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D 17532 - D 17526  
02 July 2009

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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 the Former Yugoslavia  
since 1991

Case No.

IT-03-69-T

Date:

2 July 2009

Original:

English

IN TRIAL CHAMBER I

Before:

Judge Alphons Orie, Presiding  
Judge Michèle Picard  
Judge Elizabeth Gwaunza

Registrar:

Mr John Hocking

Decision of:

2 July 2009

PROSECUTOR

v.

JOVICA STANIŠIĆ  
FRANKO SIMATOVIĆ

*PUBLIC*

REASONS FOR DENYING THE STANIŠIĆ DEFENCE REQUEST TO ADJOURN  
THE HEARINGS OF 9 AND 10 JUNE 2009 AND HAVE JOVICA STANIŠIĆ  
EXAMINED BY A PSYCHIATRIST BEFORE THE START OF TRIAL AND FOR  
DECISION TO PROCEED WITH THE COURT SESSION OF 9 JUNE 2009 IN THE  
ABSENCE OF THE ACCUSED

Office of the Prosecutor

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## BACKGROUND

1. On 9 June 2009, the Accused Jovica Stanišić (“the Accused”) claimed to be too unwell to attend court and did not waive his right to be present during the court session on that day. On the same day, the Stanišić Defence requested that the court hearings scheduled for 9 and 10 June 2009 be adjourned until the Accused had been examined by a psychiatrist. Also on 9 June 2009, the Chamber denied the request by the Stanišić Defence and decided to proceed with the court hearing on that day, in the absence of the Accused.<sup>1</sup> The Chamber will here set out the reasons for this decision.

## PROCEDURAL HISTORY AND SUBMISSIONS BY THE PARTIES

2. On 10 March 2008, the Chamber found that the Accused was fit to stand trial.<sup>2</sup> On 16 May 2008, the Appeals Chamber instructed the Chamber to adjourn the proceedings in this case and to “reassess the Accused’s [Jovica Stanišić’s] state of health before determining when the trial should commence”.<sup>3</sup> Accordingly, the Chamber adjourned proceedings *sine die* on 20 May 2008.<sup>4</sup> On 26 May 2008, the Chamber granted provisional release to both Jovica Stanišić and Franko Simatović and established a comprehensive reporting procedure to monitor the health of the Accused.<sup>5</sup> On 24 April 2009, the Chamber decided that the trial in the present case should recommence and, accordingly, revoked the provisional release of the two Accused.<sup>6</sup>

3. On 29 May 2009, the Chamber issued its Decision on the Start of Trial and Modalities for Trial.<sup>7</sup> In this decision, the Chamber considered the Accused’s health situation as described in medical reports submitted to it since the Appeals Chamber’s Decision on Defence Appeal of the Decision on Future Course of Proceedings of 16 May 2008 and, in particular, two reports drafted by the independent court experts Dr De Man and Dr Siersema,<sup>8</sup> and five medical reports submitted by the Reporting Medical Officer of the United Nations

<sup>1</sup> The procedural history will be set out below. For further details with regard to the procedural history, see Decision on Start of Trial and Modalities for Trial, 29 May 2009 (“Modalities Decision”), paras 1-5.

<sup>2</sup> Decision on Motion Re Fitness to Stand Trial, 10 March 2008 (“Fitness Decision”).

<sup>3</sup> Decision on Defence Appeal of the Decision on Future Course of Proceedings, 16 May 2008 (“16 May 2008 Decision”), para. 22.

<sup>4</sup> T. 1258.

<sup>5</sup> Decision on Provisional Release, 26 May 2008, para. 68.

<sup>6</sup> Decision on Prosecution Motion for Revocation of Jovica Stanišić’s Provisional Release and Re-Assessment of his Health and Revocation of Franko Simatović’s Provisional Release, 24 April 2009.

<sup>7</sup> Modalities Decision.

<sup>8</sup> Registry Submission Pursuant to Rule 33 (B) Concerning Psychiatric Expert Report, 19 March 2009 (“Dr De Man Report”); Registry Submission Pursuant to Rule 33 (B) Concerning Expert Report, 23 March 2009.

Detention Unit ("RMO").<sup>9</sup> The Chamber accepted the determination in the Fitness Decision that the Accused is fit to stand trial.<sup>10</sup> The Chamber found that the trial in the present case could commence pursuant to the modalities for the trial, as set out in the Annex to the Modalities Decision.<sup>11</sup>

4. Subsequent to the Modalities Decision and before the court session of 9 June 2009, the RMO submitted two weekly reports, dated 2 June 2009 and 9 June 2009, to the Chamber.<sup>12</sup> In the 2 June 2009 RMO Report, the RMO stated that the Magnetic Resonance Imaging scan conducted following the Accused's short period of unconsciousness on 24 May 2009 revealed no abnormalities and that the diagnosis indicated that it was a vago-vasal reflex.<sup>13</sup> Beyond that, the report reiterated what had been set out in previous weekly reports, without adding anything of substance.<sup>14</sup> On 2 June 2009, the RMO was questioned by the parties and the Chamber with regard to the content of his report.<sup>15</sup> With regard to the Accused's mental health, the RMO explained that as for stating in the weekly reports that the Accused's psychological situation is "unchanged",<sup>16</sup> he was comparing the Accused's health situation with that of when he first met the Accused on 4 May 2009 and based the assessment both on a report by Dr Vera Petrović, dated 10 May 2009, and his own observations.<sup>17</sup>

5. The Accused waived his right to be physically present in court during the Pre-Trial Conference held on 2 June 2009.<sup>18</sup>

6. On 9 June 2009, following submissions made by the parties, the Chamber issued its Decision to Amend the Modalities for Trial.<sup>19</sup> The amendments included that the Accused be examined by a psychiatrist who will report in writing to the Chamber on the Accused's medical condition once every eight weeks.<sup>20</sup>

<sup>9</sup> Modalities Decision, paras 6, 11-23, 25.

<sup>10</sup> Modalities Decision, para. 13.

<sup>11</sup> Modalities Decision, para. 25, Annex.

<sup>12</sup> Medical Report by Dr Michael Eekhof, Reporting Medical Officer, 2 June 2009 ("2 June 2009 RMO Report"); Absence from Court Form and Medical Report by Dr Michael Eekhof, Reporting Medical Officer, 9 June 2009 ("9 June 2009 RMO Report").

<sup>13</sup> 2 June 2009 RMO Report. See Modalities Decision, para. 19.

<sup>14</sup> 2 June 2009 RMO Report. For a review of the previous weekly reports, see Modalities Decision, paras 14-19.

<sup>15</sup> T. 1372-1381.

<sup>16</sup> See Medical Report by Dr Michael Eekhof, Reporting Medical Officer, dated 18 May 2009, filed on 20 May 2009 ("18 May 2009 RMO Report"); Medical Report by Dr Michael Eekhof, Reporting Medical Officer, dated 26 May 2009, filed on 27 May 2009 ("26 May 2009 RMO Report"); 2 June 2009 RMO Report.

<sup>17</sup> T. 1376-1378; Medical Report by Dr Michael Eekhof, Reporting Medical Officer, dated 5 May 2009, filed on 21 May 2009. The report by Dr Vera Petrović was subsequently filed by the Stanišić Defence, see Defence for Mr Stanišić Filing of Dr Petrović Medical Report with Annex, 17 June 2009 ("Petrović Report").

<sup>18</sup> Absence from Court Form, 2 June 2009; T. 1371.

<sup>19</sup> Decision Amending Modalities for Trial, 9 June 2009 ("Amending Modalities Decision"). See also T. 1440.

<sup>20</sup> Amending Modalities Decision, Annex B, para. 3. Annex B of this Decision contains the operative modalities for trial and this document will henceforth be referred to as the "Modalities for Trial".

7. In the 9 June 2009 RMO Report, the RMO repeated his assessment included in previous reports that the Accused's back pain is improving slowly and added that "[the Accused] was observed walking in his cell without support. The physiotherapist has conceived a rehabilitation program".<sup>21</sup> The RMO also stated that the colitis showed some signs of inflammation and that the medication had been adapted by the treating gastroenterologist.<sup>22</sup> Finally, with regard to the Accused's mental health, the RMO stated:

The psychological situation is unchanged. His state of mind is depressed; he has a negative view of the future, stating that further living is pointless. In my opinion there is no risk of suicide at this moment. He declined the offer by Dr. Falke to consult a psychiatrist, but Mr. Stanisic is requesting a meeting with Dr. De Man, psychiatrist, who has full knowledge of his background and history. In my opinion a report by Dr. De Man on the present psychological and psychiatric state, would provide us with an expert view and advice.<sup>23</sup>

8. Also on 9 June 2009, the Accused informed the Chamber, via the staff of the United Nations Detention Unit ("UNDU"), that he felt too unwell to attend court in person and that he did not wish to use the video-conference link.<sup>24</sup> Further, the Accused submitted that he did not waive his right to be physically present in court during the Prosecution's opening statement to be heard on that day.<sup>25</sup> Upon inquiry by the Chamber, the Stanišić Defence submitted that the Accused was not able to participate in the proceedings via the video-conference link at the UNDU "purely based on his mental condition".<sup>26</sup> The Stanišić Defence therefore requested that the court hearings scheduled for 9 and 10 June 2009 be adjourned until the Accused had been examined by a psychiatrist.<sup>27</sup> In support of this, the Stanišić Defence referred to the Petrović Report.<sup>28</sup> The Prosecution submitted that the request by the Stanišić Defence was an attempt to conflate the assessment of the Accused with the treatment of him and that the Prosecution would have no objection to the Accused receiving a more regular psychiatric therapy.<sup>29</sup> The Prosecution opposed, however, the adjournment of the proceedings.<sup>30</sup>

9. On 9 June 2009, the RMO was questioned by the parties and the Chamber with regard to the 9 June 2009 RMO Report as well as the Petrović Report.<sup>31</sup> The RMO stated that

<sup>21</sup> 9 June 2009 RMO Report, p. 4. See Modalities Decision, paras 15-16, 18-19, 21.

<sup>22</sup> 9 June 2009 RMO Report, p. 4. The treating gastroenterologist is Dr Marcel Cazimier.

<sup>23</sup> 9 June 2009 RMO Report, p. 4.

<sup>24</sup> 9 June 2009 RMO Report, pp. 1-2. With regard to the video-conference link, see Modalities for Trial, para. 5.

<sup>25</sup> Ibid.

<sup>26</sup> T. 1413-1414.

<sup>27</sup> T. 1432-1434.

<sup>28</sup> T. 1414.

<sup>29</sup> T. 1435.

<sup>30</sup> T. 1436.

<sup>31</sup> T. 1416-1432.

no cause for the Accused's lower-back pain had been established and that the discal herniation had been excluded as a cause.<sup>32</sup> With regard to the Accused's mental health, the RMO reiterated that his assessment that the psychological situation of the Accused remained "unchanged" was based both on the Petrović Report and his own observations.<sup>33</sup> In this respect, he added that the Accused was able to discuss his illness.<sup>34</sup> The RMO further stated that he did not share the position expressed in the Petrović Report that the Accused's depression and apathy had become permanent.<sup>35</sup>

10. After having heard the RMO, the Chamber denied the request by the Stanišić Defence to adjourn the court hearings of 9 and 10 June 2009 and decided to proceed with the court hearing of 9 June 2009 in the absence of the Accused.<sup>36</sup>

## DISCUSSION

11. The Appeals Chamber has set out that "an accused claiming to be unfit to stand trial bears the burden of so proving by a preponderance of the evidence".<sup>37</sup> The Chamber considers that an accused who claims to be too unwell to attend court on a particular day also bears the burden to show that this is indeed the case. The decision on whether to accept the accused's claim lies solely with the Chamber. This follows from the Chamber's responsibility pursuant to Article 20 of the Statute to ensure a fair and expeditious trial. If the Chamber is not satisfied that the accused is too unwell to attend court the Chamber may decide to proceed with the court session in the absence of the accused. The Chamber considers that if this would not be the case, it would allow for an accused to dictate when, if ever, court sessions in his case should be held. In the present case, the Accused is assisted when it comes to showing possible ill-health, warranting postponement of court sessions, by the fact that the Chamber receives, on a regular basis, medical reports on the Accused's health.<sup>38</sup>

12. As set out above, on 29 May 2009, the Chamber made the assessment that the trial could commence pursuant to the modalities for the trial, as set out in the Annex to that decision. Neither party requested certification to appeal this decision nor have they requested the Chamber to reconsider the decision in light of any new circumstances. The additional material available to the Chamber on 9 June 2009, compared to the time it issued the

<sup>32</sup> T. 1428.

<sup>33</sup> T. 1418, 1420.

<sup>34</sup> T. 1419.

<sup>35</sup> T. 1420.

<sup>36</sup> T. 1440, 1442.

<sup>37</sup> *Prosecutor v. Stanislav Galić*, Appeal Chamber, Judgement, 17 July 2008, para. 56.

<sup>38</sup> See Modalities for Trial, para. 3.

Modalities Decision, was the 2 June 2009 RMO Report, the 9 June 2009 RMO Report, and the Petrović Report.

13. The Chamber considered that nothing in the 2 June 2009 RMO Report or the 9 June 2009 RMO Report warranted a decision to adjourn the hearing of 9 June 2009. These reports and the information provided by the RMO when questioned in court on 2 and 9 June 2009, showed that the medical situation of the Accused had not changed in any significant aspects since the Chamber's Modalities Decision.

14. In its submissions on 9 June 2009, the Stanišić Defence invoked the Petrović Report of 10 May 2009. As pointed out by the Stanišić Defence, this report had been referred to in the RMO's weekly report of 11 May 2009.<sup>39</sup> The Petrović Report sets out:

During the last few years [the Accused's] desires for ideal crumbled. The fact continuously contributed in deepening bodily illnesses so that depressiveness and apathy become permanent. [...] Since his arrival to the Detention Unit examinee shows signs of depression. He is emotionally fragile, vulnerable, almost totally without any interest, showing feelings of helplessness and desperateness. His mood is at the level of serious depression, without experience of hallucinations. [...] His attention is directed well, but has difficulties in keeping it. His intellectual efficacy is fluctuating, same as his overall participation. The thinking process is without psycho pathological changes. The memory is often under heavy influence of ultimate passivity and indifference, no other changes of this function have been noticed.<sup>40</sup>

15. The Petrović Report is further indicating that the Accused is loosing weight ("loosing flesh").<sup>41</sup> The Petrović Report concludes by stating that "[t]he above described situation worsened [the Accused's] overall psychological functioning in which we receive in an indirect manner, indications towards suicide tendencies".<sup>42</sup> Besides this conclusion, the assessment of the Accused's mental health in the Petrović Report does not differ in material aspects from the assessment in the Dr De Man Report, which the Chamber primarily relied on with regard to the Accused's mental health, in the Modalities Decision.<sup>43</sup> With regard to weight loss, a number of weekly reports subsequent to drafting of the Petrović Report indicate that the Accused's weight has not changed and that urine tests prove a positive energy balance.<sup>44</sup> Moreover, the RMO drew very different conclusions from the Petrović Report and

<sup>39</sup> T. 1414. See Medical Report by Dr Michael Eekhof, Reporting Medical Officer, dated 11 May 2009, filed on 25 May 2009, and Modalities Decision, paras 15, 20.

<sup>40</sup> Petrović Report, p. 3.

<sup>41</sup> Ibid.

<sup>42</sup> Ibid.

<sup>43</sup> See Modalities Decision, paras 12, 20.

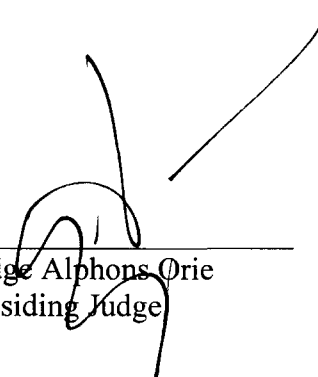
<sup>44</sup> 18 May 2009 RMO Report; 26 May 2009 RMO Report; 2 June 2009 RMO Report; 9 June 2009 RMO Report, p. 4.

from his own observations of the Accused, namely that the Accused could participate in the proceedings.<sup>45</sup>

### CONCLUSION

16. Considering the health situation of the Accused, as described in the medical reports submitted to it since the Modalities Decision and pursuant to the Chamber's obligation under Article 20 of the Statute, the Chamber found that the Stanišić Defence had not shown that the Accused was too unwell to attend the court session of 9 June 2009 and that as a consequence the court sessions scheduled for 9 and 10 June 2009 should be postponed awaiting further assessment by a psychiatrist.

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



Judge Alphons Orie  
Presiding Judge

Dated this 2nd of July 2009  
At The Hague  
The Netherlands

**[Seal of the Tribunal]**

<sup>45</sup> 9 June 2009 RMO Report, p. 4; T. 1418-1421, 1427-1431.  
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