



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: 17 December 2008
Original: English

IN TRIAL CHAMBER III

Before: Judge Patrick Robinson, Presiding
Judge Pedro David
Judge Michèle Picard

Registrar: Mr. Hans Holthuis

Decision of: 17 December 2008

PROSECUTOR

v.

**JOVICA STANIŠIĆ
AND
FRANKO SIMATOVIĆ**

PUBLIC

**DECISION ON PROSECUTION MOTION FOR
RE-ASSESSMENT OF JOVICA STANIŠIĆ'S HEALTH
AND RE-COMMENCEMENT OF TRIAL AND
DECISION ON PROSECUTION MOTION TO ORDER
FURTHER MEDICAL REPORTS ON JOVICA
STANIŠIĆ'S HEALTH**

The Office of the Prosecutor:

Mr. Dermot Groome
Ms. Doris Brehmeier-Metz

Counsel for the Accused:

Mr. Geert-Jan Alexander Knoop and Mr. Wayne Jordash for Jovica Stanišić
Mr. Zoran Jovanović and Mr. Vladimir Domazet for Franko Simatović

1. **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”) is seized of the “Prosecution Motion For Re-Assessment of Jovica Stanišić’s Health And Re-Commencement of Trial” filed on 23 October 2008 (“Motion”), the “Defence Response to Prosecution Motion For Re-Assessment of Jovica Stanišić’s Health And Re-Commencement of Trial” filed on 6 November 2008 by the Defence for Jovica Stanišić (“Stanišić Defence”) (“Stanišić Defence Response”) and the “Prosecution Request for Leave to Reply and Reply to Defence Response to Prosecution Motion For Re-Assessment of Jovica Stanišić’s Health And Re-Commencement of Trial” filed on 12 November 2008 (“Reply”). No response has been filed on behalf of the other accused, Franko Simatović.

2. The Trial Chamber is also seized of a “Prosecution Motion to Order Further Medical Reports on Jovica Stanišić’s Health” filed by the Prosecution on 1 December 2008 (“Second Motion”) and a Response from the Stanišić Defence filed on 9 December 2008. As the matters raised in the Second Motion are closely related to those in the Motion, no further filings are required by the Trial Chamber.

A. Procedural Background

3. On 10 March 2008, and following a round of hearings and submissions from the parties, the Trial Chamber found that Jovica Stanišić was fit to stand trial before the Tribunal.¹ The health of this accused has been a particular concern throughout the period that he was held in detention at the United Nations Detention Unit (“UNDU”) and the accused had been absent for medical reasons for most of the hearings as to fitness. Although the accused initially waived his right to be present at the hearings held in early March 2008, he then declined to do so and has been absent from all further proceedings. The trial of this matter opened on 28 April 2008 utilising a video-conference link with the UNDU² established previously by a “Decision on Future Course of Proceedings” issued by the Trial Chamber on 9 April 2008,³ and subsequently supplemented with a detailed procedure for the monitoring of, and reporting on, the health of the accused while following the proceedings in this way.⁴ The accused declined to avail himself of this facility.

4. The Stanišić Defence sought leave to appeal the decision to proceed by way of video-conference link, which leave was granted on 16 April 2008. On 16 May 2008 the Appeals Chamber

¹ Decision on Motion Re Fitness to Stand Trial, 10 March 2008.

² Pre-trial Conference, 28 April 2008, T. 975.

³ Decision on Future Course of Proceedings, 9 April 2008.

⁴ Order on the Monitoring of and Reporting on the Health of the Accused Stanišić, 29 April 2008; Order Establishing a Procedure for the Monitoring of and Reporting on the Accused Stanišić’s Ability to Attend Court in Person and/or to Participate in the Court Proceedings via the Video-conference Link, 8 May 2008.

issued its “Decision on Defence Appeal of the Decision on Future Course of Proceedings,” (“Appeals Chamber Decision”), in which the Appeals Chamber instructed the Trial Chamber to adjourn the proceedings in this case for a minimum period of three months and “to reassess the Accused’s state of health before determining when the trial should commence.”⁵ Consequently, at its next sitting on 20 May 2008, the Trial Chamber adjourned the proceedings in this matter for an indefinite period.⁶

5. On 26 May 2008 the Trial Chamber granted provisional release to Belgrade for both accused⁷ and, in its “Decision on Provisional Release”, the Trial Chamber established a comprehensive reporting procedure to monitor the health of the accused Jovica Stanišić while on provisional release, including the submission of independent expert reports.⁸

6. The Trial Chamber has now received the following medical reports concerning both the physical and mental health of the accused, Jovica Stanišić: (1) Independent expert gastroenterologist report of Dr. Siersema, filed 12 September 2008; (2) Independent expert psychiatric report of Dr. de Man, filed 1 September 2008; (3) Report of Dr. Fidler⁹, filed 12 August 2008; (4) Report of VMA panel of consultants, filed 16 July 2008; (5) Report of Dr. Tarabar, VMA, filed 8 August 2008; (6) Report of Dr. Bućan, neuropsychiatrist, VMA, filed 8 August 2008; (7) Report of Dr. Tarabar, filed 9 September 2008; (8) Report of Dr. Bućan, filed 9 September 2008; (9) Report of Dr. Tarabar, filed 9 October 2008; (10) Report of Dr. Pecelj-Bročić, VMA panel of consultants, filed 28 November 2008; and (11) Report of Dr. Pecelj-Bročić, filed 16 December 2008.

B. Submissions of the parties

7. In the Motion the Prosecution makes the following requests: (1) that the Trial Chamber assess the medical reports and find that the accused Jovica Stanišić is now physically able to attend hearings at the Tribunal and to order the recommencement of the trial; (2) in the event that the Chamber forms the view that a hearing is required to assess the health of the accused, that the Chamber schedule such hearing and permit Prosecution experts to examine him in advance; and (3) in the event that the Chamber determines that the accused is able to attend hearings but may benefit from treatment in Belgrade, to require him to attend court proceedings via a video-conference link

⁵ Decision on Defence Appeal of the Decision on Future Course of Proceedings, 16 May 2008, para. 22.

⁶ Hearing, 20 May 2008, T. 1258.

⁷ Decision on Provisional Release, 26 May 2008, para. 68(1).

⁸ *Ibid.*, paras. 68(2), 68(3) and 68(4).

⁹ Dr. Fidler was removed as court appointed expert and replaced by Dr. Siersema when she proved unwilling to travel to Belgrade to conduct the further examinations necessary to complete her report.

from Belgrade.¹⁰ The Prosecution asserts that such an arrangement strikes a balance between the necessity of expediting the trial and taking reasonable precautions for the health of the accused.

8. The Prosecution submits that the health of the accused, both mental and physical, has improved sufficiently to enable him to attend trial proceedings, asserting that: "While there is disagreement among the various experts with respect to his long term prognosis and the appropriate course of treatment they are uniform in their assessment that he has achieved better physical and mental health over the course of the adjournment."¹¹ It relies in part upon the report of Dr. Siersema and asserts that this report reaches the conclusion that "the Accused is currently physically able to participate in a reduced schedule designed to accommodate his condition" but defers to the psychologists' reports to determine "if his mental condition permits a modified hearing schedule". Such schedule could be for one week in court, one week for hospital treatment.¹² The Prosecution considers the possibility that the health of the accused may deteriorate if he returns to the UNDU but asserts that no reliable evidence has been produced to this effect or to demonstrate that the care the detainees receive in the UNDU is inadequate.¹³

9. The Prosecution notes that the court-appointed psychiatrist, Dr. de Man, and his colleague Dr. Verheugt, were not able to complete their testing "due to the circumstances and fatigue reported by Mr Stanišić".¹⁴ Addressing the report of Dr. Bućan, the treating psychiatrist in Belgrade, the Prosecution submits that her reports "do not contradict the overall assessment by the court-appointed experts" and that, in addition to reporting an improvement in stress tolerance, Dr. Bućan "does not report any problems with communicating with the accused, nor does she describe the presence of any signs of psychosis or cognitive malfunction."¹⁵

10. The Prosecution concludes that none of the doctors treating or evaluating Mr. Stanišić's physical or mental health observed any impairment of cognitive function or diminishment of his capacity to communicate, being "the types of infirmities considered relevant to the *Strugar* Chamber's consideration of fitness to stand trial."¹⁶

11. The Prosecution then addresses the right of the accused to be present at his trial, asserting that the right to be physically present is not absolute. The Prosecution notes that the Appeals Chamber Decision confirms that derogation from that right may be warranted by substantial trial

¹⁰ Motion, 23 October 2008, para. 1.

¹¹ Motion, para. 14.

¹² Motion, para. 2.

¹³ Motion, para. 17.

¹⁴ Motion, para. 8.

¹⁵ Motion, paras 9-10.

¹⁶ Motion, para. 9, referring to the Decision of the Trial Chamber in *Prosecutor v. Pavle Strugar*, IT-01-42-T, Decision Re the Defence Motion to Terminate Proceedings, filed 26 May 2004.

delays on the part of the accused, even if they are unintentional and that the Trial Chamber had correctly identified the proportionality principle as the legal test to be applied in such a case.¹⁷

12. The Prosecution submits that the Appeals Chamber Decision does not preclude the use of a video-conference link *per se* but that the Trial Chamber erred in proceeding in that way given the existence of a reasonable alternative, i.e., an adjournment of three to six months.¹⁸ The Prosecution notes that this period of time has now expired and thus requests the Trial Chamber to consider “whether it is reasonable to adjourn the case again or explore other alternatives that may appropriately balance the competing concerns of an expeditious trial for both accused, Mr. Stanišić’s health and his right to be physically present at his trial”.¹⁹ The Prosecution asserts that “any additional delay or indefinite delay which jeopardises the Prosecution’s ability to present its case and infringes the rights of both Accused to an expeditious trial is not reasonable”.²⁰

13. The Prosecution submits that should the Trial Chamber find that Mr. Stanišić is too unwell to return to the UNDU it would be appropriate for the Chamber to consider whether he is able to temporarily attend court hearings via video-conference link from Belgrade.²¹ The Prosecution asserts that this is technically possible and that, in the absence of any clear indication of when he will be fully able to physically attend court in the Hague the temporary use of a video-link facility in Belgrade would meet the requirements of the proportionality test.²²

14. The Prosecution seeks leave to exceed the word limit for motions due to the “complexity of the matters addressed and their critical importance to the further proceedings in this case”.²³ Leave to exceed the word limit is hereby granted.

15. In its Response, the Stanišić Defence posits that the core question to be addressed by the Trial Chamber is whether, given his mental and physical state, the accused is currently able to participate in his trial.²⁴ The Stanišić Defence asserts that “[t]he medical evidence supports a continued adjournment, so that further observations/tests can be conducted and further improvement noted, before imposing the physical and mental rigours of a substantial criminal trial on the accused”.²⁵

¹⁷ Motion, para. 18.

¹⁸ Motion, para. 19.

¹⁹ Motion, para. 20.

²⁰ Motion, para. 21.

²¹ Motion, para. 22.

²² *Ibid.*

²³ Motion, para. 24.

²⁴ Response, para. 2.

²⁵ Response, para. 4.

16. The Stanišić Defence argues that the continuation of the trial at this time would be “wholly inconsistent” with the severity of his condition and the multi-disciplinary treatment he is receiving.²⁶ It asserts that resumption of the trial would place the long term health of the accused “at greater – and more permanent – risk, as well as leading to long and unavoidable adjournments making an expeditious trial impossible.”²⁷

17. The Stanišić Defence objects to the suggestion that the accused could attend hearings on a modified schedule, for example, one week in court, one week off for treatment and recovery, asserting that any gain to be achieved in this way would be modest and would have to be balanced against “the predictable benefits of [...] rest and treatment and the obvious risks to long term health and recovery”.²⁸ The Stanišić Defence also emphasizes the repeated inpatient hospital treatment Jovica Stanišić has received during the period of provisional release, asserting that these admissions have not been solely for the purpose of receiving intravenous antibiotics but are due to the severity of the accused’s physical and mental condition.²⁹

18. Addressing Mr. Stanišić’s mental condition, the Stanišić Defence points to several references in the reports of the court appointed experts which, it is argued, the Prosecution has failed to take into account, leading to error and a “grotesque over simplification of the available medical evidence and evinces a lack of understanding of psychiatric conditions in general.”³⁰ The Stanišić Defence stresses the fact that Dr. Siersema’s proposal of a one-week on, one-week off schedule, is premised on the mental health of the accused being sufficiently robust.³¹

19. The Stanišić Defence asserts that it is not convincing to argue that any additional delay is unreasonable, especially as the Appeals Chamber characterised the proposed three to six months adjournment as “a relatively short time”.³² It argues that the assessment of what is reasonable involves more than a consideration of the Prosecution’s ability to present its case and the expeditiousness of the trial; the ability of the accused to participate and the fairness of the trial are also relevant factors. It submits that the Appeals Chamber Decision was premised on a guarantee of effective participation and that “anything less could never be reasonable.”³³ It states that “reasonable delay must be assessed by reference to the timing of the commencement of the trial and assessment of its overall length” and that any trial at this time would be subject to so many delays in

²⁶ Response, para. 5.

²⁷ *Ibid.*

²⁸ Response, paras 6-8.

²⁹ Response, para. 11.

³⁰ Response, paras 12 –16.

³¹ Response, para. 14.

³² Response, para. 18.

³³ Response, para. 19.

the form of the one-week on, one-week off schedule, combined with sessions of just one-hour with further breaks, together with regular hospital admissions for treatment, that it would not be reasonable to proceed on that basis nor would the trial be completed within a reasonable period.³⁴

20. The Stanišić Defence concludes by noting that the psychiatric and psychological evidence available to the Trial Chamber does not include specific comments as to the effects of a trial schedule at this time, asserting that there is “insufficient evidence from which the Accused’s current mental state may be judged” and that it would be inappropriate to recommence the trial without this information.³⁵

21. Thus the Stanišić Defence submits that it would be counterproductive at this time to conduct a hearing and that the further examinations that would be needed for such a hearing “would be harmful to the fragile recovery of the Accused” and could lead to the loss of more time.³⁶ The Stanišić Defence asserts that the Motion must be rejected and that the Trial Chamber “should consider further examinations (including psychological testing) by the (presently engaged) medical experts”.³⁷

22. The Stanišić Defence also seeks leave to exceed the word limit for motions “in order to address all the arguments put forward by the Prosecution.”³⁸ Leave to exceed the word limit is hereby granted.

23. The Prosecution seeks leave to file a reply to the Response. Leave to file a reply is hereby granted. In its Reply, the Prosecution asserts that the Stanišić Defence fails to address the improvement shown in the health of the Accused reported by “all medical experts” and notes that the Prosecution merely lists the one-week on, one-week off trial schedule as “one option potentially available to the Trial Chamber.”³⁹

24. The Prosecution maintains its position that “the interest of justice requires that the Trial Chamber re-assess the Accused’s health as ordered by the Appeals Chamber and further order that the trial re-commence, as is supported by the medical evidence now before the Chamber” and concludes: “It is imperative that the decision on the future course of proceedings is not left solely in

³⁴ Response, para. 20.

³⁵ Response, paras 21-23.

³⁶ Response, para. 24.

³⁷ Response, para. 25.

³⁸ Response, para. 1.

³⁹ Reply, para. 4.

the hands of an Accused whose motivation is certainly influenced by the wish not to let this trial come forward.”⁴⁰

25. In the Second Motion the Prosecution addresses the medical reporting regime currently in place and requests the Trial Chamber: (a) to direct the Registrar to confirm whether any further medical reports have been received since 29 September 2008 pursuant to the Provisional Release Decision; (b) to order that the treating doctors in Belgrade continue to report monthly on the state of health of the Accused; and (c) to order regular medical reports from another doctor who is alleged to have taken over treatment in August 2008.⁴¹

26. In its Response to the Second Motion, the Stanišić Defence notes that the treating physicians in Belgrade have continued to provide regular reports to the Trial Chamber and outlines the administrative procedure for submission of these reports. The Stanišić Defence also informs the Trial Chamber that Dr. Tarabar is on sabbatical leave and that his colleague, Dr. Pecelj-Bročić, is temporarily in charge of the treatment of the Accused and has assumed the necessary reporting obligations. The Stanišić Defence states that it is “of the position that further Orders from the Trial Chamber specifying the dates of reporting may better assist the medical team responsible for Mr. Stanišić.”⁴²

C. Discussion

27. Although the arguments of the parties have been set out in considerable detail above, the Trial Chamber has been directly tasked by the Appeals Chamber with the obligation to reassess the health of the Accused before determining when the trial should commence, an undertaking that was already in hand when the Prosecution filed its Motion. The Trial Chamber has conducted its own review of the issues that arise and relies in this Decision on its own analysis and assessment of the medical reports before it, including the most recent reports of Dr. Pecelj-Bročić, filed on 28 November 2008 and 16 December 2008. These reports record three further periods of hospitalisation of the Accused, the last discharge being on 8 December 2008, and evidences that the Accused has been hospitalised at least once every month during the period in which he has been on provisional release.

28. When viewed in their entirety, the overall conclusion of all of the medical reports is that the accused Jovica Stanišić continues to suffer from a combination of both physical and mental health problems that require both ongoing treatment as an outpatient and frequent admission to hospital as

⁴⁰ Reply, para. 7.

⁴¹ Second Motion, para. 11.

⁴² Response to Second Motion, para. 10.

an inpatient. In particular, the report of Dr. Siersema, the court-appointed gastroenterologist, indicates that if Mr. Stanišić continues to require the administration of parenteral antibiotics, a situation confirmed by the latest reports from Dr. Pecelj-Bročić,⁴³ this will entail repeated and frequent admissions to hospital for inpatient treatment. On this basis, Dr. Siersema envisages the possibility of a modified one-week-on, one-week-off schedule in any court hearings, subject to the views of his colleagues as to the mental capacity of the accused to withstand such a schedule.⁴⁴

29. The Trial Chamber also relies upon the advice and conclusion of Dr. de Man, the court-appointed psychiatrist, who opines that continued treatment with medication, combined with psychotherapy, rehabilitation and physical therapy are recommended, but does not give any specific recommendations as to how this is to be applied within the confines of an ongoing trial.⁴⁵

30. The Trial Chamber is not persuaded that there is any benefit to be gained by conducting a hearing to reassess the health of the accused and the imposition on the accused of further examination by Prosecution experts.

31. In determining the appropriate course of action at this time, the Trial Chamber has to take into consideration, as it did in its "Decision on Future Course of Proceedings", the competing right of the accused, Jovica Stanišić, to be present, with the right of both the Accused and his co-accused to an expeditious trial. The Appeals Chamber has confirmed that the balancing of these two rights is reasonable and noted that the Trial Chamber had duly considered the proportionality principle in determining whether derogation from the Accused's right to be present at trial was justified when it noted that any restrictions on a fundamental right "must be the least intrusive instrument amongst those which might achieve the desired result".⁴⁶ However, the Appeals Chamber also held that derogation is not appropriate when reasonable alternatives exist and that, in the circumstances of this case, the period of delay had not reached a level that was so substantial as to warrant derogation from the fundamental right of the Accused to be present at his trial.⁴⁷ In addition, the Appeals Chamber noted that the Trial Chamber had failed at that time to consider whether, given his physical and mental state, the Accused would be able to effectively participate in his trial via video-conference link.⁴⁸

32. The fundamental task the Trial Chamber has to address in determining the future course of proceedings in this case remains the same: to balance the right of the Accused to be present with the

⁴³ Report of Dr. Dr. Pecelj-Bročić, filed 28 November 2008, p. 2.

⁴⁴ Independent expert gastroenterologist report of Dr. Siersema, 12 September 2008, p. 3.

⁴⁵ Independent expert psychiatric report of Dr. De Man, 1 September 2008, p. 10.

⁴⁶ Appeals Chamber Decision, paras 16, 18.

⁴⁷ Appeals Chamber Decision, paras 18-19.

⁴⁸ Appeals Chamber Decision, para. 20.

right to an expeditious trial. The Appeals Chamber has stated on more than one occasion that the first of these rights means that the accused has the right to be physically present at his trial.⁴⁹ Taking into consideration all of the medical evidence before it, and despite some welcome indications of improvement, the Trial Chamber is not persuaded that the physical and mental health condition of the accused Jovica Stanišić is such as to enable him at this time to endure the rigours of an ongoing trial in The Hague and still participate effectively in such trial. Therefore, and as requested by the Stanišić Defence, a further adjournment of the proceedings is warranted.

33. The Trial Chamber has carefully considered various alternatives to a further adjournment of the proceedings, including the proposal of the Prosecution to consider the possibility of resuming the proceedings by way of video-conference link with the accused in Belgrade. However, the Trial Chamber is not persuaded that, at present, any of the alternatives constitutes a less intrusive or more reasonable alternative than the continued adjournment of the proceedings.

34. The Trial Chamber is mindful of the fact that at some stage “the period of delay in the circumstances of this case [may] reach a level that [is] so substantial as to warrant derogation from the fundamental right of the Accused to be present at trial.”⁵⁰ The proceedings have now been adjourned for six months, at the upper end of the period indicated by the Appeals Chamber to be reasonable.⁵¹ Further adjournment of the proceedings increases that period of delay. The Trial Chamber will therefore review the position again after a minimum period of adjournment.

35. In order to be in a position either to consider whether the delay in the commencement of trial has yet reached such an extent as to warrant derogation from the fundamental right of the Accused to be present at his trial or to commence the trial if the health of the accused so permits, the Trial Chamber will require further updated reports from both Dr. Siersema and Dr. de Man. These reports are to be provided after a further period of not more than three months from the date of this Decision, based on a similar regime of review and reporting as those already obtained. This period of time will enable these independent experts to conduct the necessary reviews and observations on which to base their reports without unduly prolonging the period of the adjournment.

36. The Trial Chamber will continue to require regular reports from the treating physicians in Belgrade as to the medical condition of the accused Jovica Stanišić. This accords with the position of the Stanišić Defence in its Response to the Second Motion. The Trial Chamber declines to

⁴⁹ Appeals Chamber Decision, para. 6, citing *Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-AR73.10, Decision on Nzirorera’s Interlocutory Appeal Concerning His Right to be Present at Trial, 5 October 2007 and *Protais Zigiranyiroazo v. The Prosecutor*, Case No. ICTR-2001-73-AR73, Decision on Interlocutory Appeal, 30 October 2006.

⁵⁰ Appeals Chamber Decision, para. 18.

extend the reporting obligation to the additional doctor requested by the Prosecution in the Second Motion and is satisfied that the current regime of reporting from Belgrade meets the other concerns raised by the Prosecution in the Second Motion.

37. Thus the Trial Chamber concludes that the least intrusive instrument available to it at this time in balancing the competing right of the accused, Jovica Stanišić, to be tried in his presence, with the right of the Accused and his co-accused, Franko Simatović, to an expeditious trial, is a further adjournment of the proceedings for a minimum period of three months.

D. Disposition

38. For the reasons given, the Trial Chamber **DENIES** both the Motion and the Second Motion, **VARIES** the relevant operative parts of its “Decision on Provisional Release” of 26 May 2008 and **ORDERS** as follows:

- a. The adjournment of the proceedings in this matter is prolonged;
- b. The Registry is instructed to contact the two independent court experts to facilitate the obtaining of further reports to be provided no later than three months from the date of this Order, such reports to be based on the same regime of inspection as the previous reports, that is, at least three examinations of the Accused by Dr. de Man in the next three months and at least two examinations of the Accused by Dr. Siersema;
- c. On receipt of those reports the Trial Chamber will review the health condition of the accused Jovica Stanišić for appropriate further order;
- d. Dr. Tarabar, or in his absence, Dr. Pecelj-Bročić, and Dr. Bućan are hereby ordered to continue to report to the Trial Chamber on a monthly basis at the end of each calendar month, such report to be filed with the Trial Chamber no later than the ninth day of the following month;
- e. The next such report is to be provided at the end of December 2008 and filed no later than 9 January 2009; and

⁵¹ Appeals Chamber Decision, para. 19.

- f. Dr. Tarabar or his designate is required to notify the Trial Chamber immediately of each and every occasion on which the accused Jovica Stanišić is admitted to hospital for treatment as an inpatient and the date of each corresponding discharge.

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



Judge Patrick Robinson
Presiding

Dated this seventeenth day of December 2008
At The Hague
The Netherlands

[Seal of the Tribunal]