



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: 12 April 2006
Original: English

IN TRIAL CHAMBER I

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

Registrar: Hans Holthuis

Decision: 12 April 2006

PROSECUTOR

v.

VLADIMIR KOVAČEVIĆ

**PUBLIC VERSION OF THE DECISION ON ACCUSED'S
FITNESS TO ENTER A PLEA AND STAND TRIAL**

The Office of the Prosecutor:

Ms. Susan Somers
Mr. Philip Weiner
Mr. David Re

Counsel for the Accused:

Ms. Tanja Radosavljević

1. Trial Chamber I, (“the 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 (“the Tribunal”) has to determine the fitness of the accused, Vladimir Kovačević (“Accused”), to enter a plea and to stand trial before the Tribunal as presented by the Defence.¹

I. PROCEDURAL HISTORY

2. The Accused was arrested in Belgrade on 25 September 2003 and transferred to the United Nations Detention Unit (“UNDU”) on 23 October 2003 on the basis of an Indictment dated 23 February 2001 which co-indicted Pavle Strugar, Milan Zec and Miodrag Jokić. This Indictment, which was comprised of 16 counts charging the Accused with violations of the laws or customs of war, under Article 3 of the Statute of the Tribunal (“Statute”) for events in the Dubrovnik area between 1 October 1991 and 3 December 1991,² was last amended on 17 October 2003 to narrow down the scope of the Indictment to the shelling of Dubrovnik on 6 December 1991.

3. The transfer of the Accused was delayed because of his medical condition. While in detention in Belgrade Central Prison, the Investigating Judge of the Belgrade District Court, Judge Z. Zvonar, ordered an evaluation of the mental health of the Accused. The Accused was examined by Dr. B. Mandić, psychiatrist, Dr. M. Vlašić, neuro-psychiatrist and Dr. Z. Simić, specialist in clinical psychology, whose report was subsequently transmitted to the Chamber. These experts concluded that the Accused was suffering from **[redacted for confidentiality reasons]**.

4. Upon the Accused’s arrival in The Hague on 23 October 2003, the consulting neuro-psychiatrist of the UNDU, Dr. Vera Petrović, examined the Accused. She concluded that the Accused was suffering from **[redacted for confidentiality reasons]**. In her report of 27 October 2003, Dr. Petrović estimated that the Accused would be able to appear in court and participate in the proceedings on 3 November 2003.

5. On 3 November 2003, at the Accused’s initial appearance held under Rule 62 of the Rules of Procedure and Evidence (“the Rules”), Counsel for the Defence raised the issue of the Accused’s

¹ Transcript Initial Appearance 3 November 2003, pp. 171-172.

² The areas in and around the city of Dubrovnik and the city of Mokošica were shelled and the villages of Brgat, Čilipi, Dubravka, Gruda, Močići, Osojnik, Slano and Zvekovica were either destroyed or plundered. As a result of the repeated shelling of Dubrovnik many civilians were killed and substantial parts of the Old Town were destroyed.

ability to enter a plea and to stand trial. The Chamber decided that it could not accept a plea on that date³ and adjourned for a period of thirty days. On 18 November 2003, the Chamber ordered that the Accused be examined by a psychiatrist and a psychologist in order to determine whether the Accused was able to stand trial (“Order to Medical Experts”).⁴ The Registrar appointed Dr. M. Goreta, forensic psychiatrist, and Prof. D. Krajnović, forensic psychologist, (“the Chamber’s Medical Experts”) to examine the Accused and, in accordance with the Chamber’s order, requested the Chamber’s Medical Experts to put the following questions to the Accused (“the Chamber’s 7 questions”):

1. Ability to understand the charges: Is the Accused able to understand that he is charged with the role he played in the attack on Dubrovnik on 6 December 1991 which caused death and injury to several civilians and further caused damage to a large number of (historic) buildings?
2. Understanding of the procedure: Is the Accused able to understand that the Prosecutor has brought charges against him and will adduce evidence, and that the Defence Counsel will assist him in presenting his point of view before the court, and finally that the Judges will determine whether he participated in that attack on Dubrovnik as charged and whether he deserves to be punished for that?
3. Ability to instruct his Defence Counsel: Is the Accused able to communicate with counsel in such way that counsel is able to adequately present the position of the Accused in respect of guilty or innocent and other relevant matters?
4. Ability to testify: Is the Accused able to understand that he may choose to give testimony himself, *i.e.* to answer questions put to him by Defence Counsel on, *i.e.*, his involvement or participation in the crimes for which he is charged, and that questions may also be put to him by the Prosecution and by the Judges, and that his answers can be taken into account when the Judges determine whether he is guilty; but also that he is entitled not to testify, in which case the Judges will decide the case without the information he might have given?
5. Ability to enter a plea: Is the Accused able to understand that if he admits to have participated in the attack on Dubrovnik as charged, the Judges will then most likely hear no evidence on the events themselves, but will limit themselves to hear evidence relevant for sentencing, *i.e.* determination of the punishment to be imposed?

³ Transcript Status Conference 3 November 2003, p. 189.

⁴ Order to instruct the Registrar to assign Medical Experts (hereinafter Order to Medical Experts), filed 18 November 2003.

6. Ability to understand the consequences of a conviction: Is the Accused able to understand that if convicted he may be punished to a term of imprisonment, possibly for a considerable number of years, presumably to be served in a foreign country?
7. Possible treatment: In case the Medical Experts are unable to answer any or all of the above questions in the affirmative, whether medical, psychological or psychotherapeutic treatment may then improve the ability of the Accused to understand the questions raised above. If so, which kind or combination of treatment would then be recommended and for how long an estimated period of time?

6. On 26 November 2003, the Chamber granted the Prosecution's Motion for separate trial severing the cases of the Accused, Pavle Strugar⁵ and Miodrag Jokić because the medical condition of the Accused was causing a delay in the proceedings against the co-Accused.

7. On 17 December 2003, the Chamber's Medical Experts finalised their report on the mental state of the Accused ("the Chamber's Medical Experts First Report").

8. Upon the Accused's request that Dr. D. Kosovich also examine him,⁶ Counsel for the Defence filed Dr. Kosovich's separate report on the mental state of the Accused ("Defence Expert's First Report") on 18 February 2004.

9. On 18 February 2004, the Chamber instructed the Registrar to obtain from the UNDU's consulting neuro-psychiatrist, Dr. V. Petrović,⁷ a short memorandum on the development of the mental health of the Accused since his arrival at the Detention Unit, the treatment or medication which he received and required her presence at a status conference. The Chamber also instructed the Registrar to obtain a brief report from Mr. T. McFadden,⁸ Commanding Officer of the UNDU, in respect of his and his staff's observations of the Accused's functioning in the Detention Unit.

10. On 15 March 2004, a hearing was held in which the Chamber heard the Parties, Dr. Petrović and Mr. McFadden. Both parties agreed to the fact that the Accused was in urgent need of treatment

⁵ Decision on the Prosecutor's Motion for Separate Trial and Order to schedule Pre-Trial Conference and start of the trial against Pavle Strugar, 26 November 2003.

⁶ Since the Accused's sister had allegedly already been in contact with Dr. Kosovich, it was accordingly decided that Dr. Kosovich would not be assigned as an independent expert before the Tribunal but rather as a Defence Expert Report if he so wished.

⁷ [Footnote redacted for confidentiality reasons]

and should be sent to a mental health facility for an initial period of six months. On 8 April 2004, the Chamber ordered the Registrar to intensify his communication with the Government of Serbia and Montenegro to possibly find a mental health facility that could provide the Accused with appropriate medical care.⁹

11. On 23 April 2004, the Defence filed a "Request for Provisional Release," requesting the Chamber to grant the Accused provisional release in order to receive the specialized treatment that he required and to specify the conditions of such a release in accordance with Rule 65 of the Rules. The Prosecution filed its response on 29 April 2004 stating that it would not oppose the Trial Chamber granting the Accused provisional release but emphasized that such order should contain strict conditions. It also reminded the Chamber that this case may fall under Rule 11*bis*.

12. On 2 June 2004, the Chamber issued a "Decision on Provisional Release," ordering the provisional release of the Accused for an initial period of six months, subject to certain conditions¹⁰ which the Government of Serbia and Montenegro guaranteed to comply with.¹¹

13. The Accused was provisionally released on 2 June 2004.¹² On 2 December 2004, the Chamber extended the Accused's provisional release until further notice.¹³

14. On 20 January 2005, in the context of the extension of provisional release, the Chamber's Medical Experts filed a new report¹⁴ ("the Chambers Experts' Second Report") on the mental health of the Accused.

15. On 25 February 2005, the Chamber's Medical Experts filed a submission of their conclusions ("the Chambers Experts' Third Report") upon the evaluation of the Accused as set out in the Second Report, in accordance with the Trial Chamber's Order¹⁵ of 16 February 2005.

16. Following the Chamber's Medical Experts Second and Third Report, the Defence filed a Medical Report¹⁶ ("the Defence Experts' Second Report") by Dr. Vesna Rosic.

⁸ [Footnote redacted for confidentiality reasons]

⁹ Order to Instruct the Registrar, 13 April 2004.

¹⁰ Decision on Provisional Release, 2 June 2004.

¹¹ Guarantee Ministerial Council of Serbia and Montenegro, 15 June 2004.

¹² Decision on Provisional Release, 2 June 2004.

¹³ Decision to Extend the Order for Provisional Release, 2 December 2004.

¹⁴ Psychiatric-Psychological Competency to Stand Trial of the Accused Vladimir Kovačević, 20 January 2005.

¹⁵ Order for Submissions concerning Medical Expert Report, 16 February 2005.

¹⁶ Defence Medical Report on Vladimir Kovačević by Dr. Vesna Rosic, 22 March 2005.

17. In order to assess the current mental condition of the Accused, a hearing was held on 13 April 2005. To better understand the differences from the earlier medical reports, the Chamber called an independent expert, Dr Nils Duits, to the hearing.¹⁷

18. On 7 October 2005, in order to obtain an updated opinion on the mental health of the Accused, the Chamber instructed the Registrar¹⁸ to arrange for the Chamber's Medical Experts and the leading psychiatrist or psychologist responsible for the treatment of the Accused at the Army Hospital in Belgrade, to examine the Accused and provide their findings in response to the six questions set out in the Order ("the Chamber's 6 questions"). The questions posed were:

1. Does the Accused understand the reason for and the purpose of the criminal proceedings brought against him in the Prosecutor's Indictment?
2. Will the Accused be capable of entering an informed plea to the charges in the Indictment, if he is brought to trial?
3. Does the Accused realize the consequences of a possible conviction?
4. Will the Accused, if he is brought to trial, be able to adequately instruct his Defence Counsel for the purpose of mounting a defence, including the identification and examination of witnesses?
5. Will the Accused be able to take, with full awareness, the decision of whether or not to testify at trial and offer relevant answers to questions posed to him by his Counsel, the Prosecution and the Trial Chamber?
6. Has there been any development in the circumstances that can account for any significant change in the findings included in the last reports filed by the Tribunal's Medical Experts and the chief treating psychiatrist/psychologist at the Army Hospital?

19. The Chamber's Experts filed their report on 2 November 2005 ("the Chambers Experts' Fourth Report"). Upon the request of the Defence and the Prosecution, the Chamber allowed each of the parties to have their experts examine the Accused. The Defence filed its report on 3 November 2005 ("the Defence Experts' Third Report"). The Prosecution's Experts filed their report on 5 December 2005 ("the Prosecution Experts' Report").

20. On 7 December 2005, the Chamber conducted a hearing in order to determine whether the Accused was fit "to enter a plea and to stand trial". In order make this determination, the parties

¹⁷ Hearing of 13 April 2005. (Testimony by Dr Nils Duits on the mental health of the Accused)

were permitted to question all of the medical experts. At the conclusion of the hearing, the Chamber instructed the parties to file their final observations on the medical experts reports and on the testimony given by the medical experts during the hearing. Both the Defence and the Prosecution filed their submissions on 14 December 2005 (“the Defence’s Submission” and “the Prosecution’s Submission” respectively).

1. The Applicable Legal Test

21. In *Prosecutor v Pavle Strugar*,¹⁹ Trial Chamber II considered the circumstances under which an accused may be found unfit to stand trial. Trial Chamber II’s findings in this regard were:

While there is no express provision, the Statute of the Tribunal offers material assistance for the present case, at least by way of implication. It is significant that before the Tribunal an accused has a number of relevant procedural rights. Provision for these rights is made in Articles 20 and 21 of the Statute. The enjoyment of these rights would appear to presuppose that an accused has a level of mental and physical capacity. At the commencement of trial proceedings the Trial Chamber is required to confirm that an accused understands the indictment (Art 20 par 3). The accused is, *inter alia*, entitled to defend himself (Art 21 par 4(d)), to examine the witnesses against him (par 4(e)), and to have the free assistance of an interpreter if he cannot understand or speak the language used in the Tribunal (par 4(f)).²⁰

22. Article 20, paragraph 3, of the Statute clearly assumes that an accused must have the capacity to understand the indictment. As stated by Trial Chamber II, “the rights to defend in person and examine witnesses appear to require for their exercise *inter alia* a capacity to:

- understand the purpose, including the consequences of the proceedings,
- understand the course of the proceedings, including the nature and significance of pleading to the charges,
- understand the evidence, and
- testify (should the accused so choose).²¹

23. The availability of counsel may certainly enable an accused to more adequately deal with each of the above matters, and in a particular case may well adequately compensate for any deficiency of a relevant capacity. The use of counsel requires, however, that the accused has the capacity to be able to instruct counsel sufficiently for this purpose.²²

¹⁸ Chamber’s Order to Obtain Further Medical Examination and Order to Schedule a Hearing, 7 October 2005.

¹⁹ *Decision re the Defence Motion to terminate proceedings*, Case No IT-01-42-T, 26 May 2004.

²⁰ *Ibid*, para 21.

²¹ *Ibid*, para 22.

²² *Ibid*.

24. The nature of these rights indicates that their effective exercise may be hindered, or even precluded, if an accused's mental and bodily capacity, especially the ability to understand, is affected by a mental or somatic disorder.²³

25. In the view of Trial Chamber II, it is apparent, from the provisions and the clear implications of Articles 20 and 21 of the Statute of the Tribunal, that an accused will have these capacities or, with assistance as of counsel, interpretation or otherwise, will be able to exercise these capacities in a sufficient degree to enable his or her defence to be presented.²⁴

26. Trial Chamber II further held that Articles 20 and 21 of the Statute of the Tribunal commend the view that the appropriate approach to be adopted in determining an accused's fitness to stand trial is to evaluate his/her capacity to exercise his/her express and implied rights.²⁵

27. Trial Chamber II also declares that it would be "entirely inappropriate, and unjustified, and antithetical to the application of international criminal law to require that each of these capacities must be present at their notionally highest level, or at the highest level that a particular accused has ever enjoyed in respect of each capacity." The threshold that is required is that such capacities must be present at such a level that it is possible for the accused to participate in the proceedings (in some cases with assistance) and sufficiently exercise the identified rights, in other words make his or her defence.²⁶

28. The Chamber considers that a comparative overview of the tests employed in various national jurisdictions provides support for the test that Trial Chamber II employed.²⁷ It therefore endorses Trial Chamber II's conclusions in this regard.

²³ *Ibid*, para 23.

²⁴ *Ibid*, para 24.

²⁵ *Ibid*, para 36.

²⁶ *Ibid*, para 37.

²⁷ In *Australia*, New South Wales, the test which is used to determine a person's fitness to stand trial is whether the accused is:

- unable to plead to the charge and exercise the right of challenge;
- unable to understand the nature of the trial (that it is an inquiry as to whether the person committed the offence);
- unable to follow the course of proceedings; unable to understand the substantial effect of any evidence that may be given in support of the prosecution; or:
- unable to give instructions to their legal counsel *Regina v Presser* ([2001] NSWSC 856, paras 33-34); *Regina v Saverio Quattrone* ([2001] NSWSC 856); and *Eastman v The Queen* ([2000] HCA 29, Gleeson CJ at para 25).

In the *United States*, under the US Criminal Code, "If ...the Court finds by a preponderance of the evidence that the defendant is presently suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense, the defendant will be deemed incompetent to stand trial" (18 U.S.C 4241 (d)). This test is the same as the one stated by the Supreme Court in *Dusky v United States* (362 U.S. 402; 80 S.Ct. 788; 4 L.Ed.2d 824 (1960)).

In the *United Kingdom*, several common law cases confirm the existence of an accepted test for determining competency in England. The test was first set out in *Pritchard* (1836) 7 Car. And P304: "There are three points to be

29. In conclusion, in order to determine whether the Accused is capable of entering a plea and standing trial, the Chamber needs to consider whether the Accused has the capacity to:

- plead;
- understand the nature of the charges;
- understand the course of the proceedings;
- understand the details of the evidence;
- instruct counsel;
- understand the consequences of the proceedings; and
- testify.²⁸

2. The Medical Reports

(a) The Chamber's Experts

30. **[Paragraph redacted for confidentiality reasons]**

31. **[Paragraph redacted for confidentiality reasons]**

32. **[Paragraph redacted for confidentiality reasons]**

33. **[Paragraph redacted for confidentiality reasons]**

34. **[Paragraph redacted for confidentiality reasons]**

35. **[Paragraph redacted for confidentiality reasons]**

inquired into -- First, whether the prisoner is mute of malice or not; secondly, whether he can plead to the indictment or not; thirdly, whether he is of sufficient intellect to comprehend the course of proceedings on the trial, so as to make a proper defense -- to know that he might challenge any of you to whom he may object -- and to comprehend the details of the evidence, which in a case of this nature must constitute a minute investigation. Upon this issue, therefore, if you think that there is no certain mode of communicating the details of the trial to the prisoner, so that he can clearly understand them, and be able properly to make his defense the charge; you ought to find that he is not of sane mind. It is not enough, that he may have a general capacity of communicating on ordinary matters."

Later cases of *R v Podola* [1960] 1 QB 325, *R v Robertson* [1968] 1 W.L.R. 1767; [1968] 3 All E.R. 557 *R v Berry* (1978) 66 Cr. App. R. 156; [1977] Crim L.R. (CA (Crim Div) and more recently *R v M (John)* [2003] EWCA Crim 3452 CA (Crim Div), Keene LJ at para 32 show the Court of Appeal confirming that this is the correct test to use.

In the *Netherlands*, Article 16 of the DCP states that the suspect should be able to understand the nature of the proceedings against him.²⁷ There is no recent case law on how to determine whether or not someone is unable to understand the nature of the proceedings against him.

In *Belgium*, the Cour de Cassation has defined the inability to stand trial as follows: the accused is in a state of insanity or severe state of mental disorder which renders him unfit to control his actions. Should the accused at the time of the verdict also be in a state of "social danger", he can be placed in detention in a psychiatric facility. As a rule, the accused will be placed in the psychiatric ward of a detention center for observation. However, the decision on the ability of the accused to control his actions is considered to be a finding of fact. It is not necessary that this finding is based on a medical examination, held at the time of the proceedings.

²⁸ *Ibid*, para 36.

(b) The Prosecution's Experts

36. [Paragraph redacted for confidentiality reasons]
37. [Paragraph redacted for confidentiality reasons]

(c) The Defence's Experts

38. [Paragraph redacted for confidentiality reasons]
39. [Paragraph redacted for confidentiality reasons]
40. [Paragraph redacted for confidentiality reasons]
41. [Paragraph redacted for confidentiality reasons]
42. [Paragraph redacted for confidentiality reasons]
43. [Paragraph redacted for confidentiality reasons]

3. Conclusion

44. The Chamber will now apply the abovementioned legal test to the opinions reached by the Chamber's, Defence's and Prosecution's most recent Reports in order to determine whether the Accused is fit to enter a plea and to stand trial.

45. The Chamber observes that the Experts' Reports of both the Chamber and the Defence reach the same overall conclusions. On the basis of these conclusions, the Chamber finds that the Accused lacks the ability to: (a) plead; (b) understand the nature of the charges; (c) understand the course of the proceedings; (d) understand the significance of the evidence; (e) instruct counsel; (f) understand the consequences of the proceedings; and (g) testify.

46. The Chamber notes that these reports contain minor discrepancies which do not, however, affect the above mentioned general conclusions. For instance, while the Chamber's Experts' Fourth Report states that the Accused "understands the reason and the purpose of the criminal proceedings in the indictment,"²⁹ the Defence's Experts' Fourth Report declares that "he does not have the

²⁹ Chamber Experts' Fourth Report, p. 7.

capacity to realistically understand the reason for and the purpose of the criminal proceedings brought against him.”³⁰

47. In respect of the conclusions reached by the Prosecution’s Experts, the Chamber observes that they diverge, to a certain extent, from those reached by the Chamber’s and the Defence’s Experts. In particular, paragraphs 4, 5 and 6 of the Prosecution’s Experts’ Report state that the Accused “has the capacity to provide adequate information about individual details of the events at the time in question,”³¹ “is able to understand the nature of the crimes”³² and “has the capacity to perceive a possible punishment.”³³ However, this Report also states that “it is highly probable that the subject does not have the capacity to cooperate with his Defence Counsel, and that insistence on that cooperation could result in **[redacted for confidentiality reasons]**.”³⁴

48. Furthermore, the Chamber notes that the Report submitted by the Prosecution’s Experts does not contain any conclusions in relation to three important questions: (i) the second question: Whether the Accused will be capable of entering an informed plea to the charges in the Indictment if he is brought to trial; (ii) the fifth question: Whether the Accused would be able to take, with full awareness, the decision of whether or not to testify at the trial and offer relevant answers to questions posed by his Counsel, the Prosecution and the Chamber; and (iii) the sixth question: Whether there has been any development in the circumstances which can account for any significant change in the findings included in the last reports filed by the Chamber’s Medical Experts and the chief treating psychiatrist/psychologist at the Army Hospital.

49. **[Paragraph redacted for confidentiality reasons]**

50. In conclusion, the Chamber finds that:

- (1) the Chamber’s and the Defence’s Experts’ Reports reach the same overall conclusion that the Accused is unfit to enter a plea and to stand trial;
- (2) the minor differences between the Chamber’s and the Defence’s Reports do not affect this overall conclusion;
- (3) the diagnoses on the Accused’s mental health condition are, in many respects, similar in all reports; **[Part of the paragraph redacted for confidentiality reasons]**

³⁰ Defence Experts’ Fourth Report, p. 16.

³¹ Prosecution Experts’ Report, p. 13.

³² *Ibid.*

³³ *Ibid.*

³⁴ *Ibid.*

- (4) the Prosecution's Experts' Report, as it stands, does not support by itself the conclusion that the Accused is fit to stand trial; and
- (5) even if Prosecution's Experts' Report would support the conclusion that he is fit to stand trial, the Chamber considers that it cannot overturn the concordant conclusions reached by both the Chamber's and the Defence's Experts.

50. For these reasons, the Chamber finds that the Accused is unfit to stand trial.

II. DISPOSITION

FOR THE FOREGOING REASONS,

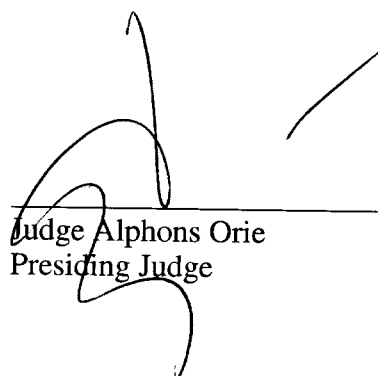
The **CHAMBER** hereby **FINDS** that the Accused does not have the capacity to enter a plea and to stand trial, without prejudice to any future criminal proceedings against him should his mental health condition change.

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

Dated this 12th day of April 2006

At The Hague,

The Netherlands.



Judge Alphons Orié
Presiding Judge

[Seal of the Tribunal]