



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-01-42/2-I
Date: 1 September 2006
Original: English

IN TRIAL CHAMBER I

Before: Judge Alphonsus Orie, Presiding
Judge Bakone Moloto
Judge Joaquín Martín Canivell

Registrar: Mr. Hans Holthuis

Decision of: 1 September 2006

PROSECUTOR

v.

VLADIMIR KOVAČEVIĆ

**DECISION ON DEFENCE MOTION
TO DISMISS THE INDICTMENT**

The Office of the Prosecutor:

Ms. Susan Somers
Mr. Philip Weiner

Counsel for the Accused:

Ms. Tanja Radosavljević

1. Background and Submissions

1. Trial Chamber I (“Trial Chamber”) of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (“Tribunal”) is seized of the “Defense Motion to Dismiss the Indictment” (“Motion”), filed by counsel for Vladimir Kovačević (“Defence” and “Accused”, respectively) on 27 April 2006.¹

2. The Accused was initially indicted with co-accused Pavle Strugar, Miodrag Jokić and Milan Zec with violations of the laws or customs of war for events which allegedly took place in 1991 in the area of Dubrovnik, Croatia.² After he had been transferred to the Tribunal on 23 October 2003, the Accused did not enter a plea due to his mental health condition.³ He was provisionally released to Serbia to receive medical treatment by a Decision of this Trial Chamber issued on 2 June 2004⁴, “until such time as the Chamber can make a final determination of his fitness to stand trial”.⁵ On 7 April 2006, the Trial Chamber issued a Decision holding that the Accused “does not have the capacity to enter a plea and to stand trial, without prejudice to any future criminal proceedings against him should his mental health condition change.”⁶

3. Already on 28 October 2004, the Office of the Prosecutor (“Prosecution”) had filed a request that the Referral Bench order the referral of the present case under Rule 11*bis* of the Rules of Procedure and Evidence (“Rules”) to the authorities of Serbia (“11*bis* Request”).⁷ On 21 April 2006, after the Trial Chamber found the Accused unfit to enter a plea and to stand trial, the Prosecution filed an application to the Referral Bench requesting a hearing on the pending 11*bis* Request. On 27 April 2006, the Defence filed two motions: one to the Referral Bench, opposing the holding of a hearing on the 11*bis* Request as unnecessary in view of the instant Motion to Trial Chamber I, requesting dismissal of the Indictment.

4. In the Motion, the Defence submits that the Trial Chamber is “more than competent and authorized to bring a final decision in the case before it”, *i.e.*, to terminate proceedings against the Accused by dismissing the Indictment. According to the Defence, support for such course of action can be found in domestic law, and no provision in the Rules prevents the Trial Chamber from doing

¹ The Defence incorporates by reference in the Motion parts of the “Submission of the Defense Pursuant to Questions Raised on the Rule 65*ter* Conference held on 11 October 2005” filed on 14 October 2005.

² See Initial Indictment, 22 February 2001. The operative indictment is the Second Amended Indictment, 17 October 2003 (“Indictment”).

³ See hearings of 3 November 2003 (T. 170-189); 28 November 2003 (T. 190-204) and 15 March 2004 (T. 205-268).

⁴ Decision on Provisional Release, 2 June 2004.

⁵ *Ibid.*, p. 2.

⁶ Decision on Accused’s Fitness to Enter a Plea and Stand Trial (public version), 12 April 2006 (“Fitness Decision”), p. 12.

so. Such course of action should be followed to avoid referral of the case to Serbia where, as the Defence submits, additional investigations related to the crimes charged could negatively impact on the Accused's condition.

5. The Prosecution opposes the Motion. In the "Prosecution's Response in Opposition to 'Defense Motion to Dismiss the Indictment'" ("Response"), filed on 10 May 2006, it argues that, considering that the Accused has not yet entered a plea on the charges against him, the Trial Chamber "is not actually seized of the hearing of the case". The Prosecution submits that Rules 47(F)(iii) and 98*bis*, which respectively allow a Trial Chamber to dismiss charges and enter a judgement of acquittal, are not applicable. As no other provision or the case-law of the Tribunal authorises the dismissal of an indictment at this procedural phase, the Trial Chamber should deny the Motion.

2. Discussion

6. The Rules and the jurisprudence of this Tribunal are silent on how to proceed following a finding that an accused is unfit to enter a plea and to stand trial for longer than a merely temporary period of time, as is the case here.⁸ Referring mainly to provisions of Serbian domestic law, the Defence asserts that the Trial Chamber is empowered to and should dismiss the Indictment, which would result in the termination of proceedings against the Accused before this Tribunal. The Prosecution, by contrast, says that there is no legal basis for the Trial Chamber to proceed as suggested by the Defence.

7. The Trial Chamber is not persuaded by the Defence that the Indictment against the Accused should at this procedural junction be dismissed *proprio motu*. Once a case has been assigned to a Trial Chamber, Rule 51(A) vests the Prosecution with the prerogative to withdraw the indictment, with the leave of that Trial Chamber. In the instant case, the Prosecution chose not to seek such leave, but rather to pursue the pending request for referral pursuant to Rule 11*bis*.

8. Even if the Trial Chamber chose to avail itself of the general provision of Rule 54, a reason to terminate the proceedings, like in the case of a deceased accused,⁹ can hardly be conceived. As the Trial Chamber stated in its Decision of 7 April 2006, the finding that the Accused is unfit to enter a plea and stand trial stands "without prejudice to any future criminal proceedings against him should his mental health condition change".¹⁰ A monitoring system regarding the Accused's mental

⁸ Regarding the legal test to be applied when considering the capability of an accused to stand trial see *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-T, Decision re the Defence Motion to Terminate Proceedings, 26 May 2004.

⁹ See *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Order Terminating the Proceedings, 14 March 2006.

¹⁰ Fitness Decision, p. 12.

health condition is currently in place precisely with a view to ascertain such changes,¹¹ which might result in criminal proceedings being resumed. Whether additional investigations in relation to the crimes charged would be required were the case to be referred to Serbia and their potential effect on the Accused are speculative matters which do not militate in favour of dismissing the Indictment.

3. Conclusion


9. For the foregoing reasons, the Motion is **DENIED**.

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

Done this first day of September 2006

At The Hague,

The Netherlands



Judge Alphonsus Orië
Presiding Judge

¹¹ Decision on Provisional Release, 2 June 2004, p. 3.