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FITNESS HEARINGS IN WAR CRIMES CASES: FROM NUREMBERG TO THE HAGUE

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Abstract: This Article examines the *Strugar* decision and its role in establishing the standards for a defendant's fitness to stand trial before an international tribunal. While fitness to stand trial was an issue in three cases at Nuremberg, those cases failed to establish any standards for the international criminal justice community. In contrast, the *Strugar* standards have been followed in other Trial Chambers at the International Criminal Tribunal for the Former Yugoslavia, and at The Special Panels for Serious Crimes at the United Nations Tribunal at East Timor. Therefore, the author argues that *Strugar* may be viewed as the seminal decision on the issue of fitness to stand trial before an international tribunal.

INTRODUCTION

In April of 2004, the United Nations International Criminal Tribunal for the Former Yugoslavia (ICTY) held the first competency¹ hearing in an international war crimes tribunal since Nuremberg. The hearing occurred during the trial of Major-General Pavle Strugar (of the former Yugoslavian People's Army, commonly referred to as the JNA), who was charged with serious violations of international humanitarian law (war crimes) relating to the shelling of the Old Town of Dubrovnik in Croatia.² The Trial Court's³ decision provides precedent for future war crimes cases and tribunals.

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[†] Exhibits referred to in this article may be obtained from either the Registrar's Office or the Office of the Prosecutor in the ICTY at The Hague.

¹ The term "competency" and the phrase "fitness to stand trial" will be used interchangeably.

² Prosecutor v. Strugar, Case No. IT-01-42-T, Judgement, ¶¶ 1-4 (Jan. 31, 2005).

³ The phrases "Trial Court" and "Trial Chamber" will be used interchangeably.

I. BACKGROUND

The Socialist Federal Republic of Yugoslavia (SFRY) was established after World War II by Josip Broz Tito. Tito bridged the SFRY's economic, political, ethnic, and nationalistic problems until his death in 1980. After the SFRY tinkered on the verge of disintegration for a decade, the republics of Slovenia and Croatia declared independence from Yugoslavia in 1991.⁴

Within Croatia, along the Dalmatian Coast, lies the City of Dubrovnik. It contains an ancient, walled city known as the "Old Town." This ancient city has been described as the "jewel of the Adriatic" and had served as the most famous tourist attraction in the former Yugoslavia. It possesses over ten Catholic churches (including a cathedral and monasteries), a mosque, an Orthodox church, and the third oldest synagogue in Europe. It also has one of the oldest pharmacies in Europe, small museums, and the finest remaining walls or ramparts of any medieval city. The Old Town was recognized as a "World Heritage Center" by United Nations Economic, Scientific and Cultural Organization in 1979. The Old Town, however, is not a museum but a living city. Seven to eight thousand residents lived there and worked in its businesses, restaurants, shops, and cafes.⁵

A. Attacks on the Old Town

In the fall of 1991, the JNA maintained a naval blockade of Dubrovnik as well as a land siege of the area. JNA forces under the command of General Pavle Strugar began to shell the Old Town of Dubrovnik in October 1991. The October shelling was limited and the resulting damage was minimal. In November, however, General Strugar's forces intensified the shelling of the Old Town. A television news team (from the International Television Network of Great Britain) filmed missiles being fired into the Old Town's walls and the boats within its harbor. In November, the attacks emanated from the land and sea.

On the same day as an agreed-upon cease-fire, December 6, 1991, JNA troops launched an early morning attack on the Croatian fortress on Mount Srd, which overlooks the Old Town. The assault lasted for approximately ten hours, causing death and injury, as well as exten-

⁴ See Prosecutor v. Tadic, Case No. IT-94-I-T, Opinion and Judgement, ¶¶ 65-77 (May 7, 1997) (describing history and disintegration of Yugoslavia).

⁵ Strugar, Case No. IT-01-42-T, Judgement, ¶¶ 19-21. See generally Strugar Prosecution Exhibit P14 (Expert Report of John Allcock).

sive damage and destruction. The damage was widespread and included six buildings that were totally destroyed. In addition, statues, fountains, and religious and historic property were damaged.

As a result of this military action, General Pavle Strugar was charged with the crimes of (1) murder, (2) cruel treatment, (3) attacks on civilians, (4) devastation not justified by military necessity, (5) unlawful attacks on civilian objects, and (6) destruction or willful damage done to institutions dedicated to religion, charity, and education, the arts and sciences, historic monuments, and works of arts and science.⁶

II. THE TRIAL

On the day prior to trial, the Defense unexpectedly requested a postponement and moved for an immediate medical examination alleging lack of fitness of the Accused to stand trial. The Pre-Trial Judge, following consideration of a number of factors, denied the motion.⁷ The Defense renewed the request the following day before the Trial Chamber. The Court refused to continue the matter and proceeded to trial.⁸ The Court, however, allowed the Defense to obtain its own medical expert to perform the allegedly necessary psychological tests without disrupting the trial.⁹

A. Defense's Medical Expert

The Defense retained Dr. Dusica Lecic-Tosevski, a neuro-psychiatrist from Belgrade, Serbia to examine the Accused. She examined the Accused, reviewed his medical records, and had conversations with his family members. She concluded that the Accused suffered from somatic and mental illnesses including chronic renal failure, joint problems at the hip and knee, lower back pain, hearing impairment, and ringing in his ears.¹⁰ The Accused's psychological problems included depression, vascular dementia, and posttraumatic stress disorder.¹¹

⁶ See generally Prosecutor v. Strugar and Kovacevic, Case No. IT-01-42, Second Amended Indictment (Oct. 17, 2003).

⁷ Prosecutor v. Strugar, Case No. IT-01-42-T, Transcript, at 191–204, 227–40, 249–54 (Dec. 15, 2003).

⁸ Strugar, Case No. IT-01-42-T, Transcript, at 259–60 (Dec. 16, 2003).

⁹ Strugar, Case No. IT-01-42-T, Transcript, at 490 (Dec. 19, 2003).

¹⁰ See Strugar, Case No. IT-01-42-T, Transcript, at 5630–31 (Apr. 29, 2004). See generally Strugar Defense Exhibits D83 and D84.

¹¹ Strugar, Case No. IT-01-42-T, Transcript, at 5630–31 (Apr. 29, 2004). See generally Strugar Defense Exhibits D83 and D84.

Dr. Lecic-Tosevski concluded that these illnesses would reduce his mental functions.¹² She further testified that he had psychological problems, which resulted in a reduction in concentration and attention span as well as making him passive and apathetic.¹³ She reported that the dementia and post-traumatic stress disorder impaired his memory process, which resulted in his forgetting life's important and traumatic events. The Defense expert also concluded that the Accused's short-term memory was impaired and that his intellectual abilities had deteriorated significantly.¹⁴

Although Dr. Lecic-Tosevski concluded that the Accused understood where he was, what was happening, the nature of the charges, and partially understood the consequences of the proceedings against him, she found that he could not participate at trial "at a high intellectual level."¹⁵ She further concluded that he understood the roles of the personnel involved in the trial (the judge, prosecutor, and defense counsel), but could only plan his defense with great difficulty.¹⁶ The Defense expert's overall conclusion was that the Accused did not meet the requirements of fitness to stand trial as defined in the *New Oxford Textbook of Psychiatry*.¹⁷

B. Prosecution's Medical Experts

The Prosecution retained three forensic psychiatrists (one of whom was Serbian/Croatian speaking) to examine the Accused. As part of their examination, the experts reviewed the Accused's medical records, interviewed the guards and nurse at the United Nations Detention Unit, viewed videotapes of the Accused interacting with the judges, observed him during a court session, and conducted a two-day forensic examination. They focused their analysis on the Accused's abilities and understanding in relation to the trial process. (In contrast, the Defense's ex-

¹² Prosecutor v. Strugar, Case No. IT-01-42-T, Transcript, at 5632 (Apr. 29, 2004).

¹³ *Id.* at 5633, 5638.

¹⁴ *Id.* at 5637–8. See generally Strugar Defense Exhibits D83 and D84.

¹⁵ Strugar, Case No. IT-01-42-T, Transcript, at 5639 (Apr. 29, 2004). See generally Strugar Defense Exhibit D84.

¹⁶ Strugar, Case No. IT-01-42-T, Transcript, at 5639 (Apr. 29, 2004). See generally Strugar Defense Exhibit D84.

¹⁷ The Expert indicated that the *New Oxford Textbook of Psychiatry* states in part that "[t]he defendant should have the capacity to *fully comprehend* the course of the proceedings in the trial, so as to make a proper defence, and to comprehend details of the evidence" (emphasis added). See Strugar Defense Exhibit D83, at 14. This is a misquotation of the standard/definition as provided in the textbook and will be discussed later in this Article. See *id.*

pert considered the medical problems already possessed by the Accused and their alleged effect.)¹⁸

The Prosecution experts found that the Accused understood the nature of the charges against him and the roles of the persons involved in the trial, as well as the consequences of a conviction.¹⁹ They also found him to be quite intelligent.²⁰ They reported that he was able to describe the circumstances surrounding the charges against him (which occurred over twelve years earlier) and portions of testimony from a hearing earlier in the day.²¹ A review of the trial videotapes indicated that the Accused was engaged in and would act appropriately during the trial.²² They observed that the Accused was perfectly able to communicate with the Court and answer its questions “with good decorum, with some eloquence even.”²³

The Prosecution experts concluded that the Accused’s physical illnesses did not “impact upon his cognitive abilities.”²⁴ Additionally, they did not find him to be “passive”²⁵ or diagnose him as having post-traumatic stress disorder.²⁶ They concluded that he did not suffer from depression as a mental disorder; rather, that he had a depressed mental state, which is common to all persons at various times in life²⁷ and especially common to prisoners.²⁸ Finally, they concluded that the Accused possessed a mild form of dementia²⁹ with no serious memory impairment.³⁰

C. Issues and the History of Fitness Hearings

Once the Prosecution and Defense filed their expert reports, the Court had several issues to consider. First, the Trial Chamber had to determine whether to hold a hearing, and if so, what type of hearing was needed. Further, there was no set of rules or law indicating: (1) the

¹⁸ See Prosecutor v. Strugar, Case No. IT-01-42-T, Transcript, at 5631 (Apr. 29, 2004).

¹⁹ See generally Strugar Prosecution Exhibit P185.

²⁰ *Id.*; Strugar, Case No. IT-01-42-T, Transcript, at 5681 (Apr. 29, 2004).

²¹ Exhibit P185; see Strugar, Case No. IT-01-42-T, Transcript, at 5682–83 (Apr. 29, 2004).

²² Strugar, Case No. IT-01-42-T, Transcript, at 5683 (Apr. 29, 2004).

²³ See Prosecutor v. Strugar, Case No. IT-01-42-T, Transcript, at 5683 (Apr. 29, 2004). See generally Strugar Prosecution Exhibit P185.

²⁴ Strugar, Case No. IT-01-42-T, Transcript, at 5520 (Apr. 28, 2004).

²⁵ Strugar, Case No. IT-01-42-T, Transcript, at 5681 (Apr. 29, 2004).

²⁶ *Id.* at 5689.

²⁷ *Id.* at 5694–95.

²⁸ *Id.* at 5684–85.

²⁹ *Id.* at 5687, 5699–700.

³⁰ Prosecutor v. Strugar, Case No. IT-01-42-T, Transcript, at 5703 (Apr. 29, 2004).

criteria to be considered for fitness; (2) which party has the burden of proof; or (3) the standard or level of proof. Significantly, the last hearings held before an international tribunal on the issue of fitness occurred almost sixty years earlier in Nuremberg.³¹

During the Nuremberg trials, the issue of fitness to stand trial arose in relation to three defendants.³² The matters will be reviewed in the order of complexity, beginning with the least difficult.

At a pre-trial hearing on November 15, 1945, the attorney for defendant Julius Streicher requested that a psychiatric examination be performed on his client. Since the defendant did not want such an examination, he did not file a formal motion.³³ On the following day, the Soviet Prosecutor filed a motion for a psychiatric examination of the defendant Streicher based on the request by Defense counsel and their concern over a strange statement made by the accused during a recent interrogation.³⁴ The Tribunal ordered an examination of the defendant in order to determine the following questions:

1. Is he sane or insane?
2. Is he fit to appear before the Tribunal and present his defense?
3. If he is insane, was he for that reason incapable of understanding the nature and quality of his acts during the period of time covered by the Indictment?³⁵

Three physicians examined the defendant, and concluded that he was sane and fit to appear at the Tribunal and present his defense.³⁶ Based on these findings, the Court ruled that the trial against the defendant proceed.³⁷

³¹ The most recent issue of fitness of note occurred in the extradition case of *The Kingdom of Spain v Augusto Pinochet Ugarte*. 39 I.L.M. 135 (Bos St. Mag. Ct. 2000). There, the court authorized the extradition of the defendant, but the British Secretary of State pursuant to his discretionary powers refused to send Pinochet to Spain on the grounds of his poor health. *Id.* at 140.

³² See *infra* notes 35–37, 42–46, 48–55.

³³ Proceedings, Preliminary Hearing, Thursday, 15 November 1945, in 2 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 22–23 (1947) [hereinafter TRIAL OF THE MAJOR WAR CRIMINALS].

³⁴ Motion of the Soviet Prosecution for a Psychiatric Examination of Defendant Streicher (Nov. 16, 1945), in 1 TRIAL OF THE MAJOR WAR CRIMINALS, *supra* note 33, at 152.

³⁵ Order of the Tribunal Regarding a Psychiatric Examination of Defendant Streicher (Nov. 17, 1945), in 1 TRIAL OF THE MAJOR WAR CRIMINALS, *supra* note 33, at 153.

³⁶ Report of Examination of Defendant Streicher (Nov. 18, 1945), in 1 TRIAL OF THE MAJOR WAR CRIMINALS, *supra* note 33, at 154.

³⁷ Proceedings, Third Day, Thursday, 22 November 1945, 2 TRIAL OF THE MAJOR WAR CRIMINALS, *supra* note 33, at 156.

The Defendant Gustav Krupp von Bohlen was seventy-five years old at the time of his indictment. Physicians from the United States military examined him twice in October of 1945.³⁸ In the initial examination, a doctor found that he was “not mentally competent to stand trial.”³⁹ Two weeks later, another physician concluded that the defendant “[had] lost all capacity for memory, reasoning or understanding of statements made to him”⁴⁰ The doctors also agreed that transporting the defendant for trial could have endangered his life.⁴¹

On November 4, 1945, Defense counsel filed a motion for postponement of Krupp’s trial based on his lack of fitness.⁴² A team of physicians examined the defendant and found that he suffered from “an organic cerebral disorder. . . . He remains uniformly apathetic and disinterested, intellectually retarded to a very marked degree, and shows no evidence of spontaneous activity.”⁴³ Therefore, the team of physicians concluded that “he is incapable of understanding court procedure, and of understanding or cooperating with interrogation;” nor could he be “moved without endangering his life.”⁴⁴

At a hearing, three of the Prosecutors opposed the Motion, arguing either that he should be tried in *absentia* or that the indictment should be amended by substituting his son (also a member of the family armaments business).⁴⁵ The Tribunal rejected both requests and granted the postponement of the Accused Krupp von Bohlen’s trial until he became physically and mentally fit.⁴⁶

³⁸ Medical Certificates Attached to Certificate of Service on Defendant Gustav Krupp Von Bohlen (Oct. 6, 1945), in 1 TRIAL OF THE MAJOR WAR CRIMINALS, *supra* note 33, at 119–22.

³⁹ *Id.* at 119.

⁴⁰ *Id.* at 122.

⁴¹ *Id.* at 119, 122.

⁴² *Id.* at 120; Motion on Behalf of Defendant Gustav Krupp Von Bohlen for Postponement of the Trial as to Him (Nov. 4, 1945), in 1 TRIAL OF THE MAJOR WAR CRIMINALS, *supra* note 33, at 124–26.

⁴³ Report of Medical Commission Appointed to Examine Defendant Gustav Krupp Von Bohlen (Nov. 7, 1945), in 1 TRIAL OF THE MAJOR WAR CRIMINALS, *supra* note 33, at 127–33.

⁴⁴ *Id.* at 127.

⁴⁵ Answer of the United States Prosecution to the Motion on Behalf of Defendant Gustav Krupp Von Bohlen (Nov. 12, 1945); Memorandum of the British Prosecution on the Motion on Behalf of Defendant Gustav Krupp Von Bohlen (Nov. 12, 1945); Memorandum of the French Prosecution on the Motion on Behalf of Defendant Gustav Krupp Von Bohlen (Nov. 13, 1945), in 1 TRIAL OF THE MAJOR WAR CRIMINALS, *supra* note 33, at 134–41.

⁴⁶ Order of the Tribunal Granting Postponement of Proceedings Against Gustav Krupp Von Bohlen (Nov. 15, 1945), in 1 TRIAL OF THE MAJOR WAR CRIMINALS, *supra* note 33, at 143; Order of the Tribunal Rejecting the Motion to Amend the Indictment by Add-

The issue of Rudolph Hess's competency remains controversial. In fact, the Assistant of Chief Counsel, Telford Taylor, who observed Hess during trial, did not believe that he was fit to stand trial.⁴⁷ The process began on November 7, 1945 when counsel filed a motion for an evaluation of the Accused's fitness to stand trial. Counsel based his motion on the grounds that the Accused "has completely lost his memory" and could not provide any information in relation to the alleged crimes.⁴⁸

The Tribunal assigned a panel of ten physicians to determine "whether he is able to take his part in the Trial, specifically" addressing the following questions:

1. Is the defendant able to plead to the Indictment?
2. Is the defendant sane or not, and on this last issue the Tribunal wishes to be advised whether the defendant is of sufficient intellect to comprehend the course of the proceedings of the trial so as to make a proper defense, to challenge a witness to whom he might wish to object and to understand the details of the evidence.⁴⁹

The doctors filed three similar reports in which they agreed the defendant was not insane but had suffered a memory loss due to hysteria.⁵⁰ They concluded his amnesia "will not entirely interfere with his comprehension of the proceedings, but it will interfere with his ability to make his defense and to understand details of the past which arise in evidence."⁵¹

ing the Name of Alfred Krupp Von Bohlen as a Defendant (Nov. 17, 1945), *in* 1 TRIAL OF THE MAJOR WAR CRIMINALS, *supra* note 33, at 146.

⁴⁷ TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR* 179 (1992).

⁴⁸ Motion on Behalf of Defendant Hess for an Examination by a Neutral Expert with Reference to his Mental Competence and Capacity to Stand Trial (Nov. 7, 1945), *in* 1 TRIAL OF THE MAJOR WAR CRIMINALS, *supra* note 33, at 155-56.

⁴⁹ Order of the Tribunal Rejecting the Motion on Behalf of Defendant Hess, and Designating a Commission to Examine Defendant Hess with Reference to his Mental Competence and Capacity to Stand Trial (Nov. 24, 1945), *in* 1 TRIAL OF THE MAJOR WAR CRIMINALS, *supra* note 33, at 158.

⁵⁰ Report of Commission to Examine Defendant Hess (Nov. 17, 1945) *in* 1 TRIAL OF THE MAJOR WAR CRIMINALS, *supra* note 33, at 159-65; Report of Prison Psychologist on Mental Competence of Defendant Hess (Aug. 17, 1945), *in* 1 TRIAL OF THE MAJOR WAR CRIMINALS, *supra* note 33, at 166-67.

⁵¹ Report of Commission to Examine Defendant Hess (Nov. 17, 1945), *in* 1 TRIAL OF THE MAJOR WAR CRIMINALS, *supra* note 33, at 160, 163-64. The American physicians further concluded that "there is a conscious exaggeration of his loss of memory." *Id.* at 164.

The Court held a hearing concerning Hess's fitness to stand trial.⁵² After hearing arguments from both parties, the Court provided Hess the opportunity to address them. Shockingly, Hess announced that he had been feigning amnesia for tactical reasons unbeknownst to his counsel and was ready to stand trial.⁵³ The hearing was adjourned and on the following day, the Court ruled that Hess was fit to stand trial.⁵⁴ Despite this ruling, the question of his competence was raised again during trial.⁵⁵ Hess was ultimately convicted, sentenced, and years later committed suicide in prison.

As noted in these three matters, the Nuremberg Tribunal described some of the criteria for evaluating competency, but did not establish the burden of proof or evidentiary standards for such determination.⁵⁶

III. THE STRUGAR TRIAL: THE NECESSITY OF A FITNESS INQUIRY

The Trial Chamber's decision in the *Strugar* case consists of three sections.⁵⁷ The first part concerns whether a court is obligated to evaluate the fitness of an accused when the question is raised, or alternatively, whether fitness for trial is even a requirement. After confirming the need to make a determination of fitness, the Court estab-

⁵² Proceedings, Ninth Day, Friday, 30 November 1945, Afternoon Session, in 2 TRIAL OF THE MAJOR WAR CRIMINALS, *supra* note 33, at 478–96.

⁵³ *Id.* at 496.

⁵⁴ Proceedings, Tenth Day, Saturday, 1 December 1945, Morning Session, in 3 TRIAL OF THE MAJOR WAR CRIMINALS, *supra* note 33, at 1.

⁵⁵ Report of Commission to Examine Defendant Hess (Nov. 17, 1945) in 1 TRIAL OF THE MAJOR WAR CRIMINALS, *supra* note 33, at 159–65; Report of Prison Psychologist on Mental Competence of Defendant Hess (Aug. 17, 1946), in 1 TRIAL OF THE MAJOR WAR CRIMINALS, *supra* note 33, at 166–67. See generally J.R. REES, THE CASE OF RUDOLF HESS: A PROBLEM IN DIAGNOSIS AND FORENSIC PSYCHIATRY (1948) (providing the medical reports of the doctors who examined and treated Hess from the time of his capture in 1941 through the trial).

⁵⁶ The issue of fitness was also raised before the International Military Tribunal For The Far East in relation to the accused Shumei Okawa. On the first day of trial, Dr. Okawa struck General Tojo several times on the head. He was sent to a hospital for psychiatric examination and diagnosed with tertiary syphilis. He was declared unfit for trial. See JOHN L. GINN, SUGAMO PRISON, TOKYO: AN ACCOUNT OF THE TRIAL AND SENTENCING OF JAPANESE WAR CRIMINALS IN 1948, BY A U.S. PARTICIPANT 25–26 (1992); see also 42 TOKYO MAJOR WAR CRIMES TRIAL: THE RECORDS OF THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST 19637–38 (R. John Pritchard ed., 1998) (after reviewing the findings of medical experts, the Court held that Okawa had not “recovered the intellectual capacity and judgment to make him capable of standing trial and of conducting his defense . . .”).

⁵⁷ Prosecutor v. Strugar, Case No. IT-01-42-T, Decision Re The Defence Motion to Terminate Proceedings (May 26, 2004).

lished the standards for such a determination and then proceeded to apply the facts to these newly-created standards.

Initially, the Court noted that neither the Statute of the Tribunal (Statute) nor the Rules of Procedure and Evidence, refers to the fitness of an accused to stand trial. The Court, however, reasoned by implication that fitness for trial was mandated by the procedural rights provided by Articles 20 and 21 of the Statute.⁵⁸ Specifically, these Articles provide that an accused is entitled to defend himself in person, to examine witnesses, and to have the free assistance of an interpreter.⁵⁹ The Articles also require that an accused be provided with the assistance of counsel⁶⁰ and that the Trial Chamber confirm that an accused understands the indictment.⁶¹

The Trial Chamber explained that “[t]he enjoyment of these rights would appear to presuppose that an accused has a level of mental and physical capacity.”⁶² For example, the right of counsel may only be enjoyed if an accused “has the capacity to be able to instruct counsel sufficiently”⁶³ Similarly, the right to defend oneself and examine witnesses presupposes the capacity to testify and understand the evidence as well as the purpose, course, and consequences of the proceedings.⁶⁴ The Trial Chamber held that an accused must possess these capacities and be able to exercise them with the assistance of counsel in order to present his defense.⁶⁵ They found that “any question whether the accused is fit to stand trial, *i.e.* has the necessary capacities, or is able with assistance to exercise them, should be determined by the Tribunal.”⁶⁶

⁵⁸ *Id.* ¶¶ 19–49.

⁵⁹ See Int’l Criminal Trib. for the Prosecution of Persons Responsible for Serious Violations of Int’l Humanitarian Law Committed in the Territory of the Former Yugo. Since 1991, *Statute of the International Criminal Tribunal for the Former Yugoslavia*, art. 21, ¶¶ (4)(d)–(f) (2006), available at <http://www.un.org/icty/legaldoc-e/basic/statut/statute-feb06-e.pdf>.

⁶⁰ *Id.* art. 21(4)(d).

⁶¹ *Id.* art. 20(3).

⁶² Prosecutor v. Strugar, Case No. IT-01-42-T, Decision Re The Defence Motion to Terminate Proceedings, ¶ 21 (May 26, 2004).

⁶³ *Id.* ¶ 22.

⁶⁴ *Id.*

⁶⁵ *Id.* ¶ 24. The Court further notes at paragraph 23 that “[t]he nature of these rights indicates that their effective exercise may be hindered, or even precluded, if an accused’s mental and bodily capacities, especially the ability to understand, *i.e.* to comprehend, is affected by mental or somatic disorder.”

⁶⁶ *Id.* ¶ 25. In further support of its holding on fitness, the Court surveyed decisions from various national jurisdictions as well as the European Court of Human Rights. *Id.* ¶¶ 29–31 It noted that the principle that an accused be fit to stand trial enjoyed “general acceptance.” *Id.* ¶ 29.

Finally, the Court noted that trials in *absentia* are prohibited before the Tribunal and reasoned that requiring an accused to be present presupposes that he is able to assist in the presentation of his defense.⁶⁷ Consequently, the presence of an accused who is incapable of understanding or following the proceedings or assisting in his defense would render the prohibition against trials in *absentia* “devoid of any substance.”⁶⁸

A. *The Standards*

After determining that an accused must be fit for trial, the Trial Chamber established the standards for evaluating fitness. Initially, the Court held that a finding of incompetence may arise from either mental or physical illnesses.⁶⁹ It emphasized, however, that “the issue is not whether the accused suffers from particular disorders, but rather . . . whether he is able to exercise effectively his rights in the proceedings against him.”⁷⁰

The Court reasoned that it should evaluate certain capacities in order to determine whether an accused can exercise his rights provided under Articles 20 and 21 of the Statute.⁷¹ In determining the fitness of an accused to stand trial, consideration must be given to the capacity of the accused “to plead, to understand the nature of the charges, to understand the course of the proceedings, to understand the details of the evidence, to instruct counsel, to understand the consequences of the proceedings, and to testify.”⁷²

The Court in *Strugar* recognized that some difficulties would occur in the process of measuring these capacities and setting a threshold for fitness.⁷³ Based on decisions from various national jurisdictions, the Trial Chamber adopted a “*minimum* standard of overall capacity below which an accused cannot be tried without unfairness or injustice.”⁷⁴

⁶⁷ Prosecutor v. Strugar, Case No. IT-01-42-T, Decision Re The Defence Motion to Terminate Proceedings, ¶ 32 (May 26, 2004).

⁶⁸ *See id.*

⁶⁹ *Id.* ¶ 35.

⁷⁰ *Id.*

⁷¹ *Id.* ¶ 36.

⁷² Prosecutor v. Strugar, Case No. IT-01-42-T, Decision Re The Defence Motion to Terminate Proceedings, ¶ 36 (May 26, 2004). The Court also notes in this paragraph that the list of capacities is not “exhaustive,” but sufficient for the matter at hand.

⁷³ *Id.* ¶ 37.

⁷⁴ *Id.* The Court explains in this paragraph that “[i]t would be entirely inappropriate, and unjustified . . . to require that each of these capacities must be present at their notion-

The Court concluded that the threshold for fitness to stand trial is satisfied when:

[A]n accused has those capacities, viewed overall and in a reasonable and commonsense manner, 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, *i.e.* to make his or her defence.⁷⁵

The Trial Chamber placed the burden of proving that an accused is not fit to stand trial upon the Defense.⁷⁶ It should be noted, however, that in its conclusion on General Strugar's fitness, the Court indicated that "this finding does not depend on the onus of proof."⁷⁷ The Trial Chamber then ruled that the standard for the burden of proof is "merely the 'balance of probabilities.'"⁷⁸ Following the jurisprudence of other nations, the Court rejected the use of the higher standard employed to establish guilt (proof beyond a reasonable doubt).⁷⁹

B. *The Determination of Fitness*

The Trial Chamber determined General Strugar's fitness by applying the facts to the standards. In evaluating the evidence provided by the experts, the Court reviewed the differing approaches the experts utilized. The Defense expert "placed considerable emphasis" on diagnosing the various physical and mental illnesses that the Accused suffered and the "possible effects of such disorders."⁸⁰ This approach resulted in "an inadequate linkage of the various diagnoses and their

ally highest level, or at the highest level that a particular accused has ever enjoyed in respect of each capacity." *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* ¶ 38. The jurisdictions vary as to the placement of the burden of proof in fitness or competency hearings. *See* Prosecutor v. Nahak, Criminal Case No. 01A/2004/PD.Dil. of the Special Crimes Panel of Dili District Court, Findings and Order on Defendant Nahak's Competence to Stand Trial, ¶¶ 61–67 (Mar. 1, 2005).

⁷⁷ Prosecutor v. Strugar, Case No. IT-01-42-T, Decision Re The Defence Motion to Terminate Proceedings, ¶ 52 (May 26, 2004).

⁷⁸ *Id.* ¶ 38.

⁷⁹ *Id.*; *see also* Nahak, Criminal Case No. 01A/2004, Findings and Order on Defendant Nahak's Competence to Stand Trial, ¶¶ 61–67. "[I]t must be remembered that competence to stand trial is not an element of the offense with which the Defendant is charged. This is significant because every element of an offense must be proved beyond a reasonable doubt" *Id.* ¶ 58.

⁸⁰ Strugar, Case No. IT-01-42-T, Decision Re The Defence Motion to Terminate Proceedings, ¶ 47.

possible or potential effects, with the issue of the actual effects experienced by this Accused on his relevant capacities.”⁸¹

The Court further noted that the Defense expert applied incorrect standards to her diagnostic findings. Specifically, the expert was under the misapprehension that English common law required that an accused “fully comprehend” the proceedings.⁸² This error—setting too high of a standard for evaluation—was further compounded when the Defense expert continued to measure the other capacities at an excessively high standard.⁸³ The Court rejected these standards.

The Prosecution experts “concentrated on evaluating the relevant capacities of the Accused” as opposed to focusing on the various illnesses that the Accused suffered.⁸⁴ For example, once finding that the Accused suffered from memory impairment, the Prosecution experts evaluated the problem and determined that the level of impairment was only mild and that his capacity to testify would not be impaired.⁸⁵

The Trial Chamber reviewed the evidence and findings of all the experts, and concluded that the Accused possessed the necessary capacities for exercising his rights at trial: i.e., the capacities to understand the nature of the charges, to understand the course of the proceedings and the details of the evidence, to testify, to instruct Defense counsel, and to understand the consequences of the proceedings.⁸⁶ The Court deemed General Pavle Strugar fit to stand trial.⁸⁷

The Court found that, in contrast to determining the issue of fitness at the pre-trial stage, determination during trial provided them with the benefit of observing the Accused for a period of almost five months.⁸⁸ When the Accused addressed the Trial Chamber, his comments were “collected, relevant, well structured and comprehensive.”⁸⁹ When concerned over matters arising at trial, the Accused would raise the issue with his counsel or with the court, thus participating in the trial. His conduct and actions during trial were appropriate and did not

⁸¹ *Id.*

⁸² Prosecutor v. Strugar, Case No. IT-01-42-T, Decision Re The Defence Motion to Terminate Proceedings, ¶ 48 (May 26, 2004) (noting that the expert misquoted the standard for evaluating fitness provided in the *New Oxford Textbook of Psychiatry*).

⁸³ *Id.* ¶¶ 48–49.

⁸⁴ *Id.* ¶ 47 (finding the approach of the Prosecution experts to be better for evaluating fitness).

⁸⁵ *Id.* ¶ 49.

⁸⁶ *Id.*

⁸⁷ Prosecutor v. Strugar, Case No. IT-01-42-T, Decision Re The Defence Motion to Terminate Proceedings, ¶ 50 (May 26, 2004).

⁸⁸ *Id.* ¶ 51.

⁸⁹ *Id.*

provide “any reason for the Trial Chamber to hesitate in its acceptance of the opinion of the Prosecution experts that the Accused is fit to stand trial.”⁹⁰

CONCLUSION

The *Strugar* decision, unlike competency decisions at Nuremberg and Tokyo, sets standards for determining an accused’s fitness to stand trial. The standards protect both the rights of the accused and the interests of the prosecution. It is noteworthy that on appeal, the Accused did not challenge the standards established in the decision, but rather alleged error in the application of the facts to those standards.⁹¹ Other Trial Chambers at the ICTY⁹² and The Special Panels for Serious Crimes at the United Nations Tribunal at East Timor have followed *Strugar*. As such, *Strugar* may be viewed as the seminal decision on the issue of fitness before international tribunals.⁹³

⁹⁰ *Id.*

⁹¹ Prosecutor v. Strugar, Case No. IT-01-42-A, Defence Appeal Brief, ¶¶ 246–55 (July 8, 2005).

⁹² See generally Prosecutor v Stanasic & Simatovic, Case No. IT-03–69-PT, Decision on Stanasic Defence’s Motion on the Fitness of the Accused to Stand Trial with Confidential Annexes (Apr. 27, 2006); Prosecutor v. Kovacic, Case No. IT-01-42/2-I, Public Version of the Decision on Accused’s Fitness to Enter a Plea and Stand Trial (Apr. 12, 2006).

⁹³ Prosecutor v. Nahak, Criminal Case No. 01A/2004/PD.Dil. of the Special Crimes Panel of Dili District Court, Findings and Order on Defendant Nahak’s Competence to Stand Trial, ¶¶ 57–67 (Mar. 1, 2005) (the Court followed all of the standards from the *Strugar Decision Re The Defence Motion to Terminate Proceedings* except for assigning the burden of proof on the defendant).