

**UNITED
NATIONS**



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-08-91-A
Date: 11 June 2014
Original: English

IN THE APPEALS CHAMBER

Before: Judge Carmel Agius, Presiding
Judge William H. Sekule
Judge Patrick Robinson
Judge Liu Daqun
Judge Arlette Ramaroson

Registrar: Mr John Hocking

Decision of: 11 June 2014

PROSECUTOR

v.

**MIĆO STANIŠIĆ
STOJAN ŽUPLJANIN**

PUBLIC

**DECISION ON PROSECUTION MOTION TO ADMIT
REBUTTAL MATERIAL**

The Office of the Prosecutor

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Counsel for Mićo Stanišić

Mr. Slobodan Zečević and Mr. Stéphane Bourgon

Counsel for Stojan Župljanin

Mr. Dragan Krgović, Ms. Tatjana Čmerić, and Mr. Christopher Gosnell

1. The Appeals 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 (“Appeals Chamber” and “Tribunal”, respectively) is seised of the “Prosecution Motion to Admit Rebuttal Material”, filed by the Office of the Prosecutor (“Prosecution”) on 1 May 2014 (“Motion”). On 12 May 2014, Mićo Stanišić (“Stanišić”) filed a “Response on Behalf of Mićo Stanišić to Prosecution Motion to Admit Rebuttal Material” (“Stanišić’s Response”). On the same day, Stojan Župljanin (“Župljanin”) filed “Stojan Župljanin’s Response to Prosecution Motion to Admit Rebuttal Material” (“Župljanin’s Response”). The Prosecution filed its reply on 16 May 2014.¹

I. BACKGROUND

2. On 14 April 2014, the Appeals Chamber admitted as additional evidence on appeal, pursuant to Rule 115 of the Rules of Procedure and Evidence of the Tribunal (“Rules”), a letter written by Judge Frederik Harhoff on 6 June 2013 and published in a Danish newspaper on 13 June 2013 (“Letter”).²

3. Also on 14 April 2014, the Appeals Chamber granted requests from Stanišić and Župljanin to vary their Notices of Appeal to include grounds of appeal relating to the Letter, and issued a supplemental briefing schedule.³ On 2 May 2014, the Pre-Appeal Judge granted a request from the Prosecution to vary the supplemental briefing schedule, and issued a new supplemental briefing schedule in relation to the additional grounds of appeal.⁴

4. Pursuant to Rule 115 of the Rules, the Prosecution seeks in the current Motion to present material to rebut the Letter.⁵ It seeks to admit the following three documents: (i) a memorandum from Judge Harhoff to Judge Jean-Claude Antonetti, dated 8 July 2013, discussing the Letter

¹ Prosecution Reply in Support of its Motion to Admit Rebuttal Material, 16 May 2014 (“Reply”).

² See Decision on Mićo Stanišić’s Motion Seeking Admission of Additional Evidence Pursuant to Rule 115, 14 April 2014 (“Rule 115 Decision”), paras 4, 27. See also Exhibit 1DA0001.

³ See Decision on Mićo Stanišić’s Motion Seeking Leave to Amend Notice of Appeal, 14 April 2014, paras 11, 23-24; Decision on Župljanin’s Second Request to Amend his Notice of Appeal and Supplement his Appeal Brief, 14 April 2014, paras 8, 16-17, 19. According to the supplemental briefing schedule, Stanišić and Župljanin were to file an addition to their appeal briefs by 5 May 2014, the Prosecution was to file any response by 26 May 2014, and Stanišić and Župljanin were to file any replies by 2 June 2014 (Decision on Mićo Stanišić’s Motion Seeking Leave to Amend Notice of Appeal, 14 April 2014, para. 24; Decision on Župljanin’s Second Request to Amend his Notice of Appeal and Supplement his Appeal Brief, 14 April 2014, para. 19).

⁴ See Decision on Urgent Prosecution Motion for Variation of Supplemental Briefing Schedule, 2 May 2014, pp 1-3. According to the new supplemental briefing schedule, Stanišić and Župljanin are to file an addition to their appeal briefs no later than 15 days after the decision on the Motion to Admit Rebuttal Material, the Prosecution is to file any response no later than 21 days after the filing of an addition to Stanišić’s and Župljanin’s appeal briefs, and Stanišić and Župljanin are to file any replies no later than seven days after the filing of any Prosecution response (Decision on Urgent Prosecution Motion for Variation of Supplemental Briefing Schedule, 2 May 2014, pp 2-3).

⁵ See Motion, paras 1-8.

(Proposed Exhibit PA1) (“Memorandum”);⁶ (ii) an article entitled “Two Puzzling Judgments in The Hague”, dated 1 June 2013, published by *The Economist* (Proposed Exhibit PA2) (“Economist Article”);⁷ and (iii) an article entitled “What Happened to the Hague Tribunal?”, dated 2 June 2013, published by *The New York Times* (Proposed Exhibit PA3) (“New York Times Article”) (together, “Proposed Rebuttal Materials”).⁸

II. SUBMISSIONS OF THE PARTIES

1. Motion

5. The Prosecution submits that the Proposed Rebuttal Materials directly affect the substance of the Letter admitted as additional evidence by the Appeals Chamber, and address the issues to which it is directed.⁹ It submits that the documents rebut Stanišić’s and Župljanin’s erroneous interpretation of the Letter regarding Judge Harhoff’s understanding of joint criminal enterprise (“JCE”) liability and his alleged predisposition to convicting accused persons.¹⁰ The Prosecution further submits that the Proposed Rebuttal Materials provide important additional information about the context of the Letter, which will assist the Appeals Chamber in assessing the Letter’s meaning and evidentiary weight.¹¹ According to the Prosecution, because the Letter “involves a matter never previously litigated in this case, it is particularly important and in the interests of justice that the parties are afforded a full opportunity to present all relevant evidence”.¹²

6. The Prosecution submits that in the Memorandum, Judge Harhoff clarified the context and meaning of various portions of the Letter, explained his understanding of JCE, and denied the allegation that he was predisposed to convict accused persons.¹³ With respect to the Economist Article and New York Times Article (together, “Articles”), the Prosecution submits that these Articles should be admitted as rebuttal material because they contribute to an understanding of the contents of the Letter.¹⁴ It argues that “[a]s explained in the Letter, Judge Harhoff sent the two articles in a prior email to the same group of friends who received the Letter”, and “[t]he Letter itself is Judge Harhoff’s ‘personal comments’ on the two news articles”.¹⁵ It further argues that the

⁶ Motion, paras 1, 3-4, 8. *See* Memorandum, attached to the Motion as proposed Exhibit PA1.

⁷ Motion, paras 1, 5-8. *See* Economist Article, attached to the Motion as proposed Exhibit PA2.

⁸ Motion, paras 1, 5-8. *See* New York Times Article, attached to the Motion as proposed Exhibit PA3.

⁹ Motion, paras 1-7.

¹⁰ Motion, paras 1, 4, 7.

¹¹ Motion, para. 2.

¹² Motion, para. 2.

¹³ Motion, para 3 *referring to* Memorandum, pp 2-3. *See also* Motion, fns 11-12.

¹⁴ Motion, para. 5.

¹⁵ Motion, para. 5. *See also* Motion, fn. 15; Letter, p. 1.

Articles are therefore “intrinsically linked” to the Letter and are necessary to accurately understand and contextualise Judge Harhoff’s remarks made therein.¹⁶

2. Responses

7. Stanišić responds that the Proposed Rebuttal Materials are inadmissible as they do not directly affect the substance of the Letter.¹⁷ In particular, Stanišić argues that the Memorandum cannot be considered as directly affecting the substance of the Letter, since it is “an *ex post facto* justification of the views expressed in [it]”.¹⁸ With regard to the Articles, he contends that they provide subjective comments on a number of cases at the Tribunal, and do not explain Judge Harhoff’s view that “there was a ‘*set practice*’ of convicting accused persons until autumn 2012”.¹⁹ Stanišić further submits that the Articles focus almost exclusively on aiding and abetting liability and therefore are entirely irrelevant to Judge Harhoff’s views on JCE liability.²⁰

8. Stanišić argues that, contrary to the Prosecution’s submissions, the Proposed Rebuttal Materials do not provide context or explain the clear appearance of bias which stands out in the Letter.²¹ Finally, Stanišić submits that the Prosecution is improperly seeking to re-litigate and appeal the finding made by the specially constituted Chamber in the case of *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, that the presumption of impartiality afforded to Judge Harhoff has been rebutted.²²

9. Župljanin responds that none of the Proposed Rebuttal Materials meets the applicable criteria and test for admission.²³ He argues that the Memorandum, which was drafted one month after the Letter was written and “for the very purpose of negating the impression of bias created”, provides “little value in assessing actual or perceived bias”.²⁴ Župljanin avers that the Memorandum is neither “probative nor does it provide information which would lead a reasonable observer properly informed, to not apprehend bias having read the Letter”.²⁵ He contends that the connection

¹⁶ Motion, paras 5-6.

¹⁷ Stanišić’s Response, paras 1-2, 5, 7-8, 41.

¹⁸ Stanišić’s Response, para. 7. *See also* Stanišić’s Response, paras 11-26.

¹⁹ Stanišić’s Response, para. 8. *See also* Stanišić’s Response, paras 10, 27-31.

²⁰ Stanišić’s Response, paras 8, 28-29. *See also* Stanišić’s Response, paras 27-31.

²¹ Stanišić’s Response, paras 9, 27-31.

²² Stanišić’s Response, paras 2-3, 6, 32-40 referring to *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, Decision on Defence Motion for Disqualification of Judge Frederik Harhoff and Report to the Vice-President, 28 August 2013 (“*Šešelj* Decision”). The Appeals Chamber notes that Stanišić makes a number of additional submissions relating to the weight to be accorded to the Letter and the impact of the Proposed Rebuttal Materials thereon (*See e.g.*, Stanišić’s Response, paras 10-26, 33-40. *See also infra*, para. 12.

²³ Župljanin’s Response, paras 1, 7, 8.

²⁴ Župljanin’s Response, para. 3. *See also* Župljanin’s Response, paras 2-5.

²⁵ Župljanin’s Response, para. 5.

between the Memorandum and the Letter “is not sufficient or of any impact” so as to justify admission of the Memorandum on appeal.²⁶

10. Župljanin further responds that the Articles “represent extrajudicial subjective approach by their respective authors”.²⁷ He argues that the Articles relate to parts of the Letter that do not directly affect the issue at stake, and are therefore not “intrinsically linked” to it.²⁸ Lastly, Župljanin contends that the fact that the Letter was admitted in its entirety is not a proper basis for the Prosecution to request to have the Articles adduced.²⁹

3. Reply

11. The Prosecution replies that Stanišić and Župljanin have failed to demonstrate that the Proposed Rebuttal Materials are inadmissible, and have instead primarily presented arguments that address the weight to be afforded to them.³⁰ It further replies that the fact that the Memorandum was written after the Letter became public cannot demonstrate that it is inadmissible, as alleged by Stanišić and Župljanin.³¹ The Prosecution argues that, contrary to arguments by Stanišić and Župljanin, the decision by a special panel to disqualify Judge Harhoff from the *Šešelj* trial has no bearing on its right to submit evidence to rebut the Letter admitted by the Appeals Chamber in additional evidence.³² Finally, the Prosecution reiterates its submissions that the Proposed Rebuttal Materials it seeks to admit directly affect the substance of the Letter admitted by the Appeals Chamber, and therefore meet the standard to be admitted as rebuttal evidence.³³

III. DISCUSSION

12. The Appeals Chamber recalls that rebuttal material is admissible if it directly affects the substance of the additional evidence admitted by the Appeals Chamber.³⁴ As such, rebuttal material

²⁶ Župljanin’s Response, para. 5.

²⁷ Župljanin’s Response, para. 7.

²⁸ Župljanin’s Response, para. 7 *referring to* Motion, para. 5.

²⁹ Župljanin’s Response, para. 6. The Appeals Chamber notes that Župljanin also makes submissions regarding the impact of the Proposed Rebuttal Materials on the Letter (*See e.g.*, Župljanin’s Response, paras 2-5. *See also infra*, para. 12).

³⁰ Reply, paras 2, 4-5. The Prosecution submits that Stanišić “ignores that the Appeals Chamber’s initial decision to admit the Letter is separate from the Chamber’s subsequent determination as to the evidentiary weight it will accord to the Letter” (Reply, para. 5).

³¹ Reply, paras 2, 4, 6-9.

³² Reply, paras 2-3. The Prosecution submits that the Appeals Chamber previously rejected Stanišić’s argument that the *Šešelj* Decision is binding, thus Stanišić’s arguments that the Prosecution is engaged in improper re-litigation should be rejected (Reply, para. 3).

³³ Reply, paras 1-13.

³⁴ *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-A, Decision on Prosecution’s Motion to Present Rebuttal Material, 24 August 2011 (confidential), p. 2. *See also Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84-AR65.2, Decision on Lahi Brahimaj’s Request to Present Additional Evidence Under Rule 115, 3 March 2006 (“*Haradinaj et al.* Decision”), para. 44; *Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30/1-A, Decision on Prosecution’s Motion to Adduce Rebuttal Material, 12 March 2004 (“*Kvočka et al.* Rule 115 Decision”), p. 3;

has a different standard for admissibility from additional evidence under Rule 115 of the Rules.³⁵ The Appeals Chamber further notes that, at this stage, the impact of rebuttal evidence on additional evidence is not subject to analysis by the Appeals Chamber as this is a matter which will be addressed during the appeals process, if the rebuttal material is admitted. For this reason, the Appeals Chamber will not consider, in the present decision, submissions made by Stanišić and Župljanin which appear to relate to the weight or impact to be accorded to the Letter or the Proposed Rebuttal Materials.³⁶

13. The Appeals Chamber notes that, in the Memorandum, Judge Harhoff denies the allegation that he was predisposed to convict accused persons.³⁷ In addition, Judge Harhoff explains the circumstances in which he wrote the Letter. He states that the Letter was a follow-up to an earlier e-mail that he had sent to the same group of friends and to which he had attached the Articles, and that he sought in the Letter to convey his “personal observations on the matters raised in the two articles”.³⁸ He further explains that the Letter did not distinguish between facts in the judgements discussed in the Articles, and was not clear on the distinction between JCE, aiding and abetting, and command responsibility “because it was not written as a legal intervention”.³⁹ The Appeals Chamber is of the view that the Memorandum clearly addresses the Letter and its content, and provides additional information on the context and meaning of the Letter which will assist the Appeals Chamber in assessing its evidentiary value. The Appeals Chamber considers that the Memorandum therefore directly affects the substance of the Letter. Consequently, the Appeals Chamber will admit the Memorandum as rebuttal material.

14. Regarding the Articles, the Appeals Chamber notes that in the Letter, Judge Harhoff states that “[s]ome of you may by now have read the two articles I sent round, and I thought it only proper to add a few personal comments to what you have read.”⁴⁰ Based on the Memorandum, the Appeals Chamber understands Judge Harhoff’s reference to “two articles” to mean the Articles which the Prosecution seeks to admit as part of its Proposed Rebuttal Materials.⁴¹ Upon reading the Letter, the

Prosecutor v. Momčilo Krajišnik, Case No. IT-00-39-A, Decision on Prosecution’s Motion to Adduce Rebuttal Material, 8 October 2008 (confidential), para. 9; *Prosecutor v. Radislav Krstić*, Case No. IT-98-33-A, Decision on the Admissibility of Material Presented by the Prosecution in Rebuttal to Rule 115 Evidence Admitted on Appeal, 19 November 2003 (“*Krstić* Decision”), para. 2; *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, Decision on Evidence, 31 October 2003, p. 5. See *Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Decision on Prosecution’s Motion for Leave to Call Rebuttal Material, 13 December 2006 (public redacted version), para. 7.

³⁵ *Haradinaj et al.* Decision, para. 44; *Kvočka et al.* Rule 115 Decision, p. 3. See also Rule 115 Decision, paras 11-16, setting out the standard for admission of additional evidence on appeal.

³⁶ See e.g., Stanišić’s Response, paras 10-26, 33-40; Župljanin’s Response, paras 2-5. See also *supra*, fns 22, 29. The Appeals Chamber notes that Stanišić and Župljanin may address these issues in the additions to their appeal briefs.

³⁷ See Memorandum, pp 2-3.

³⁸ Memorandum, p. 1.

³⁹ See Memorandum, p. 2 (emphasis omitted).

⁴⁰ See Letter, p. 1. See also Motion, para. 3; Memorandum, pp 1-2.

⁴¹ See Memorandum, p. 1.

Memorandum, and the Articles, it is apparent that they relate to the same subject matter and are linked to one another. The Appeals Chamber therefore considers that they ought not to be read in isolation from each other. Accordingly, the Appeals Chamber considers that the Articles provide additional background information which will assist it in understanding the meaning of the Letter and the context in which it was written, and to determine its evidentiary value. For these reasons, the Appeals Chamber finds that the Articles directly affect the substance of the Letter as they address the issues to which it is directed.⁴² The Appeals Chamber will therefore admit the Articles as rebuttal material.

15. The Appeals Chamber emphasises that its findings in this decision pertain strictly to the admissibility of the Proposed Rebuttal Materials and are in no way expressive of its views on the weight to be attached to the Letter and the Proposed Rebuttal Materials, or on the merits of the appeals, which will be determined in the Appeal Judgement.

IV. DISPOSITION

16. In light of the foregoing, the Appeals Chamber:

GRANTS the Motion;

ADMITS the Memorandum, the Economist Article, and the New York Times Article as rebuttal material, pursuant to Rule 115 of the Rules;

INSTRUCTS the Registry to assign exhibit numbers to the Memorandum, the Economist Article, and the New York Times Article;

ORDERS Stanišić to file an addition to his appeal brief with respect to ground of appeal *1bis* no later than 26 June 2014;

ORDERS Župljanin to file an addition to his appeal brief with respect to ground of appeal 6 no later than 26 June 2014;

ORDERS the Prosecution to file an addition to its response to Stanišić's appeal brief with respect to ground of appeal *1bis*, if any, no later than 21 days after the filing of an addition to Stanišić's appeal brief;

⁴² See *Krstić* Decision, para. 9.

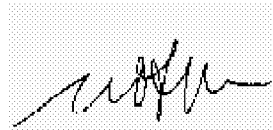
ORDERS the Prosecution to file an addition to its response to Župljanin's appeal brief with respect to ground of appeal 6, if any, no later than 21 days after the filing of an addition to Župljanin's appeal brief;

ORDERS Stanišić to file an addition to his reply brief with respect to ground of appeal *1bis*, if any, no later than seven days after the filing of any Prosecution response; and

ORDERS Župljanin to file an addition to his reply brief with respect to ground of appeal 6, if any, no later than seven days after the filing of any Prosecution response.

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

Dated this eleventh day of June 2014,
At The Hague,
The Netherlands.



Judge Carmel Agius
Presiding Judge

[Seal of the Tribunal]