

**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-09-92-AR65.1
Date: 30 June 2017
Original: English

IN THE APPEALS CHAMBER

Before: Judge Carmel Agius, Presiding
Judge Liu Daqun
Judge Fausto Pocar
Judge Theodor Meron
Judge Burton Hall

Registrar: Mr. John Hocking

Decision of: 30 June 2017

PROSECUTOR

v.

RATKO MLADIĆ

PUBLIC

**PUBLIC REDACTED VERSION OF “DECISION ON
INTERLOCUTORY APPEAL AGAINST DECISION ON
URGENT DEFENCE MOTION FOR PROVISIONAL
RELEASE” ISSUED ON 27 JUNE 2017**

The Office of the Prosecutor:

Mr. Peter McCloskey

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Mr. Branko Lukić
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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 an appeal filed by Ratko Mladić (“Mladić”) on 19 May 2017¹ against the “Decision on Urgent Defence Motion for Provisional Release” issued confidentially by Trial Chamber I of the Tribunal (“Trial Chamber”) on 12 May 2017.² On 24 May 2017, the Appeals Chamber issued an “Order for Expedited Response and Reply”.³ In accordance with this order, the Office of the Prosecutor (“Prosecution”) filed a response on 26 May 2017⁴ and Mladić filed a reply on 30 May 2017.⁵ On 1 June 2017, the Registrar filed a submission concerning the present Appeal.⁶

I. BACKGROUND

2. On 12 May 2017 the Trial Chamber issued the Impugned Decision whereby it denied Mladić’s urgent request for provisional release.⁷ The Trial Chamber held that it was not convinced that Mladić would return to the seat of the Tribunal if granted provisional release and found that, under these circumstances, the requirements of Rule 65 of the Rules of Procedure and Evidence of the Tribunal (“Rules”) were not met.⁸ The Trial Chamber nonetheless held that it had a responsibility to ensure respect for Mladić’s fundamental rights and therefore examined whether Mladić’s state of health is incompatible with continued detention.⁹ Considering the reports of the

¹ Interlocutory Appeal of Mr. Ratko Mladić Against Trial Chamber’s Decision on Emergency and Urgent Motion for Provisional Release of Mr. Ratko Mladić Based on Humanitarian and Medical Reasons Dated 12 May 2017, 19 May 2017 (confidential) (“Appeal”). A public version of the Appeal was filed on 22 May 2017, with a corrigendum containing textual corrections filed on that same day (Interlocutory Appeal of Mr. Ratko Mladić Against Trial Chamber’s Decision on Emergency and Urgent Motion for Provisional Release of Mr. Ratko Mladić Based on Humanitarian and Medical Reasons Dated 12 May 2017, 22 May 2017 (public redacted); Corrigendum to Interlocutory Appeal of Mr. Ratko Mladić Against Trial Chamber’s Decision on Emergency and Urgent Motion for Provisional Release of Mr. Ratko Mladić Based on Humanitarian and Medical Reasons Dated 12 May 2017, 22 May 2017 (confidential)).

² *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Decision on Urgent Defence Motion for Provisional Release, 12 May 2017 (confidential) (“Impugned Decision”). A public redacted version of the decision was issued the same day (*Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Decision on Urgent Defence Motion for Provisional Release, 12 May 2017 (public redacted)).

³ Order for Expedited Response and Reply, 24 May 2017.

⁴ Prosecution Response to Defence Interlocutory Appeal of Trial Chamber’s Decision Denying Provisional Release, 26 May 2017 (confidential) (“Response”). On 30 May 2017, the Prosecution filed a public redacted version of the Response (Notice of Filing of Public Redacted Version Prosecution Response to Defence Interlocutory Appeal of Trial Chamber’s Decision Denying Provisional Release, 30 May 2017).

⁵ Reply in Support of Interlocutory Appeal of Mr. Ratko Mladić Against Trial Chamber’s Decision on Emergency and Urgent Motion for Provisional Release of Mr. Ratko Mladić Based on Humanitarian and Medical Reasons Dated 12 May 2017, 30 May 2017 (confidential) (“Reply”). A public redacted version was filed the same day (Reply in Support of Interlocutory Appeal of Mr. Ratko Mladić Against Trial Chamber’s Decision on Emergency and Urgent Motion for Provisional Release of Mr. Ratko Mladić Based on Humanitarian and Medical Reasons Dated 12 May 2017, 30 May 2017 (public redacted)). On 30 May 2017, the Dutch authorities also confirmed their ability to make arrangements for Mladić’s transport to and from the UNDU if the Appeals Chamber were to grant provisional release (Correspondence from Host Country, 30 May 2017 (confidential)).

⁶ Registrar’s Submission Concerning the Defence Interlocutory Appeal of 19 May 2017, 1 June 2017 (confidential).

⁷ Impugned Decision, para. 19.

⁸ Impugned Decision, para. 17.

⁹ Impugned Decision, para. 18.

Registry's Reporting Medical Officer ("RMO") and independent medical specialists ("Independent Medical Specialists") more reliable than the reports submitted by Mladić, the Trial Chamber ultimately concluded that it remained convinced that Mladić's state of health is compatible with continued detention.¹⁰

II. STANDARD OF REVIEW

3. The Appeals Chamber recalls that an interlocutory appeal is not a *de novo* review of the Trial Chamber's decision and that a decision on provisional release by the Trial Chamber under Rule 65 of the Rules is a discretionary one.¹¹ Accordingly, the relevant inquiry is not whether the Appeals Chamber agrees with that discretionary decision, but rather whether the Trial Chamber has correctly exercised its discretion in reaching that decision.¹²

4. In order to successfully challenge a discretionary decision on provisional release, a party must demonstrate that the Trial Chamber has committed a "discernible error".¹³ The Appeals Chamber will only overturn a Trial Chamber's decision on provisional release 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.¹⁴ 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.¹⁵

III. APPLICABLE LAW

5. Under Rule 65(B) of the Rules, a trial chamber may grant provisional release only if it is satisfied that, if released, the accused will appear for trial and will not pose a danger to any victim, witness, or other person; and after having given both the host country and the State to which the accused seeks to be released the opportunity to be heard.¹⁶ Provisional release may be ordered at any stage of the trial proceedings prior to the rendering of the final judgement, and a trial chamber

¹⁰ Impugned Decision, para. 18.

¹¹ 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) ("*Hadžić* Decision"), para. 5; *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-AR65.1, Decision on Prosecution Appeal against the Decision on the Prosecution Motion to Revoke the Provisional Release of the Accused, 30 March 2015 ("*Šešelj* Decision"), para. 10; *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR65.35, Decision on the Prosecution's Appeal of the Decision on Further Extension of Milivoj Petković's Provisional Release, 12 June 2012 ("*Prlić et al.* Decision of 2012"), para. 3.

¹² *Hadžić* Decision, para. 5; *Šešelj* Decision, para. 10; *Prlić et al.* Decision of 2012, para. 3.

¹³ *Hadžić* Decision, para. 5; *Šešelj* Decision, para. 11; *Prlić et al.* Decision of 2012, para. 4.

¹⁴ *Hadžić* Decision, para. 5; *Šešelj* Decision, para. 11; *Prlić et al.* Decision of 2012, para. 4.

¹⁵ *Hadžić* Decision, para. 5; *Šešelj* Decision, para. 11; *Prlić et al.* Decision of 2012, para. 4.

in granting such a release, may consider the existence of sufficiently compelling humanitarian grounds.¹⁷

6. In deciding whether the requirements of Rule 65(B) of the Rules have been met, a trial chamber must consider all of those relevant factors which a reasonable trial chamber would have been expected to take into account before coming to a decision.¹⁸ It must then provide a reasoned opinion indicating its view on those relevant factors.¹⁹ What these relevant factors are, as well as the weight to be accorded to them, depends upon the particular circumstances of each case.²⁰ This is because decisions on motions for provisional release are fact-intensive and cases are considered on an individual basis in light of the particular circumstances of the individual accused.²¹ The trial chamber is required to assess these circumstances not only as they exist at the time when it reaches its decision on provisional release but also, as much as can be foreseen, at the time the accused is expected to return to the Tribunal.²²

IV. DISCUSSION

7. Mladić submits that the Trial Chamber abused its discretion when assessing the conditions set forth in Rule 65 of the Rules, and failed to provide a reasoned opinion.²³ He requests the Appeals Chamber to reverse the Impugned Decision and grant him provisional release to receive medical treatment in the Russian Federation (“Russia”), submitting four grounds of appeal in support.²⁴ The Prosecution responds that the Appeal should be dismissed in its entirety since Mladić

¹⁶ *Prlić et al.* Decision of 2012, para. 5; *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR65.15, Decision on Prosecution’s Appeal Against the Trial Chamber’s Decision on Slobodan Praljak’s Motion for Provisional Release, 8 July 2009 (“*Prlić et al.* Decision of 2009”), para. 6.

¹⁷ Rule 65(B) of the Rules. See also *Prlić et al.* Decision of 2012, para. 5.

¹⁸ *Hadžić* Decision, para. 7; *Šešelj* Decision, para. 13; *Prlić et al.* Decision of 2012, para. 6.

¹⁹ *Hadžić* Decision, para. 7; *Šešelj* Decision, para. 13; *Prlić et al.* Decision of 2012, para. 6.

²⁰ *Hadžić* Decision, para. 7; *Šešelj* Decision, para. 13; *Prlić et al.* Decision of 2012, para. 6.

²¹ *Prlić et al.* Decision of 2012, para. 6.

²² *Šešelj* Decision, para. 14; *Prlić et al.* Decision of 2012, para. 6.

²³ Appeal, paras 12, 21, 24-25, 27-28, 31, 34, 37, 41-42. In reply to the Prosecution’s cursory reference to Mladić’s position in the VRS chain of command and the gravity of crimes he is allegedly responsible for, Mladić avers that denying provisional release on this ground is contrary to the presumption of innocence and ignores relevant jurisprudence on provisional release (Reply, paras 4-6). Mladić further replies that his status as a fugitive cannot “by itself be considered an automatic bar preventing provisional release”, citing to other cases where despite their prior status as fugitives, accused persons were granted provisional release (Reply, paras 7-8). He submits that the Trial Chamber’s failure to consider this jurisprudence further highlights its failure to render a well reasoned decision (Reply, para. 9). The Appeals Chamber recalls that a brief in reply must be limited to arguments in reply to the response brief and therefore should not contain new arguments (*Prosecutor v. Ratko Mladić*, Case No. IT-09-92-AR73.6, Decision on Interlocutory Appeal Against Decision on Defence Motion for a Fair Trial and the Presumption of Innocence, 27 February 2017, para. 22 and references cited therein). The Appeals Chamber notes that the Prosecution merely made reference to Mladić’s position and the gravity of crimes in the introduction and did not rely on this argument in its Response. As such, Mladić’s submissions in this respect constitute new arguments. Furthermore, the Impugned Decision did not rely on Mladić’s position or the severity of charges, nor is there any suggestion in the Impugned Decision that it considered that his past as a fugitive was *per se* a bar against provisional release. The Appeals Chamber therefore declines to consider these submissions.

²⁴ Appeal, paras 28, 30, 41. Mladić sets out four grounds of appeal: (1) the Trial Chamber erred in failing to properly evaluate and give sufficient weight to the Note Verbale from the Russian Federation (“Russian Guarantees”) (Appeal,

fails to demonstrate a discernible error of the Trial Chamber.²⁵ The specific arguments are dealt with in turn, below.

A. Whether the Trial Chamber erred in its assessment of whether Mladić will return to the seat of the Tribunal

8. The Trial Chamber noted that the Host State did not object to Mladić’s provisional release, and that the Russian Guarantees contained undertakings to accept Mladić in its territory, to observe all conditions of temporary release from custody that may be set by the Tribunal, and to guarantee Mladić’s safety.²⁶ The Trial Chamber held that it was not convinced, however, that Mladić would return to the seat of the Tribunal if granted provisional release, recalling that: (i) Mladić did not voluntarily surrender to the custody of the Tribunal; (ii) evaded arrest for 16 years; and (iii) lived as a fugitive until 2011 despite suffering serious medical episodes [REDACTED].²⁷ Noting that these episodes did not prevent Mladić from continuing his life as a fugitive, the Trial Chamber rejected Mladić’s argument that his medical condition is not compatible with “life on the run”.²⁸

1. Failure to provide a reasoned opinion

9. Mladić submits that the Trial Chamber failed to provide a reasoned opinion regarding the Russian Guarantees and ignored the response of the Dutch authorities (together “State Guarantees”).²⁹ He contends that it was imperative to analyse the Russian Guarantees when assessing the requirements of Rule 65 of the Rules and points in particular to the Trial Chamber’s failure to cite Russia’s engagement concerning “the timely return of [Mladić] to the seat of the Tribunal on the date and at the time determined by the ICTY”.³⁰ Mladić argues that a reasoned decision would have considered these relevant facts, set out how the Trial Chamber had taken them into account and weighed them, and provided reasons as to why the Trial Chamber dismissed or gave little weight to them.³¹

paras 22-27); (2) the Trial Chamber erred by giving undue weight to extraneous or irrelevant factors of Mladić’s “life on the run” but without any analysis from the perspective of his current medical state (Appeal, pp 10-11 (paragraph preceding para. 28 is erroneously numbered); Appeal, paras 28-30); (3) the Trial Chamber erred by failing to properly assess all facts and circumstances of strictly medical nature (Appeal, paras 31-37); and (4) the Trial Chamber exercised its discretion incorrectly and in an unreasonable manner by failing to weigh all relevant considerations with respect to the requirements of Rule 65 of the Rules (Appeal, paras 38-43). The Appeals Chamber considers that many of the arguments across the four grounds of appeal overlap, and shall address Mladić’s arguments thematically instead.

²⁵ Response, paras 1, 5, 14.

²⁶ Impugned Decision, para. 16.

²⁷ Impugned Decision, para. 17.

²⁸ Impugned Decision, para. 17.

²⁹ Appeal, paras 22-26. In this context, Mladić advances that the Trial Chamber’s failure to provide a reasoned opinion is made apparent by its erroneous statement in the Impugned Decision that his medical condition was the sole argument he made with respect to his flight risk (Appeal, para. 26). See Impugned Decision, para. 17.

³⁰ Appeal, paras 22, 24-25.

³¹ Appeal, para. 23.

10. The Prosecution responds that the Trial Chamber provided a reasoned opinion based on relevant considerations as to why it was not convinced that Mladić would return to the seat of the Tribunal if provisionally released.³² It submits that the Trial Chamber expressly considered the State Guarantees and whether Mladić's health issues would prevent him from absconding.³³ The Prosecution asserts that the Trial Chamber was under no obligation to reproduce the Russian Guarantees verbatim in order to fulfil its duty to provide a reasoned opinion.³⁴

11. The Appeals Chamber recalls that "a Chamber is required to give reasons for its findings on the facts which led to its conclusion but this does not mean that it has a duty to give a detailed analysis of each such factor."³⁵ Contrary to Mladić's assertion, the Appeals Chamber considers that it is evident from the Trial Chamber's reasoning that it considered the State Guarantees.³⁶ The mere fact that the Trial Chamber did not cite the Russian Guarantees in their entirety is not sufficient to demonstrate that the Trial Chamber failed to provide a reasoned opinion in relation to them.³⁷ Moreover, the Trial Chamber gave detailed reasoning for its finding that, despite the State Guarantees,³⁸ it was not convinced that Mladić would return to the seat of the Tribunal if granted provisional release.³⁹ Mladić fails to demonstrate that the Trial Chamber committed a discernable error in not further elaborating on the State Guarantees.

2. Abuse of discretion in weighing relevant considerations

12. Mladić submits that, when reaching its conclusion that it was not convinced that he would return to the seat of the Tribunal if granted provisional release, the Trial Chamber failed to consider and weigh all relevant considerations and gave undue weight to irrelevant considerations.⁴⁰ He argues that no reasonable trial chamber would have given more weight to Mladić's past as a fugitive than to the current factual situation, referring in particular to: (i) the impact of the Russian Guarantees on his flight risk; and (ii) evidence of Mladić's current medical state.⁴¹

³² Response, para. 6.

³³ Response, para. 6.

³⁴ Response, para. 6.

³⁵ *Prosecutor v. Milan Milutinović*, Case No. IT-99-37-AR65.3, Decision Refusing Milutinović Leave to Appeal, 3 July 2003, para. 23.

³⁶ See Impugned Decision, para. 16.

³⁷ The Appeals Chamber notes in this respect that in his request before the Trial Chamber, Mladić only referred to the specific passage at issue in the "Relevant Background" section, and not as part of the submissions themselves (*Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Emergency and Urgent Motion for Provisional Release of Mr. Ratko Mladić Based on Humanitarian and Medical Reasons, 20 March 2017 (confidential) ("Request Before the Trial Chamber"), para. 7).

³⁸ See Impugned Decision, para. 16.

³⁹ See Impugned Decision, para. 17.

⁴⁰ Appeal, paras 12, 22-30, 31-34, 42; Appeal, pp 10-11 (paragraph preceding para. 28 is erroneously numbered).

⁴¹ Appeal, paras 12, 22-40, 42-43; pp 10-11 (paragraph preceding para. 28 is erroneously numbered).

13. With respect to the Russian Guarantees, Mladić submits that in failing to discuss the weight accorded to them, the Trial Chamber: (i) “has in essence (without expressly stating the same) disregarded the ability and authority of both the Dutch host state and the Russian Federation to properly effectuate a custodial transfer of a detained person”⁴²; and (ii) has failed to demonstrate any lack of cooperation of the Russian Federation with the Tribunal.⁴³ Concerning his medical state, Mladić asserts that the Trial Chamber focused solely on the time-period between 1996 and 2008 when he was “two decades younger”, and failed to take into account the evidence on his current medical state. According to Mladić, the Trial Chamber should have considered [REDACTED] which was “recognized by ALL the medical personal [*sic*] who provided reports”, including the Registry appointed Independent Medical Specialists.⁴⁴

14. The Prosecution responds that the Trial Chamber reasonably weighed the risk that Mladić would not return and that Mladić fails to show that the Trial Chamber abused its discretion in concluding that his substantial flight risk was not offset by the Russian Guarantees.⁴⁵ To support this submission, the Prosecution argues that: (i) a state guarantee does not in itself demonstrate that an accused will return to the Tribunal; and (ii) the argument that the Trial Chamber was required to make a finding on the reliability of the Russian Guarantees and Russia’s cooperation with the Tribunal is misguided.⁴⁶ With respect to Mladić’s argument that the Trial Chamber failed to take into account his current medical state in relation to the flight risk, the Prosecution points out that the Trial Chamber considered Mladić’s health issues, and specifically rejected Mladić’s argument that his current medical condition is not compatible with life as a fugitive.⁴⁷

15. The Appeals Chamber considers that, contrary to Mladić’s assertion, the Trial Chamber did not focus solely on the time-period between 1996 and 2008 when Mladić was “two decades younger”, in assessing his flight risk. The Trial Chamber recalled that: (i) Mladić did not voluntarily surrender to the Tribunal; (ii) evaded arrest for 16 years; and (iii) lived as a fugitive until 2011 despite suffering serious medical episodes [REDACTED].⁴⁸ With regard to his medical state, the Appeals Chamber considers that it was within the Trial Chamber’s discretion to consider in its assessment of Mladić’s flight risk that serious medical episodes suffered during the years he absconded from justice did not prevent him from continuing his life as a fugitive.⁴⁹ While a trial chamber is indeed required to assess the particular circumstances of the individual accused as they

⁴² Appeal, para. 24.

⁴³ Appeal, para. 27.

⁴⁴ Appeal, pp 10-11 (paragraph preceding para. 28 is erroneously numbered).

⁴⁵ Response, paras 7, 9, 10.

⁴⁶ Response, para. 8.

⁴⁷ Response, paras 6, 10.

⁴⁸ See Impugned Decision, para. 17.

⁴⁹ See Impugned Decision, para. 17.

exist at the time when it reaches its decision on provisional release,⁵⁰ Mladić's behaviour and intentions before his arrest are not an irrelevant consideration in assessing his current and future risk of absconding justice. Whether an accused has voluntarily surrendered to the Tribunal or has absconded justice for several years is a factor frequently taken into account when assessing whether an accused is at risk of flight.⁵¹ Further, the Trial Chamber was cognisant of Mladić's current state of health.⁵² The Appeals Chamber considers that it was open to, and within the Trial Chamber's discretion to draw a comparison between Mladić's medical situation today and before his arrest, and to take this into account when concluding that it was not convinced he would return to the seat of the Tribunal if granted provisional release.

16. Turning to the weighing of the State Guarantees, the Appeals Chamber considers that, in light of the fact that the Trial Chamber's decision not to grant provisional release was based on Mladić's own past conduct, it was open to the Trial Chamber to consider that the State Guarantees did not offset the risk of flight. The Trial Chamber was not compelled to give weight to the State Guarantees just because they had been offered by governments with power to arrest Mladić and to enforce conditions for provisional release.⁵³ State guarantees "are not dispositive of provisional release determinations".⁵⁴ There is, moreover, nothing in the Impugned Decision suggesting, as argued by Mladić, that the Trial Chamber had any doubts about the ability of the Dutch and Russian authorities "to properly effectuate a custodial transfer of a detained person".⁵⁵ The Appeals Chamber recalls in this respect that "a [t]rial [c]hamber's provisional release decision is emphatically not an assessment of the reliability of any particular government or the guarantees that it offers".⁵⁶ In this context, no negative inference can or should be drawn from the denial of a request for provisional release on the cooperation received from the State offering the guarantees. Accordingly, Mladić has not demonstrated that the Trial Chamber abused its discretion in its consideration of the State Guarantees.

⁵⁰ See *supra*, para. 6.

⁵¹ See, e.g., *Prosecutor v. Ivan Čermak and Mladen Markač*, Case No. IT-03-73-AR65.1, Decision on Interlocutory Appeal Against Trial Chamber's Decision Denying Provisional Release, 2 December 2004, para. 35; *Prosecutor v. Nikola Šainović and Dragoljub Ojdanić*, Case No. IT-99-37-AR65, Decision on Provisional Release, 30 October 2002, paras 38-39; *Prosecutor v. Mile Mrkšić*, Case No. IT-95-13/1-AR65, Decision on Appeal Against Refusal to Grant Provisional Release, 8 October 2002 ("*Mrkšić* Decision"), para. 8. See also *Prosecutor v. Vujadin Popović*, Case No. IT-02-57-AR65.1, Decision on Interlocutory Appeal from Trial Chamber Decision Denying Vujadin Popović's Application for Provisional Release, 28 October 2005 ("*Popović* Decision"), paras 6-8.

⁵² See Impugned Decision, para. 18.

⁵³ Cf. *Popović* Decision, para. 10.

⁵⁴ *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-AR108bis.2, Decision on Croatia's Request for Review of the Trial Chamber's Decision on Provisional Release, 17 January 2008 ("*Gotovina et al.* Decision"), para. 12 and references cited therein.

⁵⁵ See *supra*, para. 13.

⁵⁶ *Gotovina et al.* Decision, para. 12.

17. In light of the above, the Appeals Chamber finds that the Trial Chamber's conclusion that it was not convinced that Mladić would return to the seat of the Tribunal if granted provisional release was within its discretion, and rejects Mladić's argument that the Trial Chamber abused its discretion when weighing all relevant considerations.

B. Whether the Trial Chamber erred in its assessment of Mladić's medical situation

18. Notwithstanding its conclusion that the requirements of Rule 65 of the Rules were not met, the Trial Chamber expressly considered that as part of its responsibility to ensure respect for Mladić's fundamental rights, it felt obliged to determine whether Mladić's state of health was incompatible with continued detention.⁵⁷ The Trial Chamber recalled that in this context, it was bound to uphold commonly accepted basic human rights standards, citing to relevant jurisprudence.⁵⁸ The Trial Chamber considered that: (i) Mladić's health has been monitored extensively by the Registrar and the Trial Chamber itself;⁵⁹ and (ii) the reports of the Registry's RMO and Independent Medical Specialists had consistently shown a consolidated stable state of health of Mladić, with risks described as corresponding with his age and past medical incidents, mainly stemming from before his arrest.⁶⁰ The Trial Chamber found these reports to be more reliable than those annexed to the Request Before the Trial Chamber, consisting of reports from medical professionals who have either not personally examined Mladić or seen him in 2015 only.⁶¹ The Trial Chamber noted that the Independent Medical Specialists had assessed Mladić's medical treatment as being in accordance with internationally accepted standards, and was satisfied that there was no acute medical issue that remained unaddressed.⁶² It concluded that Mladić had failed to substantiate his submission that he is receiving inadequate medical treatment at the United Nations Detention Unit ("UNDU") and that it remained convinced that Mladić's state of health is compatible with continued detention.⁶³

19. Mladić submits that the Trial Chamber failed to provide a reasoned opinion and abused its discretion by failing to consider his arguments on inadequate medical treatment at the UNDU and the medical reports annexed to the Request Before the Trial Chamber to support this claim.⁶⁴ Mladić considers that the Trial Chamber erroneously focused on the fact that the medical reports he submitted were based only on the medical files and made by physicians who had not seen Mladić since 2015, and submits that "[s]uch facts are extraneous and irrelevant if the official records

⁵⁷ Impugned Decision, para. 18.

⁵⁸ Impugned Decision, para. 18, fn. 52.

⁵⁹ Impugned Decision, para. 18.

⁶⁰ Impugned Decision, para. 18.

⁶¹ Impugned Decision, para. 18.

⁶² Impugned Decision, para. 18.

⁶³ Impugned Decision, para. 18.

provided by the UNDU and [REDACTED] demonstrate on their face a failure to adhere to medical guidelines”.⁶⁵ Furthermore, he argues that the Trial Chamber did not provide any analysis on why it considered the reports of the RMO and the Independent Medical Specialists more reliable than those annexed to the Request Before the Trial Chamber.⁶⁶ Finally, he avers that the Trial Chamber failed to take into account the humanitarian grounds – namely, that Mladić “is at a high risk of a potential fatal outcome”⁶⁷ – for granting the request for provisional release.⁶⁸

20. The Prosecution responds that the Trial Chamber reasonably weighed the medical evidence in determining that Mladić’s rights are compatible with continued detention.⁶⁹ In particular, the Prosecution considers that the Trial Chamber’s assessment that the reports of the RMO and the Independent Medical Specialists were more reliable than the medical reports annexed to the Request Before the Trial Chamber was within its discretion.⁷⁰ Furthermore, the Prosecution submits that the Trial Chamber reasonably concluded on the basis of the reports of the RMO and the Independent Medical Specialists that “there is no acute medical issue that remains unaddressed”.⁷¹

21. The Appeals Chamber recalls that the wording of Rule 65(B) of the Rules is unequivocal in providing that provisional release may only be ordered if a trial chamber is satisfied that the accused will appear for trial and, if released, will not pose a danger to any victim, witness or other person. Where a trial chamber finds that one of these two conditions has not been met, it need not consider the other, and must deny provisional release.⁷² Indeed, only if the prerequisites are fulfilled, may the existence of sufficiently compelling humanitarian grounds be considered in granting such release. Despite its conclusion that the requirements of Rule 65 of the Rules were not met, the Trial Chamber nonetheless addressed Mladić’s serious allegations concerning the insufficiency and inadequacy of his current medical treatments and therapies and the alleged acute risk for his health.⁷³ The Trial Chamber held that it had a responsibility to ensure respect for Mladić’s fundamental rights and examined whether his state of health is incompatible with continued detention.⁷⁴ Mladić’s argument that the Trial Chamber disregarded these concerns is therefore entirely unfounded.

⁶⁴ Appeal, paras 12, 31-37.

⁶⁵ Appeal, para. 31. See also Appeal, paras 32, 34-35.

⁶⁶ Appeal, para. 36.

⁶⁷ Appeal, para. 37.

⁶⁸ Appeal, paras 37, 42.

⁶⁹ Response, paras 11-12.

⁷⁰ Response, para. 11.

⁷¹ Response, para. 12.

⁷² *Prosecutor v. Ramush Haradinaj et al.*, Case No, IT-04-84-AR65.2, Decision on Lahi Brahimaj’s Interlocutory Appeal against the Trial Chamber’s Decision Denying his Provisional Release, 9 March 2006, para. 6.

⁷³ See Impugned Decision, para. 18.

⁷⁴ See Impugned Decision, para. 18.

22. The Appeals Chamber considers, moreover, that Mladić fails to demonstrate that the Trial Chamber abused its discretion when concluding that Mladić's state of health was compatible with continued detention.⁷⁵ The Trial Chamber was presented with diverging and opposed medical opinions. While in certain instances trial chambers are called upon and able to engage in a comparison of varying medical expert opinions, the decision of whether to do so lies entirely within its discretion. Another avenue open to a trial chamber in such a scenario would be to engage yet (an)other medical expert(s) with the purpose of providing an independent assessment of the differing opinions. The Appeals Chamber notes that, in this case, the Independent Medical Specialists whose reports the Trial Chamber ultimately relied upon in reaching its conclusion in the Impugned Decision were appointed in exactly such a circumstance, namely, following an Appeal Chamber Decision which found that the Trial Chamber should have ordered an independent medical examination of Mladić (in the context of disposing of a defence motion to modify the trial sitting schedule).⁷⁶

23. The Appeals Chamber further notes that the Independent Medical Specialists were requested to respond to the specific allegations of insufficient and inadequate medical treatments and therapies made in the Request Before the Trial Chamber.⁷⁷ In doing so, the Independent Medical Specialists addressed these allegations, explained why the current regime of treatments and therapies are sufficient and adequate, and rebutted the allegation that Mladić's treatment was not in line with internationally recognized standards.⁷⁸ Moreover, while the Independent Medical Specialists acknowledged that Mladić [REDACTED],⁷⁹ they nonetheless concluded that [REDACTED] was not warranted.⁸⁰ Under these circumstances, it was within the Trial Chamber's discretion to consider their reports, and that of Mladić's RMO as more reliable than the reports

⁷⁵ See Impugned Decision, para. 18.

⁷⁶ *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-AR73.3, Decision on Mladić's Interlocutory Appeal Regarding Modification of Trial Sitting Schedule Due to Health Concerns, 22 October 2013 (confidential), para. 13. See *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Order for Medical Examination of the Accused Pursuant to Rule 74 bis, 15 November 2013, paras 3, 6-7, 9 (whereby the Registry was instructed to arrange for the medical examination of the Accused by a cardiologist and a neurologist). The Appeals Chamber notes that, on 14 March 2014, the Trial Chamber instructed the Registry to arrange for medical examination of Mladić by the Independent Medical Specialists on an ongoing basis (*Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Decision on Trial Sitting Schedule, 14 March 2014 (confidential) ("Mladić Decision on Trial Sitting Schedule"), para. 22).

⁷⁷ *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Registrar's Submission Concerning the Defence Motion of 20 March 2017, 7 April 2017 (confidential with confidential annexes) ("Registrar's Submission on Defence Motion"), para. 3; *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Deputy-Registrar's Submission of Independent Expert's Medical Report, 7 April 2017 (confidential with confidential annexes) ("Deputy Registrar's Submission of Medical Report"), para. 2.

⁷⁸ Registrar's Submission on Defence Motion, Annex B (report of Independent Medical Specialist [REDACTED]) (confidential) ("[REDACTED] Report"); Deputy-Registrar's Submission of Medical Report, Annex B (report of Independent Medical Specialist [REDACTED]) (confidential) ("[REDACTED] Report").

⁷⁹ See [REDACTED] Report, p. 10; [REDACTED] Report, pp 1, 2 (expressing agreement with the conclusion of the [REDACTED] offered by Mladić in Annex A of the Request Before the Trial Chamber that Mladić remains [REDACTED] (p. 1) and stating that [REDACTED] (p.2)). See also Registrar's Submission on Defence Motion, para. 6.

⁸⁰ [REDACTED] Report; [REDACTED] Report.

annexed to the Request Before the Trial Chamber. Equally the Appeals Chamber is of the view that it was within the discretion of the Trial Chamber to consider the fact that the RMO and Independent Medical Specialists “have regularly seen and assessed the Accused for many years”⁸¹ as a factor in its decision to consider their reports more reliable than those of “medical professionals who have either not personally examined the Accused or seen the Accused in 2015 only”.⁸² The Appeals Chamber considers that Mladić has failed to demonstrate that the Trial Chamber’s conclusion that his state of health was compatible with continued detention was a finding which no reasonable trier of fact could have made.

C. Whether the Impugned Decision was unfair and unjust

24. Mladić submits that the Impugned Decision was unfair and unjust,⁸³ and that the filing date of the Impugned Decision may give the public the perception that the Impugned Decision was “made as a political statement against Mr. Mladić and the Serb people and the VRS”.⁸⁴ He alleges that the Trial Chamber delayed the filing of the Impugned Decision as it was well aware that the date of its issuance was the date of Mladić’s appointment as commander of the Main Staff of the VRS and that it is also the date of an official holiday in Republika Srpska, “the day of the Army”.⁸⁵ Mladić further avers that Mladić “has not been afforded the type of review [...] as similarly placed accused have received”.⁸⁶ The Prosecution responds that these allegations are absurd and unsubstantiated attacks on the integrity of the Trial Chamber, which have no place in the Appeal and fail to demonstrate unreasonableness or a lack of fairness.⁸⁷

25. The Appeals Chamber rejects these allegations as unsubstantiated and inappropriate. The suggestion that the choice of the date of the filing was “an apparently purposeful act”⁸⁸, and was made as a “political statement”, unacceptably questions the integrity of the Judges of the Trial Chamber. The Appeals Chamber advises the Defence to refrain from using the judicial forum as a platform to espouse such baseless allegations, and reminds Counsel of the basic principles set out in Article 3 of the Code of Professional Conduct for Counsel Appearing Before the International

⁸¹ Impugned Decision, para. 18. See also *Mladić* Decision on Trial Sitting Schedule, p. 9.

⁸² Impugned Decision, para. 18.

⁸³ Appeal, para. 42. See also Appeal, paras 38-39, 41, 43.

⁸⁴ Appeal, para. 39.

⁸⁵ Appeal, para. 39.

⁸⁶ Appeal, para. 38. See also Reply, para. 18 (“it is fact that [...] the same trial judges analyzed and gave well-reasoned decisions giving weight to guarantees of non-states and uncooperative states when non-Serbs were before them, and it is likewise fact they refused to perform the same depth of analysis as to a Serb, Ratko Mladić and did so on a date that is a holiday/anniversary of the formation of the VRS and his appointment”).

⁸⁷ Response, para. 13.

⁸⁸ Appeal, para. 39.

Tribunal.⁸⁹ Finally, concerning Mladić’s submission that he has not been afforded “the type of review [...] as similarly placed accused have received”, the Appeals Chamber emphasises that provisional release decisions are fact-intensive, and they are discretionary. The fact that other trial chambers reached different conclusions in different cases, having taken into account similar factors, has no bearing on the reasonableness of the finding of the Trial Chamber in this case.⁹⁰

D. Conclusion

26. The Appeals Chamber finds that Mladić has failed to demonstrate a discernible error of the Trial Chamber in relation to the Impugned Decision.

V. DISPOSITION

27. For the foregoing reasons, the Appeals Chamber:

DISMISSES the Appeal.

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

Dated this thirtieth day of June 2017,
At The Hague,
The Netherlands.



Judge Carmel Agius
Presiding Judge

[Seal of the Tribunal]

⁸⁹ Code of Professional Conduct for Counsel Appearing Before the International Tribunal, IT/125 REV.3, 22 July 2009, (Article 3(ii): “as legal practitioners, counsel shall maintain high standards of professional conduct”; Article 3(iii): the role of counsel as advocates in the administration of justice requires them to act honestly, independently, fairly, skilfully, diligently, efficiently and courageously.”)

⁹⁰ *Cf. Mrkšić* Decision, para. 15.