



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 Nos. IT-08-91-PT
IT-95-5/18-PT
Date: 13 February 2009
Original: English

IT-08-91-PT 933
D933-0926 51
13 FEBRUARY 2009

IN THE SPECIALLY APPOINTED CHAMBER

Before: Judge O-Gon Kwon, Presiding
Judge Iain Bonomy
Judge Kevin Parker

Registrar: Mr John Hocking, Acting Registrar

Decision: 13 February 2009

PROSECUTOR
v.
MIĆO STANIŠIĆ
STOJAN ŽUPLJANIN

PROSECUTOR
v.
RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON STOJAN ŽUPLJANIN'S MOTION FOR
CERTIFICATION**

The Office of the Prosecutor:

Mr Thomas Hannis
Ms Joanna Korner
Mr Alan Tieger
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Counsel for the Accused:

Mr Slobodan Zečević and Mr Slobodan Cvijetić for Mićo Stanišić
Mr Tomislav Višnjić and Mr Igor Pantelić for Stojan Župljanin

The Accused:

Mr Radovan Karadžić

1. This decision of a Specially Appointed Chamber (“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 in respect of “Stojan Župljanin’s Motion for Certification for Interlocutory Appeal of the Decision on Joinder Dated 6 January 2009” filed by Counsel for Stojan Župljanin (“Župljanin Defence”) on 12 January 2009 (“Motion”).

A. Background

2. On 3 December 2008 the Župljanin Defence filed simultaneously before Trial Chamber II and Trial Chamber III “Stojan Župljanin’s Motion for Joinder with the Case of Radovan Karadžić” (“Župljanin’s motion for joinder”). By this motion the Župljanin Defence sought an order pursuant to Article 21 of the Statute of the Tribunal (“Statute”) and Rule 48 of the Rules of Procedure and Evidence (“Rules”) joining the case of *Prosecutor v Stanišić and Župljanin* with the case of *Prosecutor v Radovan Karadžić* and a further order to the Office of the Prosecutor (“Prosecution”) to consolidate and amend the indictments against the Accused. On 5 December 2008 the Acting President of the Tribunal assigned the consideration of the motion to this Chamber. On 6 January 2009 the Chamber issued its “Decision on Stojan Župljanin’s Motion For Joinder” denying Župljanin’s Defence request for joinder of the case of *Prosecutor v Stanišić and Župljanin* with the case of *Prosecutor v Radovan Karadžić* (“Joinder Decision”).

3. On 12 January 2009 the Župljanin Defence moved for certification for interlocutory appeal from the Joinder Decision. On 19 January 2009 Radovan Karadžić (“Radovan Karadžić” or “Karadžić”) filed “Karadžić Application for Certification to Appeal Decision on Joinder” seeking certification to appeal the Joinder Decision (“Application”). On 23 January 2009 the Prosecution filed “Prosecution’s Consolidated Response to Motions for Certification for Interlocutory Appeal of Decision on Joinder” (“Response”) submitting that the Motion and the Application be denied. On 30 January 2009 the Župljanin Defence filed a request for leave to reply and a reply to the Prosecution’s Response.¹

B. Law

4. Decisions on motions, other than preliminary motions challenging jurisdiction and motions for provisional release, are without interlocutory appeal, save with certification by the Trial Chamber. Rule 73 of the Rules governs the exercise of the Trial Chamber’s discretion to grant

¹ *Prosecutor v Mićo Stanišić and Stojan Župljanin*, Case No. IT-08-91-PT; *Prosecutor v Radovan Karadžić*, Case No: IT-95-5/18-PT, “Stojan Župljanin’s Reply to the Prosecution’s Consolidated Response to Motions for Certification for Interlocutory Appeal of Decision on Joinder”, 30 January 2009 (“Reply”).

certification for an interlocutory appeal. The effect of Rule 73(B) is to preclude certification unless the conditions set out in this Rule are satisfied, but, even where these conditions have been satisfied, certification remains in the discretion of the Trial Chamber.² According to Rule 73(B) a Trial 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.” A request for certification is not concerned with whether a decision was correctly reasoned or not, which is a matter for appeal whether interlocutory or one after the final judgement has been rendered.³

C. Submissions

5. The Župljanin Defence submits that, in general, the issues involved in relation to joinder *a priori* engage the factors to be considered under Rule 73(B) and that the arguments advanced in Župljanin’s motion for joinder directly concern the fair and expeditious conduct of the proceedings.⁴ With respect to the second leg of the test set out by Rule 73(B) it is submitted that the appropriate enquiry should be whether a showing has been made that the appeal can succeed, *i.e.* that the Trial Chamber committed an error as to the applicable law, that it made a patently incorrect conclusion of fact, or that it abused its discretion.⁵ It is submitted further that the Chamber committed a number of errors in the Joinder Decision, in particular in considering the wrong operative indictment in the *Karadžić* case,⁶ in assessing the importance to be attached to consistency in judgments (and in sentences),⁷ in presuming that the cases of *Stanišić and Župljanin* and *Karadžić* are at markedly different stages of pre-trial preparation,⁸ in failing to consider alternatives to its finding that joinder would disrupt the completeness of the *Karadžić* case,⁹ and in its conclusions regarding the burden of separate trials on the Župljanin Defence.¹⁰

6. Radovan Karadžić seeks certification to appeal the Joinder Decision and joins in the arguments of the Župljanin Defence. He submits that the issue of joinder is significant enough to

² *Prosecutor v Strugar*, Case No. IT-01-42-T, “Decision on Defence Motion for Certification”, 17 June 2004, para 2.

³ *Prosecutor v. Milošević*, Case No. IT-02-54-T, Decision on Prosecution Motion for Certification of Trial Chamber Decision on Prosecution Motion for Voir Dire Proceedings, 20 June 2005 para 4; *Prosecutor v Čermak and Markač*; *Prosecutor v Gotovina*, Case No: IT-03-73-PT; IT-01-45-PT, “Decision on Defence Application for Certification to Appeal Decision on the Prosecution’s Consolidated Indictment and for Joinder”, 14 August 2006 , para 10; *Prosecutor v Milutinović et al*, Case No. IT-05-87-T, “Decision on Defence Application for Certification of Interlocutory Appeal of Rule 98bis Decision”, 14 June 2007, para 4.

⁴ Motion, para 5.

⁵ Motion, para 4.

⁶ Motion, paras 7, 8.

⁷ Motion, paras 9-11.

⁸ Motion, paras 12, 13.

⁹ Motion, paras 14, 15.

¹⁰ Motion, paras 16, 17.

warrant an interlocutory decision. Support for this argument is sought in decisions on certification of other cases involving joinder.¹¹

7. The Prosecution submits that the Motion and the Application fail to meet the requirements of Rule 73 of the Rules and merely reiterate the arguments raised in Stojan Župljanin's motion for joinder and the respective reply, which have been fully addressed by the Chamber.¹² It is submitted that the Joinder Decision does not raise issues that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial and that the expeditious conduct of the proceedings is fostered by the Joinder Decision because joining cases would delay the trial against Stanišić and Župljanin and would lead to a longer and more complex trial for the three Accused.¹³ It is submitted further that resolving the matter after the trial would not unnecessarily complicate and delay the proceedings and that it would be a decision to join the trials that would have such effect.¹⁴ If the Chamber finds that the Motion and the Application satisfy the criteria of Rule 73(B), the Prosecution submits that the Chamber should refrain from exercising its discretion to grant certification given the unlikelihood of a successful appeal of this matter.¹⁵ It submits that the party seeking certification must identify an error in law or fact that has the capacity to significantly affect the fair and expeditious conduct of the proceedings or outcome of the trial, that in cases of decision involving discretion, the identified error must be "discernable", and that the Motion and the Application have failed to identify such error.¹⁶ The Prosecution further submits that the allegations of errors in the Motion are not supported by the jurisprudence or the facts of the two cases.¹⁷

8. In its Reply the Župljanin Defence does not make new submissions in support of its Motion but addresses specific arguments of the Prosecution.

D. Discussion

9. The submissions of the parties reveal a great deal of disagreement as to what the basis for the Chamber's consideration whether to grant certification for interlocutory appeal should be.

¹¹ Application, paras 3-7 referring to *Prosecutor v Slobodan Milošević*, Case No. IT-02-54-T, "Decision on Prosecution Application for Leave to File an Interlocutory Appeal", 9 January 2002 and to *Prosecutor v Popović et al*, Case Nos. IT-02-57-PT, IT-02-58-PT; IT-02-63-PT; IT-02-64-PT; IT-04-80-PT; IT-05-86-PT "Decision on Motion for Certification of Joinder Decision for Interlocutory Appeal", 6 October 2005; and to *Prosecutor v Gotovina et al*, Case Nos. IT-01-45-PT; IT-03-73-PT, "Decision on Defence Application for Certification to Appeal Decision on Prosecution's Consolidated Motion to Amend the Indictment and for Joinder, 14 August 2006.

¹² Response, para 2.

¹³ Response, para 7.

¹⁴ Response, para 8.

¹⁵ Response, para 2.

¹⁶ Response, paras 4, 8, 15.

¹⁷ Response, paras 10-14.

10. As indicated earlier, a consideration whether to certify a motion for interlocutory appeal is not concerned with the correctness of a decision but with a consideration whether the criteria set out in Rule 73(B) are met.¹⁸ Even where these criteria are met the Chamber retains discretion to decide whether certification is appropriate in the specific circumstances of a case.

11. Further, in the view of the Chamber, it is not the general legal qualification¹⁹ of the issue dealt with in a decision, but, rather, the issues raised by the specific decision in the specific circumstances of the case that should serve as a basis for the Chamber's consideration whether to certify this decision for interlocutory appeal. Certification should only be granted if there is a risk that the decision, if allowed to stand, would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial. The Chamber, therefore, cannot accept the arguments advanced by the Župljanin Defence and Karadžić that issues related to joinder *a priori* engage the factors to be considered under Rule 73(B).

12. The issues before the Chamber in the circumstances of the present case are (a) whether denial of joinder of the *Stanišić and Župljanin* case with the *Karadžić* case would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and (b) whether an immediate resolution of the Appeals Chamber may materially advance the proceedings.

13. In the view of a majority of the Chamber, none of the arguments advanced by the Župljanin Defence and Karadžić explains how the decision to deny joinder affects the fair and expeditious conduct of the proceedings or the outcome of the trial. If Mićo Stanišić and Stojan Župljanin are tried separately their trial would be expected to start sooner, to last shorter, and to be less complex. Conducting two separate trials will not affect the rights to fair trial of any of the Accused. It will not prevent the Accused from calling witnesses they wish to call or from conducting their own cross-examination. It will further allow for Stojan Župljanin and Radovan Karadžić to be called as witnesses in each others respective cases, if they so choose, which would not have been possible if they were to be tried jointly. It would be a decision to conjoin rather than one to deny joinder that would have the potential to affect the fair and expeditious conduct of the proceedings. It is for this purpose that Rule 82 of the Rules provides for specific guarantees for the rights of accused in joint trials.²⁰ In conclusion, a majority of the Chamber is not persuaded that its decision to deny joinder

¹⁸ See *supra*, para 4.

¹⁹ The Rules provide for categories of cases, for which no certification for interlocutory appeal is necessary. (See Rule 72(B)(i) and Rule 65(D)) Had it been intended that joinder, in and of itself, would meet the requirements of Rule 73(B), joinder would have been included explicitly among this category of cases.

²⁰ Rule 82 of the Rules provides:

(A) In joint trials, each accused shall be accorded the same rights as if such accused were being tried separately.
(B) The Trial Chamber may order that persons accused jointly under Rule 48 be tried separately if it considers it necessary in order to avoid a conflict of interests that might cause serious prejudice to an accused, or to protect the interests of justice.

of the *Stanišić and Župljanin* case with the *Karadžić* case may affect the fair and expeditious conduct of the proceedings or the outcome of the trial in either case.

14. By Rule 73(B) of the Rules the Chamber must also consider whether an immediate resolution of the Appeals Chamber may materially advance the proceedings in the present case. None of the submissions advanced by the parties identifies any basis to support such a conclusion. Rule 73(B) governs interlocutory appeals only. In the view of a majority of the Chamber, the question before the Chamber pursuant to this Rule, therefore, is not whether the matter may be raised on appeal at all but whether an appeal *at this stage* may materially advance the proceedings. It is unclear to a majority of the Chamber how in these circumstances an immediate resolution of the Appeals Chamber may materially advance the proceedings.


15. Finally, a majority of the Chamber would indicate here that had it been able to be satisfied that the criteria of Rule 73(B) have been met, it would not be persuaded that a due weighing of the relevant considerations would justify an exercise of its discretion in favour of granting certification for interlocutory appeal.

For the foregoing reasons and pursuant to Rule 73 of the Rules the Chamber hereby

- **DENIES** leave to the Župljanin Defence to file a Reply;
- by a majority, Judge Kwon dissenting, **DENIES** the Motion and the Application.

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

Dated this thirteenth day of February 2009
At The Hague
The Netherlands



Judge O-Gon Kwon
Presiding

[Seal of the Tribunal]

DISSENTING OPINION OF JUDGE KWON

1. In order for a Trial Chamber to grant certification for appeal against a decision, the two-pronged requirement of Rule 73 (B) should be met: (1) that the impugned decision involves an issue that would significantly affect the fair and expeditious conduct of the trial or the outcome of the trial; and (2) that an immediate resolution by the Appeals Chamber may materially advance the proceedings. As is clear in the jurisprudence of the Tribunal, certification is not concerned with whether the impugned decision was correctly reasoned or not.²¹

2. In seeking joinder with the Karadžić case, Župljanin argues that—in addition to meeting the requirements of Rule 48—joinder would serve the interests of justice and also protect Župljanin’s right to a fair trial by preventing duplication of evidence, minimising hardship to witnesses, promoting judicial economy and ensuring consistency in judgements.²² His argument concerning judicial economy is premised on the conclusion that one joint trial is more expeditious than two separate ones.²³ Therefore the issue in the Impugned Decision, viewed in this context, is clearly one that would significantly affect the fair and expeditious conduct of the proceedings, and as such, the first prong of Rule 73 (B) is satisfied.

3. As regards the second prong of Rule 73(B), I note that no date has been set for either of the trials in question to begin, and resolution by Appeals Chamber could reasonably be expected before the start of either trial. Since the issue in the Impugned Decision relates to the expeditious conduct of the proceedings, I consider that an immediate resolution by the Appeals Chamber may materially advance the proceedings. Therefore, the second prong of Rule 73 (B) is also satisfied.

4. For these reasons, I am of the opinion that both requirements of Rule 73(B) are satisfied, and I am in favour of granting the Motion.

²¹ See, for example, *Prosecutor v. Milošević*, Case No. IT-02-54-T, Decision on Prosecution Motion for Certification of Trial Chamber Decision on Prosecution Motion for Voir Dire Proceedings, 20 June 2005, para. 4; *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Decision on Miletić’s Request for Certification of the Decision on Defence Objections to the Admission of the Expert Statement of General Rupert Smith, 15 April 2008, p. 4.

²² Stojan Župljanin’s Motion for Joinder with the Case of Radovan Karadžić (“Župljanin Motion for Joinder”), 2 December 2008, paras. 13–23. See also Karadžić Response to Joinder Motion, 15 December 2008, in which Karadžić expresses his support for the Župljanin Motion for Joinder, citing the benefits of calling common defence witnesses only once, and of the potential division of labour between additional defence counsel.

²³ Župljanin Motion for Joinder, paras. 18–19.

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



Judge O-Gon Kwon

Dated this thirteenth day of February 2009
At The Hague
The Netherlands

[Seal of the Tribunal]