

**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: 17 June 2016
Original: English

IN THE TRIAL CHAMBER

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

Registrar: Mr. John Hocking

Decision: 17 June 2016

PROSECUTOR

v.

GORAN HADŽIĆ

PUBLIC

**DECISION ON PROSECUTION MOTION FOR FORMAL TERMINATION OF
THE PROCEEDINGS**

The Office of the Prosecutor:
Mr. Douglas Stringer

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

1. **THIS TRIAL CHAMBER** of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 (“Tribunal”) is hereby seised of the “Prosecution Motion for Formal Termination of the Proceedings”, filed on 19 May 2016 (“Motion”). The Defence filed its confidential “Response to Prosecution Motion for Formal Termination of the Proceedings” on 2 June 2016 (“Response”).¹

A. Background

2. On 26 October 2015, the Trial Chamber issued a decision, Judge Hall dissenting, finding that the Defence had not discharged its burden of proving that Hadžić was unfit to stand trial, and it unanimously: (i) denied the Prosecution’s motions to proceed with the Defence case; (ii) denied Hadžić’s request for the termination of proceedings; and (iii) ordered that the trial proceedings be stayed for an initial period of three months.² The Prosecution appealed this decision.³

3. On 4 March 2016, the Appeals Chamber issued its “Decision on Prosecution’s Urgent Interlocutory Appeal from Consolidated Decision on the Continuation of Proceedings” (“Appeals Chamber Decision”) in which it quashed the Decision of 26 October 2015 and invited the Trial Chamber to “reassess, based on the available and updated medical records, whether Hadžić is fit for trial”, and if the Trial Chamber so finds, ordered the Trial Chamber (a) “to assess all reasonably available modalities for continuing the trial under the proportionality principle” and (b) to consider whether to continue or terminate the proceedings.⁴ The Appeals Chamber enjoined the Trial Chamber to “issue its decision on remand in a timely manner, preferably no later than 25 March 2016”.⁵

4. On 24 March 2016, the Trial Chamber issued its “Decision on Remand on the Continuation of Proceedings” (“Decision on Remand”) in which it considered that the information in the Reporting Medical Officer of the United Nations Detention Unit’s reports (“RMO” and “RMO Reports”, respectively) indicated that there had been a decline in Hadžić’s condition and found, Judge Mindua dissenting, that, on a balance of probabilities, Hadžić was unfit to stand trial as he

¹ The Defence filed a public redacted version of its Response on 6 June 2016.

² Consolidated Decision on the Continuation of Proceedings, 26 October 2015 (“Decision of 26 October 2015”), paras 55, 65-66, 69. The Trial Chamber incorporates by reference the background section set out in this decision. See Decision of 26 October 2015, paras 6-11.

³ See *Prosecutor v. Hadžić*, Case No. IT-04-75-AR73.1, Prosecution’s Urgent Interlocutory Appeal from Consolidated Decision on the Continuation of Proceedings, 1 December 2015. On 25 January 2016, the Appeals Chamber ordered the extension of “the stay of trial proceedings until the Appeals Chamber has disposed of the Interlocutory Appeal.” *Prosecutor v. Hadžić*, Case No. IT-04-75-AR73.1, Order in Relation to Prosecution’s Urgent Interlocutory Appeal from Consolidated Decision on the Continuation of Proceedings, 25 January 2016, p. 2.

⁴ Appeals Chamber Decision, para. 31.

⁵ Appeals Chamber Decision, para. 31.

was no longer able to effectively exercise his fair trial rights, even with the assistance of counsel, to such a degree that he would be able to meaningfully participate in his trial.⁶ The Trial Chamber recalled that it was not the practice of the Tribunal to terminate legal proceedings due to an indefinite suspension of hearings arising from an accused's ill health.⁷ The Trial Chamber considered that this practice was consistent with the need to not only ensure the rights of the accused are respected, but also to acknowledge the interests of the alleged victims of Hadžić's alleged crimes.⁸ The Trial Chamber, Judge Mindua dissenting, accordingly ordered an indefinite stay of proceedings as it more adequately served the interests of justice and was in line with the practice of the Tribunal.⁹

5. On 19 April 2016, the Trial Chamber issued its "Decision on Request for Reconsideration of Decision Continuing Prohibition of Social Contacts During Provisional Release" ("Decision on Social Contacts during Provisional Release") in which it considered that, as Hadžić was declared unfit to stand trial as a result of his deteriorating medical condition and proceedings had been stayed indefinitely, prohibiting social contact by Hadžić with six enumerated witnesses was not necessary in order to safeguard the integrity of the proceedings and the administration of justice.¹⁰ The Trial Chamber emphasised that Hadžić was not to discuss the case with anyone, including the six enumerated witnesses.¹¹

B. Submissions

6. In the Motion, the Prosecution asserts that the Decision on Social Contacts during Provisional Release eliminates the possibility that the proceedings could resume in the future without compromising the integrity of the proceedings.¹² It argues that, taken together, the Decision on Remand and the Decision on Social Contacts during Provisional Release indicate that the Trial Chamber has abandoned the trial proceedings in favour of a *de facto* termination.¹³ The Prosecution further argues that, "as there is now no likelihood that the trial will be brought to a conclusion, no legitimate purpose is served by the current, indefinite stay,"¹⁴ and the Trial Chamber should

⁶ Decision on Remand, paras 29, 31. The public redacted version of this decision was filed on 5 April 2016.

⁷ Decision on Remand, para. 30.

⁸ Decision on Remand, para. 30.

⁹ Decision on Remand, paras 30, 31.

¹⁰ Decision on Social Contacts during Provisional Release, p. 3. Prior to this decision, the Trial Chamber had denied Hadžić's requests to have social contact with witnesses. *See* Decision on Motion to Modify Terms of Provisional Release, 15 December 2015, pp. 4, 5; Decision on Urgent Request for Reconsideration of Decision on Motion to Modify Terms of Provisional Release (confidential), 24 August 2015, p. 2; Decision on Motion to Modify Terms of Provisional Release (confidential), 16 July 2015, para. 9; Decision on Urgent Motion for Provisional Release Filed on 28 April 2015, 21 May 2015, para. 36(5)(f).

¹¹ Decision on Social Contacts during Provisional Release, p. 3.

¹² Motion, paras 1, 13.

¹³ Motion, paras 1, 14.

¹⁴ Motion, paras 1, 14.

therefore formally terminate the proceedings.¹⁵ The Prosecution added that the Appeals Chamber discouraged the Trial Chamber from instituting a stay of proceedings,¹⁶ and the Trial Chamber left open the possibility that termination of proceedings may be permissible under the Tribunal's Statute ("Statute") before the death of an accused.¹⁷

7. In Response, the Defence submits that the Appeals Chamber invited the Trial Chamber to consider resuming or terminating proceedings.¹⁸ It argues that an indefinite stay was not discouraged or prohibited by the Appeals Chamber,¹⁹ as "such an interpretation would mean that the Appeals Chamber had purported to prospectively deprive the Trial Chamber of its inherent discretion to control its own proceedings."²⁰

8. The Defence further submits that the integrity of proceedings has not been compromised by allowing Hadžić to have contact with three persons on his witness list whom have not yet testified.²¹ It adds that the Prosecution has not established that such contacts are categorically improper, particularly under present circumstances where an accused is instructed not to discuss the case with the individuals in question.²² The Defence argues that Hadžić's health condition renders him unfit to manipulate the potential testimony of witnesses²³ and that Hadžić's desire to see old friends and acquaintances has rightly been accorded more weight as his health declines.²⁴ According to the Defence, even assuming that authorisation of contacts between an accused and prospective Defence witnesses is contrary to the Tribunal's jurisprudence, the Prosecution has not shown that meeting three potential witnesses justifies the dramatic remedy of termination.²⁵ The Defence avers that other more proportionate remedies such as vigorous cross-examination and the discarding of any eventual testimony by the witnesses in question should be considered before a request for termination is made.²⁶ It also argues that the Prosecution's failure to seek leave to appeal the Decision on Social Contacts during Provisional Release belies its assertion that social contact with potential witnesses would have such a devastating impact on the integrity of proceedings.²⁷

¹⁵ Motion, paras 1, 14-15.

¹⁶ Motion, para. 13. *See also* Motion, paras 7-8.

¹⁷ Motion, para. 12 *referring*

¹⁸ Response, paras 10, 12.

¹⁹ Response, paras 11-12.

²⁰ Response, para. 12.

²¹ Response, para. 14.

²² Response, para. 15. In this respect, the Defence also argues that self-representing accused have contact with both their own as well as the Prosecution's witnesses. Response, para. 15.

²³ Response, para. 16.

²⁴ Response, para. 17.

²⁵ Response, para. 18.

²⁶ Response, para. 20.

²⁷ Response, para. 19.

9. The Defence additionally submits that a termination of proceedings is appropriate, not for the reasons given by the Prosecution, but on the basis that Hadžić's medical condition has deteriorated to the point where it is obvious he cannot recover and participate in a meaningful way in his own trial.²⁸ The Defence asserts that the Prosecution has failed to acknowledge Hadžić's health condition as a reason to terminate proceedings and has instead focused on a relatively marginal procedural issue.²⁹ It argues that putting on trial a person with a terminal illness that has progressed as seriously as it has with Hadžić would be inhumane.³⁰

C. Discussion

10. The Trial Chamber recalls that the Appeals Chamber invited the Trial Chamber "to reassess, based on the available and updated medical records, whether Hadžić [was] fit to stand trial, and [...] consider whether to continue or terminate the proceedings."³¹ The Appeals Chamber emphasised that the Trial Chamber should avoid "any further stay of proceedings for the purpose of assessing whether Hadžić's health condition will improve."³² Having declared Hadžić unfit to stand trial in its Decision on Remand, the Trial Chamber instituted a stay, not for the purpose of assessing whether Hadžić's health condition would improve, but as this would serve the interests of justice in this case and was consistent with the Tribunal's practice.³³

11. While the Trial Chamber has previously stated that the termination of proceedings before the death of an accused may in fact be possible under the Statute,³⁴ in this instance, the Prosecution

²⁸ Response, paras 1, 22, 23. The Defence additionally argues that the Prosecution has not cited a single domestic case in which a criminal case proceeded against an accused in a situation similar to that of Hadžić. Response, para. 22.

²⁹ Response, para. 21.

³⁰ Response, paras 22-23.

³¹ Appeals Chamber Decision, para. 31.

³² Appeals Chamber Decision, para. 30.

³³ Decision on Remand, para. 30. See *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 ("Đukić Decision on Application to Withdraw Indictment"); *Prosecutor v. Đukić*, Case No. IT-96-20-A, Order Terminating the Appeal Proceedings, 29 May 1996. See also *Prosecutor v. Brđanin and Talić*, Case No. IT-99-36-T, Decision on Prosecution's Oral Request for the Separation of Trials, 20 September 2002; *Prosecutor v. Talić*, Case No. IT-99-36/1-T, Order Terminating Proceedings Against Momir Talić, 12 June 2003. In the *Đukić* case, the Prosecutor sought leave to withdraw the indictment on the grounds that "given the medical condition of General Đukić, it would be unjust and inhumane to force him to stand trial and that, furthermore, the accused would be incapable of participating in his defence in any meaningful way." *Đukić* Decision on Application to Withdraw Indictment, p. 2. The *Đukić* Trial Chamber considered, however, that

no matter how critical the medical reasons cited may be, nothing in the Statute or the Tribunal's Rules of Procedure and Evidence ("Rules") authorises the withdrawal for those reasons of an indictment for major crimes which the International Criminal Tribunal must judge, and that, consequently, no grounds exist for granting leave to the Prosecutor to withdraw that indictment.

Đukić Decision on Application to Withdraw Indictment, p. 3. The Trial Chamber considers, for all practical purposes, the request for the withdrawal of an indictment is comparable to a request for termination in that it would unequivocally bring an end to proceedings.

³⁴ Decision of 26 October 2015, para. 66.

has not brought forward persuasive arguments which would enable the Trial Chamber to do so. In fact, the Motion is based on the Prosecution's opinion of the possible, future effects of the Decision on Social Contacts during Provisional Release. In essence, the Prosecution seeks relief for defects that may yet occur and for which, if they indeed materialise, there may be more suitable remedies. The request to terminate on this basis is thus premature and hypothetical. The Prosecution's request for termination is further based on its mistaken interpretation of the Decision on Remand.³⁵ As noted above, that decision was consistent with the Appeals Chamber's enjoinder to the Trial Chamber. The Trial Chamber notes that the Prosecution did not seek certification to appeal either the Decision on Social Contacts during Provisional Release or the Decision on Remand. That fact is inconsistent with the gravity of the allegations the Prosecution now makes in respect of the Trial Chamber's handling of this case, in particular its allegation that the Trial Chamber has compromised the integrity of the proceedings. As a result of the foregoing, the Trial Chamber finds that the Prosecution has not demonstrated: (i) any persuasive arguments as to why the proceedings should now be terminated; (ii) the existence of any new fact which would support its Motion; or (iii) any relevant domestic or international case law to support its request. The Motion will therefore be denied.

12. The Trial Chamber notes that the Defence also requests termination of the present proceedings. The Defence, however, seeks termination of the present proceedings on the basis of Hadžić's current state of health, as it has done on previous occasions.³⁶ The Trial Chamber receives information on Hadžić's health every two weeks, as relayed by his wife and members of Hadžić's treating team in Serbia to the RMO.³⁷ The most recent of these RMO Reports provides no new information that changes the general picture of Hadžić's health condition from the time the Decision on Remand was issued.³⁸ Barring any significant change in Hadžić's health, the Trial Chamber sees no reason to deviate from its previous decision to indefinitely stay the proceedings.

13. Based on the foregoing, the Trial Chamber will maintain the indefinite stay of proceedings now in place.

D. Disposition

14. Accordingly, the Trial Chamber, pursuant to Article 20 of the Statute and Rule 54 of the Rules, hereby:

³⁵ See Motion, paras 7, 8, 13.

³⁶ See e.g., Public Redacted Version of Urgent Motion to Terminate, or for Stay of, Proceedings, 17 June 2015.

³⁷ See para. 3, *supra*.

³⁸ Deputy Registrar's Submission of Medical Report (confidential), 9 June 2016.

- a) **DENIES** the Motion; and
- b) **DENIES** the Defence's request for termination of proceedings.

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

Done this seventeenth day of June 2016,
At The Hague,
The Netherlands.



Judge Guy Delvoie
Presiding

Judge Antoine Kesia-Mbe Mindua appends a separate opinion.

[Seal of the Tribunal]

SEPARATE OPINION OF JUDGE ANTOINE KESIA-MBE MINDUA

1. Almost in its entirety, the “Decision on Prosecution Motion for Formal Termination of the Proceedings”, issued today by this Trial Chamber, satisfies me. In general, I agree with the background as described, support the summary of the parties’ submissions, and share many elements of the discussion. Consequently, I support the conclusion contained in the disposition that the Prosecution’s motion, as well as the Defence’s request for termination of proceedings, be denied. However, I diverge in some respects with the Chamber’s findings on the Defence’s request.

2. I agree that the most recent RMO Reports provide no real new information that changes the general picture of the Accused’s health condition from the time the 24 March 2016 “Decision on Remand on the Continuation of Proceedings” (“Decision on Remand”) was issued. That is why I also understand that “[b]arring any significant change in Hadžić’s health, the Trial Chamber sees no reason to deviate from its previous decision to indefinitely stay the proceedings.”¹ However, as I said in my Dissenting Opinion regarding the Decision on Remand, the RMO Reports are based largely on self-reporting by Hadžić or his wife and on statements of Hadžić’s treating team in Serbia.² When I, as part of the majority, declared Hadžić fit for trial on 26 October 2015, I relied basically on two independent experts.³ Since then, this Trial Chamber has not reassessed the fitness of the Accused in light of independently appointed medical expertise. How can I again decide on the Defence’s request only on the basis of the RMO Reports without any other new independent expert opinions?

3. The Appeals Chamber’s “Decision on Prosecution’s Urgent Interlocutory Appeal from Consolidated Decision on the Continuation of Proceedings”, rendered on 4 March 2016 (“Appeals Chamber Decision”), enjoined the Trial Chamber to issue its decision preferably no later than 25 March 2016 and invited the Trial Chamber to “reassess, based on the available and updated medical records, whether Hadžić is fit for trial”, and “to consider whether to continue or terminate the proceedings”.⁴ Having to issue its decision by 25 March 2016, this Trial Chamber did not have the possibility of receiving new independent expert opinions within the timeframe set out by the Appeals Chamber.⁵ That is why I was unable to decide whether the Accused had become unfit and

¹ Decision on Prosecution Motion for Formal Termination of the Proceedings, para. 12.

² Decision on Remand, Dissenting Opinion of Judge Antoine Kesia-Mbe Mindua, 24 March 2016 (“Dissenting Opinion”), para. 8.

³ See Consolidated Decision on the Continuation of Proceedings, 26 October 2016, paras 10, 43-55.

⁴ Appeals Chamber Decision, para. 31.

⁵ Appeals Chamber Decision, para. 31.

also declined to follow the majority in ordering an indefinite stay of the proceedings.⁶ Today, I am unfortunately in the same situation as on 24 March 2016, and my final determination is therefore the same. It is a matter of logic.

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

Done this seventeenth day of June 2016,
At The Hague,
The Netherlands.



Judge Antoine Kesia-Mbe Mindua

[Seal of the Tribunal]

⁶ See Dissenting Opinion, para. 17.