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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:

6 August 2009

Original:

English

IN TRIAL CHAMBER I

Before: Judge Alphons Orie, Presiding
Judge Michèle Picard
Judge Elizabeth Gwaunza

Registrar: Mr John Hocking

Decision of: 6 August 2009

PROSECUTOR

v.

JOVICA STANIŠIĆ
FRANKO SIMATOVIĆ

PUBLIC

DECISION ON URGENT DEFENCE REQUEST FOR FURTHER SUBMISSIONS OF
PSYCHIATRIC MEDICAL EXPERT
AND
DECISION ON DEFENCE MOTION TO REDACT MEDICAL REPORTS

Office of the Prosecutor

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Procedural History

1. On 26 June 2009, court-appointed psychiatric expert Dr de Man submitted a medical report to the Chamber pursuant to the Chamber's modalities for trial ("Dr de Man Report").¹ In his report, Dr de Man addresses the Chamber, asking whether a meeting between him and Ms Lidija Vukašinović would be endorsed by the Chamber.²
2. On 6 July 2009, the Stanišić Defence requested the Chamber to order further submissions from Dr de Man, addressing specific pre-formulated questions ("Request").³ The Prosecution responded on 8 July 2009, opposing the Request ("Response").⁴ On 10 July 2009, the Stanišić Defence requested leave to reply to the Response ("Request to Reply").⁵ The Request to Reply was granted on 15 July 2009 and the Chamber informed the parties of its decision through an informal communication. On 17 July 2009, the Stanišić Defence replied to the Response ("Reply").⁶
3. On 13 July 2009, the Stanišić Defence requested the Chamber to order that a certain type of sensitive information be redacted in future medical reports so as to protect the privacy rights of Mr Stanišić ("the Accused") and third parties, such as family, friends, or associates ("Motion").⁷ The Prosecution responded on 20 July 2009, opposing the Motion ("Response to Motion").⁸

Submissions by the parties

Request

4. In its Request, the Stanišić Defence asks for a more detailed and comprehensive examination of the Accused by Dr de Man with a further report dealing with the following issues:

¹ Registry Submission Pursuant to Rule 33 (B) Concerning Psychiatric Expert Report, 26 June 2009; see also Decision Amending Modalities for Trial, 9 June 2009, Annex B ("Modalities for Trial"), para. 11.

² Dr de Man Report, p. 5.

³ Urgent Defence Request for Further Submissions of Psychiatric Medical Expert, 6 July 2009, paras 4, 6, 12-13.

⁴ Prosecution Response to Jovica Stanišić's Urgent Defence Request for Further Submissions of Psychiatric Medical Expert, 8 July 2009, paras 1, 9.

⁵ Defence Request for Leave to Reply to Prosecution Response to Jovica Stanišić's Urgent Defence Request for Further Submissions of Psychiatric Medical Expert, 10 July 2009.

⁶ Defence Reply to Prosecution Response to Jovica Stanišić Urgent Defence Request for Further Submissions of Psychiatric Medical Expert, 17 July 2009.

⁷ Defence Motion to Redact Medical Reports, 13 July 2009, paras 2, 7.

⁸ Prosecution Response to Defence Motion to Redact Medical Reports, 20 July 2009, paras 1, 11, 28.

(a) the Accused's GAF Scale and Hamilton Score; (b) the Accused[s] ability to concentrate and focus on the details of this case (as opposed to the type of abilities needed in ordinary life); (c) the Accused's ability to maintain a reasonable concentration on the details on his case (including the effects of any medication currently being prescribed); (d) the Accused's ability to withstand the taking [sic] of instructions (Defence counsel would benefit from knowing what work and effort the client can withstand what he can and cannot do; and what risks might arise, if any, from the Defence work with him in taking instructions and discussing the case); (e) whether the client is suicidal[;] and (f) whether the treatment regime in place (e.g. visits by Dr. Petro Vic [sic]) is adequate and, correspondingly, whether he might benefit from an enhanced psychiatric program.⁹

5. The Stanišić Defence submits that the information provided in the Dr de Man Report is "wholly inadequate" for the purposes of gaining a meaningful understanding of the Accused's cognitive capabilities and his suicidal or self-harm risks.¹⁰ The Stanišić Defence further requests the Chamber to order Dr de Man to address the following pre-formulated questions:

(a) Is the Accused able to understand the nature of the charges and proceedings against him, including the consequences of a conviction on those charges? (b) Is the Accused able to instruct his Defence counsel as to his defence of the charges? (c) Is the Accused able to testify on his behalf if he elects to do so? (d) Is the Accused physically able to withstand full-time trial proceedings (approximately five hours per day, five days per week) or some lesser formula of scheduling? (e) Does the Accused's health situation require any particular accommodation to support his ability to stand trial?¹¹

6. In its Response, the Prosecution points out that it should not matter whether the Accused has the ability to concentrate on the details of the case, but rather whether he has a broad understanding of the proceedings and the general thrust of what is said in court.¹² It further submits that Dr de Man has in fact already touched upon the questions the Stanišić Defence now wants addressed.¹³ Finally, the Prosecution submits that the pre-formulated questions are of an essentially legal nature, and thereby an "attempt to re-open the fitness issue".¹⁴ In its Reply, the Stanišić Defence clarifies that the Request is only geared at

⁹ Request, paras 4, 6, 12.

¹⁰ Request, para. 9.

¹¹ Request, para. 13.

¹² Response, para. 3.

¹³ Response, para. 4.

¹⁴ Response, para. 5.

obtaining more information about the Accused's health and not an application to declare the Accused unfit to stand trial.¹⁵

Motion

7. In its Motion, the Stanišić Defence submits that there is “no public interest sufficient to justify the public dissemination of private or personal information relating to the Accused (aside from the particular medical treatment or diagnoses) or any subject that concerns or touches upon his family, friends or associates”.¹⁶

8. In its Response to the Motion, the Prosecution argues that redacting certain parts of the medical reports would contravene the proper administration of trial and undermine the transparent reporting regime.¹⁷ The Prosecution requests that the Chamber reaffirm to the doctors involved in the reporting of the Accused's health that all information pertinent to the diagnosis of the Accused should be contained in their reports.¹⁸ The Prosecution further proposes a system in which the reports would temporarily be withheld from the public so that any requests for redactions could be expressed by the Stanišić Defence and ruled upon by the Chamber.¹⁹ Lastly, the Prosecution requests that the status of the Motion and the Response to the Motion be changed from confidential to public.²⁰

Applicable Law

9. Rule 54 of the Tribunal's Rules of Procedure and Evidence (“Rules”) provides that at the request of either party or *proprio motu*, a Judge or a Trial Chamber may issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial.

10. Rule 74 *bis* of the Rules provides that a Trial Chamber may, *proprio motu* or at the request of a party, order a medical, psychiatric or psychological examination of the accused.

¹⁵ Reply, para. 3.

¹⁶ Motion, paras 2, 4.

¹⁷ Response to the Motion, paras 11-13.

¹⁸ Response to the Motion, paras 17, 28.

¹⁹ Response to the Motion, para. 25.

²⁰ Response to the Motion, paras 2, 27-28.

Discussion

Request

11. The Chamber has the primary duty to hear the case against the Accused and Mr Simatović and, in this respect, has the obligation pursuant to Article 20 of the Statute to ensure that the trial is fair and expeditious. Over the past months, it has spent considerable efforts to provide for facilities to accommodate the Accused's health concerns. This includes amongst others the possibility of reduced court sessions, the possibility of more and longer breaks on hearing days, and the possibility for the Accused to make use of a video-conference link in order to follow and participate in the proceedings from the United Nations Detention Unit. Intense medical monitoring thoroughly addressed major areas of concern and established that the Accused's medical condition has remained at least stable. With respect to some of the Accused's complaints, there has been a constant discrepancy between his claims and the medical examinations. The Chamber has to find a fair balance between monitoring the Accused's health developments and focusing on hearing the case. The Chamber has considered the Request in this context.

12. The Stanišić Defence has on one previous occasion requested to seek further clarifications from Dr de Man.²¹ The Chamber addressed this request in its 22 July 2009 Reasons, in which it stated that the Stanišić Defence had not demonstrated that the information before it (including the Dr de Man Report) 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.²² The Chamber reiterates this conclusion and considers it unnecessary, at this stage, for Dr de Man to produce an interim report. The Chamber is nonetheless cognizant that Dr de Man, according to paragraph 11 of the Modalities for Trial, is due to submit his next report at the end of August 2009. The Chamber will now consider whether it finds it appropriate to instruct Dr de Man to answer any specific questions in his next report.

13. As the Chamber has previously held, questions such as the pre-formulated questions submitted by the Stanišić Defence require a legal determination in which facts presented by a

²¹ T. 1552, 1559; see 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, 22 July 2009 ("22 July 2009 Reasons").

²² 22 July 2009 Reasons, para. 17.

medical assessment are but one, although a large, consideration.²³ This determination is ultimately for the Chamber to make, once informed as to the circumscribed medical facts available to the reporting doctors.²⁴ The Chamber further notes in this respect that question (d) in paragraph 5 above seeks information about the Accused's *physical* ability to withstand proceedings, something which does not fall within the scope of specific expertise for which Dr de Man was appointed to report on.

14. Dr de Man is a specialist in neuropsychiatry and has many years of professional experience in the field of psychiatry, including forensic psychiatry. He has submitted four reports to the Chamber and has testified before it in 2008. Dr de Man is familiar with the Accused's medical condition and has consulted with other medical professionals involved in the treatment or examination of the Accused.²⁵

15. The Chamber expects that all reporting doctors, within their respective areas of expertise, use all information pertinent to the diagnosis of the Accused in their reports. The Chamber considers that this was the approach taken by Dr de Man in his previous reporting to the Chamber. By way of this decision, Dr de Man is made aware of the positions taken by the parties and the Chamber on these issues. The Chamber invites Dr de Man to consider addressing in his next report any medical element underlying the pre-formulated questions which is within his medical field of expertise and to the extent that he considers it appropriate to do so. In this respect, the Chamber stresses, as elaborated above, that it needs medical facts in order to make certain legal determinations. With regard to the specific methodology to be employed, including medical tests to be administered, the Chamber finds that this is a matter to be determined by the court-appointed expert. The Chamber further invites Dr de Man to indicate in his next report, whether he already considered any medical elements underlying the matters raised by the Stanišić Defence in his previous reporting. The Chamber further clarifies that it would call Dr de Man to court for further questioning, upon request by a party or *proprio motu*, if it feels that clarification of his reports is needed.

16. With regard to Dr de Man's question as to an informative meeting with Ms Lidija Vukašinović, the Chamber leaves it in Dr de Man's hands whether he would find such a meeting beneficial for his reporting as the court-appointed psychiatric expert. The Chamber

²³ Decision on Start of Trial and Modalities for Trial, 29 May 2009 ("Modalities Decision"), para. 22.

²⁴ Ibid.

²⁵ Cf. Dr de Man Report, pp. 4-5.

notes in this respect that Dr de Man's consultations with other people in the Accused's surround seemed to have been helpful for his reporting.

17. The Chamber further notes that the Stanišić Defence, in its Reply, states that guidance on the fulfilment of Counsel's ethical and legal duties with regard to receiving instructions from their client is "long overdue".²⁶ As stated above, the Chamber addresses these matters pursuant to its obligation to ensure a fair and expeditious trial. The Chamber finds that its efforts in relation to the assessment of the Accused's medical condition suffice for the Stanišić Defence to further consider its ethical and legal duties. In this respect, the Chamber also refers the Stanišić Defence to the Chamber's Decision on Motion Re Fitness to Stand Trial, where the matter was substantially addressed; a decision which was not challenged.²⁷

Motion

18. The Chamber reiterates the importance of complete and transparent medical reporting.²⁸ However, the transparent medical reporting should not unnecessarily encroach on the privacy rights of the Accused or third persons. Nevertheless, any redactions of medical reports will only be considered in relation to 'redacting from the public', and not as 'redacting from the Chamber or the parties'. The Chamber is confident that all reporting doctors, having now been made aware of this matter, can identify any such areas in their future reports by placing them in a separate annex which should then be filed as 'confidential' by the Tribunal's Registry. If the reporting doctors are uncertain about whether certain information should be put in the report or in a separate annex, they are invited to seek specific guidance from the Chamber through the Tribunal's Registry.

19. With regard to the Prosecution's request to change the status of the Motion and the Response to the Motion, the Chamber finds that it is not necessary to lift their confidential status, since the present decision gives the public sufficient information about the substance of the parties' submissions.

Disposition

20. For the foregoing reasons and pursuant to Rule 54 of the Rules, the Chamber

²⁶ Reply, paras 7-10.

²⁷ Decision on Motion Re Fitness to Stand Trial, 10 March 2008; see also Modalities Decision, para. 13.

²⁸ See Modalities Decision; 22 July 2009 Reasons.

DENIES the Request;

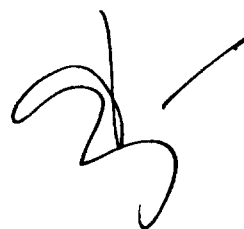
DENIES the Motion;

INSTRUCTS the Registrar to serve this decision on Dr de Man, Dr Siersema, Dr Oldenburg, and Dr Eekhof;

ORDERS the Registrar to instruct all medical professionals submitting medical reports to this Chamber pursuant to the Modalities for Trial, to submit any sensitive personal information about the Accused or third parties that is not directly related to the Accused's ailments, in a separate annex to their reports;

INSTRUCTS the Registrar to file such separate annexes as confidential annexes to the reports.

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



Judge Alphons Orie
Presiding Judge

Dated this sixth day of August 2009
At The Hague
The Netherlands

[Seal of the Tribunal]