set out by the Appeals Chamber, the Trial Chamber must assess Hadžić’s current fitness on the basis of the information currently before it.

22. In this respect, the Trial Chamber first recalls that in his expert medical report prepared in July 2015,⁶⁶ Dr. Martell found that Hadžić’s language abilities were generally intact.⁶⁷ Hadžić spoke at a normal rate and volume with “clear articulation”⁶⁸ and had “no difficulty [understanding] verbal instructions, or conversing in a normal fashion.”⁶⁹ He expressed his thoughts “in a logical, coherent, and goal-directed fashion with no evidence of formal thought disorder.”⁷⁰ Dr. Martell noted that Hadžić was able to raise issues on his own initiative, both in relation to past events, such as his shoulder injury in the UNDU and his time as a fugitive, and future events like the planning of his estate.⁷¹ According to Dr. Martell, Hadžić’s executive functioning, which includes one’s ability to take initiative, was by and large intact.⁷² During an extensive interview with Dr. Specenier in

⁶³ Appeals Chamber Decision, para. 31.

⁶⁴ Registry Submission, para. 3.

⁶⁵ Registry Submission, paras 4-6.

⁶⁶ See Decision of 26 October 2015, para. 43 (Trial Chamber’s analysis on reliability of Dr. Martell’s examination.)

⁶⁷ Registrar’s Submission of Medical Report (confidential), 23 July 2015, confidential Annex, (“Martell Report”), pp. 10, 14.

⁶⁸ Martell Report, p. 8.

⁶⁹ Martell Report, p. 11.

⁷⁰ Martell Report, p. 8.

⁷¹ Daniel Martell, 29 July 2015, T. 12636-12638.

⁷² Daniel Martell, 29 July 2015, T. 12648.

June 2015,⁷³ Hadžić was able to provide detailed answers to his questions without any help or suggestion over an 80 minute period.⁷⁴

23. The Trial Chamber considers, however, that the information provided in the latest RMO Reports describes a recent and marked deterioration in Hadžić's ability to communicate. In February 2016, Hadžić's wife indicated that [REDACTED].⁷⁵ She described [REDACTED].⁷⁶ [REDACTED].⁷⁷ The Deputy Medical Officer of the UNDU observed in the middle of February that [REDACTED].⁷⁸ As of 2 March 2016, however, Hadžić's treating neuro-psychiatrist, Dr. Nadj, reported that [REDACTED].⁷⁹ Hadžić's wife, on the other hand, reported at the beginning of March that [REDACTED].⁸⁰ She indicated [REDACTED].⁸¹ More recently, on 16 March 2016, Hadžić's wife reported that [REDACTED].⁸² In the same report, the RMO reported that [REDACTED].⁸³

24. The Trial Chamber further recalls that Dr. Martell expressed concern with Hadžić's overall stamina, ability to maintain focus, his short-term memory, and processing speed.⁸⁴ Hadžić complained to Dr. Martell of intermittent headaches in the morning and afternoon and periods of vertigo, which Hadžić dealt with by taking naps that consequently recharged him for two or three hours.⁸⁵ Dr. Martell reported that his examination of Hadžić was discontinued after two and a half hours of effort in order to allow Hadžić to rest.⁸⁶

25. [REDACTED], 2 March 2016, the RMO reported that [REDACTED].⁸⁷ [REDACTED].⁸⁸ [REDACTED] the UNDU Deputy Medical Officer on 18 February 2016, [REDACTED].⁸⁹ Hadžić

⁷³ See Decision of 26 October 2015, para. 44 (Trial Chamber's analysis on reliability of Dr. Specenier's examination).

⁷⁴ Deputy Registrar's Submission of Medical Report (confidential), 15 July 2015, confidential Annex, ("Specenier Report"), pp. 9, 11.

⁷⁵ Deputy Registrar's Submission of Medical Reports (confidential), 22 February 2016, confidential Annex, p. 1, ("17 February 2016 RMO Report"), para. 2.

⁷⁶ 17 February 2016 RMO Report, para. 2.

⁷⁷ 17 February 2016 RMO Report, para. 2.

⁷⁸ Deputy Registrar's Submission of Medical Reports (confidential), 22 February 2016, confidential Annex, p. 2, ("18 February 2016 Medical Report"), para. 3.

⁷⁹ Registrar's Submission of Medical Report (confidential), 3 March 2016, confidential Annex, ("2 March 2016 RMO Report"), para. 5. See also 17 February 2016 RMO Report, para. 4; Deputy Registrar's Submission of Medical Report (confidential), 5 February 2016, confidential Annex ("3 February 2016 RMO Report"), para. 4; Deputy Registrar's Submission of Medical Report (confidential), 22 January 2016, confidential Annex, ("20 January 2016 RMO Report"), para. 4.

⁸⁰ 2 March 2016 RMO Report, para. 3.

⁸¹ 2 March 2016 RMO Report, para. 3.

⁸² Deputy Registrar's Submission of Medical Report (confidential), 18 March 2016, confidential Annex, ("16 March 2016 RMO Report"), para. 3.

⁸³ 16 March 2016 RMO Report, paras 2, 6.

⁸⁴ Martell Report, pp. 14-15; Daniel Martell, 29 July 2015, T. 12647-12648. See also Pol Specenier, 21 August 2015, T. 12661-12664.

⁸⁵ Martell Report, p. 9.

⁸⁶ Martell Report, p. 9.

⁸⁷ 2 March 2016 RMO Report, para. 2.

⁸⁸ 2 March 2016 RMO Report, para. 2.

also reported that [REDACTED].⁹⁰ [REDACTED].⁹¹ The Deputy Medical Officer also noted that [REDACTED].⁹²

26. In the most recent RMO Report, Hadžić's wife reported that [REDACTED].⁹³ She indicated that [REDACTED].⁹⁴ Hadžić's wife reported that [REDACTED].⁹⁵ [REDACTED] was confirmed by Hadžić's treating team in Serbia in a medical report submitted to the RMO, dated 16 March 2016.⁹⁶ The treating team also confirmed that [REDACTED].⁹⁷ The RMO concluded that [REDACTED].⁹⁸

27. Finally, the Trial Chamber notes that on 17 February 2016, Dr. Nadj considered [REDACTED].⁹⁹

28. The Trial Chamber notes that the RMO Reports are based largely on self-reporting by Hadžić or his wife during telephone conversations with the RMO,¹⁰⁰ and as such are primarily hearsay evidence. Further, the interest that Hadžić and his wife have in him being found unfit cannot be ignored. However, the Trial Chamber notes that much of what Hadžić and his wife report is confirmed by Hadžić's treating team in Serbia.¹⁰¹ Additionally, the RMO speaks with Hadžić or his wife, as well as a member of Hadžić's treating team, on a bi-weekly basis and has not raised concern over the accuracy of what has been reported. Moreover, the described deterioration in Hadžić's condition, while not having been confirmed by independent expert examinations, is consistent with Dr. Specenier's testimony that Hadžić's condition was evolving from day to day and it could be expected that it would worsen rapidly.¹⁰² He clarified that the growth of Hadžić's tumour was "dramatic": the tumour had trebled in size since the first MRI scan in November 2014 to the second scan in May 2015.¹⁰³ Dr. Specenier also testified that, in addition to the original tumour, the May 2015 scan revealed a new lesion and an "edema with shift of the midline".¹⁰⁴ He explained that

⁸⁹ 18 February 2016 Medical Report, para. 2.

⁹⁰ 18 February 2016 Medical Report, para. 2.

⁹¹ 18 February 2016 Medical Report, para. 2.

⁹² 18 February 2016 Medical Report, para. 2.

⁹³ 16 March 2016 RMO Report, para. 3.

⁹⁴ 16 March 2016 RMO Report, para. 3; 2 March 2016 RMO Report, para. 3.

⁹⁵ 16 March 2016 RMO Report, para. 3.

⁹⁶ 16 March 2016 RMO Report, para. 4.

⁹⁷ 16 March 2016 RMO Report, para. 4.

⁹⁸ 16 March 2016 RMO Report, para. 6.

⁹⁹ 17 February 2016 RMO Report, para. 4. *See also* 3 February 2016 RMO Report, para. 4.

¹⁰⁰ 16 March 2016 RMO Report; 2 March 2016 RMO Report; 18 February 2016 Medical Report; 17 February 2016 RMO Report.

¹⁰¹ *See* 16 March 2016 RMO Report, para. 4; 2 March 2016 RMO Report, paras 5-6; 17 February 2016 RMO Report, para. 4.

¹⁰² Pol Specenier, 21 August 2015, T. 12664.

¹⁰³ Pol Specenier, 21 August 2015, T. 12674-12675; Specenier Report, p. 11.

¹⁰⁴ Pol Specenier, 21 August 2015, T. 12674-12676; Specenier Report, p. 11.

the intracranial pressure resulting from that shift can be fatal in the short-term, meaning that symptoms of Hadžić's gradual decline in neurological functioning and consciousness could manifest themselves "from week to week".¹⁰⁵ Similarly, Dr. Martell stated that Hadžić's tumour could "be expected to continue to grow and his capacity to participate [would] continue to deteriorate. He will get worse."¹⁰⁶ Therefore, considering that Hadžić's condition as described in the RMO Reports is not unexpected in light of the passage of time and the medical evidence presented by Dr. Martell and Dr. Specenier, and in the absence of updated medical reports prepared by Tribunal-appointed experts, the Trial Chamber, Judge Antoine Kesia-Mbe Mindua dissenting, will rely on the information provided in the RMO Reports.

29. The Trial Chamber considers that the information in the RMO Reports indicates that there has been a decline in Hadžić's condition. Notably, Hadžić is [REDACTED].¹⁰⁷ [REDACTED],¹⁰⁸ and [REDACTED].¹⁰⁹ The Trial Chamber is satisfied that these deficiencies will prevent Hadžić from being able to effectively communicate with, and instruct, his counsel. Importantly, Hadžić's treating physician believes [REDACTED].¹¹⁰ For all of these reasons, the Trial Chamber, Judge Antoine Kesia-Mbe Mindua dissenting, finds that, on a balance of probabilities, Hadžić is no longer able to effectively exercise his fair trial rights, even with the assistance of counsel, to such a degree that he is able to meaningfully participate in his trial. The Trial Chamber, Judge Antoine Kesia-Mbe Mindua dissenting, finds, therefore, that Hadžić is currently unfit to stand trial.

30. The Trial Chamber's finding that Hadžić is currently unfit to stand trial does not lead to the conclusion that the proceedings must be terminated. To the contrary, the Trial Chamber recalls that it is not the practice of the Tribunal to terminate legal proceedings due to an indefinite suspension of hearings arising from an accused's ill health.¹¹¹ This practice is consistent with the need to not only ensure that the rights of the accused are respected, but to also protect the interests of the alleged victims of Hadžić's alleged crimes. The Trial Chamber, Judge Antoine Kesia-Mbe Mindua dissenting, considers that an indefinite stay of the proceedings will more than adequately serve the interests of justice in this case and is in line with the practice of the Tribunal.

¹⁰⁵ Pol Specenier, 21 August 2015, T. 12676.

¹⁰⁶ Daniel Martell, 29 July 2015, T. 12653-12654.

¹⁰⁷ 16 March 2016 RMO Report, para. 3.

¹⁰⁸ 2 March 2016 RMO Report, para. 5; 17 February 2016 RMO Report, para. 4.

¹⁰⁹ 2 March 2016 RMO Report, para. 2.

¹¹⁰ 17 February 2016 RMO Report, para. 4.

¹¹¹ See Decision on Motion for Voluntary Withdrawal or Disqualification of Judges from Adjudication of Motion to Proceed with the Defence Case, 21 April 2015, para. 14, citing *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 Prosecution's Oral Request for the Separation of Trials, 20 September 2002; *Prosecutor v. Talić*, Case No. IT-99-36/1-T, Order Terminating Proceedings Against Momir Talić, 12 June 2003. See also *Strugar* 26 May 2004 Decision, para. 39.

E. Disposition

31. Accordingly, the Trial Chamber, pursuant to Articles 20 and 21 of the Statute and Rules 54, 74 *bis*, and 126 *bis* of the Rules hereby:

- (a) **GRANTS** the Defence leave to file the Reply;
- (b) **DISMISSES** the Motion;
- (c) **DECLARES** that Hadžić is currently unfit to stand trial;
- (d) **STAYS** the present proceedings indefinitely;
- (e) **ORDERS** that the terms and conditions of provisional release, as previously set out,¹¹² remain in effect; and
- (f) **ORDERS** the Defence—by no later than 31 March 2016—to file a written submission indicating what medical information contained in this decision, if any, it requests to remain confidential.

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

Done this fifth day of April 2016,
At The Hague,
The Netherlands.


 Judge Guy Delvoie
 Presiding

Judge Antoine Kesia-Mbe Mindua appends a dissenting opinion.

[Seal of the Tribunal]

¹¹² Decision of 26 October 2015, para. 69(f); Decision on Fourth Request for Modification of Mr. Hadžić's Address While on Provisional Release (confidential), 8 October 2015; Decision on Request for Minor Modification to Terms of Provisional Release (confidential), 18 August 2015; Decision on Urgent Motion for Provisional Release Filed on 28 April 2015, 21 May 2015, paras 35-36.

DISSENTING OPINION OF JUDGE ANTOINE KESIA-MBE MINDUA

1. In general, I respectfully agree with many elements of this “Decision on Remand on Continuation of Proceedings” adopted by the majority of this Trial Chamber (“Decision”). While I concur with my fellow Judges about the background of this case,¹ the submissions of the parties,² and the analysis of the applicable law,³ I must confess that I am hesitant about the discussion and I do not share their finding that Hadžić is unfit to undergo and conclude his trial.⁴ Similarly, I do not share their view to stay the proceedings indefinitely.⁵

2. The purpose of a trial is to achieve a fair and impartial administration of justice between the parties, that means between the Accused and the Prosecutor representing the victims as well as the international community. Thus, a trial seeks to ascertain the truth of the matters at issue between the parties and to apply the law to those matters. Even though a trial is not a historical work aiming to establish the history of an event, a trial has the possibility of ascertaining, through the proceedings, some facts linked to the case. Many means are used for that: witnesses, documentary evidence, reports, etc. The aim is to provide a final legal determination of the dispute by a judgment. A trial which is not concluded by a judgment is almost a loss of time and resources.

3. A verdict could be an acquittal or a conviction followed by the imposition of a sentence. However, the purpose of a trial is not necessarily the delivery of a sentence. That is why even a person who is in the final stages of his/her life is also entitled to a judgment if he/she is involved in a case, even if there is no hope of him/her serving a prison sentence.

4. Thus, a terminally ill accused, who is presumed innocent, is entitled to, and has an interest in, having his judgment pronounced as soon as possible in order to establish, if applicable, his innocence. Equally for victims, it is necessary to have a legal determination of the case. Similarly for the international community, since the crimes involved in our case are of international concern, there is a strong interest in having a final legal determination.

5. Of course, a judgment makes sense only if the trial has been fair and the administration of justice has been impartial. This means that the rights of the accused to a fair trial have been scrupulously respected. Thus, it is not possible to try a person who is not fit for trial, in other words,

¹ Decision, paras 3-8.

² Decision, paras 9-12.

³ Decision, paras 13-19.

⁴ Decision, para. 29.

⁵ Decision, para. 30.

who cannot participate effectively in his/her trial since he/she does not have an understanding of the essentials of the proceedings.⁶

6. In its “Decision on Prosecution’s Urgent Interlocutory Appeal from Consolidated Decision on the Continuation of Proceedings” rendered on 4 March 2016, the Appeals Chamber ordered the Trial Chamber to issue its decision at the latest by 25 March 2016 and to “reassess, based on the available and updated medical records, whether Hadžić is fit for trial”, and if the Trial Chamber so finds, orders the Trial Chamber (a) “to assess all reasonably available modalities for continuing the trial under the proportionality principle” and (b) “to consider whether to continue or terminate the proceedings”.⁷

7. Throughout this trial, which started on 16 October 2012,⁸ the Trial Chamber has done its best to assure a fair trial especially in respect of the rights of the Accused. Thus, the proceedings have been repeatedly suspended since October 2014 due to Hadžić’s medical condition and his unwillingness to waive his right to be present at trial.⁹ For fairness, and also for humanitarian reasons, the Trial Chamber, following many disruptions and taking into account the advice of two independent experts, Dr. Pol Specenier and Dr. Daniel Martell, decided on 26 October 2015 to stay the proceedings for three months.¹⁰

8. The current medical situation of Hadžić seems to have deteriorated, according to the last RMO Report dated 16 March 2016 (“16 March 2016 RMO Report”).¹¹ Along with the majority, I note that the RMO Reports are based largely on self-reporting by Hadžić or his wife during telephone conversations with the RMO, and as such are basically hearsay evidence,¹² even though many of their statements are confirmed by Hadžić’s treating team in Serbia. On the basis of the most recent RMO Reports, the majority has decided to declare Hadžić unfit.¹³ A plain reading of the 16 March 2016 RMO Report commands me to do the same. But, in this case, I cannot.

9. In order to declare Hadžić fit on 26 October 2015, I relied basically on two independent experts, even though I had the RMO Reports at hand.¹⁴ How can I now decide only on the basis of the RMO Reports without any other new independent expert opinions? What about the basic

⁶ Decision, para. 13.

⁷ *Prosecutor v. Hadžić*, Case No. IT-04-75-AR73.1, Decision on Prosecution’s Urgent Interlocutory Appeal from Consolidated Decision on the Continuation of Proceedings, 4 March 2016 (“Appeals Chamber Decision”), para. 31.

⁸ See Prosecution Opening Statement, 16 October 2012, T. 75.

⁹ Consolidated Decision on the Continuation of Proceedings, 26 October 2015 (“Decision of 26 October 2015”), para. 7.

¹⁰ Decision of 26 October 2015, para. 69.

¹¹ Deputy Registrar’s Submission of Medical Report (confidential), 18 March 2016, confidential Annex.

¹² Decision, para. 28.

¹³ Decision, para. 29.

¹⁴ Decision of 26 October 2015, paras 43-55.

principle of parallelism of the forms and procedures? We know that according to this principle of “formal parallelism”, the amending act must take the same form as the act to be amended. In my view, a fresh independent expert opinion is needed in order to reassess Hadžić’s medical condition. With such advice, I may ascertain whether Hadžić is no longer able to effectively exercise his fair trial rights, even with the assistance of counsel, to such a degree that he is no more able to meaningfully participate in his trial.¹⁵

10. In my opinion, by ordering the Trial Chamber to reassess, based on “the available and updated medical records”, whether Hadžić is fit for trial,¹⁶ the Appeals Chamber leaves open the possibility of the Trial Chamber obtaining new independent expert opinions; otherwise, there is a breach of this basic principle of parallelism of the forms and procedures. Hence, the Trial Chamber is requested and allowed to seek additional expert opinions of the same value as were previously considered. Otherwise, the only way out is to rely on the first independent expert opinions, although we have the RMO Reports which have a lower weight.

11. In her “Deputy Registrar’s Submission on Recent Proposals to Obtain Additional Medical Opinions” dated 18 March 2016, the Deputy Registrar provided information in relation to the proposals made by the Defence and Prosecution about possible new expert opinions.¹⁷ It is thus clear that it is not possible for the Trial Chamber to obtain additional medical information if it is to comply with the 25 March 2016 suggested deadline. For example, both Dr. Martell and Dr. Specenier are not available before April 2016 and the Registry was unable to indicate how much time would be required to make the necessary arrangements to send the RMO to Serbia.¹⁸

12. In accordance with the principle of proportionality, the Trial Chamber, while taking into account the humanitarian side of the situation as well as the rights of the accused, cannot ignore the rights of the victims to know the truth, to have the judgment pronounced. This outcome is all the more necessary if we consider the interest of justice, knowing that this trial is at a very advanced stage, and a great deal of public resources have been spent. The serious nature and the large number of alleged crimes involved, allegedly committed in several municipalities, as well as the great number of victims, when compared to the rights of the Accused, which have been always respected and accommodated, demand serious consideration of whether it is possible to conclude this case with a formal final judgment. In my view, such a legal determination in the form of a final judgment is more than necessary.

¹⁵ See Appeals Chamber Decision, para. 7.

¹⁶ Appeals Chamber Decision, para. 31.

¹⁷ Deputy Registrar’s Submission on Recent Proposals to Obtain Additional Medical Opinions, 18 March 2016 (“Registry Submission”).

¹⁸ Registry Submission, paras 3, 4-6.

13. Nevertheless, the fate of this trial, which involves very serious crimes of international concern, cannot be decided just on the basis of hearsay evidence. The 16 March 2016 RMO Report needs appropriate corroboration in order to declare Hadžić unfit. Before receiving the 16 March 2016 RMO Report, I was ready to declare once again that Hadžić is fit for trial and to reassess all reasonably available modalities for continuing the proceedings, as requested by the Appeals Chamber.¹⁹

14. Modalities which I could have envisaged would comprise the necessity for Hadžić to be kept abreast of the developments in the trial by in-person and telephone contacts with his counsel, while maintaining the possibility of him watching videos of proceedings and reviewing testimony transcripts, filings, and decisions when convenient for him. These modalities would also take into account that the time remaining for the conclusion of the Defence case would be drastically reduced by the Prosecution's unconditional waiver of cross-examination and the written nature of several Defence testimonies to come. This would reduce any strain on Hadžić arising from unforeseen issues in the remaining evidence. With these modalities in place, the remainder of the Defence case could easily be presented in the course of two months.

15. However, the 16 March 2016 RMO Report suggests that there has been a further deterioration of Hadžić's health condition, which I cannot, unfortunately, confirm at present. Moreover, I note that the last submissions filed by the parties are dated before 16 March 2016: (a) the Defence's "Motion for Proposed Directions to Assess Medical Fitness" was filed on 9 March 2016, (b) the "Prosecution's Response to Defence Motion for Proposed Directions to Assess Medical Fitness" was filed on 10 March 2016, and (c) the Defence's "Reply Regarding Proposed Directions to Assess Medical Fitness" was filed on 11 March 2016.

16. In my view, the 16 March 2016 RMO Report brings new information which was not envisaged or mentioned in the submissions of the parties and which was previously unknown to the Trial Chamber. However, must be corroborated by an independent opinion, which is not possible before 25 March 2016.

¹⁹ Appeals Chamber Decision, para. 31.

17. Therefore, since I still formally consider Hadžić as fit for trial, and before receiving any additional independent expert opinions, it is risky to determine the modalities for continuing the trial knowing that Hadžić's medical situation is deteriorating. However, the conclusion cannot be an indefinite stay because, simply, the Trial Chamber is requested by the Appeals Chamber to decide whether to continue or to terminate the proceedings.

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

Done this twenty-fourth day of March 2016,
At The Hague,
The Netherlands.



Judge Antoine Kesia-Mbe Mindua

[Seal of the Tribunal]