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: 13 March 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: **13 March 2015**

PROSECUTOR

v.

GORAN HADŽIĆ

PUBLIC WITH PUBLIC ANNEXES

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

The Office of the Prosecutor:
Mr. Douglas Stringer

Counsel for Goran Hadžić:
Mr. Zoran Živanović
Mr. Christopher Gosnell

1. **THIS TRIAL CHAMBER** of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 ("Tribunal") is seised of the Defence's "Request for Reclassification of Filings Related to Mr. Hadžić's Health Condition as Public", filed confidentially on 19 February 2015 ("Defence Motion"). On 27 February 2015, the "Prosecution's Response to the Defence Request for Reclassification of Filings Related to Mr. Hadžić's Health Condition" was filed confidentially ("Response").

2. The Chamber is also seised of the "Prosecution Motion for Reclassification of Testimony as Public", filed confidentially on 6 March 2015.

Submissions

3. In the Defence Motion, the Defence requests the reclassification of certain filings relating to Hadžić's health condition ("Filings"). The Defence argues that only Hadžić has a privacy interest in these documents, and therefore, on this basis, and given the importance of public proceedings, a number of documents should be reclassified as public.[1] In the Response, the Prosecution takes no position in relation to the Motion, but notes that in relation to a number of filings there may be privacy or security concerns, beyond those related to Mr. Hadžić's health, upon which the Registry may wish to comment.[2]

4. The Deputy Registrar requests that matters that may compromise the "security and good order" of the United Nations Detention Unit ("UNDU") remain confidential.[3] In this regard, the Deputy Registrar proposes redactions from its Submission of 29 January 2015[4] and proposes that the specific date of a planned medical examination be redacted from a number of filings.[5] The Deputy Registrar does not object to references to confidential medical reports it has filed being made public.[6] Finally, the Deputy Registrar notes, but takes no position on, the fact that a number of filings refer to the proposed place of provisional release.[7]

[1] Defence Motion, para. 1.
[2] Response, para. 2.
[3] Deputy Registrar's Submission in Relation to The Request for Reclassification of Filings Related to Mr. Hadžić's Health Condition as Public (confidential), 5 March 2015 ("Registry Submission"), paras 2, 4.
[4] Deputy Registrar's Submission Regarding Interim Order In Relation to the Urgent Request for Provisional Release (confidential), 29 January 2015 ("Submission of 29 January 2015"). In an email dated 12 March 2015 from the Registry to the Trial Chamber and Parties ("Registry Email"), the Registry agreed that one of its suggested redactions was not necessary under the present circumstances.
[5] Registry Submission, para. 3; Registry Email.
[6] Registry Submission, para. 6.
[7] Registry Submission, para. 5.

5. In the Prosecution Motion, the Prosecution requests that the testimony of medical expert Professor Dr. Patrick Cras, who testified in closed session, be reclassified as public.[8] The Prosecution notes that the Defence has already made public the same information about Hadžić's health that was discussed during Cras's testimony.[9] The Defence does not object to the request.[10]

Discussion

6. By virtue of Rule 78 of the Rules of Procedure and Evidence of the Tribunal ("Rules"), all proceedings before the Tribunal shall be public unless there are exceptional reasons for keeping them confidential.[11] The substantial basis for the confidential status of the Filings and Cras's testimony rested on Hadžić's interest in keeping his medical information private. As the Defence has indicated that neither the Filings nor Cras's testimony need to remain confidential on this basis, the Trial Chamber will lift the confidentiality of both. However, matters that compromise the security of the UNDU will be redacted and a public redacted version of such filings will be annexed to this decision.

Disposition

7. Accordingly, the Trial Chamber, pursuant to Rules 54 and 78 of the Rules, hereby:

(a) **GRANTS** the Defence Motion;

(b) **GRANTS** the Prosecution Motion;

(c) **INSTRUCTS** the Registry to lift the confidentiality of the following filings:

(i) Notice in Compliance with Trial Chamber Order, 12 December 2014;

(ii) Prosecution's Request for a Medical Examination of the Accused Pursuant to Rules 54 and 74 *bis* (Expedited Ruling Requested), 17 December 2014;

(iii) Response to Prosecution Request for a Medical Examination of the Accused, 31 December 2014;

(iv) Deputy Registrar's Submission Regarding Prosecution Request for a Medical Examination of the Accused, 5 January 2015;

[8] Prosecution Motion, para. 1.
[9] Prosecution Motion, para. 1.
[10] Email from the Defence to the Trial Chamber and Prosecution, 11 March 2015.
[11] *See Prosecutor v. Milan Lukić and Sredoje Lukić*, IT-98-32/1-AR65.1, Decision of Defence Appeal Against Trial Chamber's Decision on Sredoje Lukić's Motion for Provisional Release, 16 April 2007, fn. 2.

(v) Prosecution's Consolidated Request for Leave to Reply and Reply to Defence Response and Deputy Registrar's Submission Regarding Prosecution's Request for Medical Examination of the Accused Pursuant to Rules 54 and 74 *bis* (Expedited Ruling Requested), 7 January 2015;

(vi) Decision on Prosecution Request for a Medical Examination of the Accused Pursuant to Rules 54 and 74 *bis*, 16 January 2015;

(vii) Corrigendum to Urgent Request for Provisional Release, 26 January 2015;

(viii) Decision on Urgent Request for Interim Provisional Release, 11 February 2015;

(ix) Prosecution's Response to the Accused's Urgent Request for Provisional Release and Request for Oral Hearing to Question Independent Experts, 16 February 2015;

(x) Reply Concerning Urgent Request for Provisional Release, 18 February 2015; and

(xi) Corrigendum to Reply Concerning Urgent Request for Provisional Release, 18 February 2015;

(d) **INSTRUCTS** the Registry to give the following filings a partly confidential status, which lifts the confidentiality of the main submission, but retains the confidentiality of the corresponding annex(es):

(i) Deputy Registrar's Notification of Appointment of Medical Experts, 26 January 2015;

(ii) Second Supplemental Submissions in Relation to Urgent Request for Provisional Release, 2 February 2015; and

(iii) Urgent Request for Interim Provisional Release until 22 February 2015, 10 February 2015;

(e) **INSTRUCTS** the Registry to file the public redacted versions annexed to this decision of the following documents:

(i) Urgent Request for Provisional Release, 22 January 2015;[12]

(ii) Prosecution's Response to the Defence Requests set out in Paragraphs 13 and 18 of the Urgent Request for Provisional Release, 26 January 2015;

(iii) Interim Order in Relation to the Urgent Request for Provisional Release, 27 January 2015;

(iv) Deputy Registrar's Submission Regarding Interim Order in Relation to the Urgent Request for Provisional Release, 29 January 2015;

(v) Supplemental Submissions in Relation to Urgent Request for Provisional Release, 2 February 2015;[13] and

(f) **INSTRUCTS** the Registry to lift the confidentiality of the testimony of Professor Dr. Patrick Cras on 25 February 2015.

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

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

Judge Guy Delvoie
Presiding

[Seal of the Tribunal]

[12] The annexes attached to this filing are to remain confidential. Consequently, they have not been included in Annex A of this decision.
[13] The annex attached to this filing is not to remain confidential and has been included in Annex E of this decision.

ANNEX A

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

Case No. IT-04-75-T

IN TRIAL CHAMBER II

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

Registrar: **Mr. John Hocking**

Date: **21 January 2015**

THE PROSECUTOR
v.
GORAN HADŽIĆ

CONFIDENTIAL WITH CONFIDENTIAL AND EX PARTE *ANNEX A AND CONFIDENTIAL ANNEX B*

URGENT REQUEST FOR PROVISIONAL RELEASE

The Office of the Prosecutor:

Mr. Douglas Stringer

Counsel for Mr. Hadžić:

Mr. Zoran Živanović
Mr. Christopher Gosnell

URGENT REQUEST FOR PROVISIONAL RELEASE

I. INTRODUCTION

1. Goran Hadžić has been diagnosed by a neurologist and a neuro-oncologist with brain tumours known as "glioblastoma multiforme"[1] "in several areas of the brain."[2] As these brain tumours are inoperable, Mr. Hadžić is currently receiving "palliative treatment"[3] of daily radiotherapy and chemotherapy for thirty days. The ICTY's Reporting Medical Officer explains that the "prognosis for this type of tumour is poor, with a median survival rate of 12 months" from the date of diagnosis.[4] Mr. Hadžić now has a remaining life-expectancy of ten months.

2. Mr. Hadžić requests provisional release for twelve weeks starting from the end of the current thirty-day phase of his treatment on or about 29 January 2015. His treatment plan from that date forward prescribes a "4 week break in the month of February to recuperate before recommencing a further 6 week course of chemotherapy,"[5] the latter of which may be taken orally on an out-patient basis. Doctors have informed Mr. Hadžić that the chances of arresting the growth of the tumours depends on getting as much rest as possible, which is simply impossible at the UNDU. Mr. Hadžić is frequently awoken by fellow inmates or prison guards; has no dedicated caregiver; and is not provided with the range of nourishment that would optimize the chance of recovery from aggressive chemotherapy and radiotherapy. Keeping Mr. Hadžić in detention during this crucial phase of his treatment, given all the circumstances,

[1] Confidential and *Ex Parte* Annex A (the MCH report dated 28 November 2014), p. 3. The Dutch terminology used in the report is "*multifocal glioblastoom*". The Defence intends at the earliest opportunity to provide an English translation of this report; until then the report is relied on only to show the basis of the 26 November RMO report, and the identity of the treating neurologist and neuro-oncologist. Leave is respectfully sought to exceed the word limit in light of the importance and complexity of the present application.
[2] Confidential Annex B, (Deputy Registrar's Submission of Medical Report, 26 November 2014, Confidential Annex), p. 1.
[3] *Id.*
[4] *Id.*
[5] *Id.*

would be inhumane and deprive him of the best chance to extend his life beyond the median survival expectancy.

II. APPLICABLE LAW

3. The criteria for granting provisional release of an accused who has not been convicted are set out in Rule 65(B) of the Rules of Procedure and Evidence ("Rules"):

> Release may be ordered at any stage of the trial proceedings prior to the rendering of the final judgment 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.

Hence, provisional release "may" be granted where it is shown that the accused: (i) will appear for trial; and (ii) will not pose a danger to anyone.

4. Although the word "may" could imply a discretion to retain in custody even once the two conditions are satisfied, the Appeals Chamber has rejected the application of any other criteria.[6] A Trial Chamber determining whether to grant provisional release "needed only to determine whether the requirements of Rule 65(B) of the Rules were met."[7] This accords with the "rationale behind the institution of detention on remand"

[6] *The Prosecutor v. Prlić et al.*, Case No. IT-04-74-AR65.32, Decision on the Prosecution's Appeal of the Decision on Further Extension of Valentin Ćorić's Provisional Release, 25 May 2012, paras 16 ("[W]hile the Trial Chamber did not dwell upon the seriousness and the scale of the crimes charged, Ćorić's role in them and the advanced stage of proceedings, it was not required to do so. The Trial Chamber's concern was to ensure that, if granted an extension of his provisional release, Ćorić would return to the United Nations Detention Unit ("UNDU") and would not pose a danger to any victim, witness or other person"), 19 ("[i]n the view of the Appeals Chamber, it is irrelevant that some domestic jurisdictions – such as the Supreme Court of Canada – recognise such negative effects on the community as a whole when releasing individuals charged with serious crimes").

[7] *The Prosecutor v. Prlić et al.*, Case No. IT-04-74-AR65.35, Decision on the Prosecution's Appeal of the Decision on Further Extension of Milivoj Petković's Provisional Release, 12 June 2012, para. 19. *See The Prosecutor v. Hadžihasanović et al.*, Case No. IT-01-47-PT, Decision Granting Provisional Release to Enver Hadžihasanović, 19 December 2001, paras 12-13 ("[T]he Prosecutor submitted that the use of the word 'may' in Rule 65(C) suggests that the Trial Chamber still has a certain degree of discretion when the other prerequisites explicitly mentioned are met. She expressed her view that provisional release, if granted,

which "is to ensure that the accused will be present for his/her trial."[8] There is no residual discretion, and no other justification, for holding a person in detention.

5. The 2011 amendment of Rule 65(B) does enumerate one additional factor that is particularly salient to Mr. Hadžić's situation: "[t]he existence of sufficiently compelling humanitarian grounds may be considered in granting such release."

6. Most ICTY jurisprudence on provisional release concerns release during periods of adjournment. Provisional release on the basis of serious illness may nevertheless be granted even when the consequence is an interruption of trial proceedings.[9] The presumption of innocence and the narrow purposes of pre-conviction detention reflected in Rule 65(B) and associated jurisprudence remain relevant in assessing whether provisional release should be granted even when there is an impact on trial scheduling.

III. SUBMISSIONS

(i) Mr. Hadžić's Current Treatment Needs Are Incompatible with Humane Detention and Best Medical Practice

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would send the wrong signal to both the victims of the crimes and the international community and, therefore that there would be no space for provisional release. The Trial Chamber does not accept this submission. It applies the law and is not mandated to 'sending signals'. In the case in point, the question of whether the word 'may' must be read as 'shall' when all the prerequisites of Rule 65 are met or not can remain open. Normally the prerequisites for any deprivation of liberty should be established by law exclusively (see e.g. Statute of the International Criminal Court of 17 July 1998, Article 60(2))").

[8] *The Prosecutor v. Brđanin & Talić*, Case No. IT-99-36-T, Decision on the Motion for Provisional Release of the Accused Momir Talić, 20 September 2002 ("*Talić* Decision"), para. 29. *See also The Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, Redacted and Public Version on Order on Jadranko Prlić's Motion to Extend His Provisional Release, 9 March 2012, p. 5 ("the Chamber reminds the Prosecution that an accused is presumed innocent from the beginning of the trial until the day of the judgement and '[i]f it is sufficient to use a more lenient measure than mandatory detention, it must be applied'; that provisional detention meets the security needs and cannot in any way be envisaged as an early enforcement of a possible sentence").

[9] *See Talić* Decision; *The Prosecutor v. Djukić*, Case No. IT-96-20-T, Decision Rejecting the Application to Withdraw the Indictment and Order for Provisional Release, 24 April 1996 ("*Djukić* Decision").

7. Mr. Hadžić's anticipated life expectancy is ten months. He has undergone an extremely aggressive combination of radiotherapy and chemotherapy to arrest the progress of multiple brain tumours. The treatment is "palliative", meaning that it is not provided as a cure, but only to mitigate the symptoms and, at best, slow the progress of the disease.[10] Mr. Hadžić, following the completion of his daily hospital sessions of radiotherapy, will urgently need rest and care during the upcoming twelve weeks starting on or around 29 January 2015. This is his best chance to fall within the very small percentage of individuals who live significantly longer than the median survival rate.

8. Mr. Hadžić's condition is very similar to that occasioning Mr. Talić's provisional release. General Talić had been diagnosed with an "incurable and inoperable locally advanced carcinoma which presently is estimated to be at stage III-B with a rather unfavourable prognosis of survival even on short term."[11] By "short term", the Trial Chamber relied on medical information that "the average survival of a patient in Talić's condition is about one year and that the chance that Talić will be alive in two years is about 40 per cent."[12] The only treatment available, as with Mr. Hadžić, was "palliative."[13] The Trial Chamber granted provisional release taking into account both the average life expectancy and the unsuitability of the prison setting for palliative care:

> The stark reality of Talić's medical condition is that there is no escape for him from the natural consequence that his illness will ultimately bring about because his condition is incurable and inoperable and can only deteriorate with or without treatment. The stark reality is that the odds in favour of his being alive a year from now are few indeed. This scenario ultimately also means that it is very unlikely that Talić would be still alive when this trial comes to its end, or more so, that if found guilty he would be in a position to serve any sentence. Indeed this is the stark reality of the situation that this Trial Chamber is faced with. Yet the

[10] "WHO Definition of Palliative Care", (available at <http://www.who.int/cancer/palliative/definition/en/> (last accessed on 21 January 2015)) ("[P]alliative care [...] is applicable early in the course of illness, in conjunction with other therapies that are intended to prolong life, such as chemotherapy and radiotherapy, and includes those investigations needed to better understand and manage distressing clinical complications").
[11] *Talić* Decision, para. 27.
[12] *Id.*
[13] *Id.* para. 8.

> Prosecution continues to show concern with the fact that the victims and witnesses who have agreed to co-operate with its Office will not have a favourable view of such a release and in the context of their own suffering they will not understand the humanitarian motivation behind such a release. The Trial Chamber is certainly not insensitive to the concerns of the Prosecution and even more so to those of the victims and witnesses who may fail to understand as suggested by the Prosecution. It is the duty of this Trial Chamber, however, to emphasise that such concerns cannot form the basis of any decision of this Tribunal, which would be tantamount to abdicating from its responsibility to apply humanitarian law when this is appropriate . There can be no doubt that when the medical condition of the accused is such as to become incompatible with a state of continued detention, it is the duty of this Tribunal and any court or tribunal to intervene and on the basis of humanitarian law provide the necessary remedies. [....] It would be inappropriate for this Trial Chamber to wait until Talić is on the verge of death before considering favourably his application for provisional release and in the meantime allow a situation to develop which would amount to what is described in the *Mouisel* decision *supra* as being an inhumane one. This is all the more so when, as stated earlier, detention on remand is not meant to serve as a punishment but only as a means to ensure the presence of the accused for trial. The Trial Chamber, given the scenario depicted above, fails to understand the request of the Prosecution for the continued detention of Talić knowing that before long and in all probability before this trial reaches its end, his condition will not be any different from Djukić's and would, as in that case, necessitate practically unconditional provisional release.[14]

9. Mr. Djukić, who was also provisionally released, had received a prognosis only slightly worse than that of Mr. Hadžić, with an estimated life expectancy of 2 to 9 months.[15] The Prosecution in that case sought to withdraw its Indictment against the accused.[16] The Trial Chamber denied that motion, but ordered his immediate release because:

> the current medical condition of General Djukić is not compatible with any form of detention and ... the palliative care which his condition requires, or will require, justifies a different environment.[17]

10. *Mouisel v. France*, a European Court of Human Rights case relied upon in the *Talić* Decision, concerned an inmate who had been convicted and whose detention was

[14] *Id.* para. 32.
[15] *The Prosecutor v. Djukić*, Case No. IT-96-20-T, Motion to Withdraw the Indictment, 19 April 1996, p. 2.
[16] *Id.*
[17] *Djukić* Decision, p. 4.

therefore justified on much stronger grounds than merely securing attendance at trial. The case is primarily relevant as it concerns treatment of leukemia by chemotherapy (but not radiotherapy). The Court found that Mr. Mouisel's "continued detention, especially from June 2000 onwards, undermined his dignity and entailed particularly acute hardship that caused suffering beyond that inevitably associated with a prison sentence and treatment for cancer."[18] June 2000 was when Mr. Mouisel started to suffer side-effects from "an intensive course of chemotherapy" which included "permanent asthenia and fatigue; waking up in pain during the night; [...] muscle fatigue and breathlessness; [and] alleged psychological impact of stress on his life expectancy."[19] A physician commented at the time that the cancer treatment – *i.e.* the chemotherapy – was already "scarcely compatible with imprisonment" and was exacerbated by other factors.[20] Although Mr. Mouisel was subsequently released, he was ultimately accorded 15,000 Euros in damages for the period from June 2000 through March 2001 when he was released.[21]

11. The UNDU is not a suitable place for Mr. Hadžić during this critical phase of palliative care, particularly given the seriousness of his condition and life expectancy. The next two phases of his treatment can be received on an out-patient basis. Mr. Hadžić has been informed by his doctors that the priority now is to rest as much as possible, eat proper food, and receive constant attention and care as needed. None of those requirements are compatible with detention at the UNDU. Uninterrupted sleep is impossible and there is no one available to provide continuous care – to say nothing of the health benefits arising from the presence of close family members to provide care and support during this period of difficult treatment.

12. The only humane course under the circumstances is to provisionally and immediately release Mr. Hadžić after the completion of his current course of radio-therapy, which will be completed on or around 29 January 2015.

[18] ECHR, *Mouisel v. France*, Application no. 67263/01, Judgment, 14 November 2002, para. 48.
[19] *Id.* para. 17.
[20] *Id.* para. 17.
[21] *Id.* para. 52.

13. The Defence urgently requests that the RMO and the treating physicians be required to provide any medical information and advice to the Trial Chamber as may be necessary for determination of the factual issues associated with the present request, including:

(a) the likely and observed physical consequences of concurrent radiotherapy and chemotherapy in the doses given to Mr. Hadžić;

(b) the optimal conditions during the four weeks of recuperation and during the six subsequent weeks of chemotherapy that constitute the next two phases of treatment;

(c) the suitability of the UNDU in relation to those conditions relative to home care and the likely health benefits of one setting compared to the other;

(d) the percentage of individuals diagnosed with glioblastoma multiforme undergoing the same treatment as Mr. Hadžić who outlive the median life expectancy (a) by more than six months, and (b) by more than one year;

(e) the potential impact of optimal conditions of recuperation and treatment on life expectancy;

(f) confirmation that Mr. Hadžić is scheduled to undergo an MRI scan on or about [redacted] May 2015 in The Hague that will provide the first opportunity to meaningfully assess the success of the treatment plan; and

(g) confirmation that the six-weeks of chemotherapy starting at the beginning of March 2015 can be auto-ingested orally (i.e. without medical supervision or admission to a hospital).

(ii) Continued Detention Would Be Not only Inhumane, but Counter-Productive to the Course of the Proceedings

14. Mr. Hadžić not only fervently wishes to live beyond the median survival rate, but to recover sufficiently to be able to participate in the remainder of his trial. Providing suitable conditions for Mr. Hadžić's recovery during his period of recuperation and second course of chemotherapy increases the likelihood that he will survive for a longer period. This is not only humane, but serves the interests of all those who wish to see a Trial Judgement pronounced in this case.

(iii) The Conditions for Release Under Rule 65(B) Are Satisfied

15. Mr. Hadžić poses no flight risk. Becoming a fugitive would accelerate Mr. Hadžić's own death by depriving him of necessary medical care and cut off his contacts with his family. The next major benchmark in assessing Mr. Hadžić's recovery, according to his doctors, will occur on [redacted] May 2015 when a new MRI scan will be taken. Only then will the effectiveness of the treatment as a whole be known, as well as the advisability of future treatments. Mr. Hadžić has no interest other than to try to recover as much as possible with the care and support of this family and return to the care of his Dutch medical team for the MRI scan by [redacted] May 2015. He is in no position to become a fugitive and has no interest in doing so.

16. There has been no indication during this case that Mr. Hadžić personally, or anyone associated with him, has attempted to contact, influence or intimidate anyone, let alone any witness or victim. There is no basis to believe that Mr. Hadžić would attempt to do so during his release. Mr. Hadžić is also prepared to submit to any conditions of release as may be deemed necessary and appropriate by the Trial Chamber to prevent such contact, influence or intimidation.

17. Mr. Hadžić will also provide a personal guarantee solemnly declaring his commitment to return for trial and refrain from contacting any victims or witnesses in the proceedings.[22] He will also agree to be bound by any additional terms, conditions and restrictions as may be deemed appropriate by the Trial Chamber. The Government of Serbia has been requested, and is expected to shortly provide, the customary guarantees for provisional release. Mr. Hadžić and the Government of Serbia agree, as will be reflected in the forthcoming guarantees, to abide by and enforce any termination of the provisional release as may be ordered by the Trial Chamber.

(iv) The Current Request Is Compatible with the Trial Chamber's Order for Medical Examinations by Two External Experts

18. The Trial Chamber recently ordered the Registry to appoint two external experts to answer a series of questions concerning the state of Mr. Hadžić's health and capacity to attend trial.[23] Mr. Hadžić suggests, if the Trial Chamber is not satisfied that there is already an adequate evidential basis for immediate provisional release, to order as follows:

(a) the treating physicians, the ICTY medical officer, and the ICTY reporting medical officer to immediately provide written and detailed opinions in respect of the matters raised in paragraph 14 (which is also consistent with the information sought in operative paragraph D of the Trial Chamber's Order of 16 January 2015);

(b) the two independent experts, if the information provided in the preceding paragraph is deemed insufficient, to do the same on a preliminary basis within the next nine days, to be followed by any subsequent examination and opinions as defined in operative paragraph A of the Trial Chamber's Order of 16 January 2015; and

[22] The Defence will file a supplemental submission as soon as it receives this solemn declaration.
[23] *The Prosecutor v. 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 ("Order of 16 January 2015").

(c) to make any additional orders as may be deemed necessary to establish the evidential basis for the present request, if the information in the preceding two paragraphs is deemed insufficient.

IV. RELIEF SOUGHT

19. Goran Hadžić respectfully requests that he be granted provisional release for a period of twelve weeks commencing on or about 29 January 2015. He further requests that the Trial Chamber urgently make any orders in accordance with paragraphs 13 and 18 above as may be necessary to determine the present request as expeditiously as possible, and to order the Prosecution to respond on an expedited schedule to the present request.

Word count: 3,412.

Respectfully submitted,

Zoran Živanović, Lead Counsel

Christopher Gosnell, Co-Counsel

ANNEX B

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: 26 January 2015

IN TRIAL CHAMBER II

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

Registrar: Mr. John Hocking

Date: 26 January 2015

THE PROSECUTOR

v.

GORAN HADŽIĆ

CONFIDENTIAL

PROSECUTION'S RESPONSE TO THE DEFENCE REQUESTS SET OUT IN PARAGRAPHS 13 AND 18 OF THE URGENT REQUEST FOR PROVISIONAL RELEASE

The Office of the Prosecutor:

Mr. Douglas Stringer

Counsel for Goran Hadžić:

Mr. Zoran Živanović
Mr. Christopher Gosnell

THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA

Case No. IT-04-75-T

THE PROSECUTOR

v.

GORAN HADŽIĆ

CONFIDENTIAL[1]

PROSECUTION'S RESPONSE TO THE DEFENCE REQUESTS SET OUT IN PARAGRAPHS 13 AND 18 OF THE URGENT REQUEST FOR PROVISIONAL RELEASE

I. OVERVIEW

1. Pursuant to the Trial Chamber's order on 23 January 2015,[2] the Prosecution provides its response to the Accused Goran Hadžić's requests set out in paragraphs 13 and 18 of the Urgent Request for Provisional Release ("Motion").[3] The Prosecution will respond in full regarding its opposition to the remainder of the Motion in due course.

2. Three central issues arise from the Accused's requests set out at paragraphs 13 and 18 of the Motion: (1) the appropriateness of the questions listed at paragraph 13; (2) the appropriate persons to whom the questions should be directed; and (3) the timing of the responses. The Prosecution agrees in part with the wording of questions (a), (d), (f) and (g) set out under paragraph 13; rejects *in toto* questions (b), (c) and (e) set out under paragraph 13; and proposes four alternate questions, a new question (b) and three further questions (h), (i) and (j). The Prosecution submits that the Reporting Medical Officer ("RMO"), the multidisciplinary team of doctors treating the Accused, as well as the

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1 This response is filed confidentially as it addresses matters referred to in confidential filings. All citations herein are to *Prosecutor v. Hadžić*, Case No. IT-04-75, unless otherwise specified.

2 Trial Chamber Order dated 23 January 2015, set out in the email from the Associate Legal Officer to the parties, timed 3.06pm.

appointed independent neurologist and neurooncologist ("Experts"), should respond to the appropriate amended and alternate questions, as specified below, in their reports which are due to be filed by 13 February 2015.[4] Because the Deputy Registrar is more familiar with the common practice regarding the seeking of opinions from medical personnel and experts,[5] the Prosecution suggests that the Deputy Registrar also be consulted in respect of paragraphs 13 and 18 of the Motion.

II. RESPONSE

A. The appropriateness of the questions listed at paragraph 13 of the Motion

3. The Prosecution agrees for the most part with the formulations of questions (a), (d), (f) and (g) listed at paragraph 13 of the Motion. However, in the interest of accuracy and completeness, the Prosecution suggests that the following amendments (in square brackets and underlined, with rejected wording struck through) be made to questions (a), (d) and (g), and that new questions (b) and (h) be added, as set out below:

> "(a) the [~~likely and~~] observed physical consequences of concurrent radiotherapy and chemotherapy in the doses given to Mr. Hadžić;
>
> [(b) the expected physical consequences of concurrent radiotherapy and chemotherapy in the doses given to Mr. Hadžić];
>
> [...]
>
> (d) ~~the percentage of individuals diagnosed with glioblastoma multiforme undergoing the same treatment as Mr. Hadžić who outlive the median life expectancy (1) by more than six months, and (b) by more than one year~~ [details concerning the life expectancy of individuals diagnosed with glioblastoma multiforme undergoing the same treatment as Mr. Hadžić;];
>
> [...]
>
> (f) confirmation that Mr. Hadžić is scheduled to undergo an MRI scan on or about [redacted] May 2015 in The Hague that will provide the first

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3 Urgent Request for Provisional Release, dated 21 January 2015, distributed 22 January 2015 ("Motion").

4 Decision on Prosecution request for a Medical Examination of the Accused pursuant to rule 54 and 74*bis* ("Decision"), pp.4-5.

5 Deputy Registrar's Submission Regarding Prosecution Request for a Medical Examination of the Accused, 5 January 2015 ("Deputy Registrar's Submission"), para.5.

opportunity to meaningfully assess the success of the treatment plan; [~~and~~]

(g) confirmation that the six-weeks of chemotherapy starting at the beginning of March 2015 can be auto-ingested orally (i.e. without medical supervision or admission to a hospital); [and

(h) whether it is medically advisable for Mr Hadžić to be released to go to Serbia to undergo a six-week regime of chemotherapy prescribed by his team of treating doctors in The Hague, given that the medical team will not be in a position to observe or examine Mr. Hadžić.]"

4. The Prosecution objects *in toto* to questions (b), (c) and (e) set out under paragraph 13 of the Motion on the grounds they lack relevance, are imprecise and ambiguous, and are inappropriate given the context of this case. Firstly, these questions, which refer to "optimal conditions" and "home care", are based on hypothetical situations that would have to account for a large number of variables outside of the control of the Tribunal or the Accused's treating physicians. The RMO, the treating doctors and the Experts cannot therefore be expected to reasonably comment on the Accused's "home care" in comparison to detention conditions at the United Nations Detention Unit ("UNDU") when there is no verified or reliable information available concerning the former. Secondly, "optimal conditions" must be assessed in context. The Accused, a known fugitive who is accused of serious violations of international humanitarian law, is currently in detention during the final stages of his trial at an international criminal tribunal. His detention has been deemed necessary by this Trial Chamber due to his flight risk. While in detention, he is receiving state of the art medical care and treatment. The enquiry, therefore, should be what is adequate medical care for a person in the Accused's position, and not (as the Accused suggests) some undefined "optimal" scenario.[6] Finally, provisional release is not a right of the Accused, and in its response to the Motion the Prosecution will provide the Trial Chamber with its reasons as to why the Accused's provisional release request should be rejected.

5. The focus of the enquiry, therefore, should be on which, if any, conditions at the UNDU adversely impact the Accused's treatment and recuperation, and if so, what measures may be implemented to ameliorate those conditions in the UNDU. Accordingly,

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[6] The Appeals Chamber has already endorsed the adequate standard of medical care available at the UNDU, *see*, *Prosecutor v. Mile Mrkšić*, Case No. IT-95-13/1-AR65, Decision on Appeal Against Refusal to Grant Provisional Release, 8 October 2002, paras.23-24; *Prosecutor v. Mile Mrkšić*, Case

in place of questions (b), (c) and (e) set out under paragraph 13 of the Motion, and in order to accurately take account of the *status quo*, the Prosecution proposes the following questions:

> "(i) whether the conditions at the UNDU are unduly detrimental to the treatment and recuperation of Mr Hadžić; and
>
> (j) whether any conditions at the UNDU need to be changed so as to ameliorate Mr. Hadžić's treatment and better facilitate his recuperation."

B. The persons to whom the questions should be directed

6. The Prosecution agrees that the RMO and the treating doctors should respond to the amended and/or new questions (a), (f), (g) and (h) set out above at paragraph 3, as these are matters which are clearly within their knowledge, and in line with the information contained in the weekly medical reports filed by the Deputy Registrar pursuant to Rule 33(B) of the Rules.[7]

7. The Trial Chamber has already ordered the Registry to instruct independent Experts to provide evaluations of the Accused's health condition and ability to be present, in order for the Trial Chamber and the parties to assess to what extent and under what conditions trial proceedings may continue.[8] The Prosecution understands the Registry's position to be that the role of the RMO and the treating doctors are not equated with that of a court-appointed independent medical expert pursuant to Rule 74*bis*.[9] The Prosecution therefore submits that in the interest of thoroughness and fairness, the new and/or amended questions (b) and (d) set out above at paragraph 3, as well as the two further questions (i) and (j) as set out above at paragraph 5, all of which relate to the questions set out in the Decision,[10] and which are clearly within the remit of their expertise, should be put solely to the Experts. Question (h) set out above at paragraph 3 should be put to both the treating doctors and the Experts.

No. IT-95-13/1, Decision on Mile Mrkšić's Application for Provisional Release, 24 July 2002, para.39.

7 *See e.g.* most recent Deputy Registrar's Submission of Medical Report, 22 January 2015.

8 Decision, pp.4-5.

9 Deputy Registrar's Submission, para.5.

10 Decision, pp.4-5.

8. The Prosecution further submits that the Deputy Registrar should be invited to provide input as to which questions should be put to which team, i.e., the RMO/treating doctors and/or the Experts.

C. The timing of the responses

9. The RMO and the treating doctors, as well as the Experts, will require sufficient time to carefully consider and respond in full to the questions set out at paragraphs 3 and 5 above, as well as to those questions set out in the Decision.[11] Before they can respond to the questions they will also need time to consider the Registry's submissions addressing the central issues raised in the Motion at paragraphs 2 and 11, which are due to be filed by 29 January 2015.[12] The Prosecution submits that the upcoming deadline of 13 February 2015 as stipulated by the Trial Chamber in its Decision,[13] will allow sufficient time.[14]

III. RELIEF

10. For the foregoing reasons, the Prosecution respectfully requests the Trial Chamber to reject the Accused's requests set out at paragraphs 13 and 18 of the Motion in part, and

(a) order that the RMO and the treating doctors answer amended questions (a), (f), (g) and (h), as set out at paragraphs 3 and 5 above

(b) order that the Experts answer the amended questions (b), (d), (h), (i) and (j), as set out at paragraphs 3 and 5 above; and

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11 Decision, pp.4-5.

12 Email from the Deputy Registrar to the Trial Chamber and the parties, dated 23 January 2015, timed 3.04pm.

13 Decision, p.4.

14 As such, the Prosecution objects to the Accused's request for a response "within the next nine days" at para.18(b) of the Motion.

(c) order that the responses to the foregoing questions be filed by 13 February 2015.[15]

Word Count: 1602

Douglas Stringer
Senior Trial Attorney

Dated this 26th day of January 2015
At The Hague, The Netherlands

[15] Decision, pp.4-5.

ANNEX C

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: 27 January 2015

Original: English

IN THE TRIAL CHAMBER

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

Registrar: **Mr. John Hocking**

Order: **27 January 2015**

PROSECUTOR

v.

GORAN HADŽIĆ

CONFIDENTIAL

INTERIM ORDER IN RELATION TO THE URGENT REQUEST FOR 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 ("Trial Chamber" and "Tribunal", respectively);

BEING SEISED OF the "Urgent Request for Provisional Release", filed confidentially with confidential and confidential and ex *parte* annexes by the Defence on 22 January 2015 ("Motion");

NOTING the "Supplemental Submission in Support of Urgent Request for Provisional Release", filed confidentially with confidential annexes by the Defence on 22 January 2015;

NOTING the "Corrigendum to Urgent Request for Provisional Release," filed confidentially by the Defence on 26 January 2015;

NOTING that on 23 January 2015 the Chamber asked the Prosecution to provide a partial response, relating to paragraphs 13 and 18 of the Motion, no later than 1:00 p.m. on 26 January 2015;[1]

NOTING the "Prosecution's Response to the Defence Requests Set Out in Paragraphs 13 and 18 of the Urgent Request for Provisional Release", filed confidentially on 26 January 2015 ("Response");

NOTING the "Decision on Prosecution Request for a Medical Examination of the Accused Pursuant to Rules 54 and 74 *bis*", issued confidentially on 16 January 2015 ("Order"), in which the Chamber ordered the Registry to appoint an independent neurologist and an independent neuro-oncologist ("Experts") who will each examine Hadžić and submit, no later than 13 February 2015, detailed written reports in relation to Hadžić's capacity to attend and participate in trial proceedings;[2]

NOTING the "Deputy Registrar's Notification of Appointment of Medical Experts", filed confidentially with confidential annexes on 26 January 2015, in which the Deputy Registrar provides notice that she has appointed two medical experts to examine Hadžić, in accordance with the Order;

NOTING that Hadžić has begun a 16 week treatment plan ("Treatment Plan") comprised of: (i) six weeks of daily radiotherapy and chemotherapy treatments which will continue until the end of January; (ii) four weeks of recuperation in February; and (iii) six weeks of chemotherapy;[3]

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[1] Email from the Trial Chamber to the Parties, 23 January 2015.
[2] Order, p. 4. *See also* Public Redacted Version of 16 January 2015 Decision on Prosecution Request for a Medical Examination of the Accused Pursuant to Rules 54 and 74 *bis*, 22 January 2015.
[3] "Update Health condition of Mr. Goran Hadzic", dated 26 November 2014, appended to the Deputy Registrar's Submission of a Medical Report, 26 November 2014 (confidential), p. 1.

NOTING that, in the Motion, the Defence requests that Hadžić be granted provisional release for a period of twelve weeks, commencing on or about 29 January 2015, during which time he will reside with his sister in Novi Sad, Serbia;[4]

NOTING that, in support of its request, the Defence submits that detention at the United Nations Detention Unit ("UNDU") does not provide the optimal conditions for Hadžić's recuperation because he "is frequently awoken by fellow inmates or prison guards; has no dedicated caregiver; and is not provided with the range of nourishment that would optimize the chance of recovery from aggressive chemotherapy and radiotherapy";[5]

NOTING that the Defence requests that, if the Chamber "is not satisfied that there is already an adequate evidential basis for immediate provisional release", the Chamber urgently order the Reporting Medical Officer of the UNDU ("RMO") and Hadžić's treating physicians[6] to provide "any medical information and advice to the Trial Chamber as may be necessary for determination of the factual issues associated with the present request", including:

> (a) the likely and observed physical consequences of concurrent radiotherapy and chemotherapy in the doses given to Mr. Hadžić;
>
> (b) the optimal conditions during the four weeks of recuperation and during the six subsequent weeks of chemotherapy that constitute the next two phases of treatment;
>
> (c) the suitability of the UNDU in relation to those conditions relative to home care and the likely health benefits of one setting compared to the other;
>
> (d) the percentage of individuals diagnosed with glioblastoma multiforme undergoing the same treatment as Mr. Hadžić who outlive the median life expectancy (a) by more than six months, and (b) by more than one year;
>
> (e) the potential impact of optimal conditions of recuperation and treatment on life expectancy;
>
> (f) confirmation that Mr. Hadžić is scheduled to undergo an MRI scan on or about [redacted] May 2015 in The Hague that will provide the first opportunity to meaningfully assess the success of the treatment plan; and
>
> (g) confirmation that the six-weeks of chemotherapy starting at the beginning of March 2015 can be auto-ingested orally (i.e. without medical supervision or admission to a hospital);[7]

NOTING that the Defence further requests that, if the information provided by the RMO and treating physicians is deemed insufficient, the Chamber order the Experts to answer the same

[4] Motion, paras 2, 19; Supplement, confidential Annex B.
[5] Motion, paras 2, 11.
[6] In an email to the Trial Chamber, Prosecution, and Registry, sent on 23 January 2015, the Defence stated that it is not asking that a treating physician be appointed as an expert under Rule 74 *bis* and noted that: "The only request made by the Defence is that the treating physicians provide medical information to the Trial Chamber directly, in addition to information provided by and through the RMO." The Chamber notes that the Defence has made no submissions to suggest that the reporting method in use thus far—by which the RMO, in consultation with the treating physicians, provides a report for the Chamber—is not sufficient.

questions on a preliminary basis "within the next nine days" to be followed by any subsequent examination and opinions as defined in the Order;[8]

NOTING that the Prosecution objects to Defence questions (b), (c), and (e) *in toto* because: (i) there is no reliable information as to what "home care" would entail and therefore the RMO, treating physicians, and Experts cannot reasonably compare it to conditions at the UNDU and (ii) "optimal conditions" must be assessed within the context that Hadžić "is currently in detention during the final stages of his trial at an international criminal tribunal" and his "detention has been deemed necessary by this Trial Chamber due to his flight risk";[9]

NOTING that the Prosecution submits that the focus should be on "which, if any, conditions at the UNDU adversely impact the Accused's treatment and recuperation, and if so, what measures may be implemented to ameliorate those conditions in the UNDU";[10]

NOTING that the Prosecution proposes amendments to Defence questions (a), (d), and (g), the elimination of Defence questions (b), (c), and (e), and the addition of questions (b), (h), (i), and (j), as follows:

> (a) the observed physical consequences of concurrent radiotherapy and chemotherapy in the doses given to Mr. Hadžić;
>
> (b) the expected physical consequences of concurrent radiotherapy and chemotherapy in the doses given to Mr. Hadžić;
>
> [...]
>
> (d) details concerning the life expectancy of individuals diagnosed with glioblastoma multiforme undergoing the same treatment as Mr. Hadžić;
>
> [...]
>
> (f) confirmation that Mr. Hadžić is scheduled to undergo an MRI scan on or about [redacted] May 2015 in The Hague that will provide the first opportunity to meaningfully assess the success of the treatment plan;
>
> (g) confirmation that the six-weeks of chemotherapy starting at the beginning of March 2015 can be auto-ingested orally (i.e. without medical supervision or admission to a hospital);
>
> (h) whether it is medically advisable for Mr. Hadžić to be released to go to Serbia to undergo a six-week regime of chemotherapy prescribed by his team of treating doctors in The Hague, given that the medical team will not be in a position to observe or examine Mr. Hadžić;
>
> (i) whether the conditions at the UNDU are unduly detrimental to the treatment and recuperation of Mr. Hadžić; and

[7] Motion, paras 13, 18-19.
[8] Motion, para. 13.
[9] Response, para. 4.
[10] Response, para. 5.

(j) whether any conditions at the UNDU need to be changed so as to ameliorate Mr. Hadžić's treatment and better facilitate his recuperation.[11]

NOTING that the Prosecution submits that Prosecution questions (a), (f), and (g) should be answered by the RMO and treating physicians because they are matters which are "clearly within their knowledge, and in line with the information contained in the weekly medical reports filed by the Deputy Registrar";[12] Prosecution questions (b), (d), (i), and (j) should be answered by only the Experts because "the role of the RMO and the treating doctors are not equated with that of a court-appointed independent medical expert pursuant to Rule 74*bis*", the questions relate to the questions outlined in the Order, and the questions are "clearly within the remit of their expertise";[13] and that Prosecution question (h) should be answered by the RMO, treating physicians, and the Experts;[14]

NOTING that the Prosecution suggests that the Deputy Registrar be invited to provide submissions as to which questions should be put to which medical team;[15]

NOTING that the Prosecution also submits that the RMO, treating physicians, and the Experts will require "sufficient time to carefully consider and respond in full to the questions" and to consider Registry submissions addressing the conditions of Hadžić's detention at the UNDU,[16] and that the 13 February 2015 deadline stipulated in the Order will allow sufficient time;[17]

CONSIDERING that the Chamber would benefit from receiving additional information on Hadžić's health condition, treatment, and conditions of detention in order to make an informed decision on the Motion;

PURSUANT to Rules 33(B), 54, and 74 *bis* of the Rules hereby:

GRANTS the Motion, in part:

(a) **ORDERS** the RMO, in consultation with the multi-disciplinary team of doctors treating Hadžić, to submit, no later than 29 January 2015, a medical report, answering the following questions:

(i) What are (a) the observed, and (b) the expected, physical consequences of concurrent radiotherapy and chemotherapy in the doses given to Hadžić?

[11] Response, paras 3-5.
[12] Response, para. 6.
[13] Response, para. 7.
[14] Response, para. 7.
[15] Response, para. 8.

(ii) What conditions are (a) necessary, and (b) optimal, to enable Hadžić to achieve the intended results of the prescribed Treatment Plan during (a) the four weeks of recuperation and (b) the six weeks of chemotherapy?

(iii) What conditions, if any, at the UNDU would need to be changed to meet the optimal or necessary conditions referred to in question (ii) above?

(iv) What benefits and risks to Hadžić's health can be expected if he returns to Serbia to the home of a family member (a) during the scheduled four weeks of recuperation, and (b) during the scheduled six weeks of chemotherapy?

(v) Provide details concerning the life expectancy of individuals diagnosed with *glioblastoma multiforme* who have undergone the same treatment as Hadžić.

(vi) Can the planned chemotherapy be ingested orally without medical supervision or admission to a hospital?

(vii) Is Hadžić scheduled to undergo an MRI scan on or about [redacted] May 2015 in The Hague, and will this provide the first opportunity to meaningfully assess the success of Hadžić's treatment?

(b) **ORDERS** the Experts to provide, as early as practicable and no later than 13 February 2015, answers to the questions enumerated in (a)(i) through (a)(v) above, in addition to the detailed written reports proscribed in the Order;

(c) **INSTRUCTS** the Registry to, no later than 29 January 2015, provide written submissions:

(i) Addressing the Defence submissions on the conditions of Hadžić's detention at the UNDU;

(ii) If necessary, proposing any alternatives which may improve the conditions of Hadžić's detention; and

(iii) Indicating the earliest possible date for the Experts to examine Hadžić as described in the Order;

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[16] In an email to the Chamber, Prosecution, and Defence sent on 23 January 2015, the Deputy Registrar confirmed that she will file a submission addressing the issues raised by the Defence in the Motion at paras 2 and 11 by 29 January 2015.

[17] Response, paras 9, 10.

(d) **REMAINS** seized of the Motion in all other respects.

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

Done this twenty-seventh day of January 2015,
At The Hague,
The Netherlands.

Judge Guy Delvoie
Presiding

[Seal of the Tribunal]

ANNEX D

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: 29 January 2015

Original: English

IN TRIAL CHAMBER II

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

Registrar: **Mr. John Hocking**

Submission date: **29 January 2015**

THE PROSECUTOR

v.

GORAN HADŽIĆ

CONFIDENTIAL

DEPUTY REGISTRAR'S SUBMISSION REGARDING INTERIM ORDER IN RELATION TO THE URGENT REQUEST FOR PROVISIONAL RELEASE

The Office of the Prosecutor:
Mr. Douglas Stringer

Counsel for Mr. Hadžić:
Mr. Zoran Živanović
Mr. Christopher Gosnell

1. Pursuant to Rule 33(B) of the Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia, and further to the Trial Chamber's "Interim Order in Relation to the Urgent Request for Provisional Release" ("Order"),[1] and Mr. Goran Hadžić's "Urgent Request for Provisional Release" ("Accused" and "Motion", respectively),[2] the Deputy Registrar respectfully files this submission.

2. In the Order, the Trial Chamber instructs the Registry to provide written submissions addressing the Defence submissions on the conditions of the Accused's detention at the UNDU, and if necessary, proposing any alternatives which may improve his conditions of detention.[3] The Trial Chamber also instructs the Registry to indicate the earliest possible date for the independent medical experts appointed pursuant to the Trial Chamber's prior order to examine the Accused.[4]

Conditions of detention and alternatives put in place by the UNDU

3. In the Motion, the Accused states that doctors have advised him to get as much rest as possible, which he says is "impossible" at the UNDU.[5]

4. A certain amount of disturbance is inevitable in a detention environment. As concerns the Accused, the Medical Officer informed the UNDU management that the Accused is suffering from a sleeping disorder, tiredness and less tolerance of noise in his surroundings. Accordingly, he asked the management to put in place measures to enable the Accused to sleep in the morning.

5. In order to provide the Accused with an opportunity to rest, the management of the UNDU has ensured that Detention Officers on duty are fully aware of the need to maintain a relatively quiet environment to enable the Accused to rest. The Commanding Officer has also instructed the Detention Officers to close the door to the Accused's cell after the

[1] *The Prosecutor v. Goran Hadžić*, Case No. IT-04-75-T, Interim Order in Relation to the Urgent Request for Provisional Release, confidential, 27 January 2015.
[2] *The Prosecutor v. Goran Hadžić*, Case No. IT-04-75-T, Urgent Request for Provisional Release, confidential, dated 21 January 2015. See also *The Prosecutor v. Goran Hadžić*, Case No. IT-04-75-T, Supplemental Submission in Support of Urgent Request for Provisional Release, confidential, 22 January 2015; *The Prosecutor v. Goran Hadžić*, Case No. IT-04-75-T, Corrigendum to Urgent Request for Provisional Release, confidential, 26 January 2015.
[3] Order, para. (c)(i)–(ii).
[4] *Id.*, para. (c)(iii). See also *The 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*, confidential, 16 January 2015, para. (a); *The Prosecutor v. Goran Hadžić*, Case No. IT-04-75-T, Deputy Registrar's Notification of Appointment of Medical Experts, confidential, dated 23 January 2015, para. 2 (indicating that the Deputy Registrar appointed Professor Dr. Patrick Cras as the independent neurologist and Dr. Tatjana Seute as the independent neuro-oncologist).
[5] Motion, paras. 2, 11.

wake-up round in the morning, to enable him to sleep longer, if he so wishes. In addition, the Accused is not subject to periodic checks at night.

6. The Accused is woken up during the day by Detention Officers for internal and external medical appointments, which are necessary for his treatment. [redacted] and it is inevitable that there will be some disturbance as they move about and undertake various activities while on the wing.

7. The Accused is detained at the UNDU under the same regime as other detainees and subject to the rules, regulations and procedures of a prison environment. On weekdays, the doors of [redacted] The detainees remain at liberty to have breakfast, and carry out their day-to-day activities which include cooking, cleaning, fresh air, sports, recreation in the recreation room and visits. They can also make telephone calls, listen to the radio and watch television, among other activities. These activities take place from the time their cell doors are opened until [redacted] However, [redacted] and [redacted] all detainees are locked up in their cells for the Detention Officers to change shifts.

8. [redacted] the detainees are locked up in their cells for the night. After lock-up, they may watch television in their cells, listen to the radio, read books, rest or sleep, until the next morning.[6] Throughout the night, Detention Officers [redacted] ensuring as little disturbance as possible. On the recommendation of the Medical Officer (for medical reasons) or the Commanding Officer (for operational reasons), specific detainees may be under a periodic regime of frequent checks at night, which are also carried out with minimal disturbance.

9. The alternative of admitting the Accused to the Judicial Centre for Somatic Care[7] within the host prison has been considered and is not deemed appropriate for the Accused. This option is only exercised on the advice of the Medical Officer and where a detainee needs specific care, such as if the detainee's medical condition poses a risk to others or if the detainee can no longer feed and care for himself or herself. At present, the Medical Officer advises against this option because it is not warranted by any such needs. In addition, the Medical Officer considers that the Accused will benefit from having other detainees around him with whom he can speak his own language, and that admission to the Judicial Centre for

[redacted]

[7] *Justitieel Centrum Voor Somatische Zorg.*

Somatic Care might adversely impact the Accused psychologically, at a time when he is vulnerable.

The Accused is not currently in need of a caregiver

10. The Accused states in the Motion that he has no dedicated caregiver.[8] The Deputy Registrar confirms that, although the Accused receives medical care provided by the medical service, he does not have a caregiver who attends to his personal care. The Medical Officer has advised that the Accused is not currently at the stage where he requires a caregiver to assist him with his personal care. Should this arise, the Medical Officer will evaluate the possibility of transferring the Accused to the Judicial Centre for Somatic Care within the host prison.

The food provided to detainees at the UNDU meets national and international standards

11. In the Motion, the Accused avers that he is not provided with the range of nourishment that would optimise the chance of recovery from treatment.[9] The basis for this claim is not identified.

12. The food provided to detainees at the UNDU meets national and international standards in terms of quality, quantity and calorific value, and offers the detainees an opportunity to follow a healthy regime. Detainees are provided three meals a day and, subject to the advice of the Medical Officer, may also be provided with food supplements.

13. The Deputy Registrar notes that the provision of food to detainees at the UNDU is the responsibility of the Host State, which has engaged an external caterer to provide food services to the entire Dutch Prison system, including the prison that houses the UNDU. The menu is designed to provide healthy meals of a sufficient quality, quantity and calorific value for an adult male. A new menu is provided each season, and each menu includes regulated options to give detainees an element of choice and to ensure any medical or religious requirements are met. The detainees may also purchase additional items from the Host Prison shop, including fresh fruit, vegetables, meat and fish, as well as Balkan specialties.

14. Not only is the food provided at the UNDU guided by the specifications and approved standards of the Dutch Prison system, but the UNDU Medical Service has confirmed that the food meets national and international standards as specified above. [redacted]

[8] Motion, paras. 2, 11.
[9] *Ibid.*

[redacted][1]

Medical examinations and reports

15. The Deputy Registrar informs the Trial Chamber that the independent neurologist has indicated his availability to examine the Accused on 5 February 2015, while the independent neuro-oncologist is scheduled to examine the Accused on 11 February 2015. These are the earliest possible dates that could be arranged with the independent experts.

16. The Registry has conveyed the Order to the independent experts and to the Reporting Medical Officer ("RMO"), and instructed them to provide answers to the Trial Chamber's questions in accordance with the Order.

17. The RMO's answers are being filed today, while the independent experts will provide their answers in the written reports to be filed by 13 February 2015.

Conclusion

18. The UNDU is paying due attention to ensure minimum disturbance to the Accused within the confines of a detention regime, and to enable him to have as much rest as possible. With regard to his personal care, the Medical Officer will make the appropriate determination as to the suitability of continued housing in the UNDU if his condition deteriorates to the point he can no longer care for himself. The food provided is in line with both national and international standards. The Registry expects the independent experts to provide their answers by 13 February 2015.

19. The Deputy Registrar remains at the Trial Chamber's disposal should any further questions arise.

Respectfully submitted,

Kate McKintosh
Deputy Registrar

Dated this 29th day of January 2015
At The Hague,
The Netherlands.

[10] Rules Governing the Detention of Persons Awaiting Trial or Appeal Before the Tribunal or Otherwise Detained on the Authority of the Tribunal, IT/38/Rev.9, 21 July 2005 ("Rules of Detention").
[11] Due to confidentiality restrictions, such reports cannot be quoted in this submission.

ANNEX E

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

Case No. IT-04-75-T

IN TRIAL CHAMBER II

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

Registrar: **Mr. John Hocking**

Date: **31 January 2015**

THE PROSECUTOR
v.
GORAN HADŽIĆ

CONFIDENTIAL WITH CONFIDENTIAL ANNEX

SUPPLEMENTAL SUBMISSIONS IN RELATION TO URGENT REQUEST FOR PROVISIONAL RELEASE

The Office of the Prosecutor:

Mr. Douglas Stringer

Counsel for Mr. Hadžić:

Mr. Zoran Živanović
Mr. Christopher Gosnell

SUPPLEMENTAL SUBMISSIONS IN RELATION TO URGENT REQUEST FOR PROVISIONAL RELEASE

I. INTRODUCTION

1. Goran Hadžić hereby respectfully requests leave, to the extent leave is required, to file these supplemental submissions in relation to his Urgent Request for Provisional Release, dated 22 January 2015 ("Request"). The present submission is justified to provide an opportunity to comment on the Deputy Registrar's submissions, and the Reporting Medical Officer's ("RMO") report,[1] both filed on 29 January 2015 pursuant to the Trial Chamber's Interim Order of 27 January 2015.[2] One clarification is also made to the submissions contained in the Request.

II. OBSERVATIONS ON THE RMO'S MEDICAL REPORT

2. The Defence does not propose to comment on the correctness of medical opinions expressed by the RMO and will limit its comments to the consequences to be drawn from those submissions.

3. The Defence submits that the RMO's report confirms that provisional release for the remainder of Mr. Hadžić's scheduled therapy is medically appropriate; that his symptoms imply that he is not physically fit to attend trial; and that he has an estimated life expectancy of one year.[3] These are sufficient grounds, in and of themselves, to grant provisional release.

[1] Deputy Registrar's Submission Regarding Interim Order in Relation to the Urgent Request for Provisional Release, 29 January 2015 ("Deputy Registrar's Submissions"); Deputy Registrar's Submission of Medical Report, 29 January 2015 ("Medical Report").
[2] *The Prosecutor v. Hadžić*, Case No. IT-04-75-T, Interim Order in Relation to the Urgent Request for Provisional Release, 27 January 2015 ("Interim Order").
[3] Medical Report, p. 2 (v).

4. The RMO's report could have been more detailed, in particular in response to questions (a)(i) and (a)(ii).[4] Further description of the consequences of the "aggressive and toxic treatment"[5] endured by Mr. Hadžić could have been provided. The Defence also regrets that a fuller and more specific answer has not been provided to question (a)(v) concerning the predictive value of the well-established medical notion of "median life expectancy". Notwithstanding these shortcomings, the RMO's report adequately establishes: (i) the dire medical situation facing Mr. Hadžić; (ii) the suffering occasioned by his treatment; (iii) the medical benefits of, and immediate need for, home care; and (iv) the terminal nature of this condition.[6]

5. If the Trial Chamber is dissatisfied with the level of detail of any aspect of the RMO's Medical Report, then the Defence respectfully requests that RMO be ordered to **immediately** supplement his report as may be considered necessary.

III. OBSERVATIONS ON THE DEPUTY REGISTRAR'S SUBMISSIONS

(i) The Submissions Confirm that Mr. Hadžić Cannot Be Afforded a Suitably Restful Environment Given His Particularly Serious Condition

6. The Deputy Registrar confirms that Mr. Hadžić is awoken daily by UNDU guards [redacted] From then until [redacted] with the exception of two hours, the "[redacted]" on his floor are free to move around "carrying out their day-to-day activities which include cooking, cleaning [...] recreation in the recreation room and visits [...] mak[ing] telephone calls, listen[ing] to the radio and watch[ing] television."[7] All of these activities are disruptive of Mr. Hadžić's attempts to sleep during those hours. The cell doors do not shut out these noises, and do not prevent other detainees or the guards from knocking and entering as they wish. This is no reproach to the Registry, the UNDU, or the other detainees; it is simply an inevitable consequence of close and regimented confinement.

[4] Interim Order.
[5] Medical Report, p. 1.
[6] Medical Report, p. 2 (iv).
[7] Deputy Registrar's Submissions, para. 7.

(ii) Mr. Hadžić Agrees with the Deputy Registrar and Medical Officer that He Cannot Be Sent to the Dutch Penitentiary Medical Ward

7. Mr. Hadžić strongly agrees with the Medical Officer's opinion, as relayed in the Deputy Registrar's Submissions, that the Dutch penitentiary medical ward is "not deemed appropriate for the Accused."[8] Mr. Hadžić, as he explains in the attached annex, lost seven kilos when he was previously obliged to stay in the medical unit, an environment that amounts to quasi-isolation. This is, accordingly, not a viable or appropriate solution to provide a more peaceful environment.

(iii) Mr. Hadžić Does Need a Caregiver

8. Mr. Hadžić strongly disagrees that he is not in need of a dedicated caregiver.[9] The only reason that none has been necessary until now is that he has been assisted by two other detainees who, though not obliged to do so, have assisted him in various ways. Again, Mr. Hadžić strongly resists the suggestion that this care could be provided by removing him to the Dutch penitentiary medical ward, which is entirely unsuitable for palliative care.

(iv) The Food Is Not Adequate Given Mr. Hadžić's Needs

9. Food may comply with "international standards in terms of quality, quantity and calorific value"[10] and yet still be utterly unappetizing. This, unfortunately, is the case in respect of the food provided through the Dutch caterers. While this may be tolerable for a healthy inmate, it becomes unacceptable for someone who is seriously ill. Mr. Hadžić's illness has

[8] Deputy Registrar's Submissions, para. 9.
[9] Deputy Registrar's Submissions, para. 10.
[10] Deputy Registrar's Submissions, para. 12.

understandably made him more selective of the foods he finds appetizing, and he is no longer capable of preparing his own food ordered from the Balkan menu.

*(v) The Registrar Does Not Explain Why Preliminary Reports Cannot Be Provided by the Rule 74*bis *Medical Experts*

10. The Rule 74*bis* doctors should be provided immediately, if this has not already occurred, with all medical documents relevant to Mr. Hadžić's diagnosis and current treatment. Since the diagnosis of glioblastoma multiforme is based primarily on brain scans and tissue sampling, these tests – along with blood results – are also likely to be the primary basis on which the experts will be able to offer their expert opinions.

11. In this context, the Deputy Registrar should: (i) ensure that all medical information related to Mr. Hadžić's diagnosis, treatment, and reaction to treatment are forwarded to the Rule 74*bis* doctors without delay; (ii) ensure that any other information customarily made available is provided to the Rule 74*bis* doctors, such as facilitating their contact with the treating physicians; and (iii) explain whether, in light of the foregoing measures, the Rule 74*bis* doctors are in a position to provide, at the very least, a preliminary report on the questions raised in the Interim Order. A supplemental submission from the Deputy Registrar in relation to these matters would be appropriate.

IV. MR. HADŽIĆ'S PERSONAL STATEMENT

12. A personal statement of Mr. Hadžić is annexed to this submission.[11]

[11] Confidential Annex.

V. CLARIFICATION OF THE BASIS FOR PROVISIONAL RELEASE

13. The Defence wishes to clarify, for the avoidance of any possible doubt,[12] that provisional release is sought not only on the basis of medical benefits, but also because it would be simply inhumane, given Mr. Hadžić's short expected life expectancy, to prevent him from spending as much of his remaining life as possible with his family. Provisional release should therefore encompass any periods when he is unfit to attend trial, which is and will be the case for the remainder of his intensive treatment. This is believed to be the primary rationale of the *Talić* Decision, which is indistinguishable from the situation facing Mr. Hadžić.

Word count: 1,215.

Respectfully submitted,

Zoran Živanović, Lead Counsel

Christopher Gosnell, Co-Counsel

[12] The Defence submits that this argument has already been raised in the urgent Request in parts of paragraphs 2, 8 and 12, but not as distinctly as it should have been.

CONFIDENTIAL
ANNEX

Lična izjava Gorana Hadžića kao dodatak zahtevu za privremeno puštanje na slobodu

1. Obavešten sam od strane mojih doktora da bolujem od vrste raka gliobastoma multiforme. Oni su mi rekli da ne treba da očekujem da živim više od godinu dana, i da je moja najveća nada u ovaj tretman ta da uspori taj kraj.

2. Završio sam upravo sa jednomesečnom dnevnom radioterapijom i hemoterapijom, iako je hemoterapija bila prekinuta zbog loše krvne slike. Sledeće dve faze moje terapije, kao što sam obavešten, su četiri nedelje oporavka, praćene sa sledećih šest nedelja hemoterapije.

3. Moje terapije su izuzetno fizički naporne. Ja se osecam fizički slabim i patim od ostalih simptoma. Bilo koji produženi period koncentracije je nemoguć. Ja ne bih bio u mogućnosti da pratim sudski postupak u bilo kakvom neprekidnom obliku, ako opet krene iznova. Ja sam obavešten od strane mojih doktora da će takvo stanje da se nastavi tokom moje terapije.

4. Ja želim da provedem što je moguće više od života koji mi je preostao sa mojom porodicom. Ja na osnovu toga tražim privremeno puštanje na slobodu tokom perioda za koji sam nesposoban da prisustvujem sudjenju; što je definitivno sada slučaj.

5. Takodje, ja verujem i tako mi je rečeno od doktora da bi kućna nega bila mnogo bolje mesto za moj oporavak, posebno tokom sledeće dve faze moje terapije, perioda oporavka i perioda hemoterapije. Ja verujem da mi je potrebno što je moguće više mira i tišine, ali ne želim da budem premešten u kvazi izolaciju koja bi bila potrebna da se obezbedi mir i tišina u pritvoru. Ja sam izgubio sedam kilograma prošlog puta kada sam boravio u pritvorskoj bolnici i ja bih strogo zahtevao da ne budem tamo premešten. Takodje mislim da bi prisustvo i nega moje žene bili od velike medicinske i psihološke koristi. U suprotnosti, biti nateran da ostanem u pritvoru u svim ovim okolnostima bilo bi nehumano i štetno za moj oporavak.

6. Ja želim da istaknem da prihvatam sve uslove koje mi Sudsko veće odredi po odluci o privremenom puštanju na slobodu.

Goran Hadžić

Personal Statement of Goran Hadžić In Support of Request for Provisional Release

1. I have been informed by my doctors that I have a form of cancer known as glioblastoma multiforme. They have told me that I should not expect to live for another year, even with medical treatment, and that my best hope for the treatment is to slow that outcome.

2. I have just completed a month of daily radiotherapy treatment and chemotherapy, although the latter was recently discontinued because of poor blood results. The next two phases of my treatment, as I have been informed, are a four week period of recuperation, followed by another six weeks of chemotherapy.

3. My treatments so far are physically exhausting. I am physically frail and suffer other symptoms. Any prolonged period of concentration impossible. I would be unable to follow any trial proceedings in any sustained fashion if they were re-commenced. I have been informed by my doctors to expect that situation to continue through my treatment phase.

4. I wish to spend as much of what remains of my life with my family. I am therefore requesting on this ground alone, that I be granted provisional release for any period during which I am unfit to attend trial, which is certainly the case now.

5. In addition, I believe and have been told by my doctors that home care would be a far more suitable place of recovery, especially during the next two phases of my treatment, recuperation and chemotherapy. I believe that I need as much peace and quiet as possible, but do not wish to be placed in the quasi-isolation that would be required to ensure peace and quiet in the prison. I lost seven kilos the last time that I stayed in the prison health unit and I would strongly request not to be sent back there. I also think that the presence and care of my wife would be medically and psychologically beneficial. Conversely, being compelled to remain in custody under all these circumstances would be both inhumane and detrimental to my recovery.

6. I wish to express that I will comply with any conditions imposed by the Trial Chamber in the decision on provisional release.

Goran Hadžić
/signed/