



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: 09 April 2008
Original: English

IN TRIAL CHAMBER III

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

Registrar: Mr. Hans Holthuis

Decision of: 09 April 2008

PROSECUTOR

v.

**JOVICA STANIŠIĆ
AND
FRANKO SIMATOVIĆ**

PUBLIC

DECISION ON FUTURE COURSE OF PROCEEDINGS

The Office of the Prosecutor

Mr. Dermot Groome
Ms. Doris Brehmeier-Metz
Mr. Gregory Townsend
Mr. John Docherty

Counsel for the Accused

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

1. **TRIAL CHAMBER III** (“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 seised of the proceedings of the Prosecutor v. Jovica Stanišić and Franko Simatović since 11 December 2007.¹ In the proceedings to date, the health situation of Jovica Stanišić has played a prominent role.

2. In January 2004, the Accused Jovica Stanišić (“Accused”) was granted provisional release. Between January 2004 and February 2008, he requested a number of variations of the conditions of provisional release in order to be able to receive certain medical treatment. The matter of the Accused’s fitness to stand trial was first addressed by the Tribunal in a decision of 27 April 2006. The Defence motion was dismissed as being premature. In January 2008, the Defence for the Accused filed a motion in which it submitted that the Accused was not fit to stand trial. The Accused suffered from chronic pouchitis, recurring kidney stones, recurring thrombosis, osteoporosis and depression. This Trial Chamber, after hearing the evidence of expert witnesses, dismissed this motion by decision of 10 March 2008.²

3. On 6 February 2008, Jovica Stanišić and Franko Simatović were ordered to return to the United Nations Detention Unit (“UNDU”), as the Pre-Trial Conference and opening statements in their trial were scheduled to take place on 27 February 2008.³ In light of the scheduled hearing on the Accused’s health, the Pre-Trial Conference and the opening statements were postponed to 10 March 2008. During the hearing of 6 March 2008, the Prosecution requested that the Pre-Trial Conference and opening statements be postponed. This request was granted and the commencement of the case was postponed to 17 March 2008.

4. On 14 March 2008, the Medical Officer of UNDU reported that the Accused was “close to a total psychological breakdown”.⁴ On 17 March 2008, the Accused did not attend court and the Trial Chamber adjourned until the next day in order to receive an update on the Accused’s medical situation.⁵ That same day, it received information from the Medical Officer of the UNDU indicating that the Accused would not be well enough to attend the hearing of 18 March 2008 and that further medical examinations could be detrimental to the Accused’s health. On 18 March 2008, the Trial Chamber, after consultation with the Medical Officer, decided that it was in the interests of justice and the good administration of the trial that the proceedings regarding the health of the Accused be held in public session. In light of the report of the Medical Officer, it also postponed the Pre-Trial

¹ “Order Reassigning a Case to a Trial Chamber”, filed by the President of the Tribunal on 11 December 2007.

² Hearings were held in closed session from 3 March 2008 to 6 March 2008.

³ Scheduling Order, 6 February 2008.

⁴ Registry Submission pursuant to Rule 33 (B) Concerning the Accused’s Medical Condition, filed confidentially and *ex parte* on 14 March 2008. The Trial Chamber lifted the *ex parte* status during the hearing on 17 March 2008, T. 689.

Conference and opening statements until 1 April 2008 and ordered an independent psychiatrist to examine the Accused on 28 March 2008 and to report on his medical condition by 31 March 2008. On 27 March 2008, the Accused was taken to hospital because of the occurrence of kidney stones.⁶ On 28 March 2008, he stayed in the penitentiary hospital in Scheveningen, where he was examined by the independent psychiatrist, Dr. Joseph de Man. His summary conclusion, sent to the Trial Chamber on 31 March 2008, was that the severe depression of the Accused was such that he was “clearly unfit to stand trial on psychiatric grounds only” and that his fitness was not expected “to be restored within three, possibly six months”. During the hearing of 1 April 2008, the Accused again did not appear in court. The Trial Chamber set out a number of possibilities for the future progress of the case, namely: (1) severance of the cases of Accused and Franko Simatović under Rule 82 in the interest of justice, (2) in light of Dr. De Man’s summary conclusion, a postponement of the trial for several months, (3) another round of examination of the Accused and another hearing on the Accused’s fitness to stand trial (4) trial by video conference link if and when the Accused would be unable to come to court and (5) setting 7 April 2008 as the date for the commencement of the trial on the basis that by that time, the Accused would be out of the hospital and would have returned to the UNDU.⁷ On 2 April 2008, the Parties responded to these five options. The Prosecution submitted that it was in favour of establishing a video-conference link with the UNDU. The Defence submitted that the most reasonable course of action would be to adjourn the proceedings for three to six months. None of the Parties was in favour of severing the cases.

5. After receipt of the full report by Dr. De Man and the Parties’ comments in relation to that report during the hearing of 2 April 2008, the Trial Chamber scheduled a hearing on 7 April 2008, at which hearing Dr. De Man was to be examined on his report. On 7 and 8 April 2008, Dr. De Man was questioned by the Parties and the Bench. The Accused was not present during those hearings and a form supporting his absence was filed. Dr. De Man, in response to questions from the Bench and the Prosecution conceded that his conclusion did not take account of the legal criteria for determining fitness. The Chamber therefore put to Dr. De Man the five questions that had been put to the experts who testified at the hearing on fitness.⁸

⁵ Hearing, 17 March 2008, T. 700.

⁶ Hearing, 1 April 2008, T. 705.

⁷ Hearing, 1 April 2008, T. 707 - 708.

⁸ These questions were: whether the Accused is able to understand the nature of the charges and proceedings against him, to include the consequences of a conviction on those charges; whether the Accused is able to instruct his Defence counsel as to his defence of the charges; whether the Accused is able to testify on his on behalf if he elects to do so; whether the Accused is physically able to withstand full-time trial proceedings (approximately five hours per day, five days per week) or some lesser formula of scheduling; whether the Accused’s health situation requires any particular accommodation to support his ability to stand trial.

6. On 8 April 2008, the Prosecution submitted that there was nothing in the evidence of Dr. De Man to unseat the Trial Chamber's decision of 10 March 2008. Mr. Knoops, for the Defence, submitted that the Defence did not wish to re-open the decision but instead requested that the trial be postponed for three to six months. On the same date, the Trial Chamber, by majority, Judge Robinson dissenting, found that the evidence of Dr. De Man did not warrant a reconsideration of the decision of 10 March 2008 regarding fitness of the Accused to stand trial.

7. From January 2008 to present, the Trial Chamber held ten hearings. Since his transfer to the UNDU, the Accused attended only part of one hearing, namely the hearing on 3 March 2008. He was excused from attending the rest of the hearing of 3 March 2008 because he said that he had not slept from 03.30 hours in the morning onward and wished to return to the UNDU. He signed waivers for the hearings of 3, 4, 5 and 6 March 2008, indicating he was unable to attend court due to illness. He refused to sign any further waiver forms. On each occasion, his non-attendance was supported by a member of the medical unit of the UNDU.

8. Article 21(4)(d) of the Statute provides that an accused has a right "to be tried in his or her presence". The drafters of the Statute clearly viewed this right as an "indispensable cornerstone of justice", like the right to self-representation, the right to remain silent, the right to confront witnesses against him, the right to a speedy trial, and the right to counsel.⁹ The Appeals Chamber of the International Criminal Tribunal for Rwanda ("ICTR") has interpreted this right as meaning that an accused has a right to be *physically* present at his trial.¹⁰

9. Both the Appeals Chamber of the ICTR and the Appeals Chamber of the Tribunal have observed that an accused's right to be tried in his presence is not absolute.¹¹ An accused person can waive or forfeit the right to be present at trial.¹² Furthermore, Rule 80(B) of the Rules of Procedure and Evidence ("Rules") allows a Trial Chamber to "order the removal of an accused from the courtroom and continue the proceedings in the absence of the accused if the accused has persisted

⁹ *Slobodan Milošević v. Prosecutor*, Case No. IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence Counsel, 1 November 2004 ("*Milošević* Appeal Decision"), paras 11 and 13; ICTY Statute, Art. 21(4)(d) for the right to self-representation, Art. 21(4)(g) for the right to remain silent, Art. 21(4)(e) for the right to confront witnesses against them, Art. 21(4)(c) for the right to a speedy trial, Art. 21(4)(d) for the right to counsel.

¹⁰ *Protais Zigiranyirazo v. The Prosecutor*, Case No. ICTR-2001-73-AR73, Decision on Interlocutory Appeal, 30 October 2006 ("*Zigiranyirazo* Appeal Decision"), paras 11-13. The Appeals Chamber considered that the physical presence of an accused before the court, as a general rule, is one of the most basic and common precepts of a fair criminal trial, *see* para. 11.

¹¹ *Milošević* Appeal Decision, para. 13; *Zigiranyirazo* Appeal Decision, para. 14; *The 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, para. 11 ("*Nzirorera* Appeal Decision").

¹² *See Zigiranyirazo* Appeal Decision, para. 14.

in disruptive conduct”.¹³ In the case of *Prosecutor v. Slobodan Milošević*, the Appeals Chamber interpreted this Rule as meaning that an accused’s right to be present for his or her trial can be restricted “on the basis of substantial trial disruptions”.¹⁴ The Appeals Chamber specified that “it cannot be that the only kind of disruption legitimately cognizable by a Trial Chamber is the intentional variety”.¹⁵ It also added the following observation:

How should the Tribunal treat a defendant whose health, while good enough to engage in the ordinary and non-strenuous activities of everyday life, is not sufficiently robust to withstand all the rigors of trial work [...] unless the hearing schedule is reduced to one day a week, or even one day a month? Must the Trial Chamber be forced to choose between setting that defendant free and allowing the case to grind to an effective halt? In the Appeals Chamber’s view, to ask that question is to answer it.¹⁶

The Appeals Chamber finally noted that if Milošević’s health problems were to resurface with sufficient gravity, “the presence of Assigned Counsel [would] enable the trial to continue even if Milošević was temporarily unable to participate”.¹⁷ In the case of *Prosecutor v. Vojislav Sešelj*, the Appeals Chamber found that a Trial Chamber may place restrictions on the right of an accused to self-representation where “a defendant’s self-representation is substantially and persistently obstructing the proper and expeditious conduct of his trial”.¹⁸

10. In determining whether to restrict any statutory right of an accused, a Trial Chamber must take into account the proportionality principle, pursuant to which any restriction of a fundamental right must be in service of a sufficiently important objective and must impair the right no more than is necessary to accomplish this objective.¹⁹ In this regard, the United Nations Human Rights Committee has observed, *inter alia*, that any such restrictions “must be the least intrusive instrument amongst those which might achieve the desired result”.²⁰

¹³ Article 63 of the Statute of the International Criminal Court provides that, if the accused “continues to disrupt the trial, the Trial Chamber may remove the accused and shall make provision for him or her to observe the trial and instruct counsel from outside the courtroom, through the use of communication technology, if required”.

¹⁴ *Milošević* Appeal Decision, para. 13. The Appeals Chamber noted that “[i]f a defendant’s right to be present for his trial - which, to reiterate, is listed in the same string of rights and indeed in the same *clause* as the right to self-representation - may thus be restricted on the basis of substantial disruption, the Appeals Chamber sees no reason to treat the right to self-representation any differently”.

¹⁵ *Milošević* Appeal Decision, para. 14.

¹⁶ *Milošević* Appeal Decision, para. 14.

¹⁷ *Milošević* Appeal Decision, para. 20.

¹⁸ *Prosecutor v. Vojislav Sešelj*, Case No. IT-03-67-AR73.4, Decision on Appeal against the Trial Chamber’s Decision (No. 2) on Assignment of Counsel, 8 December 2006, para. 19, referring to *Milošević* Appeal Decision, paras 12-14. The Appeals Chamber noted that “[a]ll that matters is that the disruptive behaviour of the Accused ‘is substantially and persistently obstructing the proper and expeditious conduct of his trial’”.

¹⁹ *Milošević* Appeal Decision, para. 17; *Zigiranyirazo* Appeal Decision, para. 14; *Nzirorera* Appeal Decision, para. 11.

²⁰ Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, HRI/GEN/1/rev.6, 12 May 2003, p. 176.

11. In the case of *Protais Zigiranyirazo v. The Prosecutor*, the ICTR Appeals Chamber held that the need to ensure a reasonably expeditious trial is an objective of general importance.²¹ In the present case, the Trial Chamber has to strike an appropriate balance between the reasonably expeditious resolution of the case and the need to protect the Accused's right to be present at his trial. The commencement of the trial, by way of the Pre-Trial Conference and the opening statements, has been delayed four times due to the medical condition of the Accused. Thus far, the delay already amounts to approximately a month and a half. In addition, the health condition of the Accused is such that it would be prudent to expect future delays.

12. It is clear from the case law in *Milošević* that there need not be a deliberate disruption on the part of the Accused to warrant derogation from his right to be present in court. If the Trial Chamber has to postpone the proceedings each time the Accused is too ill to be physically present in court, it is very likely that the trial would last unreasonably long.

13. In dealing with the question of the future course of the trial, the Trial Chamber cannot ignore the fact that the Accused is not the only person on trial. The co-Accused Franko Simatović is also on trial, and he, too, is entitled to a fair and expeditious trial.

14. Therefore, the Trial Chamber considers it necessary to establish a system that will enable the Accused to participate in the proceedings from the UNDU on days that he is too unwell to attend court. If the Accused is too ill to attend court, he can follow the proceedings by form of video-conference link and, if he so wishes, he can make a statement pursuant to Rule 84 *bis* of the Rules of Procedure and Evidence at a later stage of the trial. The video-conference link that is to be established will allow the Accused to see the witnesses. Also, a telephone line will be established that will enable him to communicate with his counsel in the Courtroom. At the same time, a member of the Defence team may be present with the Accused at the UNDU.

15. The Trial Chamber does not regard the video-conference link to be a permanent feature. The Accused must attend court if he is able to do so. If he does not, in spite of being able to do so, he will be taken to waive his right to be present in court. The legal basis for carrying on the trial in those circumstances where his ill health prevents him from coming to court is that his health condition is a factor that persistently interferes with the right to a fair and expeditious trial, warranting derogation from the right to be present in court. In the prevailing circumstances, the establishment of a video-conference link meets the test of proportionality.

²¹ *Zigiranyirazo* Appeal Decision, para. 17. See also *Milošević* Appeal Decision, para 15. The Appeals Chamber found that "[t]here was a legitimate basis [...] for the Trial Chamber's conclusion that the trial 'might last for an unreasonably long time, or worse yet, might not be concluded' if Milošević were allowed to continue representing himself".

16. The Trial Chamber has been informed by the Registry that the establishment of the video-conference link and the telephone line will take some time.

17. For the foregoing reasons, the Trial Chamber decides as follows:

1) the Registrar will set up, at the UNDU: a video-conference link which allows the Accused to see the witnesses at all times, to follow the proceedings, whether they be held in open session or in closed or private session, and to make a statement pursuant to Rule 84 *bis* of the Rules if he chooses to do so immediately after the opening statements, or at a later stage in the trial; a telephone line with the Courtrooms at the Tribunal, which allows the Accused to communicate with his Defence Counsel in court;

2) the Registrar, as soon as possible, shall inform the Trial Chamber of the time frame within which these facilities can be arranged;

3) cancels the hearings of Wednesday, 9 April 2008 and Thursday, 10 April 2008 and confirms the hearing set for Monday, 14 April 2008 at 14.15 hours at which time the Pre-Trial Conference and opening statements are to take place.

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



Judge Patrick Robinson
Presiding Judge

Dated this ninth day of April 2008

At The Hague

The Netherlands

[Seal of the Tribunal]