

IT-01-42-T
D 4155 - D 4152
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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 Former Yugoslavia since 1991

Case No. IT-01-42-T
Date: 17 June 2004
Original: English

IN TRIAL CHAMBER II

Before: Judge Kevin Parker, Presiding
Judge Krister Thelin
Judge Christine Van Den Wyngaert

Registrar: Mr. Hans Holthuis

Decision of: 17 June 2004

PROSECUTOR

v.

PAVLE STRUGAR

DECISION ON DEFENCE MOTION FOR CERTIFICATION

The Office of the Prosecutor:

Ms. Susan Somers
Mr. Philip Weiner

Counsel for the Accused:

Mr. Goran Rodić
Mr. Vladimir Petrović

1. This decision of Trial Chamber II is in respect of the Defence motion of 2 June 2004 to grant certification to appeal from the "Decision Re the Defence Motion to Terminate the Proceedings" of 26 May 2004 in which the Chamber found that the Accused is fit to stand trial. The Defence motion was filed in due time.¹

2. Decisions on motions, other than preliminary motions, which the Chamber's decision of 26 May 2004 is not, "are without interlocutory appeal save with certification by the Trial Chamber". Rule 73 of the Rules of Procedure and Evidence governs the exercise of the Chamber's discretion to grant certification for an interlocutory appeal. The effect of Rule 73 (B) is to preclude certification unless its conditions are satisfied, but, in a case where they are satisfied, certification remains in the discretion of the Trial Chamber. By Rule 73 (B) a Chamber may grant certification "if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings".

3. The Defence submits that the decision on the Accused's fitness to stand trial satisfies the conditions of Rule 73 (B). It is argued that the determination of this issue affects the fairness of the trial, as well as its outcome and expeditiousness.² On the basis that both parties appeared to accept that if the Accused was found to be unfit the trial should be terminated, the Defence submits that the issue could be determinative as regards the outcome of the trial.³ The Defence further submits that the rights of the Accused, as provided by the Statute of the Tribunal, are implicated by the decision, and therefore, questions of fairness arise.⁴ It is additionally submitted that the issue of the fitness of the Accused is a matter of first impression in this Tribunal, that it is not explicitly addressed in either the Statute or the Rules and that it is a matter of general importance to international criminal law.⁵ Other matters raised in the Defence Motion are more appropriately left to a submission on the merits.

4. The Prosecution submits that the Chamber's decision of 26 May 2004 is capable of meeting the standard pursuant to Rule 73(B), insofar as the issue of fitness is fundamental to a fair trial.⁶ However, the Prosecution submits that the Defence, while raising in very general terms that the decision is affected by errors of fact and law, as well as errors in the legal standard applied, does not

¹ Rule 73 (C) states that a request for certification "shall be filed within seven days of the filing of the impugned decision."

² Defence Motion, para. 4.

³ Defence Motion, paras 10 and 12.

⁴ Defence Motion, para. 5.

⁵ Defence Motion, para. 14.

⁶ Prosecution Response, para. 4.

particularise the errors or indicate what is contended to be the correct legal standard.⁷ The Prosecution submits that, absent adequate identification of the error, the Trial Chamber would be unable to determine the basis upon which it could grant certification to appeal.⁸ It is also submitted that the Defence cannot raise issues on appeal that were never raised before the Trial Chamber, e.g. the question whether the Accused bears the burden of proving unfitness.⁹

5. The issue of the Accused's fitness to stand trial is an important one, bearing crucially upon the fairness of the proceedings. Thus, the decision clearly meets the first of the two conditions set out in Rule 73 (B), that is, it "involves an issue that would significantly affect the fair [...] conduct of the proceedings". It may also significantly affect "the outcome of the trial", but whether this would be the case would depend on the merit of issues which the Defence seeks to ventilate.

6. However, before granting certification pursuant to Rule 73 (B) the Chamber must also form the opinion that "an immediate resolution by the Appeals Chamber may materially advance the proceedings". This further condition reflects the fact that Rule 73(B) governs interlocutory appeals only, that is, appeals raised in the course of the proceedings and before the final judgement has been entered. Hence, the question currently before the Chamber is not whether the Accused may raise this matter on appeal *at all*. Should he be convicted at the end of the trial, he has a right of appeal which would enable the question of his fitness to stand trial to be ventilated. The question, rather, is whether the Accused should appeal *at this stage of the proceedings*. Herein lies the crux of the matter as far as this trial is concerned.

7. As has been noted in the decision, the subject of this Motion, in this case the question of the Accused's fitness to stand trial, was not raised on arraignment. Had it been properly raised before the commencement of the evidence, the Defence would have been in a better position at that early stage to demonstrate that "an immediate resolution by the Appeals Chamber may materially advance the proceedings". In this case, however, the issue was not adequately raised until the trial was well underway. Hence, the Defence now seeks certification for an interlocutory appeal when the trial is at an advanced stage. After five full months of hearing, the Prosecution concluded its case on 18 May 2004. The Defence case, subject to the Chamber's decision on a Rule 98 *bis* motion, is due to commence on 28 June 2004 and is expected to last no longer than a month. Therefore, barring unforeseen impediments, the Chamber anticipates that the trial could be concluded within a fairly brief time span.

⁷ Prosecution Response, paras 5 and 6.

⁸ Prosecution Response, para. 9.

⁹ Prosecution Response, paras 6, 7 and 8.

8. By contrast, were the Chamber to certify at this stage for an interlocutory appeal from its decision that the Accused is fit to stand trial, there would be likely to be significant delay. In particular, the issue would inevitably arise whether the trial proceedings should be suspended pending the determination of the appeal. In these circumstances, it is difficult to see that an immediate resolution of the issue by the Appeals Chamber may materially advance the proceedings. Further, while deeply conscious that its decision involved significant legal issues which had not previously been the subject of decision in this Tribunal, the Trial Chamber is not able to see from the very general terms of the Defence Motion that there may well be some oversight or error which has affected its decision. The question may also be posed whether the Accused would not be equally or better served, in health and otherwise, by having his trial completed expeditiously. Should he be convicted, the question of the correctness of the decision that he is fit to stand trial can then be made the subject of appeal in the ordinary way, and at the normal stage of the proceedings. This course could also better facilitate a full and measured consideration of the important legal issues relevant to this question. Should it prove to be the case that on appeal it is held that it should have been decided that he is unfit to stand trial, any conviction would be quashed.

9. For these reasons, and in the particular circumstances presented by this case, the Trial Chamber finds that it is not of the opinion, as required by Rule 73 (B) before it can exercise its discretion in favour of the Defence Motion, that an immediate resolution by the Appeals Chamber may materially advance the proceedings. Further, it would not be persuaded in any event, that a due weighing of the relevant considerations would justify an exercise of its discretion in favour of the Defence Motion at this stage. The Motion is therefore denied.

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

Dated this 17th day of June 2004
At The Hague
The Netherlands



Judge Kevin Parker
Presiding

[Seal of the Tribunal]