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-AR73.1
		Date:	04 March 2016
		Original:	English

IN THE APPEALS CHAMBER

Before: **Judge Carmel Agius, Presiding**
Judge Liu Daqun
Judge Fausto Pocar
Judge Theodor Meron
Judge Koffi Kumelio A. Afanđe

Registrar: **Mr. John Hocking**

Decision of: **04 March 2016**

PROSECUTOR

v.

GORAN HADŽIĆ

PUBLIC

DECISION ON PROSECUTION'S URGENT INTERLOCUTORY APPEAL FROM CONSOLIDATED DECISION ON THE CONTINUATION OF PROCEEDINGS

The Office of the Prosecutor:

Mr. Douglas Stringer

Counsel for the Accused:

Mr. Zoran Živanović
Mr. Christopher Gosnell

1. The Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 ("Appeals Chamber" and "Tribunal", respectively) is seised of the "Prosecution's Urgent Interlocutory Appeal from Consolidated Decision on the Continuation of Proceedings", filed by the Office of the Prosecutor ("Prosecution") on 1 December 2015 ("Interlocutory Appeal"). On 15 December 2015, Mr. Goran Hadžić ("Hadžić") filed his confidential response.[1] The Prosecution filed its confidential reply on 21 December 2015.[2] On 22 December 2015, Hadžić filed a request for leave to file a sur-reply together with his proposed sur-reply.[3] On 25 January 2016, the Appeals Chamber ordered an extension of the stay which had been ordered by the Trial Chamber, pending the resolution of the Interlocutory Appeal.[4]

I. PROCEDURAL HISTORY

2. Hadžić was indicted before the Tribunal in May 2004 but was not arrested and transferred to the Tribunal until July 2011. The trial against Hadžić commenced on 16 October 2012 before Trial Chamber II of the Tribunal ("Trial Chamber") and, with the exception of one witness, the Prosecution's case was completed on 17 October 2013.[5] Since October 2014, the Trial Chamber has repeatedly suspended the trial proceedings due to Hadžić's medical condition and his refusal to waive his right to be present at trial.[6] Specifically, Hadžić was diagnosed in November 2014 with *glioblastoma multiforme*, a malignant brain tumour, with an estimated median survival rate of 12 months.[7] Hadžić has been on provisional release since April 2015.[8]

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[1] Response to Prosecution's Urgent Interlocutory Appeal from Consolidated Decision on the Continuation of Proceedings, 15 December 2015 (confidential; public redacted version filed on 21 December 2015) ("Response").
[2] Prosecution Reply to Defence Response to Prosecution's Urgent Interlocutory Appeal from Consolidated Decision on the Continuation of Proceedings, 21 December 2015 (confidential; public redacted version filed on 6 January 2016) ("Reply").
[3] Request for Leave to File Sur-Reply, and Sur-Reply, to Prosecution's Reply to Defence Response to Prosecution's Urgent Interlocutory Appeal from Consolidated Decision on the Continuation of Proceedings, 22 December 2015 ("Request to File a Sur-Reply" and "Sur-Reply", respectively). In the Sur-Reply, Hadžić concedes that the Response was filed out of time, and requests a retrospective extension of the deadline or, alternatively, the consideration of the Response in the interests of justice due to the complexity and importance of the legal and medical issues. Sur-Reply, paras 2-4.
[4] Order in relation to Prosecution's Urgent Interlocutory Appeal from Consolidated Decision on the Continuation of Proceedings, 25 January 2016.
[5] *Prosecutor v. Goran Hadžić*, Case No. IT-04-75-T, Consolidated Decision on the Continuation of Proceedings, 26 October 2015 ("Impugned Decision"), para. 6.
[6] Impugned Decision, para. 7.
[7] Impugned Decision, para. 7.
[8] Impugned Decision, paras 11, 67-69. See *Prosecutor v. Goran Hadžić*, Case No. IT-04-75-AR65.1, Decision on Urgent Interlocutory Appeal from Decision Denying Provisional Release, 13 April 2015 (public with confidential annex).

3. Between March 2015 and June 2015, the Parties filed various motions before the Trial Chamber concerning the continuation of the trial proceedings.[9] The Prosecution requested, *inter alia*, that the trial be resumed whether or not Hadžić was present,[10] and proposed measures which it contended would expedite the trial proceedings – including an offer to unconditionally waive its right to cross-examine all remaining Defence witnesses.[11] Hadžić, on the other hand, requested that the trial proceedings be terminated or stayed indefinitely.[12] During the same months, a series of tests were conducted by Tribunal-appointed medical experts in neuro-oncology and neuro-psychology with medical reports prepared and filed on 15 July 2015 and 23 July 2015, respectively.[13] On 29 July 2015 and 21 August 2015, the medical experts testified before the Trial Chamber,[14] and on 25 August 2015, the Parties filed their confidential submissions on Hadžić's fitness to stand trial.[15]

4. On 26 October 2015, the Trial Chamber issued the Impugned Decision in which it, *inter alia*, found Hadžić fit to stand trial, denied the Prosecution's motions to proceed with the Defence case, denied Hadžić's request for the termination of proceedings, and ordered that the trial proceedings be stayed for an initial period of three months.[16]

5. On 24 November 2015, the Trial Chamber granted the Prosecution's request for certification to appeal the Impugned Decision.[17] The Prosecution has appealed the Impugned Decision "insofar as it denies the Prosecution's request to proceed with the trial".[18] On 2 December 2015, the President of the Tribunal issued an order assigning Judges to the Bench considering the Interlocutory Appeal.[19]

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[9] Impugned Decision, paras 1, 4, 12, 21. See Interlocutory Appeal, paras 10, 12; *Prosecutor v. Goran Hadžić*, Case No. IT-04-75-T, Prosecution Motion to Proceed with the Defence Case, 2 March 2015 ("First Motion to Proceed"); *Prosecutor v. Goran Hadžić*, Case No. IT-04-75-T, Prosecution's Second Motion to Proceed with the Defence Case (*Expedited Ruling Requested*), 19 June 2015 ("Second Motion to Proceed").
[10] Impugned Decision, para. 12. See Interlocutory Appeal, para. 10; First Motion to Proceed, paras 9, 21, 23; Second Motion to Proceed, para. 7.
[11] Impugned Decision, paras 2, 12, 15, 21. See *Prosecutor v. Goran Hadžić*, Case No. IT-04-75-T, Prosecution's Proposal for Expediting Presentation of the Defence Case, 24 March 2015; Second Motion to Proceed.
[12] Impugned Decision, paras 3, 18. See *Prosecutor v. Goran Hadžić*, Case No. IT-04-75-T, Urgent Motion to Terminate, or for Stay of, Proceedings, 17 June 2015 (public redacted version).
[13] Impugned Decision, paras 8-10.
[14] Impugned Decision, para. 10.
[15] Impugned Decision, paras 5, 24-36.
[16] Impugned Decision, paras 55, 65-66, 69.
[17] *Prosecutor v. Goran Hadžić*, Case No. IT-04-75-T, Decision on Prosecution Request for Certification to Appeal Consolidated Decision on the Continuation of Proceedings, 24 November 2015 ("Certification Decision"), p. 3.
[18] Interlocutory Appeal, para. 1.
[19] Order Assigning Judges to a Case before the Appeals Chamber, 2 December 2015, p. 1.

II. STANDARD OF REVIEW

6. Trial Chambers enjoy considerable discretion in relation to the management of the proceedings before them, to which the Appeals Chamber accords deference.[20] In order to successfully challenge a discretionary decision, a party must demonstrate that the trial chamber has committed a discernible error resulting in a prejudice to that party.[21] The Appeals Chamber will only overturn a trial chamber's discretionary decision where it is found to be: (i) based on an incorrect interpretation of governing law; (ii) based on a patently incorrect conclusion of fact; or (iii) so unfair or unreasonable as to constitute an abuse of the trial chamber's discretion.[22] In addition, the Appeals Chamber will consider whether the trial chamber has given weight to extraneous or irrelevant considerations or has failed to give weight or sufficient weight to relevant considerations in reaching its decision.[23]

III. APPLICABLE LAW

7. The Appeals Chamber recalls that the applicable standard for determining whether an accused is fit to stand trial 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".[24]

8. The Appeals Chamber recalls that Article 21(4)(d) of the Statute of the Tribunal grants the accused the right to be tried in his presence. The Appeals Chamber has interpreted this right as meaning that an accused has the right to be physically present.[25] This right, however, is not absolute.[26] An accused can waive or forfeit the right to be physically present at trial.[27] For example,

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[20] *Prosecutor v. Goran Hadžić*, Case No. IT-04-75-AR65.2, Decision on Appeal on Suspension of Provisional Release, 24 June 2015 (confidential) ("*Hadžić* Decision of 24 June 2015"), para. 5; *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-AR73.5, Decision on Interlocutory Appeal Against the 27 March 2015 Trial Chamber Decision on Modality for Prosecution re-Opening, 22 May 2015 ("*Mladić* Decision of 22 May 2015"), para. 6; *Prosecutor v. Nikola Šainović et al.*, Case No. IT-05-87-A, Judgement, 23 January 2014 ("*Šainović et al.* Appeal Judgement"), para. 29.

[21] *Hadžić* Decision of 24 June 2015, para. 5; *Mladić* Decision of 22 May 2015, para. 6; *Šainović et al.* Appeal Judgement, para. 29.

[22] *Hadžić* Decision of 24 June 2015, para. 5; *Mladić* Decision of 22 May 2015, para. 6; *Šainović et al.* Appeal Judgement, para. 29.

[23] *Hadžić* Decision of 24 June 2015, para. 5; *Mladić* Decision of 22 May 2015, para. 6; *Šainović et al.* Appeal Judgement, para. 29.

[24] *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-A, Judgement, 17 July 2008 ("*Strugar* Appeal Judgement"), para. 55.

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

[26] *Stanišić and Simatović* Decision of 16 May 2008, para. 6; *Zigiranyirazo* Decision of 30 October 2006, para. 14.

[27] *Stanišić and Simatović* Decision of 16 May 2008, para. 6; *Zigiranyirazo* Decision of 30 October 2006, para. 14, citing *Slobodan Milošević v. Prosecutor*, Case No. IT-02-54-AR73.7, 1 November 2004, Decision on Interlocutory Appeal of

under Rule 80(B) of the Rules of Procedure and Evidence of the Tribunal ("Rules"), a trial chamber may order the removal of an accused from the courtroom and continue the proceedings in the absence of the accused if the accused has persisted in disruptive conduct, following a warning that such conduct may warrant the removal. The Appeals Chamber has observed that the right of an accused to be present at trial pursuant to Rule 80(B) of the Rules can be restricted "on the basis of substantial trial disruptions".[28] The Appeals Chamber has further found that this rule is not limited to intentional disruptions.[29] The Appeals Chamber further emphasises that in assessing a particular limitation on a statutory guarantee, such as the right to be physically present, the proportionality principle must be taken into account, pursuant to which any restriction of a fundamental right must be in service of a sufficiently important objective and must impair the right no more than is necessary to accomplish the objective.[30]

IV. SUBMISSIONS

A. Interlocutory Appeal

9. The Prosecution submits that the Trial Chamber committed several errors in performing its trial management duties by failing to fully address all fair and reasonable ways in which to resume the trial.[31] Specifically, under its first ground of appeal, the Prosecution argues that the Trial Chamber erred by failing to provide a reasoned opinion on whether the trial could continue even when Hadžić does not attend.[32] The Prosecution asserts that the Trial Chamber only explicitly addressed two of its proposals on how to proceed with the proceedings, *i.e.* through Hadžić's presence in the courtroom or through a video-conference link,[33] but did not discuss its proposal to continue the trial without Hadžić's physical presence.[34] In addition, the Prosecution submits that the Trial Chamber erred by failing to order that the trial be resumed, even if Hadžić does not attend,[35]

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the Trial Chamber's Decision on the Assignment of Defence Councel ("*Milošević* Decision of 1 November 2004"), para. 13.

[28] *Stanišić and Simatović* Decision of 16 May 2008, para. 6; *Zigiranyirazo* Decision of 30 October 2006, para. 14, citing *Milošević* Decision of 1 November 2004, para. 13.

[29] *Stanišić and Simatović* Decision of 16 May 2008, para. 6; *Milošević* Decision of 1 November 2004, para. 14.

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

[31] Interlocutory Appeal, para. 3. See Interlocutory Appeal, para. 17.

[32] Interlocutory Appeal, paras 3, 18-21, 31. According to the Prosecution, the Trial Chamber's "mere recitation" of its argument concerning the continuation of proceedings even when Hadžić does not attend fails to constitute a reasoned opinion. Interlocutory Appeal, para. 21.

[33] Interlocutory Appeal, paras 19, 21, referring to Impugned Decision, paras 61-62.

[34] Interlocutory Appeal, para. 21. The Prosecution further asserts that any suggestion that the Trial Chamber implicitly addressed the issue is belied by the Trial Chamber's overt acknowledgement that it only considered the two other options presented. In addition, the Prosecution argues that reasons for a ruling must be explicitly stated. Interlocutory Appeal, para. 21.

[35] Interlocutory Appeal, paras 18, 22, 31.

which is justified in the exceptional and unique circumstances of this case.[36] It argues that Hadžić's right to be tried in his presence is not absolute and "may yield where the ill-health of the Accused jeopardizes proceedings".[37]

10. Under its second ground of appeal, the Prosecution argues that the Trial Chamber erroneously concluded that video-conference link is not a suitable option allowing for Hadžić's effective participation in the trial.[38] The Prosecution contends that the Trial Chamber applied different standards of fitness to an accused's ability to attend trial in the courtroom and to an accused's ability to attend the trial via video-conference link.[39] It also argues that there is "no reasoned explanation as to how the Accused's 'physical and mental state' is not conducive to a video-conference link"[40] and challenges the Trial Chamber's reliance on the testimony of Dr. Daniel Martell ("Dr. Martell"), the appointed independent expert in neuro-psychology.[41] The Prosecution further submits that the Trial Chamber failed to take into account all accommodations that could be employed for the accused in Serbia alongside video-conference link, such as communicating with counsel during court sessions by telephone and accessing e-Court and Livenote programs.[42]

11. The Prosecution's third ground of appeal alleges that the Trial Chamber failed to consider all reasonably available modalities to accommodate Hadžić so that the trial could continue,[43] including its proposals that Hadžić: (1) could watch videos of proceedings and review testimony transcripts, filings, and decisions when convenient to him; and (2) be kept abreast of the developments in the trial by in-person and telephone contacts.[44]

12. Under its fourth ground of appeal, the Prosecution argues that the Trial Chamber erroneously concluded that its offer to waive cross-examination did not weigh in favour of continuing proceedings,[45] while it is "indisputable" that its offer would significantly reduce the length of time required to complete the Defence case and reduce any strain on Hadžić arising from

[36] Interlocutory Appeal, paras 22, 30, 31.
[37] Interlocutory Appeal, para. 22, referring to, *inter alia, Stanišić and Simatović* Decision of 16 May 2008, para. 6, *Milošević* Decision of 1 November 2004, para. 13. See Reply, para. 21.
[38] Interlocutory Appeal, paras 3, 32-36. See Reply, paras 23-24.
[39] Interlocutory Appeal, paras 32-33, 36.
[40] Interlocutory Appeal, para. 33.
[41] Interlocutory Appeal, para. 34.
[42] Interlocutory Appeal, paras 35-36.
[43] Interlocutory Appeal, paras 3, 37-38.
[44] Interlocutory Appeal, para. 37. The Prosecution highlights in this regard the Trial Chamber's findings that, *inter alia*, Hadžić has good reading comprehension and is able to effectively communicate with his counsel, and that the Defence could request additional time to consult with him, if necessary. Interlocutory Appeal, para. 37.
[45] Interlocutory Appeal, paras 3, 39-40.

unforeseen issues in the remaining evidence.[46] According to the Prosecution, the Trial Chamber erroneously reasoned that the waiver could be revoked when in fact, it was unconditional.[47]

13. The Prosecution argues that each of these errors constitutes a basis to reverse the Impugned Decision and that, taken together and in conjunction with other factors noted by the Trial Chamber, they constitute an abuse of discretion.[48] According to the Prosecution, the Trial Chamber's balancing of the factors relevant to the question whether the trial should be stayed was "fundamentally flawed".[49] It argues that, although the Trial Chamber correctly identified several of the factors weighing in favour of proceeding with the trial, the finding that these factors were outweighed by the inhumanity of detaining Hadžić while being presumed innocent was incorrect.[50] The Prosecution also claims to have identified other relevant factors that the Trial Chamber failed to consider.[51] The Prosecution requests that the Appeals Chamber: (1) reverse the Impugned Decision insofar as it grants a three-month stay of proceedings; (2) order the Trial Chamber to immediately proceed with the remainder of the Defence case – even if Hadžić cannot attend; and (3) order any appropriate measures to accommodate Hadžić during the remainder of the trial proceedings.[52]

B. Response

14. Hadžić responds that the Prosecution's grounds of appeal should be dismissed.[53] Specifically, in response to the first ground, Hadžić argues that: (1) the Prosecution "never suggested" that the trial proceed with only *post facto* communications of what transpired at trial;[54] (2) an equivocation arose from different possible meanings of "presence";[55] and (3) the First Motion to Proceed proposed a working regime based on Hadžić's contemporaneous participation, with additional measures for days on which his condition prevented him from such participation, while the Second Motion to Proceed acknowledged that proceeding without his presence would violate his fair trial rights.[56] Hadžić submits that, in any event, dispensing with an accused's right to be present without an informed and voluntary waiver is unsupported by the authorities cited by the

[46] Interlocutory Appeal, para. 39.
[47] Interlocutory Appeal, para. 40.
[48] Interlocutory Appeal, paras 41, 43.
[49] Interlocutory Appeal, para. 42.
[50] Interlocutory Appeal, paras 4, 42, referring to Impugned Decision, para. 65.
[51] Interlocutory Appeal, para. 43, referring in particular to the absence of evidence suggesting that continuing the trial in the way proposed "would create a substantial, unmanageable danger" to Hadžić's life or health.
[52] Interlocutory Appeal, paras 6, 44-45. See Interlocutory Appeal, para. 6.
[53] Response, paras 4, 64.
[54] Response, para. 6. Hadžić also argues that the *post facto* communications are legally irrelevant, unsatisfactory, and "make a mockery of an accused's participation in trial" as it deprives the accused of the right to instruct counsel during the proceedings. Response, para. 33. See Response, paras 32, 34.
[55] Response, para. 7.
[56] Response, para. 11. See Response, paras 6, 9-10.

Prosecution[57] and legally impermissible,[58] as well as inconsistent with any proper exercise of judicial discretion.[59]

15. Regarding the Prosecution's second ground of appeal, Hadžić responds that the only available medical evidence showed that he was not mentally and cognitively fit to participate in trial proceedings, including through a video-conference link.[60] He avers that, in light of this evidence, the Trial Chamber erroneously concluded that he was still able to communicate with and instruct his counsel,[61] and that it failed to address the issue of the physical strain put upon him by the continuation of the trial.[62] Hadžić submits that the Trial Chamber did not err in finding that video-conference link "would make it even harder for [him] to participate in trial proceedings",[63] and that it applied the same standard of fitness to his participation both in person and via video-conference link.[64] Hadžić further asserts that the Prosecution chose not to question Dr. Martell on the mechanics of video-conference link technology.[65]

16. Responding to the Prosecution's third ground of appeal, Hadžić argues that the measures proposed to the Trial Chamber were irrelevant and unsatisfactory as they were based on the false assumption that he would be able to communicate with and instruct his counsel.[66] In relation to the Prosecution's fourth ground of appeal, Hadžić responds that the Prosecution's waiver was not "unconditional" since it reserved the right to challenge the testimony of Defence witnesses, and that the Trial Chamber thus properly accorded no weight to this offer.[67] In addition, Hadžić asserts that the Prosecution mischaracterises the Impugned Decision, as the Trial Chamber did not find that the trial could be completed in six to seven weeks and that his participation in the remainder of the trial need only be *de minimis*.[68]

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[57] Response, paras 20-31, referring to, *inter alia*, *Stanišić and Simatović* Decision of 16 May 2008, paras 3, 7, 20, *S. Milošević* Decision of 1 November 2004, paras 13-14.
[58] Response, paras 14-19. See Response, para. 4. Hadžić asserts that trial chambers have, without exception, suspended proceedings whenever an accused it medically unfit and does not waive his right to participate in trial proceedings. Response, para. 16.
[59] Response, para. 14.
[60] Response, para. 36. See Response, paras 4, 34, 37-56.
[61] Response, para. 53. See Response, para. 54.
[62] Response, para. 55.
[63] Response, para. 56.
[64] Response, para. 57.
[65] Response, para. 56.
[66] Response, paras 33-34.
[67] Response, paras 58-59, referring to, *inter alia*, Impugned Decision, para. 60. See Response, para. 4.
[68] Response, para. 5.

C. Reply

17. The Prosecution replies that the Response should be struck out as being out of time,[69] or in the alternative, that the portions of the Response dealing with the question of Hadžić's fitness to stand trial should be struck or not considered as the Trial Chamber's finding in this respect has not been appealed.[70] The Prosecution further replies that it never retreated from its request to continue the trial even if the Accused is unable to attend[71] and that continuing the trial via a video-conference link is suitable as it strikes a proper balance between the accused's right to be present and the Trial Chamber's obligation to guarantee expeditious proceedings.[72]

V. DISCUSSION

A. Preliminary matter

18. The Appeals Chamber notes that the Response was due on 14 December 2015,[73] but was filed on 15 December 2015 and thus one day late. The Appeals Chamber however finds that, considering the nature of the appeal, it is in the interests of justice to consider the Response as validly filed. Based on the foregoing, the Appeals Chamber finds it unnecessary to consider the Sur-Reply.[74]

B. The scope of the Interlocutory Appeal

19. The Appeals Chamber notes that, in line with the Certification Decision,[75] the Prosecution challenges the Impugned Decision "insofar as it denies the Prosecution's request to proceed with the trial".[76] The Prosecution does not challenge the Trial Chamber's finding on Hadžić's fitness to stand trial.[77] The Appeals Chamber further notes that Hadžić did not seek certification to appeal the Impugned Decision and, consequently, did not file an appeal against the Impugned Decision. However, in the Response, Hadžić makes several submissions implicitly challenging the Trial Chamber's findings on his fitness to stand trial.[78] It is noted that in its Reply, the Prosecution has

[69] Reply, paras 4-6.
[70] Reply, paras 2, 7-8.
[71] Reply, paras 9-16.
[72] Reply, paras 23-24, referring to *Stanišić and Simatović* Decision of 16 May 2008, paras 2, 17-19.
[73] See Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings Before the International Tribunal, IT/155 Rev. 4, 4 April 2012, paras 10, 16.
[74] See *supra*, fn. 3.
[75] See Certification Decision, p. 3.
[76] Interlocutory Appeal, para. 1.
[77] Interlocutory Appeal, para. 17.
[78] See *e.g.* Response, paras 36, 53-55

sought exclusion or non-consideration of these submissions on the basis that the fitness for trial issue is not on appeal.[79]

20. The Appeals Chamber is of the view that Hadžić cannot be permitted to challenge findings of an impugned decision in a response to a Prosecution appeal. Hadžić has chosen to refrain from seeking certification to appeal and thus does not have standing as an appellant. Accordingly, to the extent Hadžić's challenges are aimed at appealing the Trial Chamber's finding on Hadžić's fitness to stand trial, the Appeals Chamber will not consider them. Nevertheless, the Appeals Chamber notes that in the Prosecution's second ground of appeal concerning the possibility of continuing the trial through the use of video-conference link, the Prosecution argues that the Trial Chamber applied different standards of fitness to an accused's ability to participate in the trial in the courtroom and to an accused's ability to participate in the trial via video-conference link.[80] The Appeals Chamber will therefore consider, in this context, Hadžić's arguments to the extent that they are relevant to answering the Prosecution's argument.

C. Merits of the Interlocutory Appeal

21. The Trial Chamber found that Hadžić was fit to stand trial on the basis that he was able to understand the essentials of the proceedings, was able to communicate with and instruct counsel, and had "the requisite broad understanding of the trial and its significance to meaningfully participate in the proceedings".[81] Having found him fit to stand trial, the Trial Chamber considered that a different question to be answered remained, namely whether the "nature of Hadžić's illness militates against a continuation of proceedings and in favour of terminating or staying the case".[82] It considered that when an accused is terminally ill, termination or stay of proceedings should be employed on a case-by-case basis and that factors to consider include, *inter alia*, the accused's fitness to stand trial and "the availability of accommodations for health concerns which facilitate the continuation of proceedings".[83] After rejecting several possible modalities, such as the use of a video-conference link and the Prosecution's waiver of cross-examination,[84] the Trial Chamber considered that the only option for continuing the proceedings was in the courtroom with Hadžić physically present.[85] However, this would require Hadžić's return to the United Nations Detention Unit, which according to the Trial Chamber, in light of his limitations stemming from his medical condition, would result in such an inhumane situation as to outweigh the factors in favour of

[79] Reply, paras 7-8. See *supra*, para. 17.
[80] *Supra*, para. 10.
[81] Impugned Decision, para. 55.
[82] Impugned Decision, para. 56.
[83] Impugned Decision, para. 56.
[84] Impugned Decision, paras 58, 61.
[85] Impugned Decision, para. 62.

continuing the proceedings.[86] In these circumstances, the Trial Chamber decided to stay the proceedings.

22. The Appeals Chamber will now address the Prosecution's grounds of appeal in turn.

23. With respect to the Prosecution's argument, contained in its first ground of appeal, that the Trial Chamber erred in law by failing to provide a reasoned opinion on whether the trial could continue even when Hadžić does not attend,[87] the Appeals Chamber recalls that "[w]hile a Trial Chamber has an obligation to provide reasons for its decision, it is not required to articulate the reasoning in detail".[88] The Appeals Chamber observes that the Trial Chamber quoted the Prosecution's request for the resumption of the trial, even if Hadžić cannot attend, and noted a summary of the Prosecution's arguments supporting this request.[89] Having found Hadžić fit to stand trial and having rejected the Prosecution's proposal to accept only written evidence, the Trial Chamber concluded that "should it continue proceedings, [it] must do so by accommodating Hadžić's right to be present".[90] The Trial Chamber then noted that: (1) this right is not absolute and referred in this regard to the proportionality principle; (2) Hadžić repeatedly indicated his unwillingness to waive this right; and (3) there were no instances whereby Hadžić can be considered to have forfeited this right under Rule 80(B) of the Rules.[91] The Trial Chamber also 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".[92] The Trial Chamber found, in light of its conclusion that using a video-conference link was unsuitable, that "the only remaining option is to continue proceedings in a courtroom setting at the Tribunal".[93] The Appeals Chamber is therefore satisfied that the Trial Chamber did consider and address the Prosecution's request for the continuation of proceedings in Hadžić's absence, but rejected the request. Accordingly, the Appeals Chamber finds that the Prosecution has not demonstrated that the Trial Chamber failed to provide a reasoned opinion on the continuation of proceedings in Hadžić's absence.

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[86] Impugned Decision, paras 62-63.
[87] *Supra*, para. 9.
[88] *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR73.17, Decision on Slobodan Praljak's Appeal of the Trial Chamber's Refusal to Decide Upon Evidence Tendered Pursuant to Rule 92 *bis*, 1 July 2010, para. 12; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-AR73.5, Decision on Radovan Karadžić's Appeal of the Decision on Commencement of Trial, 13 October 2009, para. 20; *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR73.6, Decision on the Interlocutory Appeal by the *Amici Curiae* Against the Trial Chamber Order Concerning the Presentation and Preparation of the Defence Case, 20 January 2004, para. 7.
[89] Impugned Decision, para. 12.
[90] Impugned Decision, para. 61.
[91] Impugned Decision, para. 61.
[92] Impugned Decision, para. 61, referring to *Stanišić and Simatović* Decision of 16 May 2008, paras 16, 19.
[93] Impugned Decision, para. 62.

24. Moving now to the Prosecution's argument under its first ground of appeal that the Trial Chamber erred in failing to order the trial be resumed, even in Hadžić's absence,[94] the Appeals Chamber notes that the Trial Chamber addressed the issue of "the availability of accommodations for health concerns which facilitate the continuation of proceedings" as part of its exercise of balancing the factors weighing in favour and against continuing the proceedings in light of the terminal nature of Hadžić's illness.[95] The Appeals Chamber notes that, having concluded that Hadžić could not be physically present at trial,[96] the Trial Chamber did not then proceed to assess whether a restriction of Hadžić's right to be present at trial was in service of a sufficiently important objective and whether that restriction would impair Hadžić's right to be present no more than necessary to accomplish the identified objective.[97] The Appeals Chamber cannot agree with the Trial Chamber's approach. Recalling the law as set out above,[98] the Appeals Chamber, Judge Afanđe dissenting, considers that, only once the Trial Chamber had determined whether a proportionate means of continuing the trial existed, *i.e.* in such a way as to impair Hadžić's rights no more than necessary to accomplish the objective of a fair and expeditious completion of the proceedings, should the Trial Chamber have considered whether the circumstances of this case "[militate] against the continuation of proceedings and in favour of terminating or staying the case".[99] As such, the Appeals Chamber, Judge Afanđe dissenting, finds that by failing to apply the proportionality principle, the Trial Chamber erred in law.

25. The Appeals Chamber further considers, in relation to the Prosecution's third ground of appeal,[100] that it follows from the above that it was imperative for the Trial Chamber to explicitly address and give due consideration to all modalities proposed to it which may have assisted in limiting the impairment of Hadžić's right to be present at trial no more than necessary to accomplish the objective of a fair and expeditious completion of the proceedings.[101] In this regard, the Appeals Chamber notes that the Impugned Decision does not explicitly address the accommodations proposed by the Prosecution,[102] namely, that Hadžić could review videos of proceedings, testimony transcripts, filings, and decisions at his convenience and be kept abreast of the developments in the trial through in-person and telephone contact. The Appeals Chamber finds

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[94] *Supra*, para. 9.
[95] Impugned Decision, para. 56. See Impugned Decision, para. 61. See also *supra*, para. 21.
[96] Impugned Decision, paras 62-63. The Appeals Chamber notes that the Prosecution does not challenge this aspect of the Impugned Decision.
[97] The Appeals Chamber observes that despite recalling the correct law in this respect, the Trial Chamber failed to apply the proportionality principle when considering whether the trial could be resumed even in Hadžić's absence. See Impugned Decision, para. 61, fn. 284.
[98] See *supra,* para. 8.
[99] Impugned Decision, para. 56.
[100] *Supra*, para.11.
[101] See *supra*, paras 8, 24.
[102] See *supra*, para. 11.

that by failing to consider these accommodations under the proportionality principle, the Trial Chamber committed a discernible error.

26. The Appeals Chamber will now address the Prosecution's arguments in relation to the modalities of video-conference link and waiver of cross-examination raised in the second and fourth grounds of appeal, respectively.[103] It is mindful in this regard that the Trial Chamber assessed these modalities as part of its balancing exercise while it should have done so in the context of applying the proportionality principle to determine whether these modalities would assist in limiting the impairment of Hadžić's right to be present at trial.[104]

27. With respect to the possibility of proceeding with the trial through the use of video-conference link,[105] the Trial Chamber, having found Hadžić fit to stand trial, noted that it must "consider whether an accused's physical and mental state allows for effective participation via video-conference link".[106] The Trial Chamber considered Dr. Martell's testimony that watching the proceedings via video-conference link would: (1) "probably exacerbate any impairments [Hadžić] has";[107] and (2) "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"[108] and on this basis dismissed the suitability of the video-conference link option.[109]

28. The Appeals Chamber observes that the Trial Chamber failed to explain how, in relation to Hadžić's impairments, watching the proceedings via video-conference link would be any different than watching the proceedings while physically in the courtroom. Consequently, the Appeals Chamber, Judge Afanđe dissenting, considers that it is unclear how the Trial Chamber – having found in the context of assessing Hadžić's fitness to stand trial that he was able to effectively participate in the proceedings, where necessary with the assistance of his defence counsel[110] – reached the conclusion that in light of his impairments, Hadžić would not be able to effectively participate in the proceedings through a video-conference link.[111] These conclusions appear to contradict one another and accordingly, in the view of the Appeals Chamber, Judge Afanđe dissenting, undermine the Trial Chamber's finding that Hadžić is fit to stand trial, and more specifically, that he is able to effectively participate in the proceedings. Furthermore, the Appeals

[103] *Supra*, paras 10, 12.
[104] See *supra*, paras 8, 24-25.
[105] *Supra*, para. 10.
[106] Impugned Decision, para. 61, referring to *Stanišić and Simatović* Decision of 16 May 2008, para. 20.
[107] Impugned Decision, para. 61.
[108] Impugned Decision, para. 61, referring to Daniel Martell, T. 12647-12648 (29 July 2015). See Impugned Decision, fn. 289.
[109] Impugned Decision, para. 61.
[110] Impugned Decision, para. 54.
[111] Impugned Decision, para. 61.

Chamber, Judge Afande dissenting, considers that by reaching these apparently contradictory conclusions, the Trial Chamber appears to have applied different standards of fitness for Hadžić's participation when in the courtroom and for his participation through video-conference link and as such, committed a discernible error.

29. Finally, with respect to the Prosecution's fourth ground of appeal, the Appeals Chamber notes that the Trial Chamber discussed the Prosecution's offer to unconditionally waive its right to cross-examine the remaining Defence witnesses in order to continue proceedings. The Trial Chamber observed the Prosecution's right to conduct its case as it chooses and thus concluded that "[s]hould [it] choose to revoke its waiver for some or all of the remaining Defence witnesses it may do so".[112] Accordingly, the Trial Chamber concluded that "the Prosecution's waiver of its right to cross-examine witnesses weighs neither in favour of nor against continuing proceedings".[113] However, the Appeals Chamber considers that the Prosecution's right to conduct its case as it chooses includes the right to forgo cross-examination on a witness-by-witness basis. The Appeals Chamber notes that the Prosecution's waiver in this case was a blanket and *unconditional* waiver and therefore, it finds that the Trial Chamber erred in concluding that the Prosecution could unilaterally revoke its waiver. The Appeals Chamber further notes that the Trial Chamber acknowledged that the waiver would reduce the time required to complete the Defence case.[114] The Appeals Chamber considers that as a result, the waiver would also reduce the time during which accommodations would need to be made, thereby limiting any derogations from his right to be present at trial. Therefore, in the view of the Appeals Chamber, this waiver is important to consider when identifying means of continuing the proceedings under the proportionality principle. Accordingly, the Appeals Chamber finds that by concluding that the Prosecution's waiver carried neither positive nor negative weight, be it in the context of its balancing exercise rather that in the context of applying the proportionality principle, the Trial Chamber committed a discernible error.

D. Conclusion

30. In light of the above, the Appeals Chamber, Judge Afande partially dissenting, finds that the Prosecution has demonstrated that the Trial Chamber's decision contains discernible errors. In determining how best to remedy these errors, the Appeals Chamber notes that, in the Impugned Decision, the Trial Chamber ordered that further information in relation to Hadžić's medical condition be provided to it every two weeks.[115] Accordingly, the Appeals Chamber understands that the Trial Chamber has received information about Hadžić's medical condition over the last months.

[112] Impugned Decision, para. 58.
[113] Impugned Decision, para. 58.
[114] Impugned Decision, para. 58.

Such information may have an impact on whether Hadžić, at this stage, is fit to stand trial or what kind of accommodations, at this stage, could be instituted and would be appropriate. In this regard, the Appeals Chamber, Judge Afanđe dissenting, also recalls its findings as to the apparently contradictory conclusions the Trial Chamber reached in the Impugned Decision concerning Hadžić's effective participation in the proceedings in person versus through video-conference link.[116] Considering this, as well as the Trial Chamber's organic familiarity with the case, the Appeals Chamber finds that the Trial Chamber is best placed to make the ultimate decision on the continuation of the proceedings. In this assessment, the Trial Chamber shall take into account any new information and bear in mind the Appeals Chamber's findings and guidance as set out above. The Appeals Chamber, however, emphasises that any further stay of proceedings for the purpose of assessing whether Hadžić's health conditions will improve must be avoided.

VI. DISPOSITION

31. For the foregoing reasons, the Appeals Chamber:

DISMISSES the Request to File a Sur-Reply;

GRANTS the Interlocutory Appeal in part, Judge Afande partially dissenting;

QUASHES the Impugned Decision;

REMANDS the matter to the Trial Chamber;

INVITES the Trial Chamber to reassess, based on the available and updated medical records, whether Hadžić is fit for trial, and, if it finds this to be case, **ORDERS**, Judge Afande partially dissenting, the Trial Chamber to assess all reasonably available modalities for continuing the trial under the proportionality principle and, only after correcting the errors identified above, to consider whether to continue or terminate the proceedings;

ENJOINS the Trial Chamber to issue its decision on remand in a timely manner, preferably no later than 25 March 2016; and

[115] Impugned Decision, para. 68.

DENIES the remainder of the Interlocutory Appeal.

Judge Afanđe appends a partially dissenting opinion.

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

Dated this fourth day of March 2016,
At The Hague,
The Netherlands.

Judge Carmel Agius
Presiding Judge

[Seal of the Tribunal]

[116] See *supra*, para. 28.

PARTIALLY DISSENTING OPINION OF JUDGE KOFFI KUMELIO A. AFANDE

1. I am in agreement with the Majority insofar that this matter should be referred back to the Trial Chamber for reconsideration.[1] I also agree that the first stage of the Trial Chamber's reconsideration is to determine whether Mr. Hadžić remains fit to stand trial.[2]

2. However, and in summary, I disagree with the Majority on: (i) the sequence of the analysis, ordering the Trial Chamber to first determine a proportionate means of continuing the trial and only then assessing Mr. Hadžić's terminal illness;[3] and (ii) the incompatibility of finding Mr. Hadžić fit to stand trial but unable to follow the proceedings via a video-conference link.[4]

3. I am in agreement that the Trial Chamber erred in examining the issue of proceeding with the trial in Mr. Hadžić's absence as part of its exercise of balancing the factors weighing in favour and against continuing the proceedings in light of the terminal nature of Mr. Hadžić's illness.[5] I cannot however support the Majority's resolution that the Trial Chamber should first determine a proportionate means of continuing the trial and only thereafter consider whether the terminal nature of Hadžić's illness "[militate] against the continuation of proceedings and in favour or terminating or staying the case at hand".[6] By this approach, the Majority gives the impression that the means of continuing the trial could be determined *in abstracto*, without taking into account Mr. Hadžić's terminal illness.[7] However, even though the Majority is right by directing the Trial Chamber to avoid any further stay of the proceedings for the purpose of assessing whether Mr. Hadžić's health will improve,[8] the Majority seems to contend that only the stay is to be linked to the terminal illness, and that the choice between resuming or terminating proceedings shall be based solely on the fitness to stand trial and not on the terminal nature of Mr. Hadžić's illness.

4. In this approach, the Majority underestimates the scope of the impact of Mr. Hadžić's terminal illness which is more than crucial for the furtherance of these proceedings, in the sense that it goes beyond the issue of the stay, to affect also the decision whether to resume or to terminate proceedings. This is because in the Impugned Decision the Trial Chamber made a two-limbed and intertwined finding; that Mr. Hadžić was fit to stand trial, whilst acknowledging that he is

[1] Majority Decision, paras 30, 31.
[2] Majority Decision, paras 30, 31.
[3] Majority Decision, para. 24.
[4] Majority Decision, para. 28.
[5] Majority Decision, para. 24.
[6] Majority Decision, para. 24.
[7] Majority Decision, para. 24.

"terminally ill".[9] In my view, fitness to stand trial and terminal illness are separate issues, since not only are the standards different, but also because a person can be fit to stand trial whilst terminally ill or terminally ill and therefore unfit to stand trial. But, as the Trial Chamber did in the Impugned Decision, these issues are conjoined in the case at hand. Indeed, declaring an accused person fit to stand trial, but "terminally ill" does not directly lead to resuming the proceedings, which in turn raises the issue of accommodation under the proportionality principle as the Majority states. Assuming however that the Trial Chamber was right in finding that Mr. Hadžić is fit to stand trial but is at the same time terminally ill, this intertwined finding creates an inescapable cocktail, different from when an accused is either "fit to stand trial and not terminally ill" or "terminally ill and unfit to stand trial". In a situation where Mr. Hadžić's terminal illness and fitness to stand trial coexist, the former may affect the latter, in particular concerning Mr. Hadžić's ongoing status of being fit to stand trial. In my view, the Trial Chamber is obliged to fully examine the relationship between the fitness to stand trial and terminal illness. Such an examination will then naturally allow the proper application of the proportionality principle and the balancing of modalities of trial, which are in themselves separate, but both require taking into account the specifics of a situation, which must in this case include the conjoined finding.

5. A logical intermediate question, that the Majority Decision fails to set out, but which is necessary in order to tackle this important issue is therefore to know to what extent that terminal illness can progress and potentially nullify, before the completion of the case, Mr. Hadžić's declared fitness to stand trial. If with regard to this first stage, the Trial Chamber concludes that Mr. Hadžić remains fit to stand trial, then I believe that an answer to the "intermediate" question is essential before considering modalities under the proportionality principle for Mr. Hadžić's right to be present during the trial, either by physically attending court or following the proceedings via video-conference link. The decision as to which one would be more suitable between Mr. Hadžić's physical presence in court and him following the proceedings by video-conference link can only be based on medical expertise, albeit supported by explicit legal reasoning. Whilst the Trial Chamber elaborated on its reasoning with regards to the inappropriateness of physical attendance in court, it was perhaps incumbent on the Trial Chamber to equally expand its reasoning on the inadequacy of a video-link conference by backing its finding with legal reasoning beyond simply quoting the medical expert.

[8] Majority Decision, para. 30.
[9] *See* Impugned Decision, para. 56.

6. To examine further the "intermediate question" though, there is a need for the Trial Chamber to assess the reasonable expectation that Mr. Hadžić will remain fit to stand trial for the remainder of the case against him, meaning until at least the delivery of the Trial Judgement. Such an assessment need not consider his life expectancy *per se*, because Mr. Hadžić could remain alive, but his terminal illness could cause the degeneration of his health to the extent that he may lose his fitness to stand trial status. The answer to this intermediate question is crucial when keeping in mind that the objective of the trial must go beyond the aim of the fair and expeditious completion of the proceedings, and include the drafting and delivery of the Trial Judgement, without running the risk of ignoring the Trial Chamber's consideration of Mr. Hadžić's terminal illness. I see no reason to resume the trial for the sake of it, if the answer to the intermediate question is that Mr. Hadžić remains fit to stand trial but there is a high likelihood that he will lose functions and will be no longer fit to stand trial until the delivery of the Trial Judgement, taking into account his terminal illness and its effects on his health based on medical expertise. It is only in the case of an affirmative answer to this intermediate question on the reasonable expectation that Mr. Hadžić's terminal illness will not impair the trial from completion, that the proportionality principle can be discussed. This principle must then take into account that any accommodation put into place for the proceedings to resume may need to be adjusted based on the deterioration of Mr. Hadžić's illness, which again would lead to further delays.

7. If I may put it simply, it seems futile for the Trial Chamber to find Mr. Hadžić fit to stand trial and then press on with the resumption of the proceedings without it first enquiring as to how long Mr. Hadžić will likely remain fit to stand trial. It should be noted that the proceedings may likely take weeks just to resume given that witnesses will need to be arranged, Prosecution and Defence teams assembled, and accommodations put in place, be they for a video-conference link or physical attendance at court. Should the trial proceedings then resume this should be safe in the knowledge that the Tribunal has done everything within its power to ensure that Mr. Hadžić will not be treated as an object to be pushed through the judicial process but that his trial will proceed in full compliance with his right to dignity. Mr. Hadžić's right to dignity goes beyond the respect of the proportionality principle, including his effective participation in the trial and the protection of his fair trial rights.

Judge Koffi Kumelio A. Afande