

IT-03-69-T
D 17749 - D 17742
22 July 2009

17749
1/3

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: 22 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: 22 July 2009

PROSECUTOR

v.

JOVICA STANIŠIĆ
FRANKO SIMATOVIĆ

PUBLIC

**REASONS FOR DECISION DENYING THE STANIŠIĆ DEFENCE REQUEST TO
POSTPONE THE COURT PROCEEDINGS AND DECISION PROCEEDING WITH
THE COURT SESSION OF 29 JUNE 2009 IN THE ABSENCE OF THE ACCUSED**

Office of the Prosecutor

Mr Dermot Groome
Ms Doris Brehmeier-Metz

Counsel for Jovica Stanišić

Mr Geert-Jan Alexander Knoops
Mr Wayne Jordash

Counsel for Franko Simatović

Mr Zoran Jovanović
Mr Vladimir Domazet

BACKGROUND

1. On 29 June 2009, the Accused Jovica Stanišić (“the Accused”) claimed to be too unwell to attend court but 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 proceedings be postponed or, in the alternative, that the Chamber requested further information on the Accused’s mental health from an independent medical expert. Also on 29 June 2009, the Chamber denied the Stanišić Defence request and decided to proceed with the scheduled court hearing, in the absence of the Accused.¹ The Chamber sets out the reasons for this decision below.

PROCEDURAL HISTORY AND SUBMISSIONS

2. On 29 May 2009, the Chamber issued the Decision on Start of Trial and Modalities for Trial (“Modalities Decision”). 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,² and five medical reports submitted by the Reporting Medical Officer of the United Nations Detention Unit (“RMO”).³ The Chamber accepted the determination made in the decision of 10 March 2008 that the Accused is fit to stand trial.⁴ Further, 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.⁵

3. On 9 June 2009, the Accused informed the Chamber that he was too unwell to attend court, that he did not waive his right to be present during the court session on that day, and that he did not wish to use the video-conference link.⁶ Having considered the medical reports submitted to it since the Modalities Decision and having heard the RMO, the Chamber denied the request by the Stanišić Defence to adjourn the court hearings of 9 and 10 June

¹ 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, paras 1-5 and 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, 2 July 2009 (“2 July 2009 Reasons”), paras 2-10.

² Registry Submission Pursuant to Rule 33 (B) Concerning Psychiatric Expert Report, 19 March 2009; Registry Submission Pursuant to Rule 33 (B) Concerning Expert Report, 23 March 2009.

³ Modalities Decision, paras 6, 11-23, 25.

⁴ Modalities Decision, para. 13. See Decision on Motion Re Fitness to Stand Trial, 10 March 2008.

⁵ Modalities Decision, para. 25, Annex.

⁶ Absence from Court Form and Medical Report by Dr Michael Eekhof, Reporting Medical Officer, 9 June 2009, pp. 1-2. With regard to the video-conference link, see Decision Amending Modalities for Trial, 9 June 2009, Annex B (“Modalities for Trial”), para. 5.

2009 and decided to proceed with the court hearing of 9 June 2009 in the absence of the Accused.⁷ The reasons for this decision were filed on 2 July 2009.⁸

4. On 10 June 2009, the Accused again informed the Chamber that he was too unwell to attend court, that he did not waive his right to be present during the court session scheduled that day, and that he did not wish to use the video-conference link.⁹ On the same day, the RMO submitted a report summarizing the physical health of the Accused:

[The Accused's] physical situation remains unchanged since yesterday. There are no physical medical reasons preventing him [from] participating in proceedings in the adapted [video-conference link] room.¹⁰

With regard to the psychological condition of the Accused, the RMO reiterated what had been set out in the 9 June 2009 RMO Report that the Accused's state of mind is depressed and that, in the view of the RMO, there is no risk of suicide at this moment.¹¹ The RMO added:

[The Accused] states not being able to participate in the proceedings; in my opinion as a general practitioner, although his state of mind is depressed, there are no evident psychiatric reasons preventing him [from] participating in proceedings. On this subject there is a difference in opinion between [the Accused] and the [RMO].¹²

5. The RMO was not heard on 10 June 2009 since neither the parties nor the Chamber expressed any wish to question him.¹³ On the same day, the Chamber decided to proceed in the absence of the Accused, for the reasons applicable to the Chamber's decision of 9 June 2009.¹⁴

6. On 16 June 2009, the RMO submitted a weekly report.¹⁵ With regard to "lumbar complaints", the RMO stated that

observation has proven that [the Accused] has no problem getting out of bed, walking around for periods up to one hour and picking things up from the floor; nor did walking to the smoking facility and the visitor room and back pose any problems.¹⁶

⁷ T. 1440, 1442.

⁸ 2 July 2009 Reasons.

⁹ Absence from Court Form and Medical Report by Dr Michael Eekhof, Reporting Medical Officer, 10 June 2009 ("10 June 2009 RMO Report"), pp. 1-2.

¹⁰ 10 June 2009 RMO Report, p. 4.

¹¹ Ibid. 4.

¹² Ibid.

¹³ T. 1483.

¹⁴ Ibid. See also 2 July 2009 Reasons.

¹⁵ Medical Report by Dr Michael Eekhof, Reporting Medical Officer, dated 16 June 2009, filed on 17 June 2009 ("16 June 2009 RMO Report").

¹⁶ Ibid.

Further, the RMO stated that the Accused's weight had not changed and that the urine test proved a positive energy balance.¹⁷ With regard to the mental health, the RMO reiterated what he had set out in the 10 June 2009 RMO Report.¹⁸ The RMO concluded that “[o]n the basis of [the Accused's] activities and unimpaired intellectual capacities during consultations”, the Accused could be transported to and participate in the court proceedings for at least one hour.¹⁹

7. On 23 June 2009, the RMO submitted another weekly report.²⁰ The RMO stated that observation had shown less impairment with regard to mobility than claimed by the Accused.²¹ The RMO also reported on the conclusion from a meeting of the medical staff of the United Nations Detention Unit (“UNDU”) and Dr Vera Petrović, that the health problem of the Accused was very complex and that rehabilitation and reassessment of the medication prescribed to him was important for the improvement of his general health condition.²²

8. On 26 June 2009, the Chamber received two expert reports, one from Dr Siersema and Dr Oldenburg as independent expert gastroenterologists, and one from Dr de Man as an independent expert psychiatrist.²³ Dr Siersema and Dr Oldenburg concluded that the Accused is probably suffering from a therapy-refractory pouchitis which, in general, results in a high stool frequency, abdominal discomfort, and, overall, in an impaired quality of life.²⁴ Further, the experts stated that if the pouchitis does not result in deficiencies or major disturbances of the biochemistry lab, this can mostly be handled in an out-patient setting.²⁵ The experts further reported that they had discussed various treatments, including surgery, with the Accused.²⁶

9. Dr de Man reported that he had met the Accused twice, for 30 and 45 minutes, respectively.²⁷ Dr de Man had noticed “a grey discoloration below the eyes” during his first visit.²⁸ On a video recording shown by the UNDU authorities, Dr de Man observed that the Accused was moving around quite a lot and “seem[ed] to apply a substance, possibly cigarette

¹⁷ Ibid.

¹⁸ Ibid.

¹⁹ Ibid.

²⁰ Medical Report by Dr Michael Eekhof, Reporting Medical Officer, dated 23 June 2009, filed on 25 June 2009 (“23 June 2009 RMO Report”).

²¹ Ibid.

²² Ibid.

²³ Registry Submission Pursuant to Rule 33 (B) Concerning Expert Report, 26 June 2009 (“Dr Siersema and Dr Oldenburg Report”); Registry Submission Pursuant to Rule 33 (B) Concerning Psychiatric Expert Report, 26 June 2009 (“Second Dr de Man Report”).

²⁴ Dr Siersema and Dr Oldenburg Report, p. 4.

²⁵ Ibid..

²⁶ Dr Siersema and Dr Oldenburg Report, pp. 3-4.

²⁷ Second Dr de Man Report, p. 4.

²⁸ Second Dr de Man Report, p. 5.

ash, to his lower eyelids”.²⁹ Dr de Man further reported that the Accused was worried about his medication which was “causing him to remain in a dreamlike state” and to have occasional lapses of memory.³⁰ However, Dr de Man stressed that a certain kind of medication had recently been discontinued by the treating gastroenterologist.³¹ He summarized the examinations in the following way:

[The Accused] is well oriented and shows (despite claims to this effect) no evident disturbance of memory. Speech is slow, but [the Accused] proves to be quite alert. His facial expressing [sic] shows signs of despondency, but is reactive to subjects discussed. There are no signs of disturbances of perception and judgment. No thought disturbances are noted. No hallucinatory experiences are related or observed. The speed of thinking is normal. Motor activity however is quite limited. Mood is low. Affect is adequately modulating. He indicates that he considers his present life to be not worth living. Conclusion: the examination still shows signs of major depression.³²

Dr de Man stated that, in his view, there is no divergence in professional opinion with regard to the Accused’s health between the independent experts reporting to the Chamber and the treating physicians in the Netherlands and Serbia.³³

10. On 29 June 2009, the Accused informed the Chamber that he was too unwell to attend court and that he waived his right to be present during the court session on that day.³⁴ However, later on the same day, but before the court session, the Accused informed the Chamber that he in fact did not waive his right to be present during the court session and that he did not wish to use the video-conference link.³⁵ On the same day, the RMO submitted a report indicating that the Accused’s medication was being reviewed, that the Accused participated in a rehabilitation program, and that the Accused had increased his walking activities slightly.³⁶ The RMO also reported that the Accused was under treatment by Dr Vera Petrović who had informed the RMO that the Accused was in a depressive mood, and was suffering from a general loss of energy and interest although contact with him was possible.³⁷ On her insistence, the Accused had agreed to exercise more.³⁸ Concluding, the RMO

²⁹ Ibid.

³⁰ Ibid.

³¹ Ibid.

³² Ibid.

³³ Ibid.

³⁴ Absence from Court Form, 29 June 2009, pp. 1-2. See T. 1548-1549.

³⁵ Absence from Court Form, 29 June 2009, p. 1; Second Absence from Court Form, 29 June 2009, p. 1. See T. 1548-1549.

³⁶ Medical Report by Dr Michael Eekhof, Reporting Medical Officer, 29 June 2009 (“29 June 2009 RMO Report”).

³⁷ Ibid.

³⁸ Ibid.

reiterated his position from the 16 June 2009 RMO Report about the Accused being able to participate in the proceedings.³⁹

11. On 29 June 2009, the Stanišić Defence requested that the court proceedings be postponed, arguing that the Accused was not capable of participating in the proceedings either in the courtroom or via the video-conference link.⁴⁰ The Stanišić Defence argued that, according to the Second Dr de Man Report, the Accused considers his present life situation not to be worth living, that he showed signs of a major depression, and that it therefore would not be in accordance with the rights of the Accused to proceed.⁴¹ The Stanišić Defence also argued that it cannot be concluded on the basis of the Second Dr de Man Report itself, that the Accused is mentally fit to be present in court or participate via the video-conference link.⁴² Therefore, in the alternative, the Stanišić Defence requested that the Chamber seeks further clarification as to certain portions of the Second Dr de Man Report.⁴³

12. The Prosecution opposed the Stanišić Defence's request, arguing that there was nothing in either the Dr Siersema and Dr Oldenburg Report or the Second Dr de Man Report that would suggest that the Accused could not participate in the court proceedings.⁴⁴ The Prosecution added that the reference in the Second Dr de Man Report to the Accused's application of a substance, possibly cigarette ash, to his lower eyelids suggested that the Accused was attempting to manipulate Dr de Man's findings, by attempting to appear tired.⁴⁵

13. On 29 June 2009, the Chamber decided, with reasons to follow, to deny the Stanišić Defence's request and proceed with the scheduled court session, in the absence of the Accused.⁴⁶

DISCUSSION

14. The Chamber reiterates that an accused who claims to be too unwell to attend court on a particular day also bears the burden of showing that this is indeed the case.⁴⁷ As mentioned above, on 29 May 2009, the Chamber decided that the trial could commence pursuant to the modalities for the trial, as set out in the Annex to the Modalities Decision. No party requested certification to appeal this decision nor did they request the Chamber to

³⁹ Ibid.

⁴⁰ T. 1551.

⁴¹ Ibid.

⁴² T. 1552.

⁴³ T. 1552, 1554.

⁴⁴ T. 1553-1554.

⁴⁵ Ibid.

⁴⁶ T. 1559.

reconsider the decision in light of new circumstances that may have arisen. On 9 June 2009, under circumstances materially similar to those present for the current decision, the Chamber decided to proceed with the scheduled court hearing in the absence of the Accused. The Chamber issued its reasons for this decision on 2 July 2009. No party requested reconsideration or certification to appeal this decision. The additional material available to the Chamber on 29 June 2009, compared to that which was available at the time it issued its decision of 9 June 2009, consisted primarily of the 10 June 2009 RMO Report, the 16 June 2009 RMO Report, the 23 June 2009 RMO Report, the Dr Siersema and Dr Oldenburg Report, and the Second Dr de Man Report.

15. The Stanišić Defence has not indicated how the information provided in these reports differs from the information that formed the basis of the Modalities Decision and the Chamber's decision of 9 June 2009. The Chamber considered that the reports submitted by the RMO on 10, 16, and 23 June 2009, 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 significantly since the 9 June 2009 Decision or, indeed, since the Modalities Decision. Similarly, the information provided in the Dr Siersema and Dr Oldenburg Report and the Second Dr de Man Report does not differ in any material respect from information contained in the previous independent expert reports, assessed in the Modalities Decision, nor in the RMO reports. The Chamber therefore considers that the medical information provided to the Chamber does not warrant a conclusion different than that which has been adopted in previous decisions, namely that the trial in the present case can proceed pursuant to the Modalities for Trial. This includes the option for the Accused to follow the proceedings via a video-conference link from the UNDU.

16. The Stanišić Defence's alternative argument is, in essence, that the information before the Chamber pertaining to the Accused's health is insufficient for making a determination about the Accused's ability to be present and participate in the court proceedings. The Chamber notes in this respect that since the beginning of May, it has received weekly RMO reports, as well as RMO reports on all the days when court hearings were scheduled.⁴⁸ On a number of occasions, the Chamber and the parties have also questioned the RMO about the content of his reports, generating further information on the Accused's health. The opportunity for such questioning has been, and will be available to the parties upon their request. In addition to this, so far this year, the Chamber has requested and

⁴⁷ See 2 July 2009 Reasons, para. 11.

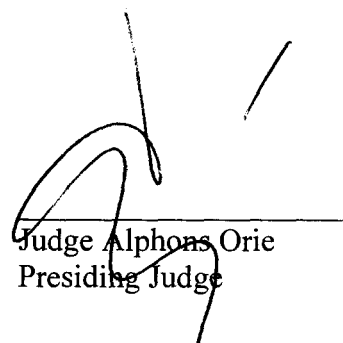
⁴⁸ For a review of the RMO medical reports, see Modalities Decision, paras 14-19; 2 July 2009 Reasons, paras 4, 7, 9; and paras 4, 6-7, 10 above.

received two reports by independent expert gastroenterologists and two reports by an independent expert psychiatrist. The Chamber has also received other medical reports, including one submitted by the Stanišić Defence and drafted by Dr Vera Petrović. As foreseen by the Modalities for Trial, the Chamber is keeping itself well informed about the health situation of the Accused.

CONCLUSION

17. Considering the health situation of the Accused, as described in the numerous medical reports submitted to the Chamber, some of which have already been assessed and considered in the Modalities Decision and the 2 July 2009 Reasons, 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 29 June 2009 and that, as a consequence the court proceedings should be postponed. Further, the Chamber considered that the Stanišić Defence had not demonstrated that the information before the Chamber was insufficient for the purpose of deciding on postponement or adjournment of proceedings or whether to proceed in the absence of the Accused due to his health situation.

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



Judge Alphons Orié
Presiding Judge

Dated this 22nd of July 2009
At The Hague
The Netherlands

[Seal of the Tribunal]