



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-AR65.1

Date: 13 April 2015

Original: English

IN THE APPEALS CHAMBER

Before:

**Judge Theodor Meron, Presiding
Judge Arlette Ramaroson
Judge Khalida Rachid Khan
Judge Bakhtiyar Tuzmukhamedov
Judge Koffi Kumelio A. Afande**

Registrar:

Mr. John Hocking

Decision of:

13 April 2015

PROSECUTOR

v.

GORAN HADŽIĆ

PUBLIC WITH CONFIDENTIAL ANNEX

**DECISION ON URGENT INTERLOCUTORY APPEAL FROM
DECISION DENYING PROVISIONAL RELEASE**

Office of the Prosecutor:

Mr. Douglas Stringer

Counsel for the Accused:

Mr. Zoran Živanović
Mr. Christopher Gosnell

1. The Appeals 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 (“Appeals Chamber” and “Tribunal”, respectively), is seised of the “Urgent Interlocutory Appeal from Decision Denying Provisional Release until May 2015” (“Appeal”), filed publicly with a confidential annex on 17 March 2015 by Goran Hadžić (“Hadžić”) pursuant to Rule 65(D) of the Tribunal’s Rules of Procedure and Evidence (“Rules”),¹ whereby he requests reversal of a decision issued on 13 March 2015 by Trial Chamber II of the Tribunal (“Trial Chamber”), which denied his urgent request for provisional release.² On 24 March 2015, the Prosecution filed its response,³ and Hadžić filed his reply on 26 March 2015.⁴

I. BACKGROUND

2. The trial in the case of *Prosecutor v. Goran Hadžić*, Case No. IT-04-75-T, commenced in October 2012 and Hadžić began the presentation of his defence case in July 2014. In November 2014, he was diagnosed with *glioblastoma multiforme*, a terminal form of brain cancer and his expected survival is estimated in the range of 12 to 24 months.⁵ The evidentiary hearings have been suspended since 20 October 2014 as Hadžić has been continuously declared unfit to attend trial by the Tribunal’s medical officers as a result of the medical treatment he is receiving in The Netherlands and the side effects of that treatment.⁶

¹ With his appeal, Hadžić also requested the Appeals Chamber to require the Office of the Prosecutor (“Prosecution”) to file any response within two days. *See* Appeal, para. 5. His request in this respect has been addressed by the Appeals Chamber’s order of 20 March 2015. *See* Order for Expedited Response and Reply to Goran Hadžić’s Urgent Interlocutory Appeal from Decision Denying Provisional Release (confidential), 20 March 2015.

² *Prosecutor v. Goran Hadžić*, Case No. IT-04-75-T, Decision on Defence Urgent Request for Provisional Release, 13 March 2015 (“Impugned Decision”), paras 1, 42(d).

³ Prosecution’s Response to the Accused’s Urgent Interlocutory Appeal from Decision Denying Provisional Release until May 2015, 24 March 2015 (confidential) (“Response”).

⁴ Reply Regarding Urgent Interlocutory Appeal from Decision Denying Provisional Release until May 2015, 26 March 2015 (confidential) (“Reply”). The Appeals Chamber notes that there have been a number of ancillary filings by the Deputy Registrar of the Tribunal and by Hadžić in response. *See* Deputy Registrar’s Submission Regarding Extremely Serious Defence Allegations of Professional Misconduct, 24 March 2015; Response to Registrar’s Rule 33(B) Submissions, 26 March 2015; Supplemental Response to Registrar’s Rule 33(B) Submissions, 30 March 2015. The Appeals Chamber considers that these are irrelevant to the determination of the Appeal and do not warrant the intervention of the Appeals Chamber.

⁵ *See* Impugned Decision, para. 2, and references to medical reports cited therein. *See also* Appeal, paras 1, 6; Response, para. 6.

⁶ *See* Impugned Decision, para. 3; *Prosecutor v. Goran Hadžić*, Case No. IT-04-75-T, Decision on Prosecution Request for a Medical Examination of the Accused pursuant to Rules 54 and 74 bis, 16 January 2015 (“Decision on Prosecution Request for a Medical Examination of the Accused”), p. 1.

3. On 22 January 2015, Hadžić filed a confidential urgent request for provisional release until early May 2015 when he is scheduled to have an MRI scan in The Hague.⁷ On 16 February 2015, the Prosecution filed its response and requested an oral hearing to explore Hadžić's ability to be present at trial.⁸ On 18 February 2015, Hadžić opposed the request for an oral hearing as, in his view, it was not necessary to question medical experts to establish that he is unable to participate in trial proceedings and urged the immediate grant of provisional release.⁹ On 20 February 2015, the Trial Chamber decided that it would benefit from hearing the expert evidence of Professor Dr. Patrick Cras and Dr. Tatjana Seute and called them to appear before it on 25 and 26 February 2015.¹⁰

4. On 13 March 2015, the Trial Chamber denied the Request in its Impugned Decision.¹¹ The Trial Chamber found that although the mandatory conditions of Rule 65(B) of the Rules were met, as it had received appropriate guarantees from both the Host State and the Government of Serbia and Hadžić did not pose a flight risk or danger to any victim or witness,¹² it nevertheless retained the discretion to deny provisional release.¹³ The Trial Chamber noted that the proceedings are ongoing, it is seised of a Prosecution motion to proceed with the defence case,¹⁴ and it was under an obligation to avoid unnecessary interruptions and further delays.¹⁵ The Trial Chamber also considered that it would not exercise its discretion to grant provisional

⁷ *Prosecutor v. Goran Hadžić*, Case No. IT-04-75-T, Urgent Request for Provisional Release, 22 January 2015 (confidential with confidential and *ex parte* annexes) ("Request"), para. 2. See also *Prosecutor v. Goran Hadžić*, Case No. IT-04-75-T, Supplemental Submission in Support of Urgent Request for Provisional Release, 22 January 2015 (confidential with confidential annexes); *Prosecutor v. Goran Hadžić*, Case No. IT-04-75-T, Corrigendum to Urgent Request for Provisional Release, 26 January 2015 (made public pursuant to *Prosecutor v. Goran Hadžić*, Case No. IT-04-75-T, 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 on 13 March 2015 ("Order on Reclassification of Filings")); *Prosecutor v. Goran Hadžić*, Case No. IT-04-75-T, Supplemental Submissions in Relation to Urgent Request for Provisional Release, 2 February 2015 (confidential with confidential annex); *Prosecutor v. Goran Hadžić*, Case No. IT-04-75-T, Second Supplemental Submissions in Relation to Urgent Request for Provisional Release, 2 February 2015 (confidential with confidential annex).

⁸ *Prosecutor v. Goran Hadžić*, Case No. IT-04-75-T, Prosecution's Response to the Accused's Urgent Request for Provisional Release and Request for Oral Hearing to Question Independent Experts, 16 February 2015 (made public pursuant to Order on Reclassification of Filings). See also Appeal, para. 9, fn. 13.

⁹ *Prosecutor v. Goran Hadžić*, Case No. IT-04-75-T, Reply Concerning Urgent Request for Provisional Release, 18 February 2015 (made public pursuant to Order on Reclassification of Filings). See also Corrigendum to Reply Concerning Urgent Request for Provisional Release, 18 February 2015 (made public pursuant to Order on Reclassification of Filings).

¹⁰ *Prosecutor v. Goran Hadžić*, Case No. IT-04-75-T, Scheduling Order, 20 February 2015 (confidential).

¹¹ Impugned Decision, para. 42(d).

¹² Impugned Decision, paras 32-35. As to the available guarantees, see *Prosecutor v. Goran Hadžić*, Case No. IT-04-75-T, Communication from Ministry of Foreign Affairs of the Kingdom of the Netherlands, 28 January 2015; *Prosecutor v. Goran Hadžić*, Case No. IT-04-75-T, Urgent Request for Interim Provisional Release until 22 February 2015, 10 February 2015 (confidential with confidential annex), and Defence Submission of Additional Guarantees of the Government of Serbia, 2 March 2015 (confidential with confidential annex) ("Guarantee of the Government of the Republic of Serbia").

¹³ Impugned Decision, para. 35.

¹⁴ Impugned Decision, fn. 116.

¹⁵ Impugned Decision, para. 35.

release, unless other relevant factors justified granting such release.¹⁶ In this respect, the Trial Chamber was satisfied that the conditions of detention at the United Nations Detention Unit (“UNDU”) were compatible with the requirements of Hadžić’s treatment and that the benefit of Hadžić’s provisional release was not a compelling humanitarian ground warranting the exercise of its discretion to grant provisional release.¹⁷ On this basis, it concluded that Hadžić had failed to provide sufficiently compelling humanitarian reasons to justify his provisional release.¹⁸

II. STANDARD OF REVIEW AND APPLICABLE LAW

5. The Appeals Chamber reiterates that an interlocutory appeal is not a *de novo* review of the Trial Chamber’s decision and that a decision on provisional release by a trial chamber under Rule 65 of the Rules is discretionary.¹⁹ Accordingly, the relevant enquiry is whether the trial chamber has correctly exercised its discretion in reaching that decision, not whether the Appeals Chamber agrees with it.²⁰ In order to successfully challenge a discretionary decision, a party must demonstrate that the trial chamber has committed a “discernible error”.²¹ The Appeals Chamber will only overturn a trial chamber’s decision where it is found to be: (i) based on an incorrect interpretation of governing law; (ii) based on a patently incorrect conclusion of fact; or (iii) so unfair or unreasonable as to constitute an abuse of the trial chamber’s discretion.²² The Appeals Chamber will also consider whether the trial chamber has given weight to extraneous or irrelevant considerations or has failed to give weight or sufficient weight to relevant considerations in reaching its decision.²³

6. Rule 65(B) of the Rules provides as follows:

Release may be ordered at any stage of the trial proceedings prior to the rendering of the final judgement by a Trial Chamber only after giving the host country and the State to which the accused seeks to be released the opportunity to be heard and only if it is satisfied that the accused will appear for trial and, if released, will not pose a danger to any victim, witness or other person. The existence of sufficiently compelling humanitarian grounds may be considered in granting such release.²⁴

¹⁶ Impugned Decision, para. 35.

¹⁷ Impugned Decision, paras 38-39. *See* Impugned Decision, paras 36-37.

¹⁸ Impugned Decision, paras 39, 41.

¹⁹ *See, e.g., Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-AR65.1, Decision on Prosecution Appeal against the Decision on the Prosecution Motion to Revoke the Provisional Release of the Accused, 30 March 2015 (“*Šešelj* Decision”), para. 10, and references cited therein.

²⁰ *Šešelj* Decision, para. 10.

²¹ *Šešelj* Decision, para. 11, and references cited therein.

²² *Šešelj* Decision, para. 11, and references cited therein.

²³ *Šešelj* Decision, para. 11, and references cited therein.

²⁴ *See Šešelj* Decision, paras 12, 16.

7. In deciding whether the requirements of Rule 65(B) of the Rules have been met, a trial chamber must consider all relevant factors that a reasonable trial chamber would have been expected to take into account before coming to a decision.²⁵ It must then provide a reasoned opinion indicating its view on those relevant factors. What these relevant factors are, as well as the weight to be accorded to them, depends upon the particular circumstances of each case.²⁶

III. DISCUSSION

A. Submissions of the Parties

8. Hadžić submits that the Impugned Decision is rife with legal and factual errors, which, individually and cumulatively, make it so unreasonable and unfair that amounts to an abuse of discretion.²⁷ He maintains that the Trial Chamber failed to give due weight to relevant considerations including: (i) his terminal condition and the estimated time-frame of his death;²⁸ and (ii) the short period of release requested which, given his current condition, would not cause any delay in the proceedings and would not affect the quality of his treatment.²⁹ He also maintains that the Trial Chamber erred in finding the conditions of detention at the UNDU suitable in his circumstances and alleges that the Trial Chamber failed to identify the factors which weighed against his provisional release.³⁰ Hadžić requests, as a remedy, the reversal of the Impugned Decision and his immediate provisional release by the Appeals Chamber until the date when he is scheduled to have an important MRI scan in The Hague.³¹

²⁵ *Šešelj* Decision, para. 13, and references cited therein.

²⁶ *Šešelj* Decision, para. 13, and references cited therein.

²⁷ Appeal, paras 3, 24. *See also* Appeal, Annex (confidential). In his Reply, Hadžić concedes that information concerning the effects of the first cycle of his treatment was submitted for the first time to the Appeals Chamber but invites the Appeals Chamber, given the highly exceptional and urgent circumstances, to consider this material in the interests of justice. *See* Reply, paras 4-5. The Prosecution objects to this material being taken into consideration as, *inter alia*, it is presented for the first time on appeal. *See* Response, paras 16-18. The Appeals Chamber observes that, in view of the urgent and exceptional circumstances presented in this case and the fact that Hadžić's condition at present is a relevant consideration, it does not accept the Prosecution's objection.

²⁸ Appeal, paras 2-3, 15-22, 24, 32-33, 36-37, 63.

²⁹ Appeal, paras 3, 25-31, 35, 38-40.

³⁰ Appeal, paras 3, 12-14, 32-37, 63; Reply, paras 16-17.

³¹ Appeal, paras 4, 24, 41-64. In addition, Hadžić requests the Appeals Chamber to "consider, at its discretion, a longer period in light of the benchmarks set out in the expert reports." Appeal, para. 64. Hadžić also notes that all required documentation for provisional release was available on record including the guarantees of the Governments of Serbia and The Netherlands, the confirmation of availability of all medication and medical facilities required during provisional release and a personal guarantee. *See* Appeal, para. 62.

9. The Prosecution responds that Hadžić fails to demonstrate that the Trial Chamber committed a discernible error in the exercise of its discretion and that, accordingly, the Appeal should be dismissed.³²

B. Analysis

1. Alleged failure to consider important factors in assessing the existence of humanitarian grounds requiring release

10. Hadžić submits that the Trial Chamber only considered his terminal condition and the estimated time-frame of his death when assessing the compatibility of detention at the UNDU with his treatment and failed to take his actual medical condition and terminal prognosis into consideration when assessing whether there were any compelling humanitarian grounds requiring his release.³³ He submits that his prognosis suggests that he will not survive long enough to see a first-instance judgement, let alone an appeal judgement.³⁴

11. Hadžić similarly asserts that his continued detention in these circumstances serves no legitimate purpose and converts detention on remand into punishment despite the fact that he is entitled to the presumption of innocence.³⁵ He notes that every month he presently serves in detention is a substantial fraction of his remaining life.³⁶

12. Hadžić also contends that the Trial Chamber failed to duly consider the short duration of the requested release period which, given that he is medically certified as unfit to attend trial since October 2014 and throughout the period of provisional release requested, would not cause any delay in the proceedings and would not affect the quality of his treatment.³⁷ In the view of

³² Response, paras 1-2, 14, 19-44, 49.

³³ Appeal, paras 2-3, 15-22, 24, 63. He also argues that the Trial Chamber failed to take into consideration these important factors by applying a higher standard of proof to its fact-finding than the required "balance of probabilities" and by failing to identify and give a reasoned opinion as to the "relevant factors" which served as a basis for denying his request for provisional release. *See* Appeal, paras 3-4, 12-14, 16, 25-26, 40; Reply, paras 7-9.

³⁴ Appeal, paras 22-23, 63.

³⁵ Appeal, para. 22.

³⁶ Appeal, paras 22-23. Hadžić further claims that the Prosecution was incorrect in stating that this trial could be "easily completed" within the time that Hadžić is expected to live. First, he is now medically unfit to attend trial and will not likely be fit to attend trial for the remainder of his chemotherapy treatment. Second, the supposed "time-saving measures" is a motion requesting the Trial Chamber to continue with the trial in the absence of the accused, in clear violation of Article 21(4)(d) of the Tribunal's Statute. *See* Reply, para. 11.

³⁷ Appeal, paras 3, 26, 38-40; Reply, para. 13. *See* Appeal, paras 25, 27-31, 35. Hadžić also submits that the Trial Chamber disregarded the clear medical evidence confirming that over the period of provisional release requested the only treatment foreseen is self-administered ingestion of a chemotherapy drug, accompanied by blood testing primarily to ensure adequate platelet levels which is available to him in Serbia. *See* Appeal, para. 38. Hadžić further argues that the Impugned Decision failed to consider the medical evidence to the effect that his treatment could be monitored from The Hague while he is provisionally released and that his return to Serbia posed "no additional risk" in respect of his care. *See* Appeal, paras 38-39; Reply, para. 18.

Hadžić, the compelling humanitarian considerations weighing in favour of provisional release, as well as the exceptional nature of remand detention, cannot be outweighed by the mere pendency of a Prosecution motion to continue with trial in the absence of the accused, particularly in light of the absence of any evidence suggesting any meaningful prospect of resuming the court proceedings during the period of provisional release.³⁸

13. The Prosecution responds that Hadžić fails to show that the Trial Chamber disregarded relevant considerations as the Trial Chamber had, in fact, explicitly noted his condition, anticipated life expectancy, and the period of release requested, and focused on whether he is receiving appropriate medical care at the UNDU and whether the possible benefits of home care in Serbia would constitute a sufficiently compelling humanitarian basis to grant his request.³⁹ The Prosecution maintains that the Trial Chamber was not required to reiterate every aspect of Hadžić's physical condition and the Trial Chamber duly considered the information available to it concerning Hadžić's health and conditions of detention.⁴⁰ It also argues that Hadžić further fails to show that the Trial Chamber disregarded medical evidence and, to the contrary, the Trial Chamber based its decision on the expert evidence which was available to it.⁴¹

14. The Prosecution also argues that the Trial Chamber was reasonably of the view that Hadžić's continued presence in The Hague serves the legitimate purposes of ensuring he continues to receive medical care of the highest quality and retaining the possibility that trial proceedings may continue.⁴² In the view of the Prosecution, Hadžić's assertion that he will not be fit to attend proceedings until after May 2015 ignores the concurring view of both experts that at present he does not appear to have any cognitive dysfunction.⁴³

15. The Appeals Chamber reiterates that a trial chamber is required to consider all relevant factors that a reasonable trial chamber would be expected to take into account before deciding

³⁸ Reply, para. 14.

³⁹ Response, paras 27-28, 44.

⁴⁰ Response, para. 40.

⁴¹ Response, paras 39-43. The Prosecution also argues that the Trial Chamber applied an appropriate standard of proof in its evaluation of the evidence. *See* Response, paras 29-31.

⁴² Response, para. 31. The Prosecution also argues that granting provisional release would frustrate any opportunity for the trial to resume in the interim and that the trial is at an advanced stage and can easily be completed within the time-frame of Hadžić's prognosis. *See* Response, paras 22, 32. The Prosecution notes in this respect that the Trial Chamber is seized of a motion requesting it to set a date for the resumption of the trial, which raises the possibility that Hadžić's absence from The Hague could delay the proceedings particularly in light of the time-saving measures the Prosecution is willing to undertake. *See* Response, paras 32, 38.

⁴³ Response, para. 37, *referring to* Impugned Decision, para. 36, and references cited therein. The Prosecution also challenges the submission that Hadžić is currently suffering from any cognitive dysfunction. *See* Response, paras 16-17.

whether the requirements of Rule 65(B) of the Rules have been met.⁴⁴ The Trial Chamber noted the discretionary nature of a decision granting provisional release and observed that it was not prepared to exercise its discretion and release Hadžić unless there are compelling humanitarian grounds warranting his release.⁴⁵ This conclusion accords with the discretion afforded to the Trial Chamber pursuant to Rule 65(B) of the Rules, which provides that a trial chamber may consider “the existence of sufficiently compelling humanitarian grounds” in granting release. In determining whether such grounds were present, the Trial Chamber considered the medical evidence as to Hadžić’s condition and the available evidence as to his conditions of detention and concluded that the latter were compatible with the requirements of his treatment.⁴⁶ The Trial Chamber noted that there were benefits to Hadžić recovering in an environment surrounded by family, but did not consider “the weight of this benefit [to be] such as to constitute a compelling humanitarian ground for provisional release in the present circumstances”.⁴⁷

16. The Appeals Chamber finds that the Trial Chamber’s enquiry as to the existence of compelling humanitarian grounds failed to consider the full scope of the compelling humanitarian factors evident in Hadžić’s case. Specifically, in focusing on whether or not Hadžić received adequate medical treatment in The Netherlands and whether the conditions of his detention were adequate, the Trial Chamber placed insufficient weight on the fact that Hadžić is suffering from a terminal form of cancer and thus has limited life expectancy. In particular, the Trial Chamber failed to consider, whether these facts constituted sufficiently compelling humanitarian grounds to warrant provisional release. The Trial Chamber, instead, focused its analysis on the sufficiency of the medical treatment provided to Hadžić at the UNDU, on whether that treatment is compatible with Hadžić’s medical needs, and on the need for the continuation of his trial.⁴⁸ In so doing, the Trial Chamber failed to sufficiently address the issue at the heart of its consideration of compelling humanitarian factors, namely, whether an accused with a limited life expectancy may, as a humanitarian matter, be provisionally released to his family while his trial remains adjourned, irrespective of the sufficiency of the treatment received at the UNDU.

⁴⁴ See, e.g., *Šešelj* Decision, para. 13; *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR65.26, Decision on Prosecution Appeal of Decision on Provisional Release of Jadranko Prlić, 15 December 2011, para. 6. See also *Édouard Karemera et al. v. The Prosecutor*, Case No. ICTR-98-44-AR65, Decision on Matthieu Ndirumpatse’s Appeal against Trial Chamber’s Decision Denying Provisional Release, 7 April 2009, para. 13.

⁴⁵ Impugned Decision, paras 35-36.

⁴⁶ Impugned Decision, paras 37-38.

⁴⁷ Impugned Decision, para. 39.

⁴⁸ Impugned Decision, paras 36-40.

17. The Trial Chamber also failed to sufficiently consider and assess whether Hadžić's recovery from the side-effects of his medical treatment could be alleviated by the close support of his family members and his general well-being could be improved by his provisional release to his family environment. The Appeals Chamber notes, in this respect, the expert evidence before the Trial Chamber that "optimal conditions would be care in a familiar environment supported by family members".⁴⁹ The Appeals Chamber considers that in assessing whether there were sufficiently compelling humanitarian grounds warranting release, these are factors that a reasonable trial chamber would not fail to give due weight to.

18. In addition, the Appeals Chamber finds that in weighing whether these were compelling and justifiable reasons for the Trial Chamber to exercise its discretion in favour of provisionally releasing Hadžić, the Trial Chamber failed to give sufficient weight to the fact that Hadžić has been declared unfit to attend trial continuously since 20 October 2014,⁵⁰ that he has not waived his right to be present during the proceedings,⁵¹ and that he is not realistically expected to become fit enough to follow the proceedings while undergoing treatment and, in any event, before the first therapy evaluation due to take place in May 2015.⁵² In this respect, the Trial Chamber placed insufficient weight on the expert evidence suggesting that Hadžić is currently suffering from, *inter alia*, low blood count, weight loss, headaches, cognitive dysfunction

⁴⁹ *Prosecutor v. Goran Hadžić*, Case No. IT-04-75-T, Deputy Registrar's Submission of Reports of Medical Experts, 13 February 2015 (confidential with confidential annexes), Confidential Annex 2 ("Second Cras Report"), p. 2. See also *Prosecutor v. Goran Hadžić*, Case No. IT-04-75-T, Deputy Registrar's Submission of Medical Report, 29 January 2015 (confidential with a confidential annex) ("Reporting Medical Officer's Report of 28 January 2015"), p. 1.

⁵⁰ Decision on Prosecution Request for a Medical Examination of the Accused, p. 1 (noting that "hearings have been suspended since 20 October 2014 as a result of Hadžić's inability to attend due to his health"). The Trial Chamber remains updated as to developments related to Hadžić's condition by regular medical reports prepared by the Reporting Medical Officer of the UNDU. See Impugned Decision, para. 2, and references cited therein.

⁵¹ Impugned Decision, para. 3, and references cited therein.

⁵² See *Prosecutor v. Goran Hadžić*, Case No. IT-04-75-T, Deputy Registrar's Submission of Reports of Medical Experts, 13 February 2015 (confidential with confidential annexes), Confidential Annex 1 ("First Cras Report"), p. 7, ("Mr. Hadžić is likely to show a poor performance status during and after repetitive treatment with chemotherapy. During the treatment, his functional capacity will be substantially reduced and it is unlikely that he will be fit enough to attend trial"). Dr. Cras also noted that "attending and participating in the trial will be hazardous to Mr. Hadžić's health and will most likely compromise the treatment plan. Chemotherapy with temozolomide, even if fairly well tolerated, will be accompanied by fatigue, nausea and reduced functional status." See First Cras Report, p. 9. See also Second Cras Report, p. 1 (noting the "expected side effects of future chemotherapy"); *Prosecutor v. Goran Hadžić*, Case No. IT-04-75-T, Deputy Registrar's Submission of Reports of Medical Experts, 13 February 2015 (confidential with confidential annexes), Confidential Annex 3 ("Seute Report"), p. 2 ("In my opinion Mr. Hadžić will not be able to participate in trial proceedings (for four months) ... during treatment ... At this period it is unknown whether his treatment is effective (the first evaluation [*sic*] in May 2015). Therefore it is impossible to predict whether he will be able to attend trial for a period of several months."). Dr. Seute also reported that "attending and participating in trial proceedings whilst suffering from serious side effects of chemotherapy would be detrimental to his health". See Seute Report, p. 2. The Appeals Chamber also notes in this respect that whether Hadžić suffers at present from any "cognitive dysfunction" in the sense of being "well oriented in time, space and person" and being able to "[express] himself clearly" is different from the issue of whether he is sufficiently fit to follow the trial proceedings in a meaningful way and the first does not necessarily in and of itself imply the second.

characterized by slowness and memory problems, and increased fatigue.⁵³ To the contrary, in reaching its conclusion, the Trial Chamber was guided by its obligation to ensure the expeditiousness of the proceedings without explaining how this interest is served by denying the request for a short period of provisional release during which time, in all likelihood, Hadžić will not be able to attend the proceedings, which have effectively remained adjourned since October 2014.

19. For the foregoing reasons, the Appeals Chamber concludes that the Trial Chamber committed a discernible error by failing to give sufficient weight to relevant considerations in reaching its decision. In light of this conclusion, the Appeals Chamber considers that it is not necessary to examine the parties' remaining submissions.

2. Appropriate Remedy

20. Hadžić requests the Appeals Chamber to grant his immediate provisional release until the date on which his next MRI scan is scheduled in early May 2015 and not remand the matter to the Trial Chamber.⁵⁴ He notes that an order for provisional release by the Appeals Chamber is merited in this respect given the delay in rendering the Impugned Decision which stands in sharp contrast to the obvious need for expeditiousness required in such circumstances,⁵⁵ and the repeated requests by the Trial Chamber as to whether he is prepared to waive his right to be present at his trial which he perceived as undue pressure.⁵⁶

21. In response, the Prosecution invites the Appeals Chamber to reject Hadžić's unfounded and baseless allegations as to the Trial Chamber's delay in dealing with his request for provisional release, and the enquiries as to whether Hadžić maintained his waiver at trial.⁵⁷

22. The Appeals Chamber is of the view that, given the urgency of the matter and, in particular, the time elapsed since Hadžić's original request and the scheduled date of his MRI scan in The Hague, it is in the interests of justice to award the relief requested. The Appeals

See Prosecutor v. Vujadin 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, paras 21-25.

⁵³ See First Cras Report, pp. 6-7; Second Cras Report, p. 1; Seute Report, p. 3. See also Reporting Medical Officer's Report of 28 January 2015, p. 1.

⁵⁴ Appeal, paras 4, 64.

⁵⁵ Appeal, paras 42-45.

⁵⁶ Appeal, paras 46-54. In his Reply, Hadžić clarifies that he does not suggest in any way that the Trial Chamber acted from an improper motive when it enquired whether he maintained his waiver but that its repeated requests for re-affirmation of not waiving his right to be present, particularly immediately after the projections of non-fitness in the medical reports, constituted undue "circumstantial pressure" and animated an apprehension that there was a connection between the request for waiver and his pending request for provisional release which placed him under significant *de facto* pressure. See Reply, paras 22-24.

⁵⁷ Response, paras 2, 45-48.

Chamber, therefore, orders the provisional release of Hadžić for a limited period and until the date of his MRI scan in The Hague identified in the Confidential Annex to this decision, which, in the Appeals Chamber's view, is proportionate to the present circumstances of this case. In doing so, the Appeals Chamber reiterates that the Trial Chamber, in the Impugned Decision, found that if released, Hadžić would not pose a flight risk and would not endanger victims, witnesses, or other persons.⁵⁸ The Appeals Chamber also notes the sufficiency of the guarantees provided by the Republic of Serbia.⁵⁹

IV. DISPOSITION

23. For the foregoing reasons, the Appeals Chamber:

GRANTS the Appeal and **QUASHES** the Impugned Decision;

ORDERS, pursuant to Article 29 of the Statute of the Tribunal and Rules 54, 65, and 107 of the Rules, Hadžić's provisional release until the date identified in the Confidential Annex to this decision;

FURTHER ORDERS as follows:

1. Hadžić shall be transported to Schiphol airport in The Netherlands as soon as practicable after the rendering of the present decision;
2. At Schiphol airport, Hadžić shall be provisionally delivered into the custody of a representative of the Government of the Republic of Serbia, pursuant to paragraph (a) of the Guarantee of the Ministry of Internal Affairs of the Republic of Serbia, who shall accompany Hadžić for the remainder of his travel to and from the Municipality of Novi Sad, in Serbia;
3. The period of the provisional release shall commence when Hadžić is delivered into the custody of the authorized representative of the Government of Serbia and shall terminate upon his return to the Dutch authorities in May 2015 on the date specified in the Confidential Annex;
4. On his return flight, Hadžić shall be accompanied by the authorized representatives of the Government of Serbia who shall deliver Hadžić into the custody of the Dutch authorities

⁵⁸ Impugned Decision, paras 33-34.

⁵⁹ See Impugned Decision, para. 32. See also *supra*, fn. 12.

at Schiphol airport; the Dutch authorities shall then transport Hadžić back to the UNDU in The Hague;

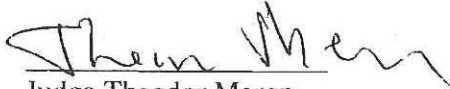
5. During the period of his provisional release, Hadžić shall abide by the following conditions:
 - a. before leaving the UNDU, Hadžić shall provide details of his itinerary to the Ministry of Justice of The Netherlands and to the Registrar of the Tribunal;
 - b. Hadžić shall remain within the confines of the Municipality of Novi Sad, Serbia, apart from his travel to and from the airport;
 - c. between 23.00 hours each night and 07.00 hours the next day, Hadžić shall be confined to the residence referred to in the Confidential Annex;
 - d. police officers designated by the Ministry of Interior of Serbia shall visit Hadžić's residence on a daily basis and submit written reports with the Registrar of the Tribunal confirming that Hadžić complies with all imposed conditions;
 - e. Hadžić shall surrender all his travel documents to the Ministry of Interior of the Republic of Serbia for the entire duration of his provisional release;
 - f. 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;
 - g. Hadžić shall not discuss his case with anyone, including the media, other than his counsel;
 - h. Hadžić shall strictly comply with any requirements of the authorities of the Government of Serbia necessary to enable them to comply with their obligations under the present decision;
 - i. Hadžić shall comply with any order of the Appeals Chamber varying the terms of or terminating his provisional release; and
 - j. Hadžić shall return to the UNDU no later than the date specified in the Confidential Annex;

6. The Appeals Chamber **REQUIRES** the Government of the Republic of Serbia to assume responsibility for:
- a. Designation of the official into whose custody Hadžić shall be provisionally released and who shall accompany Hadžić from Schiphol airport in The Netherlands to Novi Sad, Serbia, and notification, as soon as practicable, to the Trial Chamber, Appeals Chamber, and the Registrar of the Tribunal of the name of this designated official;
 - b. Designation of the police officers in Novi Sad, Serbia, who shall visit Hadžić's residence on a daily basis and submit written reports with the Registrar of the Tribunal confirming that Hadžić complies with all imposed conditions;
 - c. Immediately informing the Registrar of the Tribunal, Trial Chamber, and Appeals Chamber should Hadžić fail to report to the police station as required;
 - d. Ensuring Hadžić's personal security and safety while on provisional release in the Republic of Serbia;
 - e. All expenses in connection with the transport from Schiphol airport to the Municipality of Novi Sad, Serbia, and back;
 - f. All expenses in connection with Hadžić's treatment while on provisional release;
 - g. Facilitating, at the request of the Appeals Chamber or of the parties, all means of co-operation and communication between the parties and ensuring the confidentiality of any such communication;
 - h. Reporting immediately to the Registry of the Tribunal as to the substance of any threats to Hadžić's security, including full reports of investigations related to such threats;
 - i. Detaining Hadžić immediately should he attempt to escape from the territory of the Republic of Serbia, or should he, in any other way, breach the terms and conditions of his provisional release as set out in the present decision and Confidential Annex and immediately reporting any such breach to the Registry of the Tribunal and the Appeals Chamber;

- j. Respecting the primacy of the Tribunal in relation to any existing or future proceedings in the Republic of Serbia concerning Hadžić; and
- k. Submitting a written report to the Trial Chamber and Appeals Chamber, upon Hadžić's return to the UNDU, as to Hadžić's compliance with the terms of the present decision.
7. Finally, the Appeals Chamber **INSTRUCTS** the Registrar of the Tribunal to:
- a. Consult with the Dutch and Serbian authorities, as to the practical arrangements for Hadžić's provisional release;
- b. Request the authorities of the State(s) through whose territory Hadžić may travel to:
- (i) hold him in custody for any time he will spend in transit at the airport of the State(s) in question; and
- (ii) arrest and detain Hadžić pending his return to the UNDU should he attempt to escape during travel;
8. Continue to detain Hadžić at the UNDU in The Hague until such time as the Appeals Chamber and the Registrar of the Tribunal have been notified of the name of the designated official of the Government of Serbia into whose custody Hadžić is to be provisionally released.

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

Done this thirteenth day of April 2015,
At The Hague,
The Netherlands.


Judge Theodor Meron
Presiding

[Seal of the Tribunal]