



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-03-69-PT

Date: 27 April 2006

Original: English

IN TRIAL CHAMBER III

Before: Judge Patrick Robinson, Presiding
Judge O-Gon Kwon
Judge Iain Bonomy

Registrar: Mr. Hans Holthuis

Decision of : 27 April 2006

PROSECUTOR

v.

**JOVICA STANIŠIĆ
FRANKO SIMATOVIĆ**

PUBLIC WITH CONFIDENTIAL ANNEX

**DECISION ON STANIŠIĆ DEFENCE'S MOTION ON THE FITNESS OF THE
ACCUSED TO STAND TRIAL WITH CONFIDENTIAL ANNEXES**

Office of the Prosecutor

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Mr. Zoran Jovanović

THIS TRIAL CHAMBER of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 (“Tribunal”),

BEING SEIZED of the “Motion on the Fitness of the Accused to Stand Trial with Confidential Annexes”, filed on 28 February 2006 (“Motion”), in which the Defence of Jovica Stanišić (“Accused”) requests the Chamber:

- a.) (i) to stay the indictment and dismiss all the charges against the Accused because the Accused’s medical condition makes a fair and expeditious trial pursuant to Articles 20(1) and 21(4) of the Statute not possible,¹
- (ii) in the alternative, to schedule the trial so as to provide the Accused with the optimum conditions to prepare and understand the charges against him,² and
- b.) to hold an oral hearing into the Accused’s fitness to stand trial and scheduling of the trial to accommodate the Accused’s illness;³

NOTING the Defence arguments in the Motion, namely that “the medical condition of the Accused and in particular his debilitating intestinal disease has left him in a declining physical condition and thus significantly impaired in his ability to engage in meaningful preparations for his case”;⁴ that the “Accused’s physical infirmity prevents effective preparation to a degree, which would allow for a “fair and expeditious trial”;⁵ and that “the very real impairments endured by the Accused may well affect the Accused’s capacities to such a degree that he is unable to attain the level of cognitive function consistent with the minimum required of an Accused if the rights pursuant to Article 20 and 21 of the Statute are to be enjoyed”;⁶

¹ Motion, paras. 5, 32(a).

² *Ibid.*, para. 32(b).

³ The Defence suggested the hearing of three medical experts: Dr. Tarabar, Dr. Penchas, and Prof. Rachmilewitz. *See id.*, paras. 2, 6, 32(c).

⁴ The Defence argues that “his ability to give instructions where necessary to his/her lawyer, to play ‘an active’ role in his defence, and to give evidence in his own defence have been substantially affected and may in fact render him unfit to stand trial.” Motion, para. 1.

⁵ The Defence submits that “the Accused’s physical infirmity prevents effective preparation to the extent that he is unable, even with assistance of counsel, to understand the ‘cause and charges against him’ (Article 21(4)(b))...he lacks the capacity to be able to understand, in detail, the evidence against him sufficiently to be able to instruct counsel and to testify.” Motion, paras. 19–20.

⁶ Motion, para. 4.

NOTING the “Prosecution’s Response to Stanišić’s ‘Defence Motion on Fitness of the Accused to Stand Trial with Confidential Annexes’”, filed on 10 March 2006 (“Response”), in which the Prosecution opposes the Motion and each of the three orders sought therein and requests the Chamber to dismiss the Motion, arguing that:

- (a) “the medical evidence submitted with the Motion does not reach the threshold level required for an inquiry into the Accused’s fitness to stand trial”,⁷
- (b) “the order seeking dismissal of charges is beyond the power of the Trial Chamber”,⁸ and
- (c) the motion “is a premature request relating to the scheduling of sitting hours and conditions at trial, which should be considered at the Pre-Trial Conference or by the Trial Chamber during the trial”;⁹

NOTING that on 16 March 2006 the Defence filed its “Reply to Prosecution’s Response to Stanišić’s Defence Motion on Fitness of the Accused to Stand Trial with Confidential Annexes” (“Defence Reply”), in which the Defence submits that a stay of the indictment should be considered as an appropriate remedy and that the primary relief sought is a dismissal of the charges,¹⁰ and makes a distinction between (1) the fitness of the Accused to stand a trial *per se* and (2) the Accused’s fundamental right to effectively participate in his defence, arguing that the latter concept is not dependent upon the fitness of the Accused to stand trial;¹¹

CONSIDERING that the Defence did not seek leave, as required by Rule 126 *bis* of the Rules of Procedure and Evidence of the Tribunal (“Rules”), to reply to the Response, but the Chamber is aided by consideration of all the arguments raised and information provided by the parties;

NOTING that an accused has a number of procedural rights enshrined in Articles 20 and 21 of the Statute, in particular, an accused is entitled to a fair and expeditious trial and

⁷ Response, para. 2.

⁸ *Ibid.*, paras. 2, 7.

⁹ *Ibid.*, paras. 3, 31–32.

¹⁰ Defence Reply, para. 3.

¹¹ Defence Reply, para. 4.

proceedings that are conducted in accordance with the Rules, with full respect for his rights;¹² an accused is entitled to minimum guarantees, including, for example, the right “to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing,”¹³ and the right “to defend himself in person or through legal assistance of his own choosing”;¹⁴

NOTING the following jurisprudence from *Prosecutor v. Pavle Strugar*:

- (1) “the enjoyment of these rights would appear to presuppose that an Accused has a level of mental and physical capacity,”¹⁵ and that “[t]he nature of these rights indicates that their effective exercise may be hindered, or even precluded, if an Accused’s mental or bodily capacity, especially the ability to understand, *i.e.* to comprehend, is affected by mental or somatic disorder”;¹⁶
- (2) “[t]he availability of counsel may certainly enable an Accused to more adequately deal with each of the above matters, and in particular 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 the counsel sufficiently for this purpose”;¹⁷
- (3) “it is apparent, from the provisions and the clear implications of Articles 20 and 21 of the Statute 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”;¹⁸
- (4) “[i]f 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

¹² Paragraph 1 of Article 20 of the Statute of the Tribunal.

¹³ Paragraph 4(b) of Article 2 of the Statute of the Tribunal.

¹⁴ Paragraph 4(d) of Article 2 of the Statute of the Tribunal.

¹⁵ *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-T, Decision Re the Defence Motion to Terminate Proceedings, 26 May 2004 (“*Strugar Decision*”), para. 21; *see also Prosecutor v. Vladimir Kovačević*, Case No. IT-01-42/2-I, Public Version of the Decision on Accused’s Fitness to Enter a Plea and Stand Trial, 12 April 2006 (“*Kovačević Decision*”), para. 21.

¹⁶ *Strugar Decision*, *supra* note 15, para. 23; *Kovačević Decision*, *supra* note 15, para. 24.

¹⁷ *Strugar Decision*, *supra* note 15, para. 22; *Kovačević Decision*, *supra* note 15, para. 23.

¹⁸ *Strugar Decision*, *supra* note 15, para. 24; *Kovačević Decision*, *supra* note 15, para. 25.

fit to stand trial, *i.e.* has the necessary capacities, or is able with assistance to exercise them, should be determined by the Tribunal”;¹⁹

- (5) “a mental disorder is not a prerequisite for finding a person unfit to stand trial” and that “[t]here is no apparent justification for limiting the relevant operation of Article 20 and 21 to cases of mental disorder”; “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 issue is not whether the Accused suffers from particular disorder, but rather is better approached by determining whether he is able to exercise effectively his rights in the proceedings against him”;²⁰
- (6) “Article 20 and 21 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,” among which the following rights may be identified: “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 the counsel, to understand the consequences of the proceedings, and to testify”;²¹
- (7) to determine the fitness of the Accused to stand trial, the Chamber has to “regard any impairment of these capacities, whether due to mental or physical causes”;²²
- (8) “[i]t 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”;²³
- (9) “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

¹⁹ *Strugar* Decision, *supra* note 15, para. 25. For further legal justification with respect to the competence of the Trial Chamber to determine the fitness of the Accused to stand trial, see paras. 28–34.

²⁰ *Strugar* Decision, *supra* note 15, para. 35.

²¹ *Strugar* Decision, *supra* note 15, para. 36 (stating that rights listed in decision are illustrative only); see further para. 49. See also *Kovačević* Decision, *supra* note 15, paras. 26, 29.

²² *Ibid.*, para. 36.

²³ *Strugar* Decision, *supra* note 15, para. 37; *Kovačević* Decision, *supra* note 15, para. 27.

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”,²⁴ and

- (10) “the burden of proving that the Accused is not fit to stand trial should be on the Defence, and that the standard of that burden should be merely ‘the balance of probabilities’”,²⁵

CONSIDERING that the Chamber endorses the above propositions set forth in *Strugar* Decision;²⁶

CONSIDERING the three medical reports submitted by the Defence regarding the condition of the Accused, namely (1) the report prepared on 25 April 2005 by Dr. Dino Tarabar (gastroenterologist) and Prof. Dr. Rajko Hrvacević (nephrologists) from the Department for Treatment of the Military Medical Academy, (2) the report prepared by the independent specialists from Israel as a result of the examination of Jovica Stanišić on 28 May 2005, and (3) the report prepared on 28 February 2006 by Professor Daniel Rachmilewitz, Professor and Head of the Division of Medicine of Shaare Zedek Medical Center in Israel;²⁷

CONSIDERING that none of the medical reports submitted by the Defence indicates any bases on which it might currently be concluded on a balance of probabilities that there is any respect in which the Accused is unable to participate effectively in his defence during the Pre-Trial phase of his case, or will be unable to so exercise his rights under Article 20 and 21 of the Statute as to enable his defence to be presented;

CONSIDERING therefore that the medical evidence submitted by the Defence does not demonstrate an “adequate reason”²⁸ to hold an inquiry into the Accused’s competence to stand trial;

NOTING that the conditions of the trial and scheduling of sitting hours are being discussed and will be determined either at the Pre-Trial Conference or during the trial;

²⁴ *Ibid.*

²⁵ *Strugar* Decision, *supra* note 15, para. 38.

²⁶ *Ibid.*

²⁷ See Motion, Annexes 1–3.

²⁸ See *Strugar* Decision, *supra* note 15, para. 25 (holding that “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 necessary capacities, or is able with assistance to exercise them, should be determined by the Tribunal”).

CONSIDERING that the request to schedule the trial so as to provide the Accused with the optimum conditions to prepare and understand the charges against him is premature;

CONSIDERING therefore that a hearing on the fitness of the Accused to stand trial is not necessary at this stage of the proceedings;


NOTING that the content of the medical reports is contained in a confidential annex to the decision;

PURSUANT TO Rules 54 and 126 *bis* of the Rules,

HEREBY ODRERS AS FOLLOWS:

- (1.) the Defence is granted leave to file the Reply, which is considered as constituting the timely filed Reply to the Response; and
- (2.) the Motion is dismissed without prejudice.

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



Judge Patrick Robinson
Presiding

Dated this twenty-seventh day of April 2006.
At The Hague,
The Netherlands.

[Seal of the Tribunal]