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UNITED NATIONS

	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991	Case No.	IT-01-42-T
		Date:	26 May 2004
		Original:	English

IN THE TRIAL CHAMBER II

Before: **Judge Kevin Parker**
Judge Krister Thelin
Judge Christine Van Den Wyngaert

Registrar: **Mr. Hans Holthuis**

Decision of: **26 May 2004**

PROSECUTOR

v.

PAVLE STRUGAR

DECISION RE THE DEFENCE MOTION TO TERMINATE PROCEEDINGS

The Office of the Prosecutor:

Ms. Susan Somers
Mr. Philip Weiner
Mr. David Re

Counsel for the Accused:

Mr. Goran Rodić
Mr. Vladimir Petrović

I. INTRODUCTION

1. This Decision of Trial Chamber II (hereinafter: "Trial Chamber") is in respect of the Accused's fitness to stand trial. Generally the Trial Chamber will use interchangeably the words "fitness" or "competence" to stand trial.

2. The Accused is being tried by the Trial Chamber on an Indictment which alleges six counts of violations of the laws and customs of war arising from alleged artillery and mortar shelling of the Old Town of Dubrovnik conducted by forces under his command on 6 December 1991. Specific counts include murder, cruel treatment, attacks on civilians, devastation not justified by military necessity, unlawful attack on civilian objects, and destruction or wilful damage to institutions dedicated to religion, charity, the arts, historic monuments and works of arts and science. Both individual criminal responsibility and command responsibility are relied on. The Accused was then a General of the Yugoslav People's Army. He is now retired and is some 70 years of age. The Accused is a man of intelligence and education who achieved considerable success in his chosen military career. By the very nature of his military experience he is very familiar with the making of significant decisions and the exercise of authority. In the proceedings in this Tribunal he is represented by two experienced counsel.

3. No issue of his fitness to stand trial was raised when the Accused pleaded to the Indictment. Indeed it was not until the final pre-trial conference held on 15 December 2003 that the Defence requested that a medical examination of the Accused be carried out and his fitness to stand trial established. The Pre-Trial Judge, having considered the medical records of the Accused on which the Defence relied, found no reason for postponing the commencement of the trial, which was listed for the following day.

4. On 16 December 2003 the Defence filed a motion for a medical examination of the Accused. Having examined a written report on the medical condition of the Accused prepared by Dr de Both at the instigation of the Chamber, and the medical records of the Accused on which the Defence relied, the Trial Chamber found no justification for ordering any further examination. It did, however, leave it open for the Defence to pursue the issue further if so advised.[1] The trial continued.

[1] *See* the Trial Chamber's "Decision on the Defence Motion for a Medical Examination of the Accused pursuant to Rule 74b*is* of the "Rules" of 19 Dec. 2003.

5. On 3 February 2004 the Defence requested the termination of the proceedings, submitting that, in the light of a medical report of Professor Lečić-Toševski filed on the preceding day and the previous medical history of the Accused as revealed by his medical records, he was not fit to stand trial[2].

6. At a hearing on 4 February 2004 the Prosecution submitted that the Defence motion should be dismissed. It was contended the motion lacked adequate foundation and support. The Trial Chamber did not dismiss the motion but invited the Defence to supplement the report and the Prosecution to arrange for its own medical examination of the Accused. In the unusual circumstances, and having regard to the material then before the Trial Chamber and its own observations of the Accused's capacity during the trial to that time, the Trial Chamber decided that the trial should continue pending determination of the motion. It did so in the knowledge that the Defence relied on what was said to be a permanent although progressively worsening condition of the Accused. If that were the case, and if the Accused was found to be unfit to stand trial, there would be no injustice to the Accused because the trial would have to be abandoned.

7. On 12 February 2004 the Defence submitted a "Confidential Defence Notice and Confidential Annex". The Annex contained a further report of Professor Lečić-Toševski. On the same day the Defence filed confidentially a "Defence Motion to Terminate Proceedings", in which they sought the discontinuance of the trial, relying on the opinion of Professor Lečić-Toševski and the Accused's previous medical history as revealed by his medical records.

8. On 17 February 2004, on the motion of the Prosecution, the Trial Chamber issued a "Confidential Order for a Magnetic Resonance Imaging Scan of the Accused". This was to facilitate the examination of the Accused by experts retained by the Prosecution. The past medical records of the Accused disclosed that an MRI scan had been conducted in 2002 and Professor Lečić-Toševski had placed some reliance on the results of that scan.

9. On 22 March 2004 the Prosecution filed a medical report of the Accused prepared by Drs B. Blum, V. Folnegović-Šmalc and D. Matthews. Other supporting affidavits have since been filed.

10. Having on 30 March 2004 heard opposing submissions of the Parties on the issue, on 1 April 2004 the Trial Chamber essentially upheld the submissions of the Defence and ordered that there should be a limited opportunity for each party to cross-examine on the medical report(s) relied on by the opposing party.

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[2] "Defence Notice and Confidential Annex" filed confidentially on 2 Feb. 2004 by the Defence and containing a medical report of Professor Lečić-Toševski.

11. On 28-29 April 2004 the Trial Chamber heard evidence from Professor Lečić-Toševski and Drs Blum and Matthews. Written submissions were then filed, which were supplemented on 6 May 2004 by brief oral submissions.[3] The decision of the Trial Chamber on the issue of the fitness of the Accused to stand trial was then reserved.

II. SUBMISSIONS OF THE PARTIES

A. Defence

12. The Defence primarily relies on the two reports of Professor Lečić-Toševski (the "Defence expert") who is a Neuropsychiatrist and visiting Professor of Psychiatry at the University of Belgrade. She specialises, among other areas, in the treatment of personality disorders and the psychobiology of stress. Professor Lečić-Toševski has been involved in a project relating to the treatment of people suffering from post-traumatic stress disorder after war. She is Head of the Centre for Research and Education in the Institute for Mental Health in Belgrade, President of the National Commission for Mental Health of the Ministry of Health in Belgrade, and President of the Section for Preventive Psychiatry of the World Psychiatric Association.

13. The opinion of Professor Lečić-Toševski, in essence, is that the Accused discloses symptoms of a number of somatic and psychiatric illnesses, including, among others, vascular dementia, post-traumatic stress disorder, depression, what may be loosely called arthritic disorders and chronic renal failure. She expressed the view that those disorders, separately and in combination, affect his memory, attention span, concentration, abstraction and organising ability. Her opinion is that the impairment of those functions has resulted in the deterioration of the trial abilities of the Accused. She considered that he was unable to participate at a high level in the proceedings, or testify. She expressed the view that the Accused was able to participate in his defence only with great difficulty and was unable to advise his counsel about the trial.

14. She had examined the Accused in January this year in The Hague and had also interviewed his wife and son. Her report was based on the psychiatric history of the Accused, his psychic status, clinical diagnosis made according to the DSM-IV criteria, the use of diagnostic instruments such as questionnaires for depression, other symptoms and posttraumatic stress, as well as a review of previous medical findings and evidence, including a neuropsychological assessment, and information gathered from his wife and son.

[3] "Defence Submission" dated 4 May 2004 and "Prosecution's Submissions on the Fitness of the Accused to Stand Trial" dated 5 May 2004.

B. Prosecution

15. The Prosecution relied primarily on a joint opinion of Drs Bennett Blum, Vera Folnegović-Šmalc and Daryl Matthews (the "Prosecution experts").

Dr Blum is a physician practising as a Forensic Psychiatry Consultant in California and Arizona in the U.S.A. He is a consultant to a number of organisations and institutions. He specialises in, *inter alia*, forensic assessment of mental capacity and geriatric psychiatry. Dr Blum is the author of a standard text on the assessment of mental capacity and geriatric psychiatry and has devised a test, now in general use, for assessing mental competence in older people.

Dr Folnegović-Šmalc is a Professor and Head of the Department of Psychiatry at the University of Zagreb and chairs the Croation Clinical Psychiatry Association. She specialises in, *inter alia*, forensic psychiatry and psycho-pharmacotherapy and has often provided expert reports for court purposes.

Dr Matthews is a Professor of Psychiatry at the University of Hawaii and Director of the Forensic Psychiatry Programme at that university. He specialises in, *inter alia*, evaluating mental state at the time of an alleged offence and assessing competency to stand trial. He has evaluated competency to stand trial in several hundred cases.[4] He holds the position of Forensic Psychiatry Consultant to the State of Hawaii Department of Health and is a member of the Forensic Psychiatry Committee of the American Board of Psychiatry and Neurology.

16. Drs Blum, Folnegović-Šmalc and Matthews, in their joint report, were of the view that the Accused suffers from "uncomplicated" vascular dementia, has a mildly decreased memory, and experiences occasional word-finding difficulty. They did not find sufficient symptomatology to diagnose Posttraumatic Stress Disorder or Major Depressive Disorder. They found no evidence of a significant impairment in the Accused's ability to recall pertinent information, or to focus his attention for extended periods of time when interested in the proceedings or plan. They expressed the opinions that the Accused was able to understand what he was charged with, had a good general understanding of the trial process, and was able to communicate with his counsel, to testify, and to understand the consequences of conviction.

17. In reaching their opinion the Prosecution experts took into account the transcript of these proceedings and medical records of the Accused. During an interview with him they asked a number of neuropsychiatric questions designed to assess the functioning of different aspects of his brain. In addition, they interviewed two correctional officers and a nurse from the UN Detention

[4] Transcript p 5678.

Centre and also followed part of the proceedings in order to better observe the Accused. They also had the results of the 2004 MRI scan which was the subject of a specialist report.

18. The past medical history of the Accused, as revealed by his records which were available to all the experts and which are before the Trial Chamber, were also relied on by the Defence. As these have been considered by the expert witnesses, and have been referred to where they were considered relevant, there is no need to deal specifically with the past medical history in these reasons.

III. THE LAW

A. The legal basis for the Motion

19. The Defence motion is not grounded in any express provision of the constituting Statute, or the Rules of Procedure and Evidence, of this Tribunal. Further, no explicit legal basis for it is to be found in the existing jurisprudence of the Tribunal. Yet both parties before the Trial Chamber have proceeded on the basis that if the Accused is found to be unfit for trial, the trial should be terminated.

20. To better understand this it is first necessary to observe that the Statute of the Tribunal does not contain provisions regulating a number of matters relating, in particular, to the answerability of an accused to trial, which matters are usually found in criminal justice systems. Indeed, in the Report of the Secretary-General of the United Nations presenting the draft of what became the Statute of this Tribunal, it was explicitly anticipated that in the absence of express provisions it would be necessary for the Tribunal "to decide on various personal defences which may relieve a person of individual criminal responsibility, such as minimum age or mental capacity, drawing upon general principles of law recognized by all nations".[5] While this focussed specifically on personal defences, the issue of fitness to stand trial appear to be on a similar footing.

21. While there is no express provision, the Statute of the Tribunal offers material assistance for the present case, at least by way of implication. It is significant that before the Tribunal an accused has a number of relevant procedural rights. Provision for these rights is made in Articles 20 and 21 of the Statute. The enjoyment of these rights would appear to presuppose that an accused has a level of mental and physical capacity. At the commencement of trial proceedings the Trial Chamber is required to confirm that an accused understands the indictment (Art 20 par 3). The accused is, *inter alia*, entitled to defend himself in person (Art 21 par 4(d)), to examine the

witnesses against him (par 4(e)), and to have the free assistance of an interpreter if he cannot understand or speak the language used in the Tribunal (par 4(f)).

22. Article 20 par 3 clearly assumes that an accused must have the capacity to understand the indictment. The rights to defend in person and examine witnesses appear to require for their exercise *inter alia* a capacity to:

- understand the purpose, including the consequences, of the proceedings,
- understand the course of the proceedings, including the nature and significance of pleading to the charges,
- understand the evidence, and
- testify (should the accused so choose).

The availability of counsel to assist an accused in his defence is a feature of trials before the Tribunal. The availability of counsel may certainly enable an accused to more adequately deal with each of the above matters, and in a particular case may well adequately compensate for any deficiency of a relevant capacity. The use of counsel requires, however, that the accused has the capacity to be able to instruct counsel sufficiently for this purpose. Article 20 par 4(f) further clearly assumes that an accused has a capacity to understand or speak a language used in the Tribunal, or, with the assistance of an interpreter, to follow the proceedings in another language. The Trial Chamber observes that this analysis may not be exhaustive, but it is sufficient for present purposes.

23. The nature of these rights indicates that their effective exercise may be hindered, or even precluded, if an accused's mental and bodily capacities, especially the ability to understand, *i.e.* to comprehend, is affected by mental or somatic disorder.

24. In the view of the Trial Chamber it is apparent, from the provisions and the clear implications of Articles 20 and 21 of the Statue of the Tribunal, that an accused will have these capacities or, with assistance such as counsel, interpretation or otherwise, will be able to exercise these capacities, in each case in a sufficient degree to enable the defence of the accused to be presented.

25. If that view is well founded, it is a necessary implication of the Statute of the Tribunal that, should there be adequate reason, any question whether the accused is fit to stand trial, *i.e.* has the

[5] *See* Report of the Secretary-General Pursuant to Par 2 of Security Council Resolution 808 (1993), presented on 3 May 1993. An example of such an approach is to be found in *Delalić et al (Čelebići)*, Case IT-96-21-T, Trial Judgement, 16 Nov. 1998, par 1161.

necessary capacities, or is able with assistance to exercise them, should be determined by the Tribunal.

26. The Trial Chamber is persuaded, therefore, that it is competent for it to determine in the present case whether the Accused is fit to stand trial.

27. We would add, although neither issue is raised in the present case or suggested by the evidence, that the question of fitness to stand trial is, by nature of the subject matter, one which may possibly change in the course of a long trial. Further, in some cases a temporary unfitness may be remedied with treatment so that the trial could continue after a delay or interruption.

B. Further Legal Justifications

28. The Trial Chamber is reinforced in its decision in respect of its competence to determine the fitness of the Accused to stand trial, by further considerations to which it will briefly refer.

29. It is a common feature of the legal systems of the world to which the Chamber has been able to readily refer, that an accused may be found unfit to stand trial. The precise formulation, scope and operation of the law in this regard inevitably varies between national jurisdictions, but the underlying principle appears to enjoy general acceptance.

30. Reference may be made to the position in the United States of America where the right not to stand trial while incompetent was considered fundamental by the U.S. Supreme Court in *Cooper v Oklahoma*[6]. In England and elsewhere, at common law, it is the position that a person may be tried for a criminal office only when there is a sufficient mental capacity to present a defence: *Dashwood v Reg.*[7] In those countries which are parties to the European Convention on Human Rights it has been held by the European Court of Human Rights, on the basis of Article 6 of that Convention, that a person charged with a criminal offence is entitled to take part in the hearing.[8] The effective exercise of this right has been held to presuppose that the accused is capable, from a mental and physical point of view, of participating in the criminal proceedings against him.[9] The Trial Chamber notes that there are close comparisons between the relevant provisions of Article 6 of that Convention and Article 21 of the Statute of this Tribunal.[10]

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6 *Cooper v Oklahoma*, 517 US 348 (1996).

7 *Dashwood v Reg.* [1943] KB 4.

8 *See Colozza* v *Italy*, European Court of Human Rights, Judgement, 12 Feb. 1985, Series no. 89, p 14, par 27 and *Stanford v United Kingdom*, Judgement, 23 Feb. 1994, Series No. 282-A, pp 10-11, par 26.

9 *See Mielke v Germany*, application No. 30047/96, European Commission of Human Rights, Decision, 25 Nov. 1996.

10 Note also Article 14 of the International Covenant on Civil and Political Rights.

31. The Trial Chamber observes that in a number of jurisdictions the decisive factor for evaluation of fitness to stand trial is, or is expressed by reference to, the presence of a mental disorder.[11] It is to be noted, however, that in some national jurisdictions, laws dealing with fitness to stand trial, which appear to be directed to mental disorders, have been understood and applied more widely. For example, s. 2 of the Criminal Lunatics Act 1800 (UK)[12] contained the words:

> "if any person indicted for any offence shall be insane, and shall upon arraignment be found so ... such person cannot be tried upon such indictment..."

The effect of this provision was interpreted in *Reg. v Pritchard*[13] to be: - " ... whether the prisoner has sufficient understanding to comprehend the nature of this trial, so as to make a proper defence to the charge" In that case the accused was not insane, but deaf and dumb. Since then, the provision has been construed as also including persons who are not insane "but who, by reason of some physical or mental condition, cannot follow the proceedings at the trial and so cannot make a proper defence in those proceedings".[14]

32. The Trial Chamber further notes that, in principle, trials in *absentia* are not permitted before the Tribunal.[15] This rule would appear to be devoid of any substance if it related to the mere physical presence of the accused in court. As the presence of the accused has been held to be indispensable for the determination of guilt or innocence,[16] the requirement of presence appears to be to ensure the presence of an accused person who is capable of assisting the Tribunal by the presentation of his or her defence.

33. The Trial Chamber is also conscious that neither the Statute of the International Criminal Tribunal for Rwanda, nor the Rome Statute of the International Criminal Court, deal expressly with fitness of an accused to stand trial. However, in the case of *The Prosecutor v Nahimana, Barayagwiza and Ngeze*,[17] while the issue was not examined in detail, the ICTR granted a motion for a medical, psychiatric and psychological examination of the accused Ngeze to determine his fitness to stand trial. The resulting report verified that he was competent to stand trial and the matter was not pursued further. Also, while no case has yet been dealt with by the ICC, the Rules of Procedure and Evidence it has promulgated, in Rule 135, make express provision with respect to fitness of an accused to stand trial. Thus the view reached by the Trial Chamber appears to be in keeping with that held by the ICTR and the ICC.

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[11] *See* for example section 2 of the Criminal Code of Canada.
[12] (39 & 40 Geo. 111. c. 94)
[13] *Reg. v Pritchard* (1836) 7 Car & P 303 (173 ER 135) at 304.
[14] *Reg. v Podola* (1960) 1QB 325 at 353.
[15] *See Blaskić,* Case IT-95-14-AR 108*bis*, Appeals Chamber, Judgement on the Request of the Republic of Croatia, 29 Oct 1997.
[16] *Blaskić, idem.*
[17] Case No. ICTR-99-52-T, Trial Judgement, 3 Dec. 2003, par 52.

34. Reference should also be made to the jurisprudence of those many national jurisdictions which places emphasis on a direct assessment of particular capabilities relating to the accused's participation in his trial. The Trial Chamber is conscious in this context of, among other authorities, the decision of *Dusky v. United States*, where the US Supreme Court stipulated that the "test must be whether [the defendant] C has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational as well as factual understanding of the proceedings against him".[18] The Trial Chamber further recalls the English common law criteria formulated by Baron Alderson in *Reg. v Pritchard*: "First, whether the prisoner is mute of malice or not; secondly, whether he can plead to the indictment or not; thirdly, whether he is of sufficient intellect to comprehend the course of proceedings on the trial, so as to make a proper defence – to know that he might challenge jurors to whom he might object – and to comprehend the details of the evidence." [19] The word "comprehend" in this passage means no more than "understand".[20] The accused, however, need not have sufficient capacity to make an able defence, or to act wisely or in his own best interest.[21] In the High Court of Australia in the case of *Ngatayi v The Queen* it has been held that the issue is "the capacity of the accused to understand the proceedings", a test which needs to be applied "in a reasonable and commonsense fashion" as complete understanding may require intelligence of quite a high order, whereas "it has never been thought that a person can escape trial simply by showing that he is of low intelligence".[22] In that case the approach was approved that the issue is whether the accused "fails to come up to certain minimum standards which he needs to equal before he can be tried without unfairness or injustice to him".[23]

C. The Legal Test

35. In the view of the Trial Chamber a mental disorder is not a prerequisite for finding a person unfit to stand trial. There is no apparent justification for limiting the relevant operation of Article 20

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[18] *See Dusky v United States* 362 U.S. 402 (1960).
[19] *See Reg. v Pritchard* (1836) 7 C. & P 303 at 304 (173 ER 135).
[20] *Reg. v Podola* (1960) 1 QB 325 at 354.
[21] *Reg. v Robertson,* (1968) 1 WLR 1767; *Reg. v Berry* (1997) 66 Cr App R 156 at 158.
[22] *Ngatayi v The Queen* (1980) 147 CLR 1 at 9.
[23] *Ngatayi v The Queen, supra* at 9; *Kesavarajah v The Queen* (1994) 181 CLR 230, at [30]. These minimum standards were expressed as follows – The accused needs "to be able to understand what it is he is charged with. He needs to be able to plead to the charge and to exercise his right of challenge (to a juror). He needs to understand generally the nature of the proceeding, namely, that it is an inquiry as to whether he did what he is charged with. He needs to be able to follow the course of the proceedings so as to understand what is going on in court in a general sense, though he need not, of course, understand the purpose of all the various court formalities. He needs to be able to understand the substantial effect of any evidence that may be given against him; and he needs to be able to make his defence or answer the charge. Where he has counsel he needs to be able to do this through his counsel by giving any necessary instructions and by letting his counsel know what his version of the facts is and, if necessary, telling the court what it is. He need not, of course, be conversant with court procedure and he need not have the mental capacity to make an able defence; but he must have sufficient capacity to be able to decide what defence he

and 21 to cases of mental disorder. It is of the view that fitness or competence to stand trial is a matter which, although undoubtedly connected with the physical and mental condition of an accused person, is not confined to establishing whether a given disorder is present. The Trial Chamber considers that the issue is not whether the accused suffers from particular disorders, but rather is better approached by determining whether he is able to exercise effectively his rights in the proceedings against him.[24]

36. In the view of the Trial Chamber, Articles 20 and 21 of the Statute of the Tribunal commend the view that the appropriate approach to be adopted in determining fitness to stand trial is to evaluate the capacity of the accused to exercise his express and implied rights as identified earlier in these reasons. This will give full effect to the Statute, and the result will not be out of keeping with the widely prevailing position in national jurisdictions. These capacities identified may be stated shortly as:

- to plead,
- to understand the nature of the charges,
- to understand the course of the proceedings,
- to understand the details of the evidence,
- to instruct counsel,
- to understand the consequences of the proceedings, and
- to testify.

As indicated earlier the Trial Chamber would not regard this as necessarily an exhaustive list of capacities, but it is adequate in the context of the issues raised in this case. It is to be observed that the Parties identified similar, though not as extensive, criteria and do not seem to propose any broader tests. For the reasons given the Trial Chamber will have regard to any impairment of these capacities, whether due to mental or physical causes, for the purpose of determining the fitness of the Accused to stand trial.

37. Of course, the capacities identified are difficult to measure in any objective manner. In particular, it is difficult to set a threshold beyond which an accused is considered fit to stand trial,

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will reply upon, and to make his defence and his version of the facts known to the court and to his counsel, if any" *Reg. v Presser* (1958) VR 45 at 48.

[24] A number of researchers point out that the presence of a psychotic disorder does not imply a direct causality with unfitness (*See* Ohayon, Crocker, St-Onge, Caulet, Fitness, Responsibility, and Judicially Ordered Assessments (in) Canadian Journal of Psychiatry, Vol. 43, June 1998, p 491). Some authors observe that clinicians are often preoccupied with psychiatric impairment at the expense of assessing specific abilities (*See* Greenberg, referring to Daniel, Beck and Herath, as well as Roesch, Capacity to Stand Trial: Pitfalls of Legal Interpretation (in) Canadian Journal of Psychiatry, Vol. 39, Mar. 1994, p 113).

but below which an accused is not fit. The provision of assistance to help with one or more capacities, *e.g.* counsel, adds a further dimension of complexity to any objective evaluation. Notwithstanding those difficulties it is necessary to make such an evaluation. The Trial Chamber further observes that, by their nature, the capacities identified will vary considerably between individuals as a matter of nature and without the influence of any physical or mental disorder. It would be entirely inappropriate, and unjustified, and antithetical to the application of international criminal law, to require that each of these capacities must be present at their notionally highest level, or at the highest level that a particular accused has ever enjoyed in respect of each capacity. Rather, as the jurisprudence of many nations has identified, in the application of criminal law what is required is a *minimum* standard of overall capacity below which an accused cannot be tried without unfairness or injustice.[25] In the context of the Statute of the Tribunal, it may be said that the threshold is met when an accused has those capacities, viewed overall and in a reasonable and commonsense manner, at such a level that it is possible for the accused to participate in the proceedings (in some cases with assistance) and sufficiently exercise the identified rights, *i.e.* to make his or her defence.

38. In the view of the Trial Chamber the burden of proving that the Accused is not fit to stand trial should be on the Defence,[26] and the standard of that burden should be merely "the balance of probabilities", and not a higher standard as is required of the prosecution when proving guilt in criminal cases.[27]

39. It should also be observed in view of the Defence motion to abandon the trial, that the consequences of finding an accused unfit to stand trial are likely to vary according to the circumstances. The Trial Chamber notes that in a number of jurisdictions, once a lack of capacity

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[25] *See* the discussion in par 34 (supra) and in the footnotes to that paragraph. In addition the Trial Chamber notes that the Ontario Court of Appeal adopted a test of "limited cognitive capacity" whereby the accused was fit to stand trial, even if he suffered from delusions, as long as those delusions did not distort his "rudimentary understanding" of the criminal process (*See Reg. v Taylor* (1992) 11 OR (3d), at 338).

[26] *See mutatis mutandis*, in respect of the special defence of diminished or lack of mental responsibility, *Delalić et al* (*Čelebići*), Case IT-96-21-T, Trial Chamber, Order on Esad Landzo's submission regarding diminished or lack of mental capacity, 18 June 1998; under French law - J. Pradel, (in) Criminal Procedure Systems in the European Community, C. Van Den Wyngaert (ed.), London, Brussels, Dublin, Edinburgh 1993, p 118; under Irish law - F. McAuley and J. O'Dowd, id., p 191; *McNaghten's Case* (1843) 10 Cl. & F. 200 (United Kingdom). *See* Sections 10 and 12 of the Criminal Law (Mentally Impaired Defendants) Act 1996 (Australia).

[27] *See Cooper v Oklahoma*, where the U.S. Supreme Court set out a standard of proof which is based on "preponderance of the evidence", as opposed to the burden of "clear and convincing evidence", the placing of which on the defendant by a lower court was regarded as a breach of the Fourteenth Amendment; *See* also Sections 10 and 12 of the Criminal Law (Mentally Impaired Defendants) Act 1996 (Australia) and in the United Kingdom - "if the contention that the accused was insane was put forward by the defence, and contested by the prosecution, there was a burden upon the defence of satisfying the jury of the accused's insanity, which burden was discharged if the jury were satisfied on the balance of probabilities that the insanity was made out" (*Reg. v Podola* (1960) 1 Q B 325, at 350); this Tribunal applied a similar standard in respect of the special defence of diminished or lack of mental responsibility (*See Čelebići*, cited above).

to stand trial is found, the trial is discontinued; in other jurisdictions the accused may be ordered to undergo appropriate treatment should the trial court become satisfied that he committed the charged acts. In some European civil law countries the trial in such a case continues but the legal representation of the accused is mandatory.[28] Notwithstanding this, there appears no statutory or other basis for a trial before this Tribunal to continue while an accused is unfit to stand trial. Moreover, in a case where the unfitness to stand trial is a temporary condition, it may prove appropriate to merely adjourn the trial and to continue the trial when the accused has sufficiently recovered. Other cases may require that a trial be abandoned. It may also be the case that an impairment of capacity is of such a nature and effect that measures can be taken to sufficiently alleviate the impairment, or its effect, so that the trial can continue. An obvious example would be the provision of special technical equipment to enable an accused with a hearing impediment to follow the proceedings. In some cases legal assistance to an accused may be a sufficient measure to compensate for any limitations of capacity of the accused to stand trial.[29]

IV. DETERMINATION OF ACCUSED'S FITNESS TO STAND TRIAL

A. Overview

40. The Trial Chamber has been considerably assisted by the Defence and Prosecution experts. Each of them are unquestionably experienced psychiatrists of considerable standing. Their respective reports are each quite detailed and fairly comprehensively reveal the approach taken to the assessment of the Accused's condition and the conclusions reached. The oral evidence, in particular the cross-examination, has been particularly helpful in enabling the Trial Chamber to understand more adequately the basis for the conclusions reached and the significance of the differences of approach. The quality and the thoroughness of the assistance of these experts left the Trial Chamber entirely satisfied that there was no need for the Chamber to obtain any additional expert assistance.

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[28] *See* Article 71 of the Criminal Procedure Code of the Federal Republic of Yugoslavia; Articles 78 par 1 (3) and 202 par 4 of the Polish Code of Criminal Procedure, as well as Articles 64 and 334 of the Portuguese Code of Criminal Procedure; in respect of countries of Central and Eastern Europe see Public Interest Law Initiative report on "Access to Justice in Central and Eastern Europe", available from http://www.pili.org/resources/access/country_reports.html, p 11.

[29] *See Mielke*, cited above and *Vaudelle*, European Court of Human Rights Judgement, 30 Jan. 2001, Reports of Judgements and Decisions 2001-1 par 61; "Similarly, in deciding whether an accused is capable of understanding the proceedings so as to be able to make a proper defence it is relevant that he is defended by counsel. If the accused is able to understand the evidence, and to instruct his counsel as to the facts of the case, no unfairness or injustice will generally be occasioned by the fact that the accused does not know, and cannot understand, the law. With the assistance of counsel he will usually be able to make a proper defence" (*Ngatayi*, cited above at p 9.)

B. The Expert Opinions

41. The essence of the opinions of the Defence and Prosecution experts has been set out earlier in this decision. In some respects there are diagnostic differences between the Defence expert on the one hand, and the Prosecution experts who are in mutual agreement on the other. In particular, there is no agreement on the presence of post-traumatic stress disorder (PTSD) and depression. There is also a difference as to the degree of vascular dementia and even the very possibility of measuring the disorder.[30]

42. The Defence expert has developed a special interest in PTSD. This may have encouraged or enabled recognition of symptoms of the condition at an earlier or lower level than by the application of accepted standard criteria which was the approach of the Prosecution experts, who considered that a diagnosis of PTSD was not justified. With respect to depression there was a common acceptance of the fact that the accused experiences depression. The difference between the Defence and Prosecution experts appeared to the Trial Chamber to be much directed to whether or not this warranted being categorised as a psychiatric disorder. In this respect the Trial Chamber was impressed with the particular experience of Professor Matthews with prisoners in custody, among whom he found a state of depression was quite a common experience as a reaction to their situation. The Trial Chamber accepts that in such a situation, which is that of the Accused, depression may be experienced as an emotional condition without there being a psychiatric disorder.

43. While all experts diagnosed the presence of vascular dementia and found that the Accused had some memory difficulties, they differed as to the significance of this for present purposes. The Defence expert relied on evidence of damaged areas in the smaller deeper blood vessels revealed by the 2002 MRI of the Accused's brain in this respect, whereas the imaging of the 2004 MRI did not permit adequate assessment of these smaller deeper blood vessels by the Prosecution experts. This could offer some explanation for differences between the respective experts, but the position of the Prosecution experts essentially was that whatever may have been the position in the smaller deeper blood vessels, the degree of the effect on memory caused by the vascular dementia was slight. Hence they saw no real need for closer study of the deeper vascular structure. The Trial Chamber did find to be somewhat surprising the apparent view of the Defence expert, which was strongly contested, that the degree of vascular dementia could not be satisfactorily measured. Apparently she considered that vascular dementia either existed as a condition, or it did not, and degrees of the condition could not be assessed. In this respect the Trial Chamber found the contrary opinion to be far more persuasive.

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[30] T 5642, 5687,

44. There were also other differences between the diagnoses and approaches of the Defence and Prosecution experts, and as to what conditions each saw to be material to the issue of the Accused's fitness to stand trial. One example is the effect on the brain of the renal disorder from which it is accepted that the Accused suffers. The Defence expert saw it relevant to measure the chemical balance (or imbalance) as a consequence of the kidney disorder. The Prosecution experts, while accepting the kidney disorder, did not see that chemical measurement would be of material assistance to their conclusions.

45. While these brief comments have concentrated on differences between the Defence and Prosecution experts, it must be observed that, overall, there was substantial agreement as to the mental and physical condition of the Accused. The Trial Chamber also notes, as has been observed earlier, that both the Defence and Prosecution experts had access to the past medical records of the Accused and have taken these into account in forming their respective opinions.

C. Assessment of Opinions

46. The Trial Chamber would observe, that, however the matters of diagnostic and other differences might be resolved, and putting aside the findings to which the Chamber has come in respect of some of them, it is misleading, in the present case at least, to see that the answer to the question of the Accused's fitness to stand trial lies in resolving these differences. As the Trial Chamber has set out earlier in these reasons, the issue of fitness to stand trial is not determined merely by the diagnosis of the mental and somatic disorders from which the Accused suffers, or by identifying which of those conditions *can* affect the functioning of the Accused's mind. These are but possible steps along the path to the material issue; which is the competence of the Accused, notwithstanding any physical or mental disorders from which he might suffer, to conduct his defence in the sense set out earlier in these reasons. This turns on the capacities of the Accused which have been identified in this decision. To illustrate this point, whether the Accused experiences depression by virtue of a psychiatric disorder, or otherwise, or has a renal disorder which is having a chemical effect on the functioning of his brain, is not determinative. What is material is his relevant capacities at the time of trial.

47. It is in this respect that material distinctions emerge between the Defence and Prosecution experts. Two observations are called for. First, the approach of the Defence expert, as revealed by her reports and her oral evidence, placed considerable emphasis on identifying the full range of mental and somatic disorders from which the Accused suffers and identifying the possible effects of such disorders on the functioning of his brain. However, the basis on which, having regard to these disorders and effects, the Defence expert then concluded that this Accused was not fit to stand trial, appeared to be less than satisfactorily explained. There was an inadequate linkage of the various

diagnoses and their possible or potential effects, with the issue of the actual effects experienced by this Accused on his relevant capacities. By marked contrast, the Prosecution experts consciously concentrated on evaluating the relevant capacities of the Accused; hence the actual diagnoses of disorders had a more limited relevance for the Prosecution experts. While they accepted for example that there was a level of dementia being experienced by the Accused, the Prosecution experts, particularly by observation and testing, sought to identify the effects and degree of that dementia, and were persuaded in the end that it was only minor in degree and effect. The reasons for reaching this conclusion were adequately set out. This approach impressed the Trial Chamber as more likely to provide a satisfactory basis for its conclusion as to the capacities of the Accused and his fitness to stand trial. There is no question but that the process of evaluation by all of the experts is necessarily one which involves complex assessments and judgements, and draws considerably on expertise and experience. In this context, the Trial Chamber has been conscious of, and has weighed carefully, the various criticisms advanced by the Defence against the reliability of the Prosecution experts' approach and conclusions. Nevertheless, for the reasons indicated, we find their approach to be better directed and the result more persuasive for relevant purposes.

48. Secondly, it appears to the Trial Chamber that the conclusion of the Defence expert may have been affected by a misapprehension of the relevant standard or test. Her conclusions are expressed in the following terms:-

> Fitness to stand trial
>
> By definition 'defendant facing criminal trials need to understand and participate in the proceedings. Psychiatric disorder can render a person incapable and unfit in relation to trial. The defendant should be able to follow the proceedings and be able to instruct lawyers so that defence can be made. The defendant should have capacity to *fully comprehend* the course of the proceedings in the trial, so as to make a proper defence, and to comprehend details of the evidence' (''New Oxford Textbook of Psychiatry'' Oxford University Press, 2000).
>
> The accused Mr. Pavle Strugar does not fulfil the above mentioned requirements and therefore does not have capacity to stand trial.
>
> The accused, Mr. Strugar has multiple somatic and psychiatric illnesses that impair his social and intellectual functioning.
>
> Due to multiple cognitive deficits (impaired ability to learn new information or recall previously learned information, dissociative amnesia for past traumatic events, attention deficit, difficulty in concentrating, lassitude, fatigue, sleepiness), Mr. Strugar is not able to participate in the trial. (emphasis added).

The passage in the New Oxford Textbook of Psychiatry referred to by the Defence expert reflects the English common law position which is identified earlier in this decision. Relevantly the passage from the New Oxford Textbook of Psychiatry at 2091-2 reads:-

> In its traditional formulation the test of unfitness to plead is whether the defendant is of sufficient intellect to *comprehend* the course of the proceedings in the trial, so as to make a proper defence, to know that he might challenge jurors, and to *comprehend* details of the evidence. Specific

> considerations are whether the defendant understands what he is charged with, the nature of the prosecution evidence, and the difference between a plea of guilty and not guilty. The defendant should also be able to follow the proceedings and be able to instruct lawyers so that the defence case can be made. It should also be remembered that in some cases defendants will need to be able to give evidence themselves, and their ability to do so will need to be considered. (emphasis added).

The Defence expert appears to have misquoted and misunderstood this passage as requiring that the Accused should have the capacity to *fully comprehend* the course of the proceedings in the trial. That is not the effect of the passage in the textbook. More relevantly, for the reasons given earlier, it is not the test which should be applied by the Trial Chamber. It sets too high a standard of comprehension for the purpose of assessing fitness to stand trial. Further evidence of the effect of this misunderstanding is noted in some comments in the following paragraph of this decision. The approach of the Prosecution experts is not affected by any similar deficiency.

49. The Trial Chamber will make some further brief observations on the capacities identified earlier in this decision in light of the evidence. Inevitably, in some cases matters noted under one heading may also have relevance to another heading.

Capacity to Understand the Nature of the Charges: All experts accept that the accused understands that he is accused and of what he is accused.

Capacity to Understand the Course of the Proceedings and the Details of the Evidence: The Defence expert expresses the view that the Accused understands the roles of the Trial Chamber, prosecution and defence, and that he is able generally to understand the trial and its purpose, but due to his somatic and psychiatric illnesses is not able to follow "details and all the elements of the trial." The Prosecution experts are of the opinion that the Accused understands the concepts of guilt *v* innocence, the roles of a judge, prosecutor, defence counsel and a witness, and comprehends the nature of the testimony against him. He was able to recount to the Prosecution experts in detail *inter alia* the history of changes to the indictment, describe the nature of the trial process and his role, the nature and purpose of cross-examination, and recount recent and past evidence and discuss it rationally.

The Trial Chamber observes that while the experts have concordant opinions on most of the relevant elements, their differences appear to be affected by the Defence expert's reliance on an inability to follow "details and all the elements of the trial", which reflects too high a standard, and is as in keeping with the Defence expert's understanding of the relevant standard as revealed in her reference to the New Oxford Dictionary of Psychiatry discussed above.

Capacity to Testify: The Defence expert is of the opinion that due to depression and apathy the Accused has a diminished ability to think and concentrate, which makes testifying difficult; because

of memory deficits (gaps) she is of the view that he is not able to fully testify. In support of her opinion the Defence expert refers to her interview with the Accused, which was "not an easy one" because of his impaired hearing and forgetfulness. The Prosecution experts consider that despite complaints of memory impairment, the Accused was able for example to provide a consistent account of the circumstances of his assuming command, throughout several retellings, and detail by reference to the facts why he considered he should be acquitted. They are of the view that he has sufficient ability to speak rationally, calmly, and logically in court. In their view he has only mildly decreased memory and occasional word-finding difficulty – "most often someone's name". They observed that he usually insisted on remembering the word, "which he usually manages", after which he continues elaborating his topic. They concluded that his "tenacity and vigilance of attention are normal, and so are his thought processes, both concrete and abstract". Dr Matthews expressed the opinion that the Accused's memory problems are not such as to impair his ability to testify. It is the Prosecution experts' opinion that he is aware of his right not to give evidence.

In the Trial Chamber's view the differences between the Defence and Prosecution experts appears to be affected by the Defence expert's application of a standard that is too high, as appear from her opinion that he is unable to "fully" testify. Even so, all experts appear to accept that there is some impairment of this capacity. But, as Dr. Mathews explained, not so as to preclude his giving evidence in his defence. In particular, in so far as this may impinge on his memory and concentration, this may be alleviated to some degree because he has the assistance of two experienced counsel. Nevertheless, and anticipating the outcome of this decision, should the Accused come to give evidence in the trial, the Trial Chamber will need to allow for this in assessing his evidence and credibility.

Capacity to Instruct Defence Counsel: The Defence expert submits that due to the changes in his brain the Accused has problems in planning, organising, sequencing and abstracting, which in her view are qualities necessary to participate in the trial and help his defence counsel. She is of the view that he is not able to give relevant data to his counsel and to advise them about the trial. She considers the Accused is passive and dependent upon his lawyers and she was unable to see that he had any kind of strategy for his defence.

The Prosecution experts express the opinion that the Accused can communicate with counsel in such a way that counsel is able to adequately present the position of the accused in respect of guilt or innocence and other relevant matters. They describe in some detail the Accused's comprehension that while his counsel are expert in law, he must instruct them in matters military, so they can adequately do their job. His reasons for choosing his two defence counsel were explained. They are appropriate and intelligent. His interviews with the Prosecution experts reveal a clear apprehension of the bases for his defence.

They also conclude, for well detailed reasons, that there "is no evidence at this time that (the Accused) has significant impairment in his ability to learn new information; recall pertinent information; focus his attention for extended periods of time when he is interested in the proceedings; or plan, consider likely consequences, initiate, monitor, and appropriately control his behaviour".

The Prosecution experts' view is based on interviews with the Accused and trial materials which, given the nature of this particular capacity, were of direct relevance to the matter under examination. On the other hand, the Defence expert relied mainly on a medical examination which did not directly focus on the capacity at issue. Further, the issue of the use of an incorrect standard by the Defence expert, which has been discussed already, detracts from the reliance which the the Trial Chamber can place on the Defence expert's opinion with respect to this capacity, although the problem in not expressly identifiable in this context.

Other Capacities: The Defence expert expressed the conclusion in oral evidence that the Accused is not able to participate actively "at a high level" in the trial and that he only partially understands the consequences of the proceedings.

The Prosecution experts observe among other relevant things that the Accused understands the pleas available and is able to understand that if he admits to have participated in the attack on Dubrovnik, as charged, the Judges will then most likely hear no evidence on the events themselves, but will limit themselves to hearing evidence relevant to sentencing, *i.e.* the determination of the punishment to be imposed. They express the view that the Accused is able to understand that if convicted he may be punished to a long term of imprisonment to be served in a foreign country.

As has been indicated the relevant test is not that the Accused be able to participate in his trial "at a high level", which is the standard apparently applied in this respect by the Defence expert. Further, this opinion was expressed generally and has not been supported by any examples demonstrating deficiencies in the Accused's capacity to participate. The Defence expert did not actually explore with the Accused his capacity to understand the consequences of the proceedings. By contrast the Prosecution experts had dealt with this issue specifically in their interview with the Accused and have set out the reasons for their opinion on this matter.

D. Conclusion

50. Having regard to these matters, and for the reasons discussed above, the Trial Chamber finds itself persuaded that it should accept the opinion of the Prosecution experts that the Accused is fit to stand trial.

51. The Trial Chamber is also in the somewhat unusual position of having itself been able to observe the Accused throughout nearly 5 months of trial. This has come about because the issue of the Accused's fitness to stand trial was not raised before arraignment or adequately before the evidence commenced, as has been set out earlier in these reasons. As a consequence, during the trial to this point the Trial Chamber has been addressed by the Accused in person on matters which concerned him. The members of the Trial Chamber were also present at the final pre-trial hearing when the Accused personally addressed the Pre-Trial Judge. On each occasion the comments of the Accused appeared to the Trial Chamber to be quite collected, relevant, well structured and comprehensive. As commented upon by Dr. Matthews, the Trial Chamber also has noticed occasions when the Accused sat with his eyes closed for a period. However, this posture has been seen to change when the evidence turned to a matter of greater interest to the Accused. There have been occasions when the Accused has raised a concern that he could not follow the proceedings because of some problem with his sound equipment or video display. There have been a number of occasions when some aspect of the evidence or proceedings has apparently concerned the Accused and he has raised this with counsel, at times quite emphatically. He has taken notes during the proceeding. He has reacted appropriately throughout to both favourable and adverse aspects of the evidence, although generally he is quite controlled in his reactions. Throughout the proceedings the Accused has been appropriately and well behaved. We record these matters with the observation that the Accused's conduct during the course of the proceedings has not provided any reason for the Trial Chamber to hesitate in its acceptance of the opinion of the Prosecution experts that the Accused is fit to stand trial.

52. The Trial Chamber sees therefore no grounds for either discontinuing the proceedings, as sought by the Defence, or adjourning them. Nor does the Chamber find it necessary to consider the provision to the Accused of any special assistance on account of any limitations in his capacity to stand trial. It finds the Accused is fit to stand trial and that this has been the position throughout the trial to this time. It should be noted that this finding does not depend on the onus of proof. The Trial Chamber finds itself entirely satisfied of the fitness of the Accused to stand trial.

V. DISPOSITION

53. For the reasons given, the Trial Chamber dismisses the motion of the Defence.

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

Dated this twenty sixth day of May 2004
At The Hague
The Netherlands

Judge Kevin Parker
Presiding

[Seal of the Tribunal]