

**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 October 2015

Original: English

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**IN THE TRIAL CHAMBER**

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

**Registrar:** Mr. John Hocking

**Decision:** 26 October 2015

**PROSECUTOR**

**v.**

**GORAN HADŽIĆ**

**PUBLIC**

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**CONSOLIDATED DECISION ON THE CONTINUATION OF PROCEEDINGS**

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**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 “Prosecution Motion to Proceed with the Defence Case”, filed on 2 March 2015 (“First Motion to Proceed”). The Defence filed its “Response to Motion to Proceed with the Defence Case” on 16 March 2015 (“First Motion to Proceed Response”). The “Prosecution Request for Leave to Reply and Reply to Defence Response to Motion to Proceed with Defence Case” was filed on 24 March 2015 (“First Motion to Proceed Reply”).

2. The Chamber is also seised of the “Prosecution’s Proposal for Expediting Presentation of the Defence Case”, filed on 24 March 2015 (“Prosecution Proposal Motion”). The Defence confidentially filed its “Response to Prosecution’s Proposal for Expediting Presentation of the Defence Case” on 7 April 2015 (“Prosecution Proposal Response”). The “Prosecution’s Request for Leave to Reply and Reply to Defence Response to Prosecution’s Proposal for Expediting Presentation of the Defence Case” was filed on 15 April 2015 (“Prosecution Proposal Reply”).

3. The Chamber is further seised of the “Urgent Motion to Terminate, or for Stay of, Proceedings”, filed confidentially by the Defence on 17 June 2015 (“Motion to Terminate or Stay Proceedings”).<sup>1</sup> The “Prosecution Response to Urgent Motion to Terminate, or for a Stay, of Proceedings” was filed confidentially on 1 July 2015 (“Motion to Terminate or Stay Proceedings Response”).<sup>2</sup> The Defence filed its “Reply Regarding Urgent Motion to Terminate, or for Stay of, Proceedings” on 8 July 2015 (“Motion to Terminate or Stay Proceedings Reply”).

4. The Chamber is seised of the “Prosecution’s Second Motion to Proceed with the Defence Case”, filed on 19 June 2015 (“Second Motion to Proceed”). The Defence filed its “Response to Prosecution’s Second Motion to Proceed with the Defence Case” on 3 July 2015 (“Second Motion to Proceed Response”). The “Prosecution Reply to Defence Response to Prosecution’s Second Motion to Proceed with the Defence Case” was confidentially filed on 10 July 2015 (“Second Motion to Proceed Reply”).<sup>3</sup>

5. Finally, the “Defence Submissions on Testimony of Medical Experts” and the “Prosecution’s Submissions Concerning the Accused’s Fitness to Stand Trial” were each confidentially filed on 25 August 2015 (“Defence Submissions on Fitness to Stand Trial” and

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<sup>1</sup> See also Public Redacted Version of Urgent Motion to Terminate, or for Stay of, Proceedings, 17 June 2015.

<sup>2</sup> See also Public Redacted Version of Prosecution Response to Urgent Motion to Terminate, or for a Stay, of Proceedings, 2 July 2015.

<sup>3</sup> See also Prosecution Reply to Defence Response to Prosecution’s Second Motion to Proceed with the Defence Case, (public redacted version), 10 July 2015.

“Prosecution Submissions on Fitness to Stand Trial”, respectively). On 31 August 2015, the “Response to Prosecution’s Submissions Concerning the Accused’s Fitness to Stand Trial” and the “Prosecution’s Response to Defence Submissions on Testimony of Medical Experts” were each confidentially filed (“Defence Response to Prosecution Submissions on Fitness to Stand Trial” and “Prosecution Response to Defence Submissions on Fitness to Stand Trial”, respectively).

### A. Background

6. Goran Hadžić was initially indicted before the Tribunal in May 2004,<sup>4</sup> but was not arrested and transferred to the Tribunal until July 2011.<sup>5</sup> The Indictment in this case charges Hadžić with eight counts of crimes against humanity and six counts of violations of the laws or customs of war<sup>6</sup> in relation to his actions, from 25 June 1991 through December 1993, as, successively, the leader of the Serbian National Council; President of the Government of the Serbian Autonomous District Slavonia, Baranja, and Western Srem (“SAO SBWS”); and President of the Republic of Serbian Krajina (“RSK”).<sup>7</sup> On 24 August 2011, Hadžić pleaded not guilty to all of the charges against him.<sup>8</sup> The trial commenced on 16 October 2012<sup>9</sup> and, with the exception of one witness, the Prosecution completed the presentation of its case on 17 October 2013.<sup>10</sup> Thereafter, on 20 February 2014, the Chamber issued a decision denying Hadžić’s Rule 98 *bis* motion in its entirety.<sup>11</sup> The Defence began the presentation of its case on 3 July 2014<sup>12</sup> at which time Hadžić made a statement pursuant to Rule 84 *bis* of the Tribunal’s Rules of Procedure and Evidence (“Rules”) and was then called as the first Defence witness.<sup>13</sup> Hadžić testified for over 60 hours.<sup>14</sup> The Defence has, to date, presented

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

<sup>5</sup> See Order for Detention on Remand, 21 July 2011; Initial Appearance, 25 July 2011, T. 1-8.

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

<sup>7</sup> Indictment, paras 6, 13.

<sup>8</sup> Further Appearance, 24 August 2011, T. 11.

<sup>9</sup> See Prosecution Opening Statement, 16 October 2012, T. 75.

<sup>10</sup> See Scheduling Order for Rule 98 *bis* Proceedings, 28 November 2013, para. 2.

<sup>11</sup> Rule 98 *bis* Judgement, 20 February 2014, T. 9102-9126.

<sup>12</sup> Amended Scheduling Order for Preparation and Commencement of Defence Case, 30 May 2014.

<sup>13</sup> See Defence Opening Statement, 3 July 2014, T. 9270-9309; Statement by the Accused, 3 July 2014, T. 9309-9321 (partly confidential); Goran Hadžić, 3 July 2014, T. 9322.

<sup>14</sup> Goran Hadžić, 3-25 July 2014 and 25 August-3 September 2014, T. 9322-10885.

the evidence of 21 witnesses,<sup>15</sup> using approximately 70 hours of the 140 hours allotted to it to present its case.<sup>16</sup>

7. The evidentiary hearings in this case, however, came to an abrupt halt on 20 October 2014 after Hadžić collapsed at the United Nations Detention Unit (“UNDU”) and was transferred to a local hospital for diagnostic testing and treatment.<sup>17</sup> In November 2014, after a series of tests,<sup>18</sup> Hadžić was diagnosed with a malignant brain tumour, *glioblastoma multiforme*, with an estimated median survival rate of 12 months.<sup>19</sup> In December 2014, Hadžić began a prescribed plan for palliative treatment (“Treatment Plan”), which was to include (a) six weeks of daily radiotherapy and chemotherapy (“Combined Therapy”); (b) four weeks of recuperation; and (c) up to six cycles of chemotherapy consisting of five days of a high dose oral chemotherapy followed by a 23-day rest period (“Second Phase Treatment”).<sup>20</sup> From the time of Hadžić’s collapse at the UNDU throughout the treatment, the Reporting Medical Officer of the UNDU (“RMO”) repeatedly reported that Hadžić was unable to attend trial proceedings.<sup>21</sup> Hadžić did not waive his right to be present<sup>22</sup> and evidentiary hearings were continuously suspended.<sup>23</sup>

<sup>15</sup> Eleven witnesses have appeared in court, the evidence of three witnesses has been admitted pursuant to Rule 92 *bis* of the Rules, and the evidence of seven witnesses has been admitted pursuant to Rule 92 *quater* of the Rules. Decision on Defence Omnibus Motion for Admission of Evidence Pursuant to Rule 92 *bis*, 4 February 2015; Decision on Defence Omnibus Motion for Admission of Evidence Pursuant to Rule 92 *quater*, 26 October 2015.

<sup>16</sup> Decision on the Application for Rule 73 *ter* (E) and on Defence Motion to Modify the Trial Schedule During the Testimony of Mr. Hadžić, 24 June 2014, paras 4-5, 11(a); Email from Chambers to the Parties, 4 November 2014.

<sup>17</sup> Deputy Registrar’s Submission of Medical Report (confidential), 20 October 2014, confidential Annex; Deputy Registrar’s Submission of a Further Medical Report (confidential), 20 October 2014, confidential Annex. *See also* Decision on Prosecution Request for a Medical Examination of the Accused Pursuant to Rules 54 and 74 *bis*, 16 January 2015, p. 1.

<sup>18</sup> Deputy Registrar’s Submission of Medical Report (confidential), 23 October 2014, confidential Annex (“22 October 2014 Medical Report”); Deputy Registrar’s Submission of Medical Report (confidential), 29 October 2014, confidential Annex (“29 October 2014 Medical Report”); Deputy Registrar’s Submission of Medical Report (confidential), 4 November 2014, confidential Annex (“4 November 2014 Medical Report”); Deputy Registrar’s Submission of Medical Report (confidential), 6 November 2014, confidential Annex (“5 November 2014 Medical Report”); Deputy Registrar’s Submission on the Treatment Plan of Goran Hadžić (confidential), 10 November 2014 (“10 November 2014 Medical Report”), paras 3-4; Deputy Registrar’s Submission of Medical Report (confidential), 13 November 2014, confidential Annex (“13 November 2014 Medical Report”); Deputy Registrar’s Submission on the Medical Situation of Goran Hadžić (confidential), 18 November 2014 (“18 November 2014 Medical Report”), para. 2; Deputy Registrar’s Submission of Medical Report (confidential), 19 November 2014, confidential Annex.

<sup>19</sup> Deputy Registrar’s Submission of Medical Report (confidential), 26 November 2014, confidential Annex (“26 November 2014 Medical Report”), p. 1.

<sup>20</sup> 26 November Medical Report, p. 1; Deputy Registrar’s Submission of Medical Report (confidential), 12 February 2015, confidential Annex (“11 February Medical Report”), para. 3; Deputy Registrar’s Submission of Reports of Medical Experts (confidential), 13 February 2015, confidential Annex III, “Report medically examination of Mr. G. Hadzic”, Tatjana Seute, MD, PhD, dated 12 February 2015, pp. 1-2, 3.

<sup>21</sup> 22 October 2014 Medical Report; 29 October 2014 Medical Report; 4 November 2014 Medical Report; 5 November 2014 Medical Report; 10 November 2014 Medical Report, para. 5; 13 November 2014 Medical Report; 18 November 2014 Medical Report; 26 November 2014 Medical Report, p. 2; Deputy Registrar’s Submission of Medical Report (confidential), 5 December 2014, confidential Annex; Deputy Registrar’s Submission of Medical Report (confidential), 11 December 2014, confidential Annex; Deputy Registrar’s Submission of Medical Report (confidential), 18 December 2014, confidential Annex; Deputy Registrar’s Submission of Medical Report (confidential), 8 January 2015, confidential Annex; Deputy Registrar’s Submission of Medical Report (confidential), 15 January 2015, confidential Annex; Deputy Registrar’s Submission of Medical Report (confidential), 30 January 2015, confidential Annex (“30 January 2015 Medical Report”), para. 8; 11 February 2015 Medical Report, para. 6; Deputy Registrar’s Submission of

8. At the end of March 2015, Hadžić completed the first cycle of the Second Phase Treatment,<sup>24</sup> but the start of the second cycle was delayed due to a drop in his white blood cell count.<sup>25</sup> Hadžić did not resume chemotherapy thereafter.<sup>26</sup> On 18 March 2015, the Defence filed an “Urgent Motion for Daily Detailed Medical Monitoring and Reporting of Mr. Hadžić’s Health Condition” in which it asserted that Hadžić was “incapacitated by terminal brain cancer and high-dose chemotherapy” and was believed to be suffering from additional drastic weight loss, complete loss of appetite, severe disorientation, severe loss of short-term memory including forgetting recent conversations, difficulties speaking, an inability to take care of himself, and extreme fatigue.<sup>27</sup> The Chamber noted that the RMO and two medical experts appointed pursuant to Rule 74 *bis* of the Rules<sup>28</sup> had each reported that Hadžić did not exhibit any cognitive dysfunction.<sup>29</sup> Nevertheless, the Chamber considered that the Defence’s motion raised the issue of Hadžić’s fitness to stand trial and

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Medical Report (confidential), 20 February 2015, confidential Annex, para. 7; Registrar’s Submission of Medical Report (confidential), 27 February 2015, confidential Annex, para. 5; Deputy Registrar’s Submission of Medical Report (confidential), 5 March 2015, confidential Annex (“5 March 2015 Medical Report”), para. 4; Deputy Registrar’s Submission of Medical Report (confidential), 13 March 2015, confidential Annex (“13 March 2015 Medical Report”), para. 2.

<sup>22</sup> Notice in Response to Trial Chamber Inquiry, 3 February 2015; Notice in Response to Trial Chamber Inquiry of 16 February 2015, 17 February 2015.

<sup>23</sup> See Decision on Prosecution Request for a Medical Examination of the Accused Pursuant to Rules 54 and 74 *bis*, 16 January 2015, p. 1.

<sup>24</sup> Deputy Registrar’s Submission of Medical Update (confidential), 2 March 2015, para. 1; 5 March 2015 Medical Report, confidential Annex, para. 1; 13 March 2015 Medical Report, para. 3; Deputy Registrar’s Submission of Medical Report (confidential), 20 March 2015, confidential Annex (“20 March 2015 Medical Report”), para. 2; Deputy Registrar’s Submission of Medical Report (confidential), 26 March 2015, confidential Annex, para. 1.

<sup>25</sup> Deputy Registrar’s Submission of Medical Report (confidential), 2 April 2015, confidential Annex, para. 2. Certain aspects of the Treatment Plan had previously been suspended or delayed due a drop in Hadžić’s white blood cell count and blood platelets. See 30 January 2015 Medical Report, confidential Annex, paras 1-2.

<sup>26</sup> See Deputy Registrar’s Submission of Medical Report (confidential), 17 April 2015, confidential Annex, para. 2; Deputy Registrar’s Submission of Medical Report (confidential), 15 May 2015, confidential Annex, para. 2; Deputy Registrar’s Submission of Further Medical Report (confidential), 22 May 2015, confidential Annex (“22 May 2015 Medical Report”), paras 2-3.

<sup>27</sup> Urgent Motion for Daily Detailed Medical Monitoring and Reporting of Mr. Hadžić’s Health Condition, 18 March 2015, para. 1. See also Correction and Supplement to Urgent Motion for Daily and Detailed Monitoring and Reporting of Mr. Hadžić’s Health Condition, 19 March 2015; Deputy Registrar’s Submission Regarding Defence Motion for Daily Detailed Medical Reporting, 24 March 2015; Prosecution Response to Defence Motion for Daily Detailed Medical Monitoring and Reporting, 25 March 2015; Reply Regarding Urgent Motion for Daily and Detailed Medical Monitoring and Reporting of Mr. Hadžić’s Health Condition (confidential), 30 March 2015; Deputy Registrar’s Further Submission Regarding Defence Motion for Daily Medical Reporting (confidential), 2 April 2015; Reply to Deputy Registrar’s Further Submission Regarding Defence Motion for Daily and Detailed Medical Reporting (confidential), 7 April 2015; Decision on Urgent Motion for Daily Detailed Medical Monitoring and Reporting of Mr. Hadžić’s Health Condition, 10 April 2015.

<sup>28</sup> On 16 January 2015, at the request of the Prosecution and pursuant to Rule 74 *bis* of the Rules, the Trial Chamber ordered the Registry to appoint an independent neurologist and an independent neuro-oncologist to examine Hadžić and to submit detailed written reports providing answers to enumerated questions related to Hadžić’s ability to attend and participate in trial proceedings. 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. Accordingly, on 13 February 2015, the Deputy Registrar submitted reports prepared by Professor Dr. Patrick Cras, a specialist in the field of neurology, and Dr. Tatjana Seute, a specialist in the field of neuro-oncology. Deputy Registrar’s Submission of Reports of Medical Experts (confidential), 13 February 2015. See also Deputy Registrar’s Notification of Appointment of Medical Experts (confidential), 26 January 2015, para. 2. Dr. Cras and Dr. Seute also testified before the Trial Chamber on 25 and 26 February 2015, respectively.

on 1 April 2015 it ordered the Registry to appoint an independent neuro-psychologist to carry out in-depth test(s) to assist the Chamber in determining whether Hadžić is fit to stand trial.<sup>30</sup> The Chamber also ordered a second medical report from a neuro-oncologist addressing whether Hadžić was suffering from any cognitive dysfunctions and the effectiveness of the Treatment Plan.<sup>31</sup>

9. On 12 May 2015, Hadžić underwent an MRI scan which revealed that there had been further growth of his existing tumours and that there were a “few small new tumour-lesions”.<sup>32</sup> The Treatment Plan, which had not been able to halt or reverse the progression of Hadžić’s cancer, was discontinued by Hadžić. Hadžić additionally declined alternative treatment because it was unlikely that it would have an impact on the tumours and there were possible side-effects.<sup>33</sup> In light of the most recent MRI, the Chamber asked the appointed neuro-oncologist to address the current prognosis for Hadžić’s life expectancy in his report.<sup>34</sup>

10. On 15 July 2015, the Deputy Registrar submitted a medical report prepared by Dr. Pol Specenier,<sup>35</sup> the appointed medical expert in neuro-oncology,<sup>36</sup> and Dr. Specenier testified before the Chamber on 21 August 2015.<sup>37</sup> The medical report of Dr. Daniel Martell, the appointed expert in neuro-psychology,<sup>38</sup> was submitted on 23 July 2015<sup>39</sup> and he testified before the Chamber on

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<sup>29</sup> Order for Further Medical Examination, 1 April 2015 (“First Order for Further Medical Examination”), p. 1; *referring to* 20 March 2015 Medical Report, p. 1; Patrick Cras, 25 February 2015, T. 12583; Tatjana Seute, 26 February 2015, T. 12603.

<sup>30</sup> First Order for Further Medical Examination, p. 2.

<sup>31</sup> First Order for Further Medical Examination, p. 3; Further Order in Relation to Order for Further Medical Examination, 20 April 2015. The Chamber also asked the neuro-oncologist to address any physical side-effects of the Treatment Plan, but this question was subsequently withdrawn after Hadžić opted to discontinue the Treatment Plan. Decision on Defence Motion for Medical Examinations in Serbia and Motion to Cancel or Defer Medical Examinations (confidential), 19 June 2015, p. 4.

<sup>32</sup> 22 May 2015 Medical Report, para. 2.

<sup>33</sup> In relation to the alternative treatment, the RMO stated that “because of the lack of efficacy of the previous chemotherapy-course on the tumors, there is only a chance of about twenty percent that this new agent will have an impact on the tumor.” Hadžić felt that the possible benefits of the alternative treatment plan would not outweigh the side-effects and prolongation of suffering without the prospect of being cured. 22 May 2015 Medical Report, para. 3.

<sup>34</sup> Decision on Defence Motion for Medical Examinations in Serbia and Motion to Cancel or Defer Medical Examinations (confidential), 19 June 2015, p. 5.

<sup>35</sup> Deputy Registrar’s Submission of Medical Report (confidential), 15 July 2015, confidential Annex (“Specenier Report”).

<sup>36</sup> Deputy Registrar’s Notification of Appointment of Medical Expert (confidential), 12 June 2015. *See also* Deputy Registrar’s Submission of Medical Report and Further Update Concerning Ongoing Efforts to Appoint Additional Independent Medical Experts (confidential), 5 June 2015; Third Registry Submission Concerning Ongoing Efforts on Appointment of Additional Independent Medical Experts (confidential), 28 May 2015; Second Registry Submission Concerning Ongoing Efforts on Appointment of Additional Independent Medical Experts (confidential), 7 May 2015; Registrar’s Submission Concerning Ongoing Efforts on Appointment of Additional Independent Medical Experts (confidential), 1 May 2015.

<sup>37</sup> Hadžić temporarily returned to the UNDU for a physical examination by Dr. Specenier which took place on 27 June 2015. *See* Decision on Defence Motion for Medical Examinations in Serbia and Motion to Cancel or Defer Medical Examinations (confidential), 19 June 2015. *See also* *Prosecutor v. Hadžić*, Case No. IT-04-75-AR65.2, Decision on Appeal on Suspension of Provisional Release (confidential), 24 June 2015.

<sup>38</sup> Deputy Registrar’s Notification of Appointment of Medical Expert (confidential), 3 July 2015. *See also* Deputy Registrar’s Submission of Medical Report and Further Update Concerning Ongoing Efforts to Appoint Additional Independent Medical Experts (confidential), 5 June 2015; Third Registry Submission Concerning Ongoing Efforts on

29 July 2015.<sup>40</sup> The parties were ordered to file submissions on the issue of Hadžić's fitness to stand trial after the hearings.<sup>41</sup>

11. Hadžić has been granted provisional release to Serbia<sup>42</sup> under certain conditions including, *inter alia*, that (a) he shall remain within the confines of the City of Novi Sad, Serbia;<sup>43</sup> (b) he shall be confined to a specified residence between 11:00 p.m. and 7:00 a.m.;<sup>44</sup> (c) he shall have no contact whatsoever or in anyway interfere with victims or witnesses;<sup>45</sup> (d) he shall not discuss his case with anyone, including the media, other than his counsel; (e) police officers shall visit Hadžić on a daily basis and submit written reports confirming that Hadžić complies with all imposed conditions; and (f) the RMO shall file weekly medical reports after consultation with Hadžić's treating physician in Novi Sad.<sup>46</sup>

## **B. Submissions**

### 1. First Motion to Proceed

12. In the First Motion to Proceed, the Prosecution "requests that the Trial Chamber order the resumption of the trial in order to complete the Defence case, including, if necessary, conducting trial proceedings when the Accused is unable to attend."<sup>47</sup> The Prosecution asserts that an accused's right to be present for his trial is not absolute and may be restricted on the basis of substantial trial disruption, including disruptions resulting from an accused's state of health.<sup>48</sup> The Prosecution submits that the Appeals Chamber has recognized that the need to ensure a fair and reasonably

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Appointment of Additional Independent Medical Experts (confidential), 28 May 2015; Registrar's Submission Concerning Ongoing Efforts on Appointment of Additional Independent Medical Experts (confidential), 1 May 2015.

<sup>39</sup> Registrar's Submission of Medical Report (confidential), 23 July 2015, confidential Annex ("Martell Report").

<sup>40</sup> Dr. Martell conducted an examination of Hadžić on 13 and 14 July 2015 in Serbia. Martell Report, p. 2. *See also* Decision on Defence Motion for Medical Examinations in Serbia and Motion to Cancel or Defer Medical Examinations (confidential), 19 June 2015.

<sup>41</sup> First Order for Further Medical Examination, p. 4; Hearing, 29 July 2015, T. 12655-12656; Hearing, 21 August 2015, T. 12689.

<sup>42</sup> Decision on Urgent Motion for Provisional Release Filed on 28 April 2015, 21 May 2015 ("Provisional Release Decision of 21 May 2015"); *Prosecutor v. Hadžić*, Case No. IT-04-75-AR65.1, Decision on Urgent Interlocutory Appeal From Decision Denying Provisional Release, 13 April 2015; *Prosecutor v. Hadžić*, Case No. IT-04-75-AR65.1, Decision on Requests for Modification of the Conditions of Provisional Release (confidential), 20 April 2015.

<sup>43</sup> The Chamber granted certain modifications to this condition. *See* Decision on Request for Minor Modification to Terms of Provisional Release (confidential), 18 August 2015. *See also* Decision on Urgent Request for Modification to Terms of Provisional Release (confidential), 11 August 2015.

<sup>44</sup> The Chamber granted modifications to this condition. *See* Decision on Request for Modification of Mr. Hadžić's Address While on Provisional Release (confidential), 28 May 2015; Decision on Second Request for Modification of Mr. Hadžić's Address While on Provisional Release (confidential), 17 June 2015; Decision on Third Request for Modification of Mr. Hadžić's Address While on Provisional Release (confidential), 24 July 2015; Decision on Fourth Request for Modification of Mr. Hadžić's Address While on Provisional Release (confidential), 8 October 2015.

<sup>45</sup> The Chamber denied Defence requests for modification to this condition. *See* Decision on Motion to Modify Terms of Provisional Release (confidential), 16 July 2015; Decision on Urgent Request for Reconsideration of Decision on Motion to Modify Terms of Provisional Release (confidential), 24 August 2015.

<sup>46</sup> Provisional Release Decision of 21 May 2015.

<sup>47</sup> First Motion to Proceed, para. 1.

expeditious trial is a sufficiently important objective to justify restrictions of an accused's right to be present.<sup>49</sup> The Prosecution further asserts that, under the present circumstances, it is in the interests of justice for the Chamber to exercise its discretion, under Articles 20 and 21 of the Statute of the Tribunal ("Statute") and Rules 54 and 80 of the Rules,<sup>50</sup> to proceed with the Defence case because (a) Hadžić voluntarily surrendered to the Tribunal after he was indicted, this trial would have completed long ago;<sup>51</sup> (b) the proceedings are at an advanced stage;<sup>52</sup> (c) there is no reasonable alternative to proceeding when Hadžić is unable to attend;<sup>53</sup> and (d) any prejudice to Hadžić will be minimal, "given the late stage of the trial proceedings and the extent of his participation thus far."<sup>54</sup> The Prosecution submits that the Chamber should put in place specific procedures—such as the use of video-conference link, frequent telephone contact between Hadžić and his counsel, and the provision of videos and transcripts of the proceedings and copies of all filings for Hadžić's review—so as to ensure that Hadžić stays abreast of developments in the trial and to ensure that his fair trial rights are protected.<sup>55</sup>

13. In the First Motion to Proceed Response,<sup>56</sup> the Defence asserts that the Chamber has no discretion to proceed in the absence of an accused who is unfit to meaningfully participate in the trial proceedings because to do so would violate the accused's right to be "tried in his presence" and would impair his ability to effectively exercise other rights essential to a fair trial.<sup>57</sup> The Defence asserts that the jurisprudence cited by the Prosecution in the First Motion to Proceed does not provide support for proceeding in the absence of an accused who is ill,<sup>58</sup> and notes that trial chambers at the Tribunal have, "without exception, suspended proceedings whenever an accused is medically unfit and does not waive his right to participate in trial proceedings."<sup>59</sup> The Defence further argues that, contrary to what the Prosecution suggests, Hadžić's participation during the remaining portion of the Defence case is vital because the "presentation of evidence is much more unpredictable than challenging evidence", due in part to the "unpredictability and extemporaneousness" nature of an opposing party's cross-examination, and because the remaining witnesses are among the most important.<sup>60</sup> The Defence further asserts that the alternate procedures suggested by the Prosecution "would be nothing more than a mockery of a trial" and that, due to his

<sup>48</sup> First Motion to Proceed, paras 4-1 and citations made therein.

<sup>49</sup> First Motion to Proceed, para. 5 and cases cited therein.

<sup>50</sup> First Motion to Proceed, paras 4, 21.

<sup>51</sup> First Motion to Proceed, para. 14.

<sup>52</sup> First Motion to Proceed, paras 1, 21.

<sup>53</sup> First Motion to Proceed, para. 15.

<sup>54</sup> First Motion to Proceed, para. 16.

<sup>55</sup> First Motion to Proceed, paras 18-20.

<sup>56</sup> The Defence seeks leave to exceed the word-limit. First Motion to Proceed Response, fn. 3.

<sup>57</sup> First Motion to Proceed Response, paras 1, 3-7.

<sup>58</sup> First Motion to Proceed Response, paras 2, 8-17 and cases cited therein.

<sup>59</sup> First Motion to Proceed Response, para. 4.

<sup>60</sup> First Motion to Proceed Response, paras 19-20.

illness, Hadžić is likely to experience cognitive dysfunction that will preclude his meaningful participation in the trial.<sup>61</sup> Finally, the Defence submits that “[e]ven assuming there might be brief windows available for participating in trial, [...] keeping Mr. Hadžić locked up during chemotherapy in the faint hope of such brief windows would be disproportionate and inhumane.”<sup>62</sup>

14. In the First Motion to Proceed Reply,<sup>63</sup> the Prosecution submits that (a) the Defence’s reliance on “meaningful participation” erroneously conflates the right to be present with fitness to stand trial;<sup>64</sup> (b) the Appeals Chamber has affirmed the possibility of continuing proceedings in the absence of an accused if doing so serves a sufficiently important objective and the right to be present is impaired no more than necessary;<sup>65</sup> and (c) the assertion that “‘the presentation of evidence is much more unpredictable than challenging evidence’ is a vague and unsupported opinion undermined by the fact that a substantial portion of Hadžić’s remaining evidence is already approved for admission under Rule 92 *ter*” and the Chamber can manage the remainder of the Defence case to minimise any undue prejudice.<sup>66</sup>

## 2. Prosecution Proposal Motion

15. In the Prosecution Proposal Motion, the Prosecution proposes measures which, it contends, “will significantly reduce the amount of time necessary to complete the evidentiary phase of this trial while at the same time preserving the Defence’s ability to present its case and ensuring the fairness and integrity of these proceedings.”<sup>67</sup> Specifically, the Prosecution proposes to waive cross-examination of enumerated witnesses if the Defence agrees to tender the witnesses’ evidence entirely in written form.<sup>68</sup> If the Defence agrees to this proposal, the Prosecution will stipulate that the written statements “are entitled to the same evidentiary consideration as if the witnesses appeared in court for cross-examination”, but notes that “as with all evidence, the Prosecution

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<sup>61</sup> First Motion to Proceed Response, paras 22-23.

<sup>62</sup> First Motion to Proceed Response, paras 24-27.

<sup>63</sup> The Prosecution requests leave to reply to the First Motion to Proceed Response. First Motion to Proceed Reply, paras 1, 15.

<sup>64</sup> First Motion to Proceed Reply, paras 3-5.

<sup>65</sup> First Motion to Proceed Reply, paras 6-10.

<sup>66</sup> First Motion to Proceed Reply, paras 11-14. The Prosecution further submits that paragraphs 24 to 27 of the First Motion to Proceed Response “consist solely of provisional release arguments and are therefore inapposite to the Motion” and requests that the Chamber either disregard these paragraphs or strike them from the response. First Motion to Proceed Reply, para. 2. The Chamber denies this request of the Prosecution to strike paragraphs 24-27 of the First Motion to Proceed Response.

<sup>67</sup> Prosecution Proposal Motion, para. 2.

<sup>68</sup> Prosecution Proposal Motion, paras 3, 6. Specifically, the Prosecution proposes to waive cross-examination of DGH-002, DGH-004, DGH-005, DGH-006, DGH-042, DGH-043, DGH-046, DGH-075, DGH-076, DGH-087, DGH-088, DGH-110, and DGH-112.

maintains the ability to challenge the credibility of these witnesses and the reliability of their evidence on the content of their statements and the other evidence adduced during trial.”<sup>69</sup>

16. The Defence asserts that the Prosecution’s “proposals are manifestly disadvantageous to Mr. Hadžić and are not accepted.”<sup>70</sup> First, the Defence submits that all of the enumerated witnesses give testimony about Hadžić’s acts and conduct or “matters of vital significance in relation to proximate subordinates”. Thus, even if the Defence were inclined to agree to the Prosecution’s proposal, the evidence is inadmissible pursuant to Rule 92 *bis* and under Rule 92 *ter* the witnesses’ evidence is not admissible without oral testimony.<sup>71</sup> Further, the Defence submits that it would not agree to waive the oral component of the witnesses’ testimony because (a) evidence that is admitted without the appearance of the witness is accorded lower probative value<sup>72</sup> and (b) the Defence would be compelled to take supplemental statements from the relevant witnesses to adduce additional testimony currently expected to be heard *viva voce*, which would be “unduly burdensome”.<sup>73</sup> The Defence adds that the Prosecution’s “stipulation” that the evidence admitted as a result of its proposal is entitled to the same evidentiary consideration as if the witness had appeared in court, has no value because (a) it is for the Chamber, not the Prosecution, to determine the weight to be given to the evidence and (b) the Prosecution reserves the right to challenge the credibility and substance of the witness’s testimony in its final trial brief, which would be a violation of Rule 90(H)(ii) of the Rules.<sup>74</sup> Finally, noting that the Prosecution was not required to present its evidence under the conditions it proposes, the Defence submits that any judicial orders to enforce the Prosecution’s proposals would violate Hadžić’s right to “obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.”<sup>75</sup>

17. The Prosecution replies<sup>76</sup> that none of the fair trial or procedural issues raised by the Defence present insurmountable barriers to the implementation of its proposals; “[r]ather, the Accused’s wholesale rejection of the [Prosecution Proposal Motion]—without any indication of a willingness to explore avenues to advance proceedings—reflects his desire to impede the continuation, and ultimately the completion, of this trial.”<sup>77</sup> The Prosecution asserts that the Defence does not have a right to have its witnesses cross-examined by the Prosecution, “either to

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<sup>69</sup> Prosecution Proposal Motion, para. 4. The Prosecution further proposes that the Prosecution and Defence consider applying the above procedure to additional witnesses and discuss ways to reduce the time for direct and cross-examination of the remaining witnesses. Prosecution Proposal Motion, paras 7-9.

<sup>70</sup> Prosecution Proposal Response, para. 2.

<sup>71</sup> Prosecution Proposal Response, paras 3-6.

<sup>72</sup> Prosecution Proposal Response, paras 7-9, 11-12.

<sup>73</sup> Prosecution Proposal Response, para. 10.

<sup>74</sup> Prosecution Proposal Response, paras 11-14.

<sup>75</sup> Prosecution Proposal Response, paras 15-19.

<sup>76</sup> The Prosecution requests leave to reply to the Prosecution Proposal Response. Prosecution Proposal Reply, para. 1.

<sup>77</sup> Prosecution Proposal Reply, paras 2, 11.

enhance their credibility or to reveal the nature of the Prosecution's main challenges to their evidence".<sup>78</sup> Further, the Prosecution submits that it proposed waiving its right to cross-examination to address the Defence's claim that Hadžić's participation is vital to address issues raised during cross-examination.<sup>79</sup> Next, the Prosecution asserts that, as demonstrated by the practice of other trial chambers, Rule 92 *ter* of the Rules does not prevent the admission of written statements without the declaring witness's appearance in court, if the party entitled to cross-examination waived its right to do so.<sup>80</sup> However, the Prosecution submits that if the Chamber finds that the attendance of a witness cannot be waived pursuant to Rule 92 *ter*, it will agree to admission of the statements pursuant to Rule 89(F) of the Rules.<sup>81</sup> Further, the Prosecution submits that Rule 90(H)(ii) of the Rules does not mandate that the Prosecution cross-examine the remaining Defence witnesses.<sup>82</sup> Finally, the Prosecution submits that Rule 90(F) of the Rules gives the Chamber "the duty to exercise control over the mode and order of interrogating witnesses and presenting evidence in order to facilitate the 'ascertainment of the truth' and 'avoid needless consumption of time'" and thus the Chamber has the authority to impose the Prosecution's proposals.<sup>83</sup>

### 3. Motion to Terminate or Stay Proceedings

18. In the Motion to Terminate or Stay Proceedings, the Defence submits that, in light of Hadžić's current life expectancy, there is no reasonable prospect of bringing the criminal proceedings against him to completion.<sup>84</sup> It asserts, therefore, that the proceedings should be terminated, or in the alternative indefinitely stayed, because continuing proceedings without any reasonable prospect of completion serves no legitimate purpose, violates Hadžić's right to be presumed innocent, and is a waste of public resources.<sup>85</sup> The Defence argues that, contrary to a previous statement by the Chamber,<sup>86</sup> termination of proceedings is an available remedy under the Tribunal's jurisprudence.<sup>87</sup> In the alternative, the Defence submits that a stay of proceedings is the minimum appropriate remedy to prevent the human rights violation that would result from continuing the proceedings.<sup>88</sup> The Defence argues that stays of proceedings have been ordered at this Tribunal and other International Tribunals due to the illness or incapacity of an accused,<sup>89</sup> and

<sup>78</sup> Prosecution Proposal Reply, para. 3.

<sup>79</sup> Prosecution Proposal Reply, para. 4.

<sup>80</sup> Prosecution Proposal Reply, paras 5-7 and cases cited therein.

<sup>81</sup> Prosecution Proposal Reply, para. 6 and cases cited therein.

<sup>82</sup> Prosecution Proposal Reply, paras 8-10.

<sup>83</sup> Prosecution Proposal Reply, para. 12.

<sup>84</sup> Motion to Terminate or Stay Proceedings, para. 1.

<sup>85</sup> Motion to Terminate or Stay Proceedings, paras 1, 8, 11, 24.

<sup>86</sup> Motion to Terminate or Stay Proceedings, para. 5, *referring to* Decision on Motion for Voluntary Withdrawal or Disqualification of Judges from Adjudication of Motion to Proceed with the Defence Case, 21 April 2015, para. 14.

<sup>87</sup> Motion to Terminate or Stay Proceedings, paras 6-7 and cases cited therein.

<sup>88</sup> Motion to Terminate or Stay Proceedings, para. 9.

<sup>89</sup> Motion to Terminate or Stay Proceedings, paras 9-10 and cases cited therein.

indefinite stays of proceedings have been ordered where there was no reasonable possibility of an accused's recovery.<sup>90</sup> The Defence further argues that national jurisdictions have "almost always terminated or stayed" proceedings where: (a) a defendant's life expectancy is too short to provide any reasonable prospect of completing the proceedings and imposing a meaningful sentence; (b) continuation would negatively effect a defendant's health; or (c) a defendant's capacity to exercise his or her rights over the course of proceedings is compromised by ill health.<sup>91</sup> The Defence submits that, given Hadžić's prognosis, he can no longer be subject to detention without violating basic human rights.<sup>92</sup>

19. The Prosecution responds that the Tribunal's jurisprudence shows that chambers have not terminated cases until the death of an accused<sup>93</sup> and that, with one exception,<sup>94</sup> none of the international or national cases cited in the Motion to Terminate or Stay Proceedings indicate that proceedings may be terminated due to an accused's poor health.<sup>95</sup> The Prosecution further submits that an indefinite stay of proceedings is "neither appropriate nor warranted in the current circumstances of the case"<sup>96</sup> and that granting a stay of proceedings is fact-specific and requires a balancing of a number of factors including: (a) the extent to which an accused must participate in proceedings and whether such participation would create a substantial, unmanageable danger to an accused's life or health; (b) whether accommodations can be instituted to facilitate or obviate an accused's participation; (c) the existence of a public interest in a determination of the accused's responsibility; (d) the gravity of the charges against an accused; (e) the strength of the evidence against an accused; (f) whether proceedings are at an advanced stage; and (g) whether trial delays can be attributable to a particular party.<sup>97</sup> The Prosecution argues that a number of these factors distinguish Hadžić's case from the domestic cases relied upon by the Defence and weigh in favour of resuming trial proceedings expeditiously.<sup>98</sup> The Prosecution further argues that the Chamber has already granted a remedy to address Hadžić's humanitarian concerns—provisional release—and, in the event trial does resume, it has proposed measures that would rapidly bring the trial to

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<sup>90</sup> Motion to Terminate or Stay Proceedings, para. 10 and cases cited therein.

<sup>91</sup> Motion to Terminate or Stay Proceedings, paras 12-20 and cases cited therein.

<sup>92</sup> Motion to Terminate or Stay Proceedings, paras 21-23 and cases cited therein.

<sup>93</sup> Motion to Terminate or Stay Proceedings Response, paras 6-8 and cases cited therein. The Prosecution also submits that the Motion to Terminate or Stay proceedings is premature because: (a) it cannot be gleaned from the Deputy Medical Officer's report of 8 June 2015 whether the prognosis given in relation to Hadžić's life expectancy was based on an individual assessment of Hadžić or statistical data on similarly-situated patients; (b) expert evidence concerning Hadžić's medical condition must be taken into consideration; (c) Hadžić may wish to recommence treatment, which could further affect Hadžić's life expectancy; and (d) the Prosecution's proposals for efficiently completing the remainder of the Defence's case in a matter of weeks are still pending before the Chamber. Motion to Terminate or Stay Proceedings Response, paras 2-5.

<sup>94</sup> Motion to Terminate or Stay Proceedings Response, para. 8, *referring to* Motion to Terminate or Stay Proceedings, para. 20.

<sup>95</sup> Motion to Terminate or Stay Proceedings Response, para. 8.

<sup>96</sup> Motion to Terminate or Stay Proceedings Response, para. 9.

<sup>97</sup> Motion to Terminate or Stay Proceedings Response, para. 11 and cases cited therein.

completion without requiring Hadžić's physical presence.<sup>99</sup> The Prosecution submits that the Defence offers no explanation as to how the current state of affairs unduly prejudices Hadžić's rights.<sup>100</sup>

20. In the Motion to Terminate or Stay Proceedings Reply,<sup>101</sup> the Defence submits that the practice at the Tribunal of terminating proceedings after death does not mean that termination is only available in such circumstances; particularly, as no accused other than Hadžić seems to have sought a termination of proceedings prior to death.<sup>102</sup> The Defence further argues that (a) the continuation of proceedings, whether from the UNDU or elsewhere, would cause unacceptable mental stress and physical strain to Hadžić;<sup>103</sup> (b) all accused have a right to be tried in their presence and ill health does not constitute an implied waiver of that right;<sup>104</sup> (c) a termination or stay of proceedings would recognise Hadžić's irreversible medical situation and allow the Tribunal to adopt measures "in the interests of economy and judicial administration";<sup>105</sup> (d) "allowing charges to remain outstanding in a situation where no fair trial is possible would be unfair and improper";<sup>106</sup> and (e) the absence of stays of proceedings in the midst of trials in domestic jurisdictions merely reflects the much shorter duration of such trials and the fact that the issue of stay or termination usually arises before trial or not at all.<sup>107</sup>

#### 4. Second Motion to Proceed

21. In the Second Motion to Proceed,<sup>108</sup> the Prosecution submits that the following factors militate in favour of resuming and completing this trial: (a) the gravity of the war crimes and crimes against humanity charges against Hadžić; (b) the strength of the evidence against Hadžić—as demonstrated by the Chamber's dismissal of the Rule 98 *bis* motion; (c) the Defence having completed 50% of its case and Hadžić having already testified; (d) the Defence having had ample

<sup>98</sup> Motion to Terminate or Stay Proceedings Response, paras 11-12.

<sup>99</sup> Motion to Terminate or Stay Proceedings Response, paras 9-10, 13-14.

<sup>100</sup> Motion to Terminate or Stay Proceedings Response, paras 9-10.

<sup>101</sup> The Defence requests leave to reply to the Motion to Terminate or Stay Proceedings Response. Motion to Terminate or Stay Proceedings Reply, para. 1. The Defence also argues that the Motion to Terminate or Stay Proceedings is not premature because: (a) Hadžić's treating neuro-oncologist's prognosis is "self-evidently personalised" and based on the review of a MRI scan of Hadžić's brain conducted in May; (b) corroboration of the treating neuro-oncologist's prognosis is not required; (c) ongoing discussion about the resumption of treatment does not negate the validity of the treating neuro-oncologist's prognosis; and (d) the existence of other pending Prosecution proposals and motions does not make the Defence's Motion to Terminate or Stay Proceedings premature as all relevant pending motions could be decided simultaneously. Motion to Terminate or Stay Proceedings Reply, paras 2-6.

<sup>102</sup> Motion to Terminate or Stay Proceedings Reply, paras 7-9 and cases cited therein.

<sup>103</sup> Motion to Terminate or Stay Proceedings Reply, para. 12.

<sup>104</sup> Motion to Terminate or Stay Proceedings Reply, para. 11.

<sup>105</sup> Motion to Terminate or Stay Proceedings Reply, para. 12.

<sup>106</sup> Motion to Terminate or Stay Proceedings Reply, para. 14.

<sup>107</sup> Motion to Terminate or Stay Proceedings Reply, para. 14.

time to prepare for its remaining witnesses; (e) the interests of the public—in particular the victims of the crimes charged in the Indictment; (f) the imperative to resume trial with all due haste if it is to be completed at all; (g) the delays in initiating and prosecuting this case resulting from Hadžić’s misconduct in absconding for seven years; and (h) the measures which can be implemented to ensure the admission of the remainder of the Defence’s evidence in a manner that is consistent with Hadžić’s fair trial rights.<sup>109</sup> In order to resume and complete this trial as quickly as possible, the Prosecution, in addition to the measures proposed in its First Motion to Proceed, requests that the Trial Chamber (a) admit into evidence the written statements of all the remaining Rule 92 *ter* Defence witnesses;<sup>110</sup> (b) direct the Defence to file written statements of any remaining *viva voce* Defence witnesses;<sup>111</sup> (c) order an abbreviated schedule for the Defence’s bar table motion and the parties’ final trial briefs and closing submissions;<sup>112</sup> and (d) follow the precedent established by ICTR trial chambers and render an oral trial judgement, with a written trial judgement to follow in due course.<sup>113</sup> The Prosecution “unconditionally waives its right to cross-examine the remaining Defence witnesses, regardless of the mode through which their evidence is admitted”, but “reserve[s] its right to challenge the relevance, probative value and/or weight of uncross-examined evidence in its final submissions.”<sup>114</sup>

22. The Defence asserts that the implementation of the measures proposed in the Second Motion to Proceed would “flagrantly violate the right ‘to be presumed innocent until proved guilty’; ‘to be tried in [the defendant’s presence]’; ‘to obtain the attendance and examination of witnesses on [the defendant’s] behalf under the same conditions [as] against him’; and to a trial that is ‘fair’.”<sup>115</sup> It asserts that “[n]either the public interest, nor the interests of the ‘victims [...] and their families,’ would be served by a trial conducted in such egregious disregard of basic fairness and fundamental human rights.”<sup>116</sup> The Defence asserts that obtaining witness statements from the remaining witnesses would be unduly burdensome and “forcing the Defence to do so without Mr. Hadžić having the capacity to give proper instructions may also place the Defence in an ethically untenable position.”<sup>117</sup> The Defence further asserts that (a) the proposed “abbreviated” schedule is vague,

<sup>108</sup> The Prosecution asks that the Chamber order the Defence to respond to the Second Motion to Proceed within one week and that it render a decision on an expedited basis. Second Motion to Proceed, para. 21. The Chamber denies the Prosecution request for an expedited response and determination in relation to the Second Motion to Proceed.

<sup>109</sup> Second Motion to Proceed, para. 10.

<sup>110</sup> Second Motion to Proceed, paras 2, 13-14 and cases cited therein.

<sup>111</sup> Second Motion to Proceed, paras 2, 15. The Prosecution argues that, to the extent the Chamber may deem it necessary that certain witnesses testify *viva voce*, the Chamber should order that the testimony of these witnesses be completed by the summer recess. Second Motion to Proceed, paras 15, 20.

<sup>112</sup> Second Motion to Proceed, paras 2, 16-17.

<sup>113</sup> Second Motion to Proceed, paras 2, 18 and cases cited therein.

<sup>114</sup> Second Motion to Proceed, paras 3, 11, 15.

<sup>115</sup> Second Motion to Proceed Response, paras 2, 4-6.

<sup>116</sup> Second Motion to Proceed Response, para. 2.

<sup>117</sup> Second Motion to Proceed Response, paras 10-12.

premature, and would violate Hadžić's right to adequate time and facilities;<sup>118</sup> (b) rendering an oral trial judgement with written reasons to follow may result in Hadžić being convicted without ever having the opportunity to see or comprehend the written reasons;<sup>119</sup> and (c) rendering a trial judgement, in full awareness that Hadžić would never be able to pursue an appeal if convicted, would violate his fundamental fair trial right to appeal.<sup>120</sup>

23. The Prosecution replies<sup>121</sup> that (a) the rights cited by the Defence are not absolute and may yield where the interests of justice favour expeditious completion of the trial;<sup>122</sup> (b) the Prosecution's waiver of its right to cross-examination creates conditions that are more favourable for the presentation of Defence evidence than those applied to witnesses during the Prosecution case;<sup>123</sup> (c) the Defence's objection to the Prosecution maintaining its ability to challenge the evidence of witnesses in its final submissions is misguided—evidence admitted pursuant to Rules 92 *bis* and 92 *quater* is routinely challenged by parties in their final submissions;<sup>124</sup> (d) the Defence exaggerates the effort involved in taking statements from the remaining witnesses;<sup>125</sup> (e) the Defence has already benefited from an “extremely generous” amount of time to prepare its case;<sup>126</sup> (f) arguments as to the date of the trial judgement are premature and speculative at this stage;<sup>127</sup> and (g) the possibility that an accused might die before appeal is present in every case and is no basis for abandoning issuance of a trial judgement.<sup>128</sup>

##### 5. Prosecution Submissions on Fitness to Stand Trial

24. The Prosecution asserts that “[w]hen viewed overall and in a reasonable and commonsense manner, the record establishes that the Accused's present condition enables him to meaningfully participate in these proceedings.”<sup>129</sup> First, the Prosecution submits that because Hadžić has already pleaded and testified, his ability to do so does not need to be considered when determining his fitness to stand trial.<sup>130</sup>

<sup>118</sup> Second Motion to Proceed Response, paras 13-14.

<sup>119</sup> Second Motion to Proceed Response, paras 15-17.

<sup>120</sup> Second Motion to Proceed Response, paras 18-19.

<sup>121</sup> The Prosecution requests leave to reply to the Second Motion to Proceed Response. Second Motion to Proceed Reply, para. 1.

<sup>122</sup> Second Motion to Proceed Reply, para. 4. The Prosecution further submits that, while the Defence makes claims about Hadžić's incapacity to participate in proceedings, it has not met its burden of showing that he lacks the mental fitness to stand trial. Second Motion to Proceed Reply, para. 3.

<sup>123</sup> Second Motion to Proceed Reply, para. 6.

<sup>124</sup> Second Motion to Proceed Reply, para. 7.

<sup>125</sup> Second Motion to Proceed Reply, para. 8.

<sup>126</sup> Second Motion to Proceed Reply, para. 9.

<sup>127</sup> Second Motion to Proceed Reply, para. 10.

<sup>128</sup> Second Motion to Proceed Reply, para. 11.

<sup>129</sup> Prosecution Submissions on Fitness to Stand Trial, para. 6.

<sup>130</sup> Prosecution Submissions on Fitness to Stand Trial, para. 6.

25. Next, the Prosecution submits that Hadžić’s ability to understand the charges, proceedings, and evidence in this case is confirmed by Dr. Martell’s findings that (a) Hadžić could converse normally, demonstrated good reading comprehension, and “had no difficulty [understanding] verbal instruction”;<sup>131</sup> (b) Hadžić’s thoughts were “expressed in a logical, coherent, and goal-directed fashion”, his “reality contact was good”, and his insight was good”;<sup>132</sup> (c) Hadžić’s ability to “set switch” from one idea to another and learn from mistakes was normal;<sup>133</sup> (d) Hadžić was able to understand the purpose of Dr. Martell’s examination;<sup>134</sup> (e) Hadžić was able to recount details from the recent and distant past;<sup>135</sup> and (f) there were only two or three occasions during Dr. Martell’s examination when the interpreter noted that Hadžić had used “abnormal word pronunciations and wrong word choices”.<sup>136</sup> The Prosecution submits that Hadžić displayed these attributes “over the course of two days and nine hours of testing, during which he answered in a rationale manner hundreds of oral questions, as well as 567 written questions.”<sup>137</sup> The Prosecution notes that Dr. Martell indicated that Hadžić’s ability to understand the charges and the trial proceedings is not at issue<sup>138</sup> and that Dr. Specenier’s report further shows that Hadžić has the ability to understand the charges, proceedings, and evidence in this case.<sup>139</sup> The Prosecution specifically notes that Dr. Specenier found (a) there was “no indication of cognitive dysfunction”,<sup>140</sup> (b) Hadžić was able to answer questions accurately and in “great detail” over the course of an 80 minute examination;<sup>141</sup> and (c) Hadžić was “well oriented in time and space”.<sup>142</sup>

26. The Prosecution submits that Hadžić is also capable of instructing counsel as demonstrated by, in addition to the above described attributes, (a) the fact that he could make and communicate the decision for his counsel to represent him in his absence at the hearings of 29 July 2015 and 21 August 2015;<sup>143</sup> (b) Dr. Martell and Dr. Specenier’s findings that Hadžić was fully cooperative and responsive during their examinations and was able to raise issues on his own initiative and express his thoughts;<sup>144</sup> and (c) Dr. Martell’s finding that Hadžić has “preserved abstract reasoning

<sup>131</sup> Prosecution Submissions on Fitness to Stand Trial, paras 7, 8, *citing* Martell Report, p. 11.

<sup>132</sup> Prosecution Submissions on Fitness to Stand Trial, para. 7, *citing* Martell Report, p. 8.

<sup>133</sup> Prosecution Submissions on Fitness to Stand Trial, para. 7, *citing* Martell Report, p. 12.

<sup>134</sup> Prosecution Submissions on Fitness to Stand Trial, para. 8, *citing* Martell Report, pp. 2-3.

<sup>135</sup> Prosecution Submissions on Fitness to Stand Trial, para. 9, *citing* Daniel Martell, 29 July 2015, T. 12636-12639.

<sup>136</sup> Prosecution Submissions on Fitness to Stand Trial, para. 9, *citing* Martell Report, p. 4, Daniel Martell, 29 July 2015, T. 12634-12635.

<sup>137</sup> Prosecution Submissions on Fitness to Stand Trial, para. 7, *citing* Daniel Martell, 29 July 2015, T. 12631, 12633-12634, 12642-12643.

<sup>138</sup> Prosecution Submissions on Fitness to Stand Trial, para. 9, *citing* Daniel Martell, 29 July 2015, T. 12646.

<sup>139</sup> Prosecution Submissions on Fitness to Stand Trial, para. 10.

<sup>140</sup> Prosecution Submissions on Fitness to Stand Trial, para. 10, *citing* Specenier Report, p. 9.

<sup>141</sup> Prosecution Submissions on Fitness to Stand Trial, para. 10, *citing* Specenier Report, p. 9, 11.

<sup>142</sup> Prosecution Submissions on Fitness to Stand Trial, para. 10, *citing* Specenier Report, p. 9.

<sup>143</sup> Prosecution Submissions on Fitness to Stand Trial, para. 11.

<sup>144</sup> Prosecution Submissions on Fitness to Stand Trial, para. 12, *citing* Martell Report, p. 7; Daniel Martell, 29 July 2015, T. 12634, 12637-12638; Specenier Report, p. 9.

and abstract problem solving” and his executive decision making functions are intact.<sup>145</sup> The Prosecution also submits that, while Dr. Martell and Dr. Specenier raised concerns about Hadžić’s stamina, they found that he was able to maintain attention during their examinations.<sup>146</sup> Finally, the Prosecution challenges Dr. Martell’s conclusion that Hadžić’s short-term memory is significantly impaired because it was based “on two brief tests, which were not repeated and were based solely upon the Accused’s answers” without taking into consideration Hadžić’s “consistently demonstrated ability to understand, remember and respond to the experts’ questions”.<sup>147</sup> The Prosecution asserts that even if Hadžić does have short-term memory problems, this would not render him unfit because the Appeals Chamber in assessing Milan Gvero’s fitness held that the accused does not need to understand the complexities of the evidence, so long as he is able to understand the essentials of the proceedings.<sup>148</sup>

27. The Prosecution further submits that neither Dr. Martell nor Dr. Specenier were aware of its proposed modifications for the presentation of the remaining evidence when they examined Hadžić and submitted their reports, but they both “confirmed that such considerations are relevant to determining whether the Accused can adequately perform for purposes of trial.”<sup>149</sup> “Dr. Martell indicated that had he been aware of these measures, they would have made a difference in his assessment regarding the Accused’s fitness to stand trial.”<sup>150</sup>

28. Finally, the Prosecution asserts that Dr. Martell’s conclusion on Hadžić’s fitness to stand trial does not need to be relied on because (a) it is for the Trial Chamber to decide the ultimate issue of whether Hadžić is competent to stand trial; (b) the conclusion was made without adequate understanding of the Tribunal’s standard for legal competency, which he did not apply; and (c) he was not aware of the procedural history of this case—Hadžić already testified and is represented by counsel—or the Prosecution’s proposals to accommodate Hadžić’s condition.<sup>151</sup>

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<sup>145</sup> Prosecution Submissions on Fitness to Stand Trial, para. 13, *citing* Martell Report, p. 14; Daniel Martell, 29 July 2015, T. 12648.

<sup>146</sup> Prosecution Submissions on Fitness to Stand Trial, para. 14, *citing* Martell Report, p. 7; Daniel Martell, 29 July 2015, T. 12635; Specenier Report, p. 11; Pol Specenier, 21 August 2015, T. 12662-12663.

<sup>147</sup> Prosecution Submissions on Fitness to Stand Trial, para. 16.

<sup>148</sup> Prosecution Submissions on Fitness to Stand Trial, paras 17-19, *citing* *Prosecutor v. Popović et al.*, Case No. IT-05-88-A, Decision on Request to Terminate Appellate Proceedings in Relation to Milan Gvero (confidential and *ex parte*), 30 November 2012 (“*Popović* 30 November 2012 Appeals Decision”), para. 22. *See also*, *Prosecutor v. Popović et al.*, Case No. IT-05-88-A, Public Redacted Version of 30 November 2012, Decision on Request to Terminate Appellate Proceedings in Relation to Milan Gvero, 16 January 2013 (“Public Redacted Version of *Popović* 30 November 2012 Appeals Decision”).

<sup>149</sup> Prosecution Submissions on Fitness to Stand Trial, para. 20, *citing* Daniel Martell, 29 July 2015, T. 12640-12641; Pol Specenier, 21 August 2015, T. 12663-12665.

<sup>150</sup> Prosecution Submissions on Fitness to Stand Trial, para. 20, *citing* Daniel Martell, 29 July 2015, T. 12640-12641; Pol Specenier, 21 August 2015, T. 12663-12665.

<sup>151</sup> Prosecution Submissions on Fitness to Stand Trial, para. 21.

29. In response, the Defence submits that the “Prosecution, for the most part, simply ignores the parts of Dr. Martell’s report that it finds inconvenient. It then cherry-picks any positive adjective in the report, while ignoring Dr. Martell’s testimony (as well as that of Dr. Specenier) explaining the inter-relationship between the cognitive functions.”<sup>152</sup> The Defence asserts that Dr. Martell explained at length the severe deficiencies in Hadžić’s cognitive functions and that they can co-exist with his cognitive abilities.<sup>153</sup> The Defence further asserts that the Prosecution’s disagreement with Dr. Martell’s findings in relation to Hadžić’s short-term memory functions is based on assumptions about brain function and neuro-psychological testing that are not confirmed by medical evidence and were not put to Dr. Martell.<sup>154</sup> The Defence also submits that in relying on Dr. Specenier’s statement that there was “no indication of cognitive dysfunction”, the Prosecution ignores the context in which Dr. Specenier made that observation as well as the further explanations he provided.<sup>155</sup> The Defence asserts that neither Hadžić’s consent to the expert’s medical examinations nor his waiver of his right to be present for their testimony indicates that he has the cognitive capacity to understand the course of trial proceedings or the details of evidence, or to instruct counsel.<sup>156</sup> The Defence submits that the Appeals Chamber’s finding in relation to Milan Gvero is inapposite because fitness assessments are fact-specific and the determination of Gvero’s fitness involved fitness in relation to appeal, rather than trial, proceedings.<sup>157</sup> Finally, the Defence asserts that the Prosecution unjustifiably ignored Dr. Specenier’s evidence concerning Hadžić’s life expectancy and asserts that the limited life expectancy “is a sufficient basis, in and of itself, for termination of the proceedings.”<sup>158</sup> The Defence submits that Dr. Specenier’s evidence that Hadžić’s health will continue to decline is relevant to assessing whether Hadžić will be fit at the time the Chamber takes this decision as well as the extent to which further testing will be required to determine an accurate reflection of Hadžić’s health at a particular time.<sup>159</sup>

#### 6. Defence Submissions on Fitness to Stand Trial

30. The Defence asserts that the “uncontradicted and unchallenged medical evidence” confirms that Hadžić is not fit to participate in trial proceedings; and that, even if he were fit to participate, he

<sup>152</sup> Defence Response to Prosecution Submissions on Fitness to Stand Trial, para. 6.

<sup>153</sup> Defence Response to Prosecution Submissions on Fitness to Stand Trial, para. 7.

<sup>154</sup> Defence Response to Prosecution Submissions on Fitness to Stand Trial, paras 8-9.

<sup>155</sup> Defence Response to Prosecution Submissions on Fitness to Stand Trial, paras 10-15.

<sup>156</sup> Defence Response to Prosecution Submissions on Fitness to Stand Trial, para. 16.

<sup>157</sup> Defence Response to Prosecution Submissions on Fitness to Stand Trial, para. 17.

<sup>158</sup> Defence Response to Prosecution Submissions on Fitness to Stand Trial, paras 3, 18-21. The Defence asserts that the Prosecution’s failure to address the prognosis in its Prosecution Submissions on Fitness to Stand Trial deprives the Defence of the opportunity to respond to any position that the Prosecution may take in this regard in its second round of submissions. The Defence, therefore, requests that the Chamber reject *in limine* any relevant submissions from the Prosecution it may include in its second round of submissions. Defence Response to Prosecution Submissions on Fitness to Stand Trial, para. 3. The Chamber denies this request of the Defence.

<sup>159</sup> Defence Response to Prosecution Submissions on Fitness to Stand Trial, para. 22.

will not survive long enough for the proceedings against him to continue.<sup>160</sup> The Defence first points to Dr. Martell's conclusion that Hadžić's "brain tumour has caused severe impairments in many of the core cognitive skills required for him to take part at such a level that it is possible for him to grasp the essentials and participate effectively in the proceedings, and sufficiently exercise his identified rights."<sup>161</sup> In reaching this conclusion, the Defence argues, Dr. Martell applied the correct standard for participation in proceedings.<sup>162</sup> According to the Defence, the Prosecution, during its cross-examination of Dr. Martell, limited its questions to inquiring about Hadžić's capacity to "understand the charges against him" and to understand "that he is involved in a trial and that he has proceedings against him."<sup>163</sup> Citing the Trial Chamber and Appeals Chamber in *Strugar*, the Defence asserts that "meaningful participation", which is necessary for an accused to be found fit to stand trial, "requires more than merely understanding the charges and the existence of trial proceedings".<sup>164</sup> The Defence submits that an accused must also be able to instruct counsel, which requires an understanding of the course of proceedings and the details of the evidence.<sup>165</sup> The Defence asserts that "[t]he participation of counsel is not, and cannot be, a substitute for participation of the accused."<sup>166</sup>

31. The Defence further submits that Dr. Martell, on the basis of his finding that Hadžić has cognitive deficits, concluded, "to a reasonable degree of neuropsychological certainty, that these deficits in turn would undermine his capacity to physically participate in the proceedings, and to communicate and consult effectively with counsel during the trial process."<sup>167</sup> Specifically, the Defence notes that Dr. Martell found, *inter alia*, that Hadžić has problems with stamina and the ability to maintain attention over time.<sup>168</sup> The Defence also points to Hadžić's performance on the "Cookie-Theft" test and submits that it demonstrates how a "profound cognitive impairment can be masked by a superficial appearance of verbal normalcy" showing that "a patient may be verbally intelligible, while at the same time entirely unable to grasp an essential and obvious point."<sup>169</sup> The Defence asserts that the "deficit described would evidently be incompatible with an ability to properly follow proceedings, let alone provide any meaningful instructions to counsel."<sup>170</sup> The

<sup>160</sup> Defence Submissions on Fitness to Stand Trial, para. 3.

<sup>161</sup> Defence Submissions on Fitness to Stand Trial, para. 8, *citing* Martell Report, p. 15.

<sup>162</sup> Defence Submissions on Fitness to Stand Trial, paras 9, 12-14.

<sup>163</sup> Defence Submissions on Fitness to Stand Trial, para. 9.

<sup>164</sup> Defence Submissions on Fitness to Stand Trial, para. 10, *citing* *Prosecutor v. Strugar*, Case No. IT-01-42-A, Judgement, 17 July 2008 ("*Strugar* Appeal Judgement"), para. 55; *Prosecutor v. Strugar*, Case No. IT-01-42-T, Decision Re the Defence Motion to Terminate Proceedings, 26 May 2004 ("*Strugar* 26 May 2004 Decision"), para. 36.

<sup>165</sup> Defence Submissions on Fitness to Stand Trial, para. 11.

<sup>166</sup> Defence Submissions on Fitness to Stand Trial, para. 11.

<sup>167</sup> Defence Submissions on Fitness to Stand Trial, paras 8, 16, *citing* Martell Report, p. 15.

<sup>168</sup> Defence Submissions on Fitness to Stand Trial, para. 18, *citing* Daniel Martell, 29 July 2015, T. 12648-12649. *See also* Defence Submissions on Fitness to Stand Trial, para. 15.

<sup>169</sup> Defence Submissions on Fitness to Stand Trial, paras 19-20, *citing* Daniel Martell, 29 July 2015, T. 12643-12644.

<sup>170</sup> Defence Submissions on Fitness to Stand Trial, para. 20.

Defence submits that, despite having had “every opportunity” to do so, the Prosecution did not challenge Dr. Martell’s findings concerning Hadžić’s cognitive deficits, and asserts that, therefore, “Dr. Martell’s conclusion has been tacitly accepted by the Prosecution.”<sup>171</sup> The Defence further asserts that Dr. Martell’s findings are corroborated by Hadžić’s treating neuro-psychiatrist in Novi Sad, Dr. Nadj, who observed that Hadžić could not respond adequately to complex questions.<sup>172</sup> In the Defence’s view, Hadžić’s neuro-psychological deficits cannot be remedied through accommodation, and in particular not through the use of video-conference link, as Dr. Martell indicated that this would worsen Hadžić’s cognitive deficiencies.<sup>173</sup> Furthermore, Hadžić’s documented low levels of concentration and fatigue make the conduct of proceedings impracticable.<sup>174</sup>

32. The Defence submits that Hadžić’s disease has progressed despite treatment and asserts that his condition will likely further decline before his death.<sup>175</sup> It notes Dr. Specenier’s testimony that “[w]hen the disease worsens, it is very likely that the symptoms and deficits will increase” and that Hadžić’s condition could be expected to worsen rapidly, possibly from one week to the next.<sup>176</sup> According to the Defence, recent medical reports confirm that this decline is taking place.<sup>177</sup> The Defence further submits that Dr. Taphoorn, Hadžić’s treating neuro-oncologist in The Hague, and Dr. Specenier indicate that cognitive testing could be damaging to Hadžić’s health,<sup>178</sup> and that a reasonable inference from this is that the “much more exigent and stressful task of following criminal proceedings” would be more damaging to Hadžić than neurological testing.<sup>179</sup> Finally, the Defence submits that both Dr. Specenier and Dr. Taphoorn indicate that Hadžić’s life expectancy is very limited.<sup>180</sup>

33. The Defence concludes that, in these circumstances, proceedings should be terminated<sup>181</sup> because (a) given Hadžić’s estimated life-expectancy, there is no prospect of completing the trial and that a continuation of proceedings, therefore, serves no legitimate purpose; (b) unlike in other cases before this Tribunal where chambers have declined to terminate proceedings, Hadžić is suffering from an incurable disease with no medical possibility of recovery;<sup>182</sup> and (c) Hadžić has

<sup>171</sup> Defence Submissions on Fitness to Stand Trial, paras 2, 15-16.

<sup>172</sup> Defence Submissions on Fitness to Stand Trial, para. 17.

<sup>173</sup> Defence Submissions on Fitness to Stand Trial, para. 21.

<sup>174</sup> Defence Submissions on Fitness to Stand Trial, para. 22.

<sup>175</sup> Defence Submissions on Fitness to Stand Trial, paras 23, 29-33.

<sup>176</sup> Defence Submissions on Fitness to Stand Trial, para. 29, *citing* Specenier Report, p. 12.

<sup>177</sup> Defence Submissions on Fitness to Stand Trial, para. 31.

<sup>178</sup> Defence Submissions on Fitness to Stand Trial, para. 32.

<sup>179</sup> Defence Submissions on Fitness to Stand Trial, para. 33.

<sup>180</sup> Defence Submissions on Fitness to Stand Trial, paras 1, 23-28.

<sup>181</sup> Defence Submissions on Fitness to Stand Trial, paras 3, 37.

<sup>182</sup> Defence Submissions on Fitness to Stand Trial, para. 34.

not been convicted of any crime and there is no possibility of such a conviction.<sup>183</sup> In the alternative, the Defence requests that the Chamber order that the proceedings against Hadžić be stayed and all restrictions of provisional release be removed.<sup>184</sup>

34. The Prosecution responds that the Defence “misapplies the standard for determining competency, asserting the Accused must possess a higher degree of cognitive ability than is required”.<sup>185</sup> The Prosecution asserts that an accused “need only possess an ‘understanding of the essentials of the proceedings’” and that “[o]nce it is established that the Accused can understand relevant case and trial matters—which is clearly the case here—the capacity to instruct counsel requires only the ability to communicate and cooperate with counsel.”<sup>186</sup> It submits that the examinations by both Dr. Martell and Dr. Specenier show that Hadžić is fully cooperative and responsive.<sup>187</sup> According to the Prosecution, if the same criteria are applied to this case as those applied by the Appeals Chamber in assessing Milan Gvero’s capacities, then it is clear that Hadžić has the capability to instruct counsel.<sup>188</sup>

35. The Prosecution further asserts that “the Defence has considered the Accused’s capabilities in isolation, failing to address or even acknowledge the Prosecution’s Proposals [to move the trial forward].”<sup>189</sup> It submits that the proposed modalities would allay Dr. Martell’s concerns regarding Hadžić’s short-term memory and stamina and would remove the need for Hadžić to be physically present at hearings.<sup>190</sup> It further notes that Dr. Specenier indicated that the modalities would be relevant when assessing Hadžić’s capabilities, and Dr. Martell concluded that “shorter court days and accommodations for his physical disabilities would advance his fitness”.<sup>191</sup>

36. The Prosecution further submits that (a) the Defence relies on inadmissible medical evidence from Dr. Nadj, whom neither the Prosecution nor the Chamber has had the opportunity to review the qualifications of or to question;<sup>192</sup> (b) it rejects the Defence submission that by not

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<sup>183</sup> Defence Submissions on Fitness to Stand Trial, para. 35.

<sup>184</sup> Defence Submissions on Fitness to Stand Trial, paras 36-37. The Defence also requests: (a) an expeditious determination of the request for termination of proceedings and (b) leave to exceed the word-limit. Defence Submissions on Fitness to Stand Trial, paras 7, 36. The Chamber denies the Defence request for an expedited determination of request for termination of proceedings, but will grant leave to exceed the word-limit.

<sup>185</sup> Prosecution Response to Defence Submissions on Fitness to Stand Trial, para. 1.

<sup>186</sup> Prosecution Response to Defence Submissions on Fitness to Stand Trial, para. 3.

<sup>187</sup> Prosecution Response to Defence Submissions on Fitness to Stand Trial, para. 4.

<sup>188</sup> Prosecution Response to Defence Submissions on Fitness to Stand Trial, paras 3-4, *citing Popović* 30 November 2012 Appeals Decision, para. 23.

<sup>189</sup> Prosecution Response to Defence Submissions on Fitness to Stand Trial, para. 5.

<sup>190</sup> Prosecution Response to Defence Submissions on Fitness to Stand Trial, para. 5.

<sup>191</sup> Prosecution Response to Defence Submissions on Fitness to Stand Trial, para. 6, *citing* Pol Specenier, 21 August 2015, T. 12664-12665; Daniel Martell, 29 July 2015, T. 12640-12641.

<sup>192</sup> Prosecution Response to Defence Submissions on Fitness to Stand Trial, para. 7.

examining Dr. Martell on some of his findings it has tacitly accepted them;<sup>193</sup> (c) Hadžić's life expectancy and disease progression are not relevant to the assessment of Hadžić's fitness to stand trial at this time;<sup>194</sup> (d) the Defence distorts Dr. Specenier's evidence regarding Hadžić's life expectancy;<sup>195</sup> (e) it is impossible to predict when and to what extent Hadžić's health will worsen;<sup>196</sup> and (f) there is no evidence that resuming the trial, in the manner it has proposed, will aggravate Hadžić's medical condition.<sup>197</sup>

### C. Applicable Law

37. While there is no express provision in the Statute addressing the fitness of an accused to stand trial, the exercise of an accused's procedural rights found in Articles 20 and 21 of the Statute implicitly requires that an accused demonstrates a requisite level of mental and physical capacity.<sup>198</sup> Articles 20 and 21 of the Statute provide that the Trial Chamber must ensure a fair and expeditious trial (Article 20(1)), with the Accused understanding the indictment against him (Article 20(3)). The Accused is also entitled to, *inter alia*, be informed in a language which he understands of the nature and cause of the charges against him (Article 21(4)(a)), to have adequate facilities for the preparation of a defence and to communicate with counsel (Article 21(4)(b)), to be tried in his presence and to defend himself in person or through legal assistance (Article 21(4)(d)), and to examine the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him (Article 21(4)(e)). A necessary implication of the Statute is that, where there is any question whether an accused is fit to stand trial, a Trial Chamber is tasked with determining whether an accused possesses the necessary capacities to exercise his rights.<sup>199</sup>

38. In determining the fitness of an accused to stand trial, the jurisprudence of the Tribunal has set out a non-exhaustive list of capacities to be evaluated. These capacities include an accused's ability to: (a) plead, (b) understand the nature of the charges, (c) understand the course of the

<sup>193</sup> Prosecution Response to Defence Submissions on Fitness to Stand Trial, paras 8-9.

<sup>194</sup> Prosecution Response to Defence Submissions on Fitness to Stand Trial, paras 1, 10.

<sup>195</sup> Prosecution Response to Defence Submissions on Fitness to Stand Trial, paras 11-12.

<sup>196</sup> Prosecution Response to Defence Submissions on Fitness to Stand Trial, para. 13.

<sup>197</sup> Prosecution Response to Defence Submissions on Fitness to Stand Trial, para. 14.

<sup>198</sup> *Strugar* Appeal Judgement, para. 41; *Strugar* 26 May 2004 Decision, paras 21, 36. See also *Prosecutor v. Popović et al.*, Case No. IT-05-88-A, Decision on Motion by Counsel Assigned to Milan Gvero Relating to His Present Health Condition (confidential), 13 December 2010 ("*Popović* 13 December 2010 Decision"), para. 11; *Prosecutor v. Kovačević*, Case No. IT-01-42/2-I, Public Version of the Decision on Accused's Fitness to Enter a Plea and Stand Trial, 12 April 2006 ("*Kovačević* 12 April 2006 Decision"), para. 21.

<sup>199</sup> See *Strugar* 26 May 2004 Decision, paras 24-26.

proceedings, (d) understand the details of the evidence, (e) instruct counsel, (f) understand the consequences of the proceedings, and (g) testify.<sup>200</sup>

39. In assessing an accused's capacities, the standard to be applied is that of "meaningful participation which allows the accused to exercise his fair trial rights to such a degree that he is able to participate effectively in his trial, and has an understanding of the essentials of the proceedings."<sup>201</sup> An accused's ability to participate in his trial should be assessed by looking at whether his capacities are, "viewed overall and in a reasonable and commonsense manner, at such a level that it is possible for [him or her] to participate in the proceedings (in some cases with assistance) and sufficiently exercise the identified rights."<sup>202</sup>

40. The level at which an accused must be able to exhibit these capacities in order to exercise his rights need not be at his "notionally highest level, or at the highest level that a particular accused has ever enjoyed in respect of each capacity."<sup>203</sup> Rather, the Accused must have an understanding of the "essentials" of the proceedings,<sup>204</sup> with the processing of the wealth of complex information inherent in international criminal proceedings remaining the role of defence counsel.<sup>205</sup> Consequently, there is no need for an accused to *fully* comprehend the course of proceedings.<sup>206</sup> An accused represented by counsel cannot be expected to have the same understanding of the material related to his case as a qualified and experienced lawyer.<sup>207</sup> "What is required from an accused to be deemed fit to stand trial is a standard of overall capacity allowing for a meaningful participation in trial, provided that he or she is duly represented by counsel."<sup>208</sup> Effective participation requires a "broad understanding" of the trial process with a comprehension of the "general thrust" of what is said in court.<sup>209</sup>

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<sup>200</sup> *Strugar* Appeal Judgement, para. 55; *Strugar* 26 May 2004 Decision, para. 36. See also *Kovačević* 12 April 2006 Decision, para. 29; *Prosecutor v. Stanišić and Simatović*, Case No. IT-03-69-PT, Decision on Stanišić Defence's Motion on the Fitness of the Accused to Stand Trial with Confidential Annexes, 27 April 2006, p. 4.

<sup>201</sup> *Strugar* Appeal Judgement, para. 55.

<sup>202</sup> *Strugar* Appeal Judgement, para. 55, citing *Strugar* 26 May 2004 Decision, para. 37. See also Public Redacted Version of *Popović* 30 November 2012 Decision, para. 21.

<sup>203</sup> *Strugar* 26 May 2004 Decision, para. 37; *Strugar* Appeal Judgement, para. 55.

<sup>204</sup> *Strugar* Appeal Judgement, para. 55; *Karemera et al. v. The Prosecutor*, Case No. ICTR-98-44-T, Decision on Remand Regarding Continuation of Trial, 10 September 2009, para. 18.

<sup>205</sup> Public Redacted Version of *Popović* 30 November 2012 Decision, para. 22.

<sup>206</sup> *Strugar* Appeal Judgement, para. 60 (emphasis added).

<sup>207</sup> *Strugar* Appeal Judgement, para. 60.

<sup>208</sup> *Strugar* Appeal Judgement, para. 60.

<sup>209</sup> See *Strugar* Appeal Judgement, para. 47.

41. A finding that an accused has a certain health condition will not automatically render him unfit to stand trial, but rather the question must be directed to whether he “is able to exercise effectively his rights in the proceedings against him.”<sup>210</sup>

42. An accused claiming to be unfit to stand trial bears the burden of so proving by a preponderance of the evidence.<sup>211</sup> This burden is discharged if the party which alleges an accused’s unfitness to stand trial shows its claim on the balance of the probabilities.<sup>212</sup>

#### **D. Discussion**

43. In determining whether Hadžić is currently fit to stand trial, the Chamber has been assisted by the evidence of Dr. Martell, a practitioner in the field of forensic psychology and neuropsychology, who has previous experience as a medical expert at the Tribunal.<sup>213</sup> Dr. Martell performed a series of neuropsychological tests on 13 and 14 July 2015, for approximately three hours each day, in Hadžić’s home in Novi Sad, Serbia.<sup>214</sup> Dr. Martell conducted the examinations with the assistance of a translator who provided a literal, word-for-word translation of Hadžić’s answers.<sup>215</sup> Dr. Martell took care to further address language and cross-cultural issues by, for example, selecting tests that were either already available in the Serbian or Croatian languages or were easily translatable.<sup>216</sup> He testified that he aimed to conduct the tests in a non-stressful situation so as to “extract the best possible performance” from Hadžić, but noted that some patients find the examination inherently stressful.<sup>217</sup> Dr. Martell also indicated that he took several measures of Hadžić’s effort and tested for malingering and found that Hadžić was “putting forth his best effort, and that the resulting scores of the remainder of the test battery are suitable for interpretation.”<sup>218</sup> The Chamber is satisfied of the quality and thoroughness of Dr. Martell’s examination.

44. The Chamber has also been assisted by the evidence of Dr. Specenier, an expert in neuro-oncology.<sup>219</sup> Dr. Specenier, over the course of 80 minutes on 27 June 2015, interviewed Hadžić and conducted a physical examination.<sup>220</sup> He also reviewed Hadžić’s medical history, including the

<sup>210</sup> *Strugar* 26 May 2004 Decision, para. 35.

<sup>211</sup> *Strugar* Appeal Judgement, para. 56.

<sup>212</sup> *Strugar* Appeal Judgement, para. 56.

<sup>213</sup> Deputy Registrar’s Notification of Appointment of Medical Expert (confidential), 3 July 2015, confidential Annex; Daniel Martell, 29 July 2015, T. 12629.

<sup>214</sup> Martell Report, pp. 2-3; Daniel Martell, 29 July 2015, T. 12631.

<sup>215</sup> Martell Report, pp. 3-4.

<sup>216</sup> Martell Report, pp. 3-4.

<sup>217</sup> Daniel Martell, 29 July 2015, T. 12634.

<sup>218</sup> Martell Report, p. 9; Daniel Martell, 29 July 2015, T. 12650-12651.

<sup>219</sup> Deputy Registrar’s Notification of Appointment of Medical Expert (confidential), 12 June 2015, confidential Annex.

<sup>220</sup> Specenier Report, pp. 9, 11; Pol Specenier, 21 August 2015, T. 12659-12660.

results of the MRI performed on 12 May 2015.<sup>221</sup> The Chamber is satisfied of the quality and thoroughness of Dr. Specenier's examination.

45. Dr. Martell concluded that the impairments Hadžić exhibited "would undermine his capacity to physically participate in proceedings, and to communicate and consult effectively with counsel during the trial process."<sup>222</sup> Dr. Specenier concluded that Hadžić's "neurological examination was normal except for unsure gait" and that "at the time of [his] examination, [Hadžić] was well oriented in time and space and there were no signs of impaired memory."<sup>223</sup> The Chamber notes Dr. Martell's and Dr. Specenier's conclusions and their expertise in neuro-psychology and neurology, respectively, and will give their expert findings due consideration. The Chamber affirms, however, the principle that, while required to give due consideration to the expert opinions, it bears the responsibility to apply the legal standard to the facts at hand and to determine whether, on a balance of probabilities, Hadžić is fit to stand trial.

46. The Chamber turns first to the question of Hadžić's capacity to understand the essentials of the proceedings, including understanding the nature of the charges, the course of the proceedings, the details of the evidence, and the consequences of the proceedings.<sup>224</sup> Dr. Specenier determined that, during an extensive interview with Hadžić over the course of 80 minutes, in which Hadžić answered questions accurately and in great detail regarding his family history, medical history, personal details of a previous expert, a prior incident with Croatian police, and his expectations for the future,<sup>225</sup> Hadžić was well orientated in time and space with no signs of impaired memory.<sup>226</sup>

47. Dr. Martell confirms that in his estimation Hadžić understands the charges against him, that he is on trial, and that trial proceedings are ongoing.<sup>227</sup> For his part, Hadžić has "[p]reserved abstract reasoning and abstract problem solving."<sup>228</sup> Hadžić's performance on a test of abstract problem solving was within normal limits and it was found that Hadžić could "set switch" from one idea to another and learn from mistakes.<sup>229</sup> In evaluating his written language comprehension, Dr. Martell concluded that Hadžić has good reading comprehension.<sup>230</sup> Dr. Martell further states

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<sup>221</sup> Specenier Report, pp. 2-5, 9-10; Pol Specenier, 21 August 2015, T. 12659-12660.

<sup>222</sup> Martell Report, p. 15.

<sup>223</sup> Specenier Report, p. 10.

<sup>224</sup> The current proceedings are in the Defence phase of the case and 50% of the time allotted for the Defence case has been used. Hadžić has already pleaded and testified. The Trial Chamber will therefore not evaluate Hadžić's capacity to exercise such rights.

<sup>225</sup> Specenier Report, pp. 9, 11.

<sup>226</sup> Specenier Report, p. 10.

<sup>227</sup> Daniel Martell, 29 July 2015, T. 12639-12640.

<sup>228</sup> Martell Report, p. 14.

<sup>229</sup> Martell Report, p. 12.

<sup>230</sup> Martell Report, p. 11.

that Hadžić's "reality contact was good" and that there is currently no evidence of psychosis.<sup>231</sup> Dr. Martell also states in his report that Hadžić's brain tumour has caused "severe impairments in many of the core cognitive skills required for him to take part at such a level that it is possible for him to grasp the essentials and participate effectively in the proceedings."<sup>232</sup> However, when asked about the various aspects of the Tribunal's standard for fitness during his hearing, Dr. Martell clarified that, in Hadžić's case, the central issue is not whether he understands "the charges against him and what happens in the court proceedings", but whether he can co-operate with counsel and assist in his defence.<sup>233</sup> Accordingly, the Chamber finds that Hadžić's condition does not impair his ability to understand the essentials of the proceedings.

48. In turning to Hadžić's ability to communicate and consult with counsel as well as provide instruction, the Chamber notes that Dr. Martell found that Hadžić's language abilities were generally intact.<sup>234</sup> Hadžić spoke at a normal rate and volume with "clear articulation"<sup>235</sup> and has "no difficulty understanding verbal instructions, or conversing in a normal fashion."<sup>236</sup> He expresses his thoughts "in a logical, coherent, and goal-directed fashion with no evidence of formal thought disorder."<sup>237</sup> During an extensive interview with Dr. Specenier, Hadžić was able to provide detailed answers to his questions.<sup>238</sup> Dr. Martell noted that Hadžić is able to raise issues on his own initiative, both in relation to past events, such as his shoulder injury in the UNDU and his time as a fugitive, and future events like the planning of his estate.<sup>239</sup> Dr. Specenier similarly stated that Hadžić provided detailed answers to questions without any help or suggestion over an 80 minute period.<sup>240</sup> According to Dr. Martell, Hadžić's executive functioning, which includes one's ability to take initiative, is by and large intact.<sup>241</sup> As Dr. Martell explains, the tumour in Hadžić's brain has not greatly affected his frontal lobes, an area of the brain that is responsible for abstract reasoning, critical thinking, decision making, problem solving, some language function, and monitoring one's social skills.<sup>242</sup> A practical result of these findings is that neither expert noted any concern regarding Hadžić's ability to provide informed consent for his examinations or waive his right to be present at their hearings.<sup>243</sup>

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<sup>231</sup> Martell Report, p. 8.

<sup>232</sup> Martell Report, p. 15.

<sup>233</sup> Daniel Martell, 29 July 2015, T. 12646.

<sup>234</sup> Martell Report, pp. 10, 14.

<sup>235</sup> Martell Report, p. 8.

<sup>236</sup> Martell Report, p. 11.

<sup>237</sup> Martell Report, p. 8.

<sup>238</sup> Specenier Report, p. 9.

<sup>239</sup> Daniel Martell, 29 July 2015, T. 12636-12638.

<sup>240</sup> Specenier Report, pp. 9, 11.

<sup>241</sup> Daniel Martell, 29 July 2015, T. 12648.

<sup>242</sup> Daniel Martell, 29 July 2015, T. 12644-12645, 12648; Martell Report, p. 14.

<sup>243</sup> Specenier Report, p. 9; Martell Report, p. 3; Daniel Martell, 29 July 2015, T. 12632-12633.

49. Dr. Martell, however, expressed concern with Hadžić's overall stamina, ability to maintain focus, his short term memory, and processing speed.<sup>244</sup> Hadžić complained to Dr. Martell of intermittent headaches in the morning and afternoon and periods of vertigo, which Hadžić deals with by taking naps that consequently recharge him for two or three hours.<sup>245</sup> Dr. Martell reported that his examination of Hadžić was discontinued after two and a half hours of effort in order to allow Hadžić to rest.<sup>246</sup> Dr. Specenier gave Hadžić an ECOG rating of two, suggesting that Hadžić cannot carry out any work activities.<sup>247</sup>

50. The Chamber does not seek to ignore these elements of Hadžić's current health condition, but rather, finds that some of the experts' concerns result from a misunderstanding of the procedural history of the case and what is required of Hadžić in the context of the trial proceedings. Dr. Specenier noted that his interview of Hadžić was not completely comparable to a stressful cross-examination "or a situation where multiple people intervene."<sup>248</sup> During his hearing, Dr. Specenier clarified that he was not aware that Hadžić had already testified and would not be subject to further cross-examination, nor was he aware that Hadžić is represented by two Defence counsel and therefore would not be conducting direct-examinations, making oral arguments, or making written submissions himself.<sup>249</sup> Dr. Specenier agreed that these facts would be relevant to assessing Hadžić's ability to function for the purposes of the trial and would make it "a little easier" for Hadžić to function in the context of a trial.<sup>250</sup> Dr. Martell also stated that he was not aware that Hadžić had already testified or that there were possibilities for accommodation for his lack of physical endurance.<sup>251</sup> Dr. Martell testified that "shorter court days and accommodations for his physical disabilities would advance [Hadžić's] fitness."<sup>252</sup> The Chamber finds that the experts' concerns regarding Hadžić's stamina and focus can largely be addressed by allowing for shorter court hearings. The Chamber notes that Dr. Martell remarked that on the second day of testing Hadžić was less focused and less engaged in testing after having spent two and a half hours the previous morning being interviewed and then spending the afternoon and evening completing a 567 question written test.<sup>253</sup> Allowing hearings for, perhaps, only two and a half hours each morning<sup>254</sup>

<sup>244</sup> Martell Report, pp. 14-15; Daniel Martell, 29 July 2015, T. 12647-12648. *See also* Pol Specenier, 21 August 2015, T. 12661-12664.

<sup>245</sup> Martell Report, p. 9.

<sup>246</sup> Martell Report, p. 9.

<sup>247</sup> Specenier Report, p. 10, fn. 6. The ECOG performance status are scales and criteria used by doctors and researchers to determine appropriate treatment and prognosis and to assess how a patient's disease is progressing and affects the daily living abilities of the patient. Specenier Report, fn. 6.

<sup>248</sup> Specenier Report, p. 11.

<sup>249</sup> Pol Specenier, 21 August 2015, T. 12663-12664.

<sup>250</sup> Pol Specenier, 21 August 2015, T. 12664-12665.

<sup>251</sup> Daniel Martell, 29 July 2015, T. 12640-12641.

<sup>252</sup> Daniel Martell, 29 July 2015, T. 12641.

<sup>253</sup> Daniel Martell, 29 July 2015, T. 12635-12636.

would not overly tax Hadžić and would allow him ample time to rest and recuperate for the remainder of the day and prevent fatigue from carrying over to the next day's proceedings.

51. The most recent test of Hadžić's strength and endurance is his performance and participation in the experts' examinations. At the time of Dr. Specenier's examination, hearings in the present case had been suspended since October 2014 and Hadžić had not yet been examined by Dr. Martell.<sup>255</sup> In this context, Hadžić was given an ECOG rating of two by Dr. Specenier.<sup>256</sup> When questioned as to the ECOG rating he gave Hadžić and the fact that Hadžić could answer 567 questions over an approximately three-hour period during Dr. Martell's examination, Dr. Specenier confirmed that Dr. Martell's examination would qualify as "work" under the ECOG rating scheme.<sup>257</sup> Dr. Specenier further clarified during the hearing that he based the designated ECOG rating on Hadžić's self reporting of the activities he was currently taking part in during the day.<sup>258</sup> The Chamber accordingly does not find Dr. Specenier's ECOG rating a decisive measure of Hadžić's ability to work or his fitness to stand trial.<sup>259</sup>

52. Unlike the expert examinations conducted by Drs. Martell and Specenier, Hadžić does not have to experience the trial on his own as he is represented by counsel. The Chamber notes that "[p]rocessing the wealth of complex information inherent in international criminal proceedings is the role of defence counsel, in order to advise their clients."<sup>260</sup> As the Appeals Chamber has stated,

[a]n accused represented by counsel cannot be expected to have the same understanding of the material related to his case as a qualified and experienced lawyer. Even persons in good physical and mental health, but without advanced legal education and relevant skills, require considerable legal assistance, especially in cases of such complex legal and factual nature as those brought before the Tribunal.<sup>261</sup>

In the present case, the assistance of Hadžić's defence team will be invaluable in keeping Hadžić attuned to the most relevant matters he must weigh in on through the duration of his Defence case thereby preventing him from overly exerting himself.

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<sup>254</sup> The Defence has 70 hours of their case remaining. Conducting hearings for 2.5 hours a day, five days a week, would result in the Defence using the 70 hours in 6 weeks time. Conducting hearings for 2.5 hours a day, four days a week, would result in the Defence using the 70 hours in 7 weeks time.

<sup>255</sup> See Martell Report, p. 2; Specenier Report, p. 9.

<sup>256</sup> Specenier Report, p. 10, fn. 6.

<sup>257</sup> Pol Specenier, 21 August 2015, T. 12662-12663.

<sup>258</sup> Pol Specenier, 21 August 2015, T. 12661.

<sup>259</sup> Dr. Specenier noted that Hadžić's endurance and health condition could fluctuate day-to-day and worsen rapidly. Pol Specenier, 21 August 2015, T. 12664. Should the need arise, the Trial Chamber in these instances can work with the parties and the Registry to accommodate these fluctuations in any number of ways, including further shortening the length of hearings or temporarily suspending hearings. As regards any rapid deterioration of Hadžić's health condition, the timing of such deterioration is unknown and the way in which it will manifest is unknown. See Daniel Martell, 29 July 2015, T. 12653-12654. The Trial Chamber can only assess Hadžić's fitness to stand trial with the information it currently has before it.

53. The Chamber notes that Dr. Martell found that, while Hadžić's long-term memory was intact, Hadžić's short-term memory was significantly impaired,<sup>262</sup> and he had a severely impaired capacity for sustained attention and concentration.<sup>263</sup> Hadžić's short-term memory deficit manifested itself during two tests administered by Dr. Martell—a verbal memory test in which Hadžić was required to remember 15 words and a visual memory test in which Hadžić was required to remember 15 geometric figures.<sup>264</sup> Hadžić had difficulty maintaining focus when he had to generate words beginning with specific letters during one minute trials.<sup>265</sup> Hadžić's short-term memory deficit and impaired capacity to focus did not, however, manifest itself during the conversations he had with either Dr. Specenier or Dr. Martell. Hadžić consistently demonstrated an ability to understand and respond to the expert's questioning in a detailed manner.<sup>266</sup> The Chamber accordingly finds that Hadžić's short-term memory impairment does not currently interfere with his ability to communicate. As noted above, Hadžić's executive function also remains intact.<sup>267</sup> Hadžić's tumour has not affected his capacities for abstract reasoning, critical thinking, decision making, or problem solving,<sup>268</sup> nor has it affected his ability to take initiative.<sup>269</sup> The Chamber therefore finds that Hadžić maintains his ability to communicate, engage in abstract reasoning, think critically, make decisions, problem solve, and take initiative, thereby indicating that he is able to communicate with counsel in such a way that counsel is able to adequately present Hadžić's position with respect to matters relevant to the case. In light of the foregoing, the Chamber concludes that, while Hadžić is suffering from some impairments, he is still able to communicate and instruct counsel.

54. Having found that Hadžić understands the essentials of the proceedings and has the ability to communicate with and instruct counsel, the Chamber turns to whether the impairment of Hadžić's processing speed, short-term memory, and difficulties focusing prevent his meaningful participation in the present proceedings. Dr. Martell noted Hadžić's severely impaired cognitive processing speed, in particular the difficulty Hadžić would have remembering the testimony he hears or sees or processing events effectively in real time.<sup>270</sup> In this regard, the Chamber recalls that an accused need not operate at his notionally highest level, or at the highest level the accused has

<sup>260</sup> Public Redacted Version of *Popović* 30 November 2012 Decision, para. 22. *See also*, *Strugar* Appeal Judgement, para. 60.

<sup>261</sup> *Strugar* Appeal Judgement, para. 60.

<sup>262</sup> Martell Report, pp. 10, 14; Daniel Martell, 29 July 2015, T. 12639.

<sup>263</sup> Martell Report, pp. 10, 11-12, 14.

<sup>264</sup> Martell Report, p. 10.

<sup>265</sup> Martell Report, p. 10.

<sup>266</sup> Martell Report, p. 8, 11; Specenier Report, p. 9; Daniel Martell, 29 July 2015, T. 12636-12638.

<sup>267</sup> Daniel Martell, 29 July 2015, T. 12648.

<sup>268</sup> Daniel Martell, 29 July 2015, T. 12644-12645, 12648; Martell Report, p. 14.

<sup>269</sup> Daniel Martell, 29 July 2015, T. 12648.

<sup>270</sup> Martell Report, pp. 14-15.

ever enjoyed, in order to be found able to exercise his rights to a fair trial.<sup>271</sup> Effective participation requires a “broad understanding” of the trial process with a comprehension of the “general thrust” of what is said in court.<sup>272</sup> Hadžić need not process evidence in real time or comprehend all the details of the evidence. It is the job of Hadžić’s counsel to respond or object to evidence as it is being adduced in court. Should Defence counsel need to consult with Hadžić during proceedings, they may request time to do so and request additional time if needed. During the examination of Hadžić by Dr. Martell, Dr. Martell was able to redirect Hadžić’s attention when necessary.<sup>273</sup> Accordingly, should Defence counsel find it important that Hadžić provide his insight on a particular issue they may draw his attention to the matter and brief him on the issue. Having completed 50% of his defence case, Hadžić has already accomplished the most difficult aspects of presenting his case before the Tribunal. Hadžić has already testified, and he and his Defence team have already strategised lines of Defence, chosen witnesses, and collected statements. What remains is for Hadžić’s chosen witnesses, who have not already appeared in court, to give evidence in his defence before the Chamber. Hadžić and his Defence team, in presenting their own case, will be well aware of the evidence to be adduced at trial even before the remaining witnesses take the stand. Surprises during direct examination will likely be a rarity, however should those rare instances present themselves, the Defence may request extra time to review the relevant transcript and consult with Hadžić, and, if necessary, request additional time to question the witness(es).<sup>274</sup> In this manner, the Chamber finds that Hadžić, with the assistance of Defence counsel, is able to continue to meaningfully participate in the remaining half of his defence case and has exhibited the requisite broad understanding of the trial and its significance.

55. As noted above, the Chamber finds that Hadžić is currently able to effectively exercise his rights in the present proceedings with the assistance of counsel. Having established that Hadžić understands the essentials of the proceedings, has the ability to communicate and instruct counsel, and has the requisite broad understanding of the trial and its significance to meaningfully participate in the proceedings, the Chamber finds, Judge Burton Hall dissenting, that the Defence has not discharged its burden of proving that Hadžić is unfit to stand trial.

56. While the Chamber has found, Judge Burton Hall dissenting, that the Defence has not discharged its burden of proving that Hadžić is unfit to stand trial, a question still remains as to

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<sup>271</sup> *Strugar* 26 May 2004 Decision, para. 37; *Strugar* Appeal Judgement, para. 55.

<sup>272</sup> *Strugar* Appeal Judgement, para. 47.

<sup>273</sup> Martell Report, p. 11.

<sup>274</sup> Similarly, should issues arise during cross-examination that require Defence counsel to consult with Hadžić, Defence counsel may ask for adequate time for consultation. The Trial Chamber notes, in this regard, however, that the Prosecution has unconditionally waived its right to cross-examine Defence witnesses. Accordingly, for the time being, it seems that these instances involving cross-examination will not present themselves. *See* Second Motion to Proceed, para. 3.

whether the terminal nature of Hadžić's illness militates against a continuation of proceedings and in favour of terminating or staying the case at hand. The Chamber considers, in this regard, that a termination or stay of proceedings should not be automatic procedural mechanisms applied once it is discovered that an accused is terminally or seriously ill. These mechanisms should be employed on a case-by-case basis and take into consideration relevant factors, such as an accused's fitness to stand trial, the stage of proceedings, the availability of accommodations for health concerns which facilitate the continuation of proceedings, and the public interest in a determination of an accused's responsibility along with the gravity of the charges against an accused.<sup>275</sup>

57. This case is at a very advanced stage of proceedings: the Prosecution has completed the presentation of its case and the Defence has used approximately half of the hours allotted to it to present its case. Hadžić has made a statement pursuant to Rule 84 *bis* of the Rules and has testified under oath. The Chamber finds that the advanced stage of proceedings weighs in favour of continuing the Defence case.

58. The Prosecution has proposed a number of accommodations for Hadžić's health in order to facilitate the continuation of proceedings. One such accommodation is the unconditional waiver of its right to cross-examine the remaining Defence witnesses.<sup>276</sup> This accommodation in conjunction with a truncated hearing schedule of 2.5 hours per day will allow the Defence to use the remaining 70 hours that it has been allotted for its case in six or seven weeks time. The Chamber does not consider the Prosecution's decision to waive its right to cross-examine the remaining Defence witnesses as a prerequisite to moving forward with the Defence case, but notes that the Prosecution has a right to conduct its case as it chooses. Should the Prosecution choose to revoke its waiver for some or all of the remaining Defence witnesses it may do so. The Chamber accordingly finds that the Prosecution's waiver of its right to cross-examine witnesses weighs neither in favour of nor against continuing proceedings.

59. In addition to waiving its right to cross-examination, the Prosecution has also proposed that the Chamber dispense with the in-court appearance of the remaining witnesses and (a) admit into evidence the written statements of all the remaining Rule 92 *ter* Defence witnesses<sup>277</sup> and (b) direct

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<sup>275</sup> See *Strugar* 26 May 2004 Decision, para. 52 (considering an accused's fitness to stand trial in the context of a request for termination); *Stanišić and Simatović* 16 May 2008 Appeals Decision, paras 15-21 (considering video-link to accommodate the Accused's health condition); *Prosecution v. Brdanin and Talić*, Case No. IT-99-36-T, Decision on the Motion for Provisional Release of the Accused Momir Talić, 20 September 2002 ("*Talić* 20 September 2002 Decision"), paras 26, 31, 32 (considering, *inter alia*, the stage of the proceedings and the public interest). In the *Talić* case, provisional release was considered when the Accused had been certified as being unfit to stand trial by a panel of experts. *Prosecutor v. Brdanin and Talić*, Case No. IT-99-36-T, Decision on Prosecution's Oral Request for the Separation of Trials, 20 September 2002, para. 24.

<sup>276</sup> Second Motion to Proceed, paras 3, 11, 15.

<sup>277</sup> Second Motion to Proceed, paras 2, 13.

the Defence to file written statements of any remaining *viva voce* Defence witnesses.<sup>278</sup> The Chamber notes that 11 *viva voce* witnesses and 33 Rule 92 *ter* witnesses remain to be heard. Of the 33 Rule 92 *ter* witnesses, 23 are Rule 92 *ter* hybrid witnesses, a term the Chamber has used to denote Rule 92 *ter* witnesses whose Rule 65 *ter* witness summaries state that the witness will additionally testify to matters not contained in their statement. With regard to the proposed *viva voce* testimony of the Rule 92 *ter* hybrid Defence witnesses, the Prosecution requests that the Chamber order the Defence to file supplemental Rule 92 *ter* statements containing this additional evidence.<sup>279</sup> While in a few instances Chambers have admitted into evidence the statement of a Rule 92 *ter* witness without an in-court attestation when cross-examination had been waived,<sup>280</sup> this procedure is a rare exception and not the rule as Rule 92 *ter* explicitly provides for the appearance of a witness in court.<sup>281</sup> Here, the Prosecution suggests following this procedure for all of the remaining 33 Rule 92 *ter* witnesses, creating more of a general rule rather than an exception. Neither the Tribunal's rules nor its jurisprudence allow for systematic admission of a large number of written statements pursuant to Rule 92 *ter* without in-court attestations, as currently proposed by the Prosecution.

60. The Chamber, in accordance with the normal practice and procedure at the Tribunal with respect to Rule 92 *ter* and *viva voce* witnesses, prefers that witnesses testify live so that it is better able to assess the credibility of each witness, particularly as the evidence of these remaining witnesses can include evidence regarding Hadžić's acts and conduct. Dispensing with the live testimony of the remaining Rule 92 *ter* and *viva voce* witnesses, denies the Chamber the best opportunity to assess the credibility of 80% of the Defence's Rule 92 *ter* and *viva voce* witnesses. The need to assess the credibility of these remaining witnesses is particularly pertinent as the

<sup>278</sup> Second Motion to Proceed, paras 2, 15.

<sup>279</sup> Second Motion to Proceed, para. 14.

<sup>280</sup> In the *Milutinović et al.* case, upon agreement of the parties one witness gave evidence via Rule 92 *ter* of the Rules without appearing in court to attest to his statement or to be cross-examined. See *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, Judgement, 26 February 2009, para. 47. In the *Haradinaj et al.* retrial case, the court appearance of Rule 92 *ter* witnesses was dispensed with upon agreement of the parties and in relation to those witnesses who had testified in the original *Haradinaj et al.* trial. See *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84bis-T, Judgement, 29 November 2012, para. 11. In the *Orić* case, the Trial Chamber admitted two statements from Prosecution witnesses pursuant to Rule 89(F) of the Rules, a precursor to Rule 92 *ter* of the Rules, upon agreement by the Defence after the Defence had waived its right to cross-examine these witnesses. The *Orić* Trial Chamber, however, reserved its right to call the two witnesses for in court attestations of their written statement or for examination by the Trial Chamber if deemed necessary at a later stage. *Prosecutor v. Orić*, Case No. IT-03-68-T, 7 October 2004, T. 298-299. The Trial Chamber finds these examples inapposite to the present proceedings, as these instances concerned a small number of witnesses and upon agreement of the parties, and in the case of *Haradinaj et al.* in the context of a retrial.

<sup>281</sup> The requirement of an in court attestation and the availability of a witness for cross-examination and examination by the judges of the Trial Chamber is not a mere formality as there is a risk that unattested and untested written statements may not be accurate. As noted by Judge Hunt, “[a]nyone who has had experience of trials in which evidence is required to be given *viva voce* knows that that evidence will often depart from the version in the statement taken by the party calling the witness – not only from the actual words used in the statement but also from the substance of the statement.” *Prosecutor v. S. Milošević*, Case No. IT-02-54-AR73.4, Dissenting Opinion of Judge David Hunt on Admissibility of Evidence in Chief in the Form of Written Statement, 21 October 2003, para. 8.

Prosecution, in waiving its right to cross-examine these witnesses, does not do so because it accepts the veracity of the evidence. Instead, it has waived its right to cross-examination in order to expedite the resumption and completion of the trial.<sup>282</sup> The Prosecution continues to “reserve its right to challenge the relevance, probative value and/or weight of the uncross-examined evidence in its final submissions.”<sup>283</sup> Should the Prosecution lodge such challenges in its final submissions, the Chamber would be placed at a great disadvantage by not having heard the witnesses and not having had the opportunity to assess their credibility in court. For these reasons, the Chamber does not accept the Prosecution’s proposals for the Chamber to admit the evidence of the remaining Defence witnesses in written form without testifying live.

61. Having rejected the Prosecution’s proposal to accept only written evidence from the remaining Defence witnesses, the Chamber, should it continue proceedings, must do so by accommodating Hadžić’s right to be present. Article 21(4)(d) of the Statute provides that an accused has the right “to be tried in his presence.” This right, however, is not absolute.<sup>284</sup> An accused can waive or forfeit the right to be physically present at trial.<sup>285</sup> Hadžić, for his part, has repeatedly indicated that he is not willing to waive this right for the remainder of the proceedings against him<sup>286</sup> and there have been no instances whereby Hadžić can be considered to have forfeited this right under Rule 80(B) of the Rules. However, the Appeals Chamber has recognised that derogations from the right to be present, for example through the use of video-conference link, may be reasonable in light of substantial, unintentional trial delays due to the health of an accused.<sup>287</sup> In assessing the reasonableness of the use of video-conference link, a trial chamber must also consider whether an accused’s physical and mental state allows for effective participation via video-conference link.<sup>288</sup> Dr. Martell testified that if Hadžić were to watch the proceedings via video-conference link, it would probably exacerbate any impairments he has. Dr. Martell further stated that passive observance on a screen, as opposed to being physically present in a courtroom, would not be engaging enough to focus Hadžić’s attention and watching proceedings from home would increase the likelihood of outside distractions that would further erode Hadžić’s ability to focus.<sup>289</sup>

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<sup>282</sup> Second Motion to Proceed, para. 11.

<sup>283</sup> Second Motion to Proceed, para. 3.

<sup>284</sup> The Appeals Chamber has held that when considering a particular limitation on a statutory guarantee, such as the right to be physically present at trial, a trial chamber has to take into account the proportionality principle, pursuant to which any restriction on a fundamental right must be in service of a sufficiently important objective and must impair the right no more than is necessary to accomplish the objective. *Stanišić and Simatović* 16 May 2008 Appeal Decision, para. 6; *Zigiranyirazo v. The Prosecutor*, Case No. ICTR-2001-73-AR73, Decision on Interlocutory Appeal, 30 October 2006, para. 14.

<sup>285</sup> *Stanišić and Simatović* 16 May 2008 Appeal Decision, para. 6. *See also Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Judgement, 28 November 2007, paras 109, 116.

<sup>286</sup> Notice in Response to Trial Chamber Inquiry of 16 February 2015, 17 February 2015.

<sup>287</sup> *Stanišić and Simatović* 16 May 2008 Appeal Decision, paras 16, 19.

<sup>288</sup> *Stanišić and Simatović* 16 May 2008 Appeal Decision, para. 20.

<sup>289</sup> Daniel Martell, 29 July 2015, T. 12647-12648. Dr. Martell stated the following in relation to video-conference link:

While the Chamber has found that Hadžić is fit to stand trial, it has not done so in ignorance of the fact that Hadžić's tumour has caused some impairments, which while not rising to a level such that Hadžić could be considered unfit to stand trial, may nevertheless require some accommodation. As a result, some trial procedures may negatively impact Hadžić's ability to effectively participate in proceedings more than others. In light of the concerns raised by Dr. Martell, the Chamber does not find video-conference link a suitable option allowing for Hadžić's effective participation in trial proceedings.

62. Having ruled out the possibility of conducting proceedings via video-conference link, the only remaining option is to continue proceedings in a courtroom setting at the Tribunal, which would consequently require a revocation of Hadžić's provisional release and his return to the UNDU. The Chamber has previously ruled that conditions of detention at the UNDU were sufficiently compatible with the requirements of Hadžić's health condition.<sup>290</sup> The Chamber has serious concerns as to whether this remains the case today. During Dr. Martell's examination Hadžić reported that he experiences "daily periods of vertigo that require him to take naps to prevent fainting."<sup>291</sup> Dr. Martell has also reported that Hadžić has deficits in motor programming that affect his gait and confidence in ambulation.<sup>292</sup> Dr. Specenier has likewise documented Hadžić's unsure gait.<sup>293</sup> Such deficits increase the possibility that he may fall or be injured if left unattended. Such deficits also raise concerns regarding Hadžić's ability to engage in self-care. Based on the answers Hadžić gave during his examination on 27 June 2015 about his daily activities, Dr. Specenier concluded that Hadžić was capable of self-care.<sup>294</sup> Recently, however, Hadžić's wife has stated that Hadžić is increasingly disoriented and it is no longer possible to leave him unsupervised.<sup>295</sup> For example, Hadžić wakes up three to four times per night and needs to be

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[W]hen one sits in [the courtroom], you have this entire universe of the proceedings to focus your attention upon. When you're sitting on a couch in your house looking at a computer screen and a monitor, you've got your wife, you've got noises in the street, you've got your house, more things to distract you from focusing on what's going on. Plus given his cognitive problems, I doubt that he could attend to, for example, reading words that keep scrolling up on the screen and correlating that with what he is seeing on the video feed. That kind of rapid information processing is a significant deficit area for him.

The primary advantage of that arrangement would be that he could stop and rest. The problem would be he would need to notify the Court that he needs to stop and rest, rather than just disengaging or falling asleep while the proceedings are ongoing.

<sup>290</sup> Decision on Defense Urgent Request for Provisional Release, 13 March 2015, para. 38.

<sup>291</sup> Martell Report, pp. 9, 14.

<sup>292</sup> Martell Report, p. 14.

<sup>293</sup> Specenier Report, p. 10.

<sup>294</sup> Specenier Report, p. 10, fn. 6; Pol Specenier, 21 August 2015, T. 12661.

<sup>295</sup> Deputy Registrar's Submission of Medical Report (confidential), 18 September 2015, confidential Annex, para. 3.

“accompanied as nightly confusion and disorientation have not improved.”<sup>296</sup> Hadžić’s wife also reported that she has to assist him with all aspects of his daily living;<sup>297</sup> and more recently, Hadžić has reported that when walking he needs constant support.<sup>298</sup> The marked change in Hadžić’s ability to engage in self-care, while not having been confirmed by expert examinations, is not wholly unreasonable in light of the passage of time and the evolving nature of Hadžić’s illness.<sup>299</sup> Upon return to the UNDU, the Chamber accordingly has serious concerns as to Hadžić’s ability to engage in self-care.

63. When an accused is not able to engage in self-care, there is the possibility of an accused being placed in the UNDU Judicial Centre for Somatic Care (“Centre for Somatic Care”), where 24 hour care would be available. The Deputy Registrar has previously informed the Chamber that this option is only exercised on the advice of the Medical Officer of the UNDU (“MO”) 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”.<sup>300</sup> Being housed in the Centre for Somatic Care, however, is not without attendant consequences. On 29 January 2015, the MO advised against Hadžić being placed at the Centre for Somatic Care because, in addition to there being no evidence that Hadžić was unable to care for himself at the time, admission to the Centre for Somatic Care might adversely affect Hadžić’s psychological health, as he would not have the benefit of social interaction with other detainees who speak his own language or the support of his family.<sup>301</sup> Should proceedings be restarted, Hadžić may very well have to be placed in the Centre for Somatic Care, which denies Hadžić beneficial social contact for the remainder of the Defence case. In light of Hadžić’s life expectancy,<sup>302</sup> there is a very reasonable prospect that Hadžić could live out the remainder of his life in isolation at the Centre for Somatic Care. Moreover, despite being presumed innocent, in the current context of Hadžić’s illness, Hadžić’s return to the UNDU could effectively become a life sentence.

64. The reality is that Hadžić’s illness is inoperable and incurable. The most recent MRI scan has shown that Hadžić’s tumour is growing rapidly and his health is expected to deteriorate.<sup>303</sup> The nature of Hadžić’s deterioration will depend on the growth of his tumour.<sup>304</sup> Dr. Martell testified that, at present, the language centres and the executive control centres of Hadžić’s brain are fairly

<sup>296</sup> Deputy Registrar’s Submission of Medical Report (confidential), 3 September 2015, confidential Annex, para. 2.

<sup>297</sup> Deputy Registrar’s Submission of Medical Report (confidential), 18 September 2015, confidential Annex, para. 3.

<sup>298</sup> Deputy Registrar’s Submission of Medical Report (confidential), 25 September 2015, confidential Annex, para. 3.

<sup>299</sup> Pol Specenier, 21 August 2015, T. 12664-12645.

<sup>300</sup> Deputy Registrar’s Submission Regarding Interim Order in Relation to the Urgent Request for Provisional Release (confidential), 29 January 2015 (“Deputy Registrar’s Submission of 29 January 2015”), para. 9.

<sup>301</sup> Deputy Registrar’s Submission of 29 January 2015, para. 9.

<sup>302</sup> Specenier Report, pp. 11-12; Pol Specenier, 21 August 2015, T. 12680-12681 (confidential).

<sup>303</sup> Daniel Martell, 29 July 2015, T. 12653-12654.

<sup>304</sup> Daniel Martell, 29 July 2015, T. 12654.

well preserved, but if the tumour begins to invade those areas of the brain there will be further deterioration beyond his current impairments.<sup>305</sup> Dr. Specenier stated that Hadžić's condition will evolve day-to-day and that it will worsen rapidly.<sup>306</sup> Dr. Specenier described the growth of Hadžić's tumour as "dramatic"; the tumour had trebled in size in the time between the first MRI scan in November 2014 and the second scan in May 2015.<sup>307</sup> Dr. Specenier also testified that, besides the original tumour, there is now a new lesion and an "edema with shift of the midline".<sup>308</sup> He explained that the intracranial pressure resulting from that shift can be fatal in the short-term, meaning that symptoms of a decline in Hadžić's neurological functioning and consciousness could manifest themselves "from week to week".<sup>309</sup> Finally, Hadžić's life expectancy is very limited.<sup>310</sup> This scenario ultimately means that it is unlikely that Hadžić would still be 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.

65. There is certainly a public interest in adjudicating the case at hand as a result of Hadžić's former positions as President of the Government of the SAO SBWS and President of the RSK as well as the gravity of the crimes charged.<sup>311</sup> This factor, like other relevant factors, must be "carefully balanced" against "the right of all detainees to be treated in a humane manner in accordance with the fundamental principles of respect for their inherent dignity and of the presumption of innocence."<sup>312</sup> Here, while Hadžić's fitness to stand trial, the advanced stage of the proceedings, the gravity of the crimes charged, and the interest of victims and witnesses in the adjudication of the case weigh in favour of the continuation of proceedings, such factors do not outweigh the inhumanity of a situation whereby Hadžić would live out the remainder of his life in detention while being presumed innocent or be released while on the verge of death. The Chamber accordingly finds that this trial cannot continue in a manner consistent with the full and fair adjudication of this case without detriment to the fundamental principles of respect for the inherent human dignity of an accused and the presumption of innocence. The Chamber has always aimed to complete the Defence case and render a judgement in full respect of the rights of the Accused. If Hadžić's health does not allow for proceedings to continue in this manner, then this reality must be accepted.

66. The final question before the Chamber is whether, in light of the foregoing, a termination of proceedings, as opposed to a stay of proceedings, should be instituted. While Hadžić's health makes

<sup>305</sup> Daniel Martell, 29 July 2015, T. 12654.

<sup>306</sup> Pol Specenier, 21 August 2015, T. 12644.

<sup>307</sup> Specenier Report, p. 11; Pol Specenier, 21 August 2015, T. 12674-12675.

<sup>308</sup> Specenier Report, p. 11; Pol Specenier, 21 August 2015, T. 12675-12676.

<sup>309</sup> Pol Specenier, 21 August 2015, T. 12676.

<sup>310</sup> Specenier Report, fns 7-8; Pol Specenier, 21 August 2015, T. 12667-12668 (confidential).

<sup>311</sup> See Indictment, paras 3-4, 19-48.

<sup>312</sup> See *Talić* 20 September 2002 Decision, para. 31.

the resumption of trial currently impossible, this does not lead to the conclusion that the proceedings must be terminated. The Chamber recalls, despite the Defence's submission to the contrary,<sup>313</sup> that it is not the practice of this Tribunal to terminate legal proceedings due to an indefinite suspension of hearings arising from an accused's ill health.<sup>314</sup> The Chamber does not reject the Defence's assertion that termination of proceedings before the death of an accused may in fact be possible under the Statute, but finds that a limited, but renewable, suspension of the proceedings, for three months in the first instance,<sup>315</sup> will more adequately serve the interests of justice in this case and is in line with the practice of the Tribunal. The Chamber considers that a suspension of the proceedings on these terms is the most prudent course of action because it allows the Chamber to remain seised of the proceedings and to continue to monitor Hadžić's health, and also leaves open the possibility, however improbable, that, in the event that Hadžić's health does improve, the Chamber will be able to resume proceedings. A termination of the proceedings, on the other hand, forecloses any such possibility.

67. Noting that the proceedings in this case will initially be stayed for three months, the Chamber considers that the continuation of Hadžić's provisional release is required. Should the Defence seek amendments to the conditions of Hadžić's provisional release, such as allowing contact with witnesses, the Defence may file a motion requesting that Hadžić be allowed to have contact with certain enumerated witnesses or request any other amendment it deems appropriate. The Chamber also considers that it is appropriate to continue to monitor Hadžić's health while on provisional release; therefore, it will continue to require that the RMO communicate with Hadžić and his treating physician in Novi Sad, Republic of Serbia, and report to the Chamber on the medical condition of Hadžić.

68. On the basis of the foregoing, the Chamber concludes that proceedings in this case shall be stayed, that Hadžić's provisional release shall continue on the same terms and conditions as set out in the Provisional Release Decision of 21 May 2015, with the exception that the Chamber shall receive medical reports from the RMO on Hadžić's health every two weeks and that Hadžić shall also consult with his treating physician in Serbia every two weeks.

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<sup>313</sup> Motion to Terminate or Stay Proceedings, paras 5-7.

<sup>314</sup> See Decision on Motion for Voluntary Withdrawal or Disqualification of Judges from Adjudication of Motion to Proceed with the Defence Case, 21 April 2015, para. 14, citing *Prosecutor v. Đukić*, Case No. IT-96-20-T, Decision Rejecting the Application to Withdraw the Indictment and Order for Provisional Release, 24 April 1996; *Prosecutor v. Đukić*, Case No. IT-96-20-A, Order Terminating the Appeal Proceedings, 29 May 1996; *Talić* 20 September 2002 Decision; *Prosecutor v. Talić*, Case No. IT-99-36/1-T, Order Terminating Proceedings Against Momir Talić, 12 June 2003. Contrary to the Defence's submission at paragraph 6 of the Motion to Terminate or Stay Proceedings, the *Strugar* Trial Chamber indicated only that the consequences of finding an accused unfit to stand trial are likely to vary according to the circumstances. *Strugar* 26 May 2004 Decision, para. 39.

<sup>315</sup> The parties may apply for an extension of the stay or the Trial Chamber may extend the stay *proprio motu*.

### **E. Disposition**

69. Accordingly, the Trial Chamber, pursuant to Articles 20 and 21 of the Statute, Rules 54, 74 *bis*, and 126 *bis* of the Rules, and paragraphs (C)(5) and (7) of the Practice Direction on the Length of Briefs and Motions<sup>316</sup> hereby:

- (a) **GRANTS**, in part, the Defence Motion to Terminate or Stay Proceedings and **STAYS** the present proceedings for an initial period of three months;
- (b) **DENIES** the Prosecution's First and Second Motions to Proceed with the Defence case and the Prosecution Proposal Motion;
- (c) **GRANTS** the Prosecution and Defence leave to file their respective replies;
- (d) **GRANTS** the Defence request to exceed the prescribed word-limit in relation to its First Motion to Proceed Response and its Defence Submissions on Fitness to Stand Trial;
- (e) **ORDERS** the parties to file—by 9 November 2015—public redacted versions of the following submissions: the Prosecution Proposal Response; the Defence Submissions on Fitness to Stand Trial; the Prosecution Submission on Fitness to Stand Trial; the Defence Response to Prosecution Submissions on Fitness to Stand Trial; and the Prosecution Response to Defence Submissions on Fitness to Stand Trial;
- (f) **AMENDS** paragraphs 8 and 5(j) of the Provisional Release Decision of 21 May 2015, **ORDERS** Hadžić to consult with his treating physician in Serbia every two weeks, and **INSTRUCTS** the RMO and the UNDU Medical Service to (i) put questions to Hadžić by telephone during his provisional release and communicate with Hadžić's treating physician every two weeks and (ii) report to the Chamber on the medical condition of Hadžić within at least two days of the aforementioned communications; and

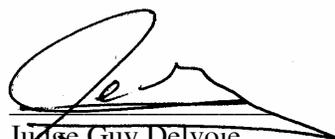
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<sup>316</sup> IT/184 Rev. 2, 16 September 2005.

(g) **ORDERS** that all other terms and conditions of the Provisional Release Decision of 21 May 2015, with its subsequent modifications,<sup>317</sup> stay in effect.

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

Done this twenty-sixth day of October 2015,  
At The Hague,  
The Netherlands.



Judge Guy Delvoic  
Presiding

Judge Burton Hall appends a partially dissenting opinion.

**[Seal of the Tribunal]**

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<sup>317</sup> Decision on Fourth Request for Modification of Mr. Hadžić's Address While on Provisional Release (confidential), 8 October 2015; Decision on Request for Minor Modification to Terms of Provisional Release (confidential), 18 August 2015.

**PARTIALLY DISSENTING OPINION OF JUDGE BURTON HALL**

1. In the Decision, my colleagues, by majority, find that Hadžić is able to understand the essentials of the proceedings, that he has the ability to communicate and instruct counsel, and that he is, therefore, currently able to effectively exercise his fair trial rights in the present proceedings with the assistance of counsel. For the reasons given below, I respectfully disagree with these findings and I find that Hadžić is currently unfit to stand trial.

2. In his report, Dr. Martell concluded that while Hadžić's "preserved language and social skills are strengths that give laymen the impression that he is cognitively intact, which he is clearly not," and that these skills "facilitate [Hadžić's] fundamental ability to communicate and consult with counsel verbally", his "brain tumor has caused severe impairments in many of the core cognitive skills required for him to take part at such a level that it is possible for him to grasp the essentials and participate effectively in the proceedings, and sufficiently exercise his identified rights".<sup>1</sup> Specifically, Dr. Martell summarized Hadžić's impairments as the following: (a) inability to maintain sustained attention and concentration; (b) inability to effectively remember testimony that he hears and evidence that he sees; (c) inability to cognitively process events occurring during the proceedings effectively in real time; and (d) inability to be free from headaches, vertigo, and fatigue that limit his physical and psychological capacity to participate for the standard duration of the proceedings without breaks to sleep.<sup>2</sup>

3. In Dr. Martell's opinion, "to a reasonable degree of neuropsychological certainty, [Hadžić's cognitive deficits] would undermine his capacity to physically participate in the proceedings, and to communicate and consult effectively with counsel during the trial process."<sup>3</sup> Dr. Martell's stated understanding of the standard for legal competency<sup>4</sup> is consistent with Tribunal jurisprudence, as

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<sup>1</sup> Martell Report, p. 15.

<sup>2</sup> Martell Report, p. 15.

<sup>3</sup> Martell Report, p. 15.

<sup>4</sup> Martell Report, p. 2. *See also* Daniel Martell, 29 July 2015, T. 12646. Specifically, in his report, Dr. Martell stated:

It is this examiner's understanding that a defendant's ability to participate in the trial proceedings is contingent upon whether he possesses the mental capacity to understand their essentials, and the mental and/or physical capacity to communicate, and thus consult, with his counsel.

Meaningful participation allows the accused to exercise his fair trial rights to such a degree that he is able to participate effectively in his trial, and has an understanding of the essentials of the proceedings.

An accused's fitness to stand trial should turn on whether his capacities, viewed overall and in a reasonable and commonsense manner, are at such a level that it is possible for him/her to participate in the proceedings and sufficiently exercise the identified rights.

set out in the Decision.<sup>5</sup> While the Trial Chamber bears the responsibility to apply the legal standard to the facts at hand and to determine whether, on a balance of probabilities, Hadžić is fit to stand trial, Dr. Martell's expert opinion must be given due consideration.

4. As noted by the majority,<sup>6</sup> Dr. Martell found that Hadžić possessed language abilities which were generally intact: Hadžić had no difficulty in understanding verbal instructions or conversing in a normal fashion and he demonstrated good reading comprehension.<sup>7</sup> Dr. Martell observed that Hadžić's thoughts were "expressed in a logical, coherent, and goal-directed fashion with no evidence of formal thought disorder".<sup>8</sup> Dr. Martell found that Hadžić performed "within normal limits" on a test of abstract problem solving, meaning he was able to "set switch" from one idea to another and was able to learn from mistakes.<sup>9</sup> I further note that, while Dr. Martell indicated that Hadžić may have lost some intellectual functioning as a result of his brain tumour, his score on an intelligence test falls within the "average" range.<sup>10</sup>

5. These abilities, when viewed on their own, could suggest that Hadžić has the cognitive capacities to understand the evidence in this case and to communicate effectively with his counsel. However, they cannot be viewed in isolation and it must be considered that Dr. Martell also found that Hadžić's brain tumour has caused severe impairments in many core cognitive skills. It is not enough that Hadžić has maintained some cognitive functions which would contribute to his ability to understand the evidence and communicate with counsel. Rather, his capacities must be "viewed overall and in a reasonable and common sense manner".<sup>11</sup> The impact of any cognitive impairments on Hadžić's ability for meaningful participation must, therefore, be considered.

6. In this respect, Dr. Martell concluded that Hadžić has a "severely impaired" capacity to maintain attention and concentration.<sup>12</sup> For example, during tests of his phonemic fluency, Hadžić had difficulty maintaining focus and effort over the course of a one-minute trial.<sup>13</sup> Dr. Martell reported that Hadžić "would start off quite rapidly generating several words in the first 15 seconds of the minute and then slowly stop and go silent for the remaining time."<sup>14</sup> Hadžić scored in the bottom three percentile in his ability to maintain auditory attention over an approximately 15

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<sup>5</sup> Decision, paras 37-42.

<sup>6</sup> Decision, paras 47, 48.

<sup>7</sup> Martell Report, pp. 10-11, 14, 15; Daniel Martell, 29 July 2015, T. 12642.

<sup>8</sup> Martell Report, p. 8.

<sup>9</sup> Martell Report, pp. 12, 14.

<sup>10</sup> Martell Report, p. 9. I note that Dr. Martell suggests that, based on an actuarial method for estimating pre-morbid intelligence, Hadžić has possibly experienced a "loss of intellectual functioning from his premorbid level."

<sup>11</sup> *Strugar* Appeal Judgement, para. 55.

<sup>12</sup> Martell Report, pp. 14, 15.

<sup>13</sup> Martell Report, p. 10.

<sup>14</sup> Daniel Martell, 29 July 2015, T. 12648-12649.

minute period, demonstrating “moderate impairment”.<sup>15</sup> In a test of his capacity for sustained attention and vigilance, Hadžić scored in the bottom one percentile, demonstrating “severe impairment”.<sup>16</sup> Dr. Martell, who monitored Hadžić’s ability to perform throughout the duration of the testing, observed that Hadžić “was seen to become significantly fatigued, lose focus and have difficulty maintaining attention and arousal after approximately two-and-a-half hours of concerted effort.”<sup>17</sup> He also noted that Hadžić “complained of losing awareness of what he was supposed to be doing during some of the testing” and that this lack of awareness was detected in certain portions of the tests performed.<sup>18</sup> Dr. Martell also indicated that Hadžić “found it very difficult to complete the 567 questions on the [written] test”.<sup>19</sup> Dr. Martell, in full awareness of Hadžić’s performance for the duration of the testing, found that Hadžić was unable to maintain sustained attention and concentration.<sup>20</sup> Relying on Dr. Martell’s expertise, the results of the tests he performed, and the observations he has made, I accept that Hadžić’s ability to maintain sustained attention and concentration is impaired.

7. Further, Dr. Martell concluded that “[b]oth verbal and visual memory proved to be major deficit areas for [Hadžić].”<sup>21</sup> On a test of Hadžić’s ability to remember and recognise words he had heard, he scored in the bottom one percentile, suggesting a “severe level of impairment”.<sup>22</sup> Likewise, on a test of his ability to recognise and remember images that he had seen, he also scored in the bottom one percentile, suggesting that his abilities were severely impaired.<sup>23</sup> His composite memory score fell in the bottom one percentile.<sup>24</sup> While Dr. Martell observed that Hadžić was able to recount details from the recent and distant past, he clarified that Hadžić is “extremely impaired with regard to his short-term memory, but he was better able to discuss things that had happened in his past.”<sup>25</sup> He further observed that Hadžić “will not remember something he told you that morning, [...] he will not remember something you just watched on television.”<sup>26</sup> Dr. Martell is an expert in neuro-psychology who was specifically tasked with “carry[ing] out in-depth test(s) that would assist the Trial Chamber in determining whether Hadžić is fit to stand trial”.<sup>27</sup> Dr. Martell has the expertise to determine and execute the appropriate tests to fulfil this mandate, including to

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<sup>15</sup> Martell Report, p. 11.

<sup>16</sup> Martell Report, p. 12.

<sup>17</sup> Martell Report, p. 7.

<sup>18</sup> Martell Report, p. 7.

<sup>19</sup> Daniel Martell, 29 July 2015, T. 12635-12636.

<sup>20</sup> Martell Report, p. 15.

<sup>21</sup> Martell Report, p. 10.

<sup>22</sup> Martell Report, p. 10.

<sup>23</sup> Martell Report, p. 10.

<sup>24</sup> Martell Report, p. 10.

<sup>25</sup> Daniel Martell, 29 July 2015, T. 12639.

<sup>26</sup> Daniel Martell, 29 July 2015, T. 12653.

<sup>27</sup> First Order for Further Medical Examination, p. 2.

properly test Hadžić's memory capabilities. Furthermore, while Dr. Specenier indicated that he "found no signs of impaired memory, either long or short",<sup>28</sup> he did not conduct any cognitive tests of Hadžić's memory and stated that Dr. Martell was in a better position to give an opinion about Hadžić's cognitive performance.<sup>29</sup> Based on Hadžić's demonstrated incapacities, I accept that Hadžić's verbal and visual memory are major deficit areas and I am not satisfied that he will not have difficulty effectively remembering the testimony that he hears or the evidence that he sees.

8. Finally, on a test of his ability to recognize and process information, Hadžić fell in the severely impaired range, or bottom one percentile.<sup>30</sup> I, therefore, accept that Hadžić's ability "to cognitively process events occurring during the proceedings effectively in real time" is impaired.<sup>31</sup>

9. I am satisfied that the record establishes that Hadžić has cognitive impairments which would at least reduce his ability to maintain sustained attention and concentration, to effectively remember testimony that is heard or evidence that is seen, or to cognitively process events effectively in real time.

10. Moreover, I note that Dr. Martell testified that Hadžić's tumour is rapidly growing and that Hadžić's condition will further deteriorate.<sup>32</sup> Dr. Specenier stated that Hadžić's condition is evolving from day to day and it can be expected that it will worsen rapidly.<sup>33</sup> He clarified that the growth of Hadžić's tumour was "dramatic": the tumour had trebled in size since the first MRI scan in November 2014 to the second scan in May 2015.<sup>34</sup> Dr. Specenier also testified that, in addition to the original tumour, the May 2015 scan revealed a new lesion and an "edema with shift of the midline".<sup>35</sup> He explained that the intracranial pressure resulting from that shift can be fatal in the short-term, meaning that symptoms of Hadžić's gradual decline in neurological functioning and consciousness could manifest themselves "from week to week".<sup>36</sup> Under these circumstances, it can reasonably be expected that Hadžić's capacities have deteriorated since the time of the examinations and will further deteriorate in the near future.

11. Regardless of the stage of trial proceedings, Hadžić must have the capacity to, *inter alia*, understand the details of the evidence, with the assistance of counsel, and to instruct his counsel.<sup>37</sup>

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<sup>28</sup> Specenier Report, p. 9.

<sup>29</sup> Pol Specenier, 21 August 2015, T. 12682-12683.

<sup>30</sup> Martell Report, p. 12.

<sup>31</sup> Martell Report, p. 15.

<sup>32</sup> Daniel Martell, 29 July 2015, T. 12653-12654.

<sup>33</sup> Pol Specenier, 21 August 2015, T. 12664.

<sup>34</sup> Pol Specenier, 21 August 2015, T. 12674-12675; Specenier Report, p. 11.

<sup>35</sup> Pol Specenier, 21 August 2015, T. 12674-12676; Specenier Report, p. 11.

<sup>36</sup> Pol Specenier, 21 August 2015, T. 12676.

<sup>37</sup> In this respect, I note the Prosecution's reliance on the analysis of the Appeals Chamber in the *Popović* 30 November 2012 Appeals Decision. However, the facts of this case are different from those in relation to Milan Gvero. The Appeals

While it is for Hadžić's counsel to process the wealth of complex information inherent in international criminal proceedings and it is not necessary for Hadžić to *fully* understand the course of the proceedings,<sup>38</sup> in my view, in order for Hadžić to be able to instruct his counsel, he must be able to, at a minimum, understand and process the evidence as explained to him by counsel, understand the advice his counsel provides, and understand options his counsel presents to him. He must also be able to understand the potential consequences of the various options.

12. I note Dr. Martell's opinion that Hadžić's impairments negatively impact his capacity to assist in his own defence.<sup>39</sup> Likewise, I consider that Hadžić's impaired ability to maintain focus over a period of 15 minutes and his difficulty in doing so even for a period of one minute, will make it impracticable for him to effectively follow the presentation of witness testimony in real time, regardless of whether he is present in the court room or remotely watching the proceedings on a video screen.<sup>40</sup> Even if the Chamber accepted that accommodations could be made to the presentation of the evidence which would enable Hadžić to follow the evidence and which would adequately protect his fair trial rights, Hadžić's difficulty in effectively remembering the evidence that he has seen or the testimony that he has heard and, in particular his impaired processing speed, will negatively impact on his ability to instruct counsel.

13. Further, Hadžić's ability to understand the evidence, even as explained by his counsel, in such a way that he will be able to process its relevance to his case is impaired. I accept that, based on the observations of the experts during their examinations, Hadžić's counsel are likely able to draw his attention to a discrete aspect of the evidence and, considering that Hadžić's long term memory is less impacted, he may even be able to form an opinion as to whether this evidence is accurate. Hadžić's language functioning is intact and he will therefore be able to communicate this to his counsel. Noting, however, Hadžić's cognitive processing impairments, his difficulty in maintaining attention, as well as his deficiencies in short term memory, I am not satisfied that Hadžić will not have difficulty, even with the assistance of his counsel, understanding how evidence fits into the overall context of the case, even if just in a general sense. Hadžić's ability to do so is a minimum requirement to enable him to understand the details of the evidence sufficiently to be able to effectively participate in the proceedings and sufficiently exercise his rights.

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Chamber in relation to Gvero was making a determination of the level of participation necessary for an appellant, which is distinct from the current proceedings. Moreover, Gvero retained capacities that the evidence suggests that Hadžić does not. For example, unlike for Gvero, Dr. Martell did not find that Hadžić's "cognitive processing speed is intact." See Prosecution Submissions on Fitness to Stand Trial, para. 18, *citing Popović* 30 November 2012 Appeals Decision, para. 22; Prosecution Response to Defence Submissions on Fitness to Stand Trial, para. 3, *citing Popović* 30 November 2012 Appeals Decision, para. 23.

<sup>38</sup> *Popović* 30 November 2012 Appeals Decision, para. 22; *Strugar* Appeal Judgement, para. 60, emphasis added.

<sup>39</sup> Daniel Martell, 29 July 2015, T. 12646.

<sup>40</sup> I further note that Dr. Martell indicated that the use of video-conference link would likely exacerbate, rather than ameliorate, Hadžić's impairments. Daniel Martell, 29 July 2015, T. 12647-12648.

14. Moreover, understanding the evidence in its context is essential for Hadžić to be able to instruct his counsel in relation to the finalization of the final trial brief and closing arguments. These final stages of the trial give the parties an opportunity to re-evaluate the evidence as a whole—the evidence that was actually *admitted* before the Chamber as opposed to the evidence that was *planned to be tendered*—and to decide upon its final theory of the case. It is essential that Hadžić, at a minimum, have the capacity to understand an explanation of the overall strategy set out by his counsel in the final trial brief and closing arguments, understand the advice his counsel provides in relation thereto, and understand the possible consequences thereof. For the reasons given above, Hadžić’s impaired ability to remain focused and to remember information that was recently told to him, as well as his reduced cognitive processing speed, will make it impracticable for Hadžić to instruct his counsel sufficiently and will thus prevent him from effectively participating in the proceedings and sufficiently exercising his rights. Even though the majority has not found that Hadžić currently has this level of impairment, it is likely that he will by the time the final trial brief and closing arguments are being prepared.

15. Dr. Specenier opined that requiring Hadžić to perform cognitive tests for a period of more than two hours would be a significant strain and that if he were required to do it on a daily basis it could damage his health.<sup>41</sup> Moreover, while Hadžić was able to complete the tests required for the cognitive examination, Dr. Martell observed that Hadžić was unable to continue after two and a half hours of concerted effort and that the following day Hadžić “was less able to focus and engage in the testing.”<sup>42</sup> Even if the Chamber accepted the Prosecution’s proposals to complete the presentation of the Defence case in such a way that Hadžić would not be required to physically attend court proceedings, doing so would still require Hadžić to, at a minimum, engage with written evidence or his counsel at a level that I consider would be equivalent to the strain of performing the cognitive tests. Even if Hadžić were able to do this, based on Dr. Specenier’s medical opinion, I consider that this could be harmful to his health.

16. Bearing in mind that the standard to be applied in a determination of fitness to stand trial is the balance of probabilities, I am satisfied that it is more likely than not that Hadžić does not have the mental or physical capacity to understand the details of the evidence, even with the assistance of counsel, or to instruct counsel at such a level that it is possible for him to participate in the proceedings and sufficiently exercise his rights. The evidence of Dr. Martell and Dr. Specenier establishes that it is more likely than not that Hadžić is incapable of the meaningful participation required at this stage of the proceedings to allow him to exercise his fair trial rights to such a degree

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<sup>41</sup> Pol Specenier, 21 August 2015, T. 12686.

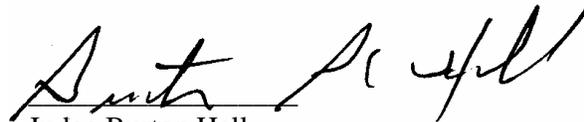
<sup>42</sup> Martell Report, p. 7; Daniel Martell, 29 July 2015, T. 12635-12636.

that he is able to participate effectively in his trial. I, therefore, find that Hadžić is currently unfit to stand trial.

17. *In fine*, I am of the view that trial proceedings cannot continue while the accused is unfit to stand trial. I, however, join my colleagues in the remainder of their findings.

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

Done this twenty-sixth day of October 2015,  
At The Hague,  
The Netherlands.



Judge Burton Hall

[Seal of the Tribunal]