

**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: 22 October 2014
Original: English

IN THE APPEALS CHAMBER

Before: Judge Carmel Agius, Presiding
Judge Patrick Robinson
Judge Arlette Ramarosan
Judge Khalida Rachid Khan
Judge Koffi Kumelio A. Afande

Registrar: Mr. John Hocking

Decision of: 22 October 2014

PROSECUTOR

v.

**MIĆO STANIŠIĆ
STOJAN ŽUPLJANIN**

PUBLIC

**DECISION ON JOINT MOTION ON BEHALF OF MIĆO
STANIŠIĆ AND STOJAN ŽUPLJANIN SEEKING EXPEDITED
ADJUDICATION OF THEIR RESPECTIVE GROUNDS OF
APPEAL 1BIS AND 6**

The Office of the Prosecutor

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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 “Joint Motion on Behalf of Mićo Stanišić and Stojan Župljanin Seeking Expedited Adjudication of Their Respective Grounds of Appeal 1*Bis* and 6”, filed jointly by Mićo Stanišić (“Stanišić”) and Stojan Župljanin (“Župljanin”) on 25 August 2014 (“Motion”). The Office of the Prosecutor (“Prosecution”) filed a response to the Motion on 1 September 2014.¹ Stanišić and Župljanin (“Applicants”) filed a joint reply on 5 September 2014.²

I. BACKGROUND

2. On 27 March 2013, Trial Chamber II of the Tribunal (“Trial Chamber”), composed of Judges Burton Hall (presiding), Guy Delvoie and Frederik Harhoff (“Judge Harhoff”), issued its judgement in the case of *Prosecutor v. Mićo Stanišić and Stojan Župljanin*, Case No. IT-08-91-T (“Trial Judgement”) convicting Stanišić and Župljanin pursuant to Article 7(1) of the Statute of the Tribunal (“Statute”) of persecutions as a crime against humanity and murder and torture as violations of the laws or customs of war.³ The Trial Chamber also convicted Župljanin pursuant to Article 7(1) of the Statute of extermination as a crime against humanity.⁴ The Trial Chamber sentenced both Stanišić and Župljanin to a single sentence of 22 years of imprisonment.⁵

3. Stanišić, Župljanin, and the Prosecution filed notices of appeal on 13 May 2013.⁶ On 2 July 2013, Stanišić filed a motion seeking leave to amend his notice of appeal to add, *inter alia*, an additional ground of appeal, ground 1*bis*, claiming a violation of his right to a fair trial by a competent, independent and impartial tribunal based on a letter written by Judge Harhoff dated 6 June 2013 and published in a Danish newspaper on 13 June 2013 (“Letter”).⁷

¹ Prosecution’s Response to Joint Motion on Behalf of Mićo Stanišić and Stojan Župljanin Seeking Expedited Adjudication of Their Respective Grounds of Appeal 1*Bis* and 6, 1 September 2014 (“Response”).

² Joint Reply to Prosecution’s Response to Joint Motion on Behalf of Mićo Stanišić and Stojan Župljanin Seeking Expedited Adjudication of Their Respective Grounds of Appeal 1*Bis* and 6, 5 September 2014 (“Reply”).

³ Trial Judgement, Vol. II, paras 955-956.

⁴ Trial Judgement, Vol. II, para. 956.

⁵ Trial Judgement, Vol. II, paras 955-956.

⁶ Notice of Appeal on Behalf of Mićo Stanišić, 13 May 2013; Notice of Appeal on Behalf of Stojan [Ž]upljanin, 13 May 2013; Prosecution Notice of Appeal, 13 May 2013.

⁷ Motion on Behalf of Mićo Stanišić Seeking Leave to Amend Notice of Appeal with Annexes A, B and C, 2 July 2013, paras 5, 30-35, 39.

4. On 2 July 2013, Stanišić also filed a motion under Rule 115 of the Rules of Procedure and Evidence of the Tribunal (“Rules”) seeking the admission of extracts from the Letter as additional evidence on appeal.⁸

5. Stanišić, Župljanin, and the Prosecution filed appeal briefs on 19 August 2013.⁹ On 28 August 2013, a Chamber convened by Order of the Vice-President of the Tribunal in the *Prosecutor v. Vojislav Šešelj* case found by majority that in the Letter, Judge Harhoff “demonstrated a bias in favour of conviction such that a reasonable observer properly informed would reasonably apprehend bias” (“*Šešelj* Decision”).¹⁰

6. On 9 September 2013, Župljanin requested leave to amend his notice of appeal and supplement his appeal brief, *inter alia*, to add an additional ground of appeal, ground 6, asserting a violation of his right to a fair trial by reason of an actual or reasonable apprehension of bias on the part of Judge Harhoff, which in his submission, was supported by the *Šešelj* Decisions.¹¹

7. On 2 April 2014, the Appeals Chamber issued its “Decision on Mićo Stanišić’s Motion Requesting a Declaration of Mistrial and Stojan Župljanin’s Motion to Vacate Trial Judgement”, in which it dismissed motions filed by Stanišić and Župljanin requesting that the Appeals Chamber declare a mistrial and vacate the Trial Judgement on the basis of a finding of reasonable appearance of bias on the part of Judge Harhoff in the *Šešelj* Decisions.¹²

8. On 14 April 2014, the Appeals Chamber granted Stanišić’s and Župljanin’s respective motions allowing them to amend their notices of appeal and file additions to their appeal briefs.¹³ On the same day, the Appeals Chamber also issued a decision admitting the Letter in its entirety as

⁸ Rule 115 Motion on Behalf of Mićo Stanišić Seeking Admission of Additional Evidence with Annex, 2 July 2013, paras 2, 28.

⁹ Appellant’s Brief on Behalf of Mićo Stanišić, 19 August 2013; Stojan [Ž]upljanin’s Appeal Brief, 19 August 2013 (confidential) (public redacted version filed on 23 August 2013); Prosecution Appeal Brief, 19 August 2013.

¹⁰ *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, para. 14. On 7 October 2013, the Special Panel denied a request by the Prosecution for reconsideration of the *Šešelj* Decision (“*Šešelj* Reconsideration Decision”) (collectively with the *Šešelj* Decision, “*Šešelj* Decisions”) (*Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, Decision on Prosecution Motion for Reconsideration of Decision on Disqualification, Requests for Clarification, and Motion on Behalf of Stanišić and Župljanin, 7 October 2013, paras 21-22).

¹¹ [Ž]upljanin’s Second Request to Amend his Notice of Appeal and Supplement his Appeal Brief, 9 September 2013, paras 1-3, 7.

¹² Decision on Mićo Stanišić’s Motion Requesting a Declaration of Mistrial and Stojan Župljanin’s Motion to Vacate Trial Judgement, 2 April 2014 (“2 April 2014 Decision”), paras 1, 6, 36. On 24 July 2014, the Appeals Chamber dismissed a motion filed by Stanišić requesting reconsideration of the 2 April 2014 Decision (see Decision on Mićo Stanišić’s Motion Seeking Reconsideration of Decision on Stanišić’s Motion for Declaration of Mistrial and Župljanin’s Motion to Vacate Trial Judgement, 24 July 2014 (“Reconsideration Decision”), paras 1, 13, 19).

¹³ Decision on Mićo Stanišić’s Motion Seeking Leave to Amend Notice of Appeal, 14 April 2014, paras 23-24; Decision on Župljanin’s Second Request to Amend his Notice of Appeal and Supplement his Appeal Brief, 14 April 2014, paras 16-19.

additional evidence on appeal.¹⁴ On 11 June 2014, the Appeals Chamber admitted three documents as rebuttal material to the Letter as requested by the Prosecution.¹⁵

9. Stanišić and Župljanin filed additional appeal briefs on 26 June 2014, providing arguments in support of their respective additional grounds of appeal *1bis* and 6 (together, “Grounds of Appeal”).¹⁶ The Prosecution filed its supplemental response brief on 18 July 2014.¹⁷ Župljanin and Stanišić filed their replies to the Prosecution’s supplemental response brief on 25 July 2014 and 29 July 2014, respectively.¹⁸

II. SUBMISSIONS OF THE PARTIES

10. The Applicants request the Appeals Chamber to expedite adjudication of the Grounds of Appeal immediately and separately from the remainder of the appeals.¹⁹ The Applicants submit three main arguments in support of their request. First, they submit that the issue raised in the Grounds of Appeal pertains directly to the fairness and validity of the ongoing proceedings.²⁰ In particular, the Applicants argue that the Appeals Chamber is seised of appeals from a judgement rendered by a Trial Chamber which was improperly constituted and did not meet the requirements of the International Covenant on Civil and Political Rights (“ICCPR”), which is binding on the Tribunal.²¹ The Applicants argue that the “credibility” of the Grounds of Appeal was confirmed by the Appeals Chamber’s finding in its Rule 115 Decision that “there is a realistic possibility that [Judge Harhoff’s Letter] could demonstrate that Stanišić was not tried by a Trial Chamber constituted of three impartial judges”.²²

11. Second, the Applicants submit that an immediate resolution of the Grounds of Appeal is in the interests of judicial economy as a resolution in favour of the Applicants by the Appeals Chamber would render the remaining grounds of appeal moot.²³

¹⁴ Decision on Mićo Stanišić’s Motion Seeking Admission of Additional Evidence Pursuant to Rule 115, 14 April 2014, (“Rule 115 Decision”) paras 22-24, 27.

¹⁵ Decision on Prosecution Motion to Admit Rebuttal Material, 11 June 2014, paras 4, 12-16.

¹⁶ Additional Appellant’s Brief on Behalf of Mićo Stanišić, 26 June 2014 (“Stanišić Additional Brief”); Stojan Župljanin’s Supplement to Appeal Brief (Ground Six), 26 June 2014 (“Župljanin Supplemental Brief”); Rule 115 Decision, paras 22-23, 27.

¹⁷ Prosecution’s Consolidated Supplemental Response Brief, 18 July 2014.

¹⁸ Stojan Župljanin’s Reply to Prosecution’s Consolidated Supplemental Response Brief Concerning Additional Appeal Ground, 25 July 2014; Additional Brief in Reply on Behalf of Mićo Stanišić, 29 July 2014.

¹⁹ Motion, paras 1, 7. The Applicants submit that since the grounds of appeal have now been fully briefed by the parties, they are “ripe for resolution or, alternatively, argument” (Motion, para. 2).

²⁰ Motion, paras 2, 3.

²¹ Motion, para. 3 referring to ICCPR, Article, 14.

²² Motion, para. 3 referring to Rule 115 Decision, para. 22.

²³ Motion, paras 2, 4. The Applicants submit that “[i]f necessary, oral arguments [on the Grounds of Appeal] could be scheduled to coincide with a regularly-scheduled status conference” (Motion, para. 4).

12. Third, the Applicants submit that a delay in the resolution of the Grounds of Appeal imposes an unreasonable delay on them, and is not in the interest of justice “bearing in mind the nature of the remedies that may possibly be ordered”.²⁴

13. The Prosecution responds that the Applicants fail to show that it is necessary to depart from the normal appellate process, and that the Appeals Chamber should reject the Motion.²⁵ The Prosecution submits that the Applicants rely on the flawed premise that expedited adjudication is necessary because Judge Harhoff’s partiality has been established in these proceedings.²⁶ It argues that the Appeals Chamber did not confirm the “credibility” of the Grounds of Appeal when it found that the Letter was admissible as additional evidence on appeal.²⁷ The Prosecution finally responds that a decision to admit additional evidence cannot justify expediting the adjudication of the ground of appeal to which that evidence relates.²⁸

14. The Applicants reply that the “normal appellate process” could include expedited consideration of selected grounds of appeal.²⁹ They further reply that while the Appeals Chamber’s previous finding was made in the context of a summary application for mistrial or to vacate the Trial Judgement, the present Motion’s “procedural posture and the nature of the request are now fundamentally different” and within the “normal appellate process”.³⁰ Finally, the Applicants reply that they did not argue that Judge Harhoff’s partiality has been established in these proceedings,³¹ but rather, that the Appeals Chamber’s previous determination demonstrates that these Grounds of Appeal “have ‘credibility’ and give rise to a ‘credible basis to believe that these proceedings are themselves unfair and improper’”.³²

²⁴ Motion, paras 2, 5-6. In this regard, the Applicants submit that “[t]he current judicial calendar neither foresees an oral hearing on the merits of the appeals until sometime in 2015 nor a Judgement on the merits for at least another 15 months”. They further argue that a “higher interest of justice would not be served by a decision in favour of the Applicants after the latter had waited more than a year for the adjudication of what would then have to be branded as unwarranted appeals on the merits”.

²⁵ Response, paras 1-3. The Prosecution submits that the Appeals Chamber has consistently indicated that these challenges will be addressed as part of the normal appellate process (Motion, para. 2 referring to 2 April 2014 Decision, paras 21, 26, 28-29, 32; Reconsideration Decision, para. 15).

²⁶ Response, para. 2.

²⁷ Response, para. 2.

²⁸ Response, para. 2.

²⁹ Reply, para. 1.

³⁰ Reply, para. 1. Further, the Applicants argue that “[t]he Appeals Chamber’s previous statement cannot be taken to preclude expedited consideration of specified grounds of appeal when it is manifestly in the interests of justice and judicial economy to do so” (Reply, para. 1).

³¹ Reply, para. 2.

³² Reply, para. 2. The Applicants further argue that the Appeals Chamber recognised that the claims “ha[ve] the potential to affect the Trial Judgement as a whole, as well as Stanišić’s right to a fair trial” including the fairness of the appellate proceedings (Reply, para. 2 quoting Rule 115 Decision, para. 22). See also Motion, para. 3.

III. DISCUSSION

15. The Appeals Chamber notes that in the Grounds of Appeal, the Applicants allege violations of their right to a fair trial by an independent and impartial tribunal on the basis of Judge Harhoff's comments following the delivery of the Trial Judgement, which, in the Applicants' submission, reveal actual bias or reasonable apprehension of bias.³³ The Appeals Chamber recalls the well-established practice at this Tribunal that allegations of partiality of trial judges are dealt with in the course of the normal appellate process, *i.e.*, *in the appeal judgement*.³⁴ The Appeals Chamber further recalls that it has already made a determination, in the present case, that it will make its *own* assessment of the issues relating to the alleged partiality of Judge Harhoff in the course of the normal appellate process.³⁵

16. With respect to the Applicants' first argument, the Appeals Chamber recalls its previous finding that there has been no "general finding" or "final determination" regarding Judge Harhoff's alleged partiality in this case and that thus there is no basis for a claim of "ongoing prejudice" during the appeal proceedings.³⁶ The fairness and validity of the Trial Judgement is yet to be determined by the Appeals Chamber. The Appeals Chamber therefore rejects the Applicants' argument that the appeal proceedings are themselves improper and unfair because the Trial Judgement is invalid. In relation to the Applicants' arguments that the Grounds of Appeal are "credible" based on the Appeals Chamber's decision to admit the Letter as additional evidence on appeal, the Appeals Chamber notes that this decision was made in the context of, and is limited to Rule 115 of the Rules. The Appeals Chamber emphasises its previous conclusion that the Rule 115 Decision "pertain[s] strictly to the admissibility [of the Letter] and not to the merits of the appeals filed by the parties".³⁷ The Appeals Chamber further emphasises that the credibility and merits of the appeals filed by the parties will be determined in due course by the Appeals Chamber. It is therefore not necessary to depart from the Tribunal's well-established practice³⁸ on the basis that these proceedings "[flow] [...] from an invalid Trial Judgement" as alleged by the Applicants.³⁹ The Applicants' arguments in this regard are therefore without merit.

³³ See Stanišić Additional Brief, paras 4, 10, 75, 113; Župljanin's Supplement Brief, paras 12, 17, 32. The Appeals Chamber notes that the Applicants' arguments relate to a finding in the *Šešelj* Decisions that Judge Harhoff "demonstrated a bias in favour of conviction such that a reasonable observer properly informed would reasonably apprehend bias" (*Šešelj* Decision, para. 14).

³⁴ See 2 April 2014 Decision, para. 21, fn. 72, and references cited therein.

³⁵ Reconsideration Decision, para. 15. See also 2 April 2014 Decision, paras 21, 25.

³⁶ 2 April 2014 Decision, para. 25; Reconsideration Decision, para. 14.

³⁷ Rule 115 Decision, para. 26.

³⁸ See *supra*, para. 15.

³⁹ Motion, para. 3. See *supra*, para. 10.

17. Regarding the Applicants' second and third arguments, the Appeals Chamber notes that under Articles 20(1) and 21(4)(c) of the Statute, the Appeals Chamber has the primary obligation to ensure that a person convicted by a Trial Chamber has a fair and expeditious process on appeal. The Appeals Chamber is now seised of the fully briefed appeals. It is considering them and will deliver its judgement in due course.⁴⁰ The Appeals Chamber observes that the Applicants' arguments of judicial economy and potential undue delay in the proceedings are based on a speculative premise as to the outcome of the appeals as a whole.⁴¹ However, as previously emphasised, the outcome of the appeals lodged by the parties will be determined in the appeal judgement.⁴² Therefore, the Appeals Chamber is not satisfied that "possible remedies" which might be ordered by it merit a departure from the practice of this Tribunal. The Appeals Chamber further emphasises that proceeding through the normal appellate process in the present case does not prejudice the Applicants. For these reasons, the Appeals Chamber is not convinced that judicial economy or the interests of justice require it to depart from the normal appellate process, *i.e.* considering the appeals as whole.

18. Consequently, the Appeals Chamber finds no justification to expedite adjudication of the Grounds of Appeal.

IV. DISPOSITION

19. In view of the foregoing, the Appeals Chamber **DISMISSES** the Motion.

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

Dated this twenty second day of October 2014,
At The Hague,
The Netherlands.



Judge Carmel Agius
Presiding

[Seal of the Tribunal]

⁴⁰ See Status Conference, 24 July 2014, T. 27.

⁴¹ See Motion, paras 4- 5.

⁴² See *supra*, para. 15.