IT-95-5/18-T
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22 December 2008

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THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA

CASE No.IT-08-91-PT
CASE No. IT-95-5/18-PT

IN THE SPECIALLY APPOINTED CHAMBER

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

Registrar: Mr.Hans Holthuis

Date Filed: 22 December 2008

THE PROSECUTOR

v.

MICO STANISIC
-and-
STOJAN ZUPLJANIN

THE PROSECUTOR

v.

RADOVAN KARADZIC

PUBLIC

STOJAN ZUPLJANIN'S REPLY TO THE RESPONSES OF THE PROSECUTION, RADOVAN KARADZIC AND MICO STANSIC TO ZUPLJANIN'S MOTION FOR JOINDER

The Office of the Prosecutor:
Tom Hannis

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Slobodan Zecevic and Slobodan Cvjetic for Mico Stanisic
Tomislav Visnjic and Igor Pantelic for Stojan Zupljanin

The Accused
Radovan Karadzic

I. Introduction

1. On 2 December 2008, Stojan Zupljanin requested that his trial be joined to that of Radovan Karadzic. On 15 December 2008, Dr. Karadzic filed a response supporting Mr. Zupljanin's request. On the same day, the prosecution and Mico Stanisic filed their responses, both opposing joinder (respectively the **"Prosecution Response"** and the **"Stanisic Response"**).

2. The Zupljanin defence requests leave pursuant to Rule 126 *bis* to reply to the prosecution, Stanisic and Karadzic responses. The Zupljanin defence does not raise new issues in support of its motion for joinder – rather this reply is limited to addressing points raised in the responses and includes submissions as to how to address the concerns expressed by the prosecution and the Stanisic defence, while protecting Mr. Zupljanin's right to a fair trial and serving the interests of justice.

II. Zupljanin's right to seek joinder

3. The prosecution complains that the Zupljanin defence has not identified any authority that an accused can seek to compel the prosecution to join accused whom it has chosen to charge separately. The prosecution suggests that Zupljanin does not therefore have standing to seek joinder.[1] The Stanisic defence makes the same submission.[2]

4. Like the prosecution, the Zupljanin defence was unable to identify any previous example before the *ad hoc* Tribunals whereby an accused has requested that their case be joined to that of another accused. Zupljanin's request that his case be joined to that of Radovan Karadzic therefore appears to raise a novel issue for determination by the Specially Appointed Chamber. It falls to the Chamber to decide whether or not a motion for joinder under Rule 48 is the sole prerogative of the prosecution.

1 Prosecution Response, para. 2.
2 Stanisic Response, para. 7b.

5. Rule 48 provides that "*Persons accused of the same or different crimes committed in the course of the same transaction may be jointly charged or tried.*" Nowhere in the Rules or the Statute is it expressly stated that a request for joinder can only be made by the prosecution. Nor should such a restriction be read into Rule 48 – the language of which is permissive rather than restrictive.

6. To vest the power to request joinder solely in the hands of the prosecution would require explicit and unequivocal language. Consistent with the fundamental principle of *in dubio pro reo,* any ambiguity as to the interpretation of Rule 48 must be resolved in favour of Mr. Zupljanin.

7. Mr. Zupljanin's motion for joinder sets out the reasons why his right to a fair trial requires that his case be joined to that of Dr. Karadzic. For example, Mr. Zupljanin highlighted (i) the prejudice he would suffer by being forced to monitor a separate but simultaneous trial; (ii) the duplication of defence evidence implied by separate but simultaneous trials and his reasonable expectation that defence witnesses will be less willing to attend The Hague on two separate occasions; and (iii) the importance to be attached to a single Trial Chamber being able to assess all of the evidence on a consistent basis in deciding upon (potentially relative degrees of) criminal responsibility.

8. In such circumstances, to foreclose from a defendant the opportunity to seek joinder would be an extreme result. In any event, the ultimate decision in relation to joinder rests in the hands of judges rather than the prosecution. Accordingly, it should be open to the Chamber to consider the particular circumstances of Mr. Zupljanin's case and whether or not joinder is appropriate.

9. The prosecution concedes that the requirements of Rule 48 are met, but argues that the Chamber should not exercise its discretion to order joinder. The remainder of this reply addresses the issues raised by the prosecution and the Stanisic defence in relation to the exercise of the Chamber's discretion.

III. The interests of justice are served by joinder

(1) Duplication of evidence (paragraphs 6-8 of the Prosecution's Response)

10. The prosecution submits that the Zupljanin defence has over-estimated the amount of duplicative prosecution evidence likely to be tendered in two separate cases.[3] It is respectfully suggested that a reasonable analysis of the two indictments, the crime sites alleged therein and the likely linkage and expert evidence to be led, reveals much in common to both cases.[4]

11. Further, the Zupljanin defence has emphasised that separate trials will result in a significant duplication of defence evidence.[5] The prosecution criticises the Zupljanin defence's failure to identify the witnesses who would be common to all three defendants.[6] It is submitted that no weight should be accorded to that submission: to adopt the prosecution's position would impose an impossible burden upon the Zupljanin defence at this early stage of the trial, especially as Mr. Stanisic opposes joinder. Given the nature of the cases against the three accused it is submitted that it is clear that separate trials will require significant duplication of defence evidence. Crucially, Dr. Karadzic agrees that a joint trial will facilitate the appearance of common defence witnesses[7], thus promoting judicial economy.

12. In support of its submission that separate trials will not entail duplicating evidence, the prosecution asserts that the Stanisic/Zupljanin Indictment "*is about crimes committed by or involving RSMUP personnel*" whereas the Karadzic Indictment "*is not focused on RSMUP but rather encompasses all political, civilian and military organs that committed*

3 Prosecution Response, para. 6.
4 The Zupljanin defence refers to the Stanisic/Zupljanin Indictment dated 29 September 2008 and the Karadzic Indictment dated 22 September 2008 and further amended on 29 September 2008. While neither indictment has been finalised, it is submitted that any motion for joinder can only sensibly be directed at these indictments rather than the operative indictments in each case.
5 Zupljanin Motion, para. 15.
6 Prosecution Response, footnote 7.
7 Karadzic Response, para. 3.

crimes committed against the non-Serb populations."[8] The prosecution's representation appears to suggest that Mr. Zupljanin is not alleged to be responsible for crimes committed by individuals other than RSMUP personnel, provided RSMUP personnel were not involved. It is submitted that this should be reflected in the finalised indictment against Mr. Zupljanin. In any event, joinder will serve to more fully illuminate the functioning and role of the RSMUP in general and Mr. Zupljanin in particular.

13. As to the prosecution's submission that the evidence of 28 witnesses is proposed to be admitted pursuant to Rule 92*ter*[9], the Zupljanin defence notes that it is currently considering this proposal and is due to respond to it no later than 26 January 2009.[10] Accordingly, the Chamber should accord only limited weight to this aspect of the prosecution's submissions.

14. In summary, it is submitted that an objective analysis of the relevant indictments and the likely evidence to be led against and on behalf of the accused reveals that separate trials will result in significant, needless and costly duplication of evidence.

(2) Judicial economy (paragraphs 9 – 14 of the Prosecution's Response)

15. The prosecution submits that the Karadzic Indictment is more complex than the Zupljanin/Stanisic Indictment and will require more evidence and a lengthier trial. The prosecution notes that in addition to the (common) crimes alleged in a number of municipalities in 1992, Radovan Karadzic is additionally charged with alleged crimes relating to Sarajevo from 1992 through 1995, crimes in Srebrenica in 1995, and the taking of UN personnel hostage in 1995.[11] The Stanisic defence also emphasises these differences[12] and suggests that judicial economy would be harmed by the Stanisic and Zupljanin defence teams having to sit through evidence which it says is irrelevant.[13]

8 Prosecution Response, para. 7.
9 Prosecution Response, para. 8.
10 *Decision on Stojan Zupljanin's Motion Requesting an Order that the Prosecution Clarify its Motion of 19 November 2008* (15 December 2008).
11 Prosecution Response, para. 9.
12 Stanisic Response, para. 10.
13 Stanisic Response, para. 20.

16. The Zupljanin defence concedes that these factors can be viewed as weighing against joinder. However, they must be considered against the factors in favour of joinder. Should the Chamber consider that on balance judicial economy is harmed by joinder of the indictments in their present form, an appropriate remedy would be to order severance of those charges and crime sites which are unique to Dr. Karadzic and hold a first (joint) trial in relation to those parts of the indictments common to all three accused. This solution would promote judicial economy and protect Mr. Zupljanin's right to a fair trial while avoiding prejudice to the accused Stanisic.

17. The prosecution submits that joinder would reduce judicial efficiency by reducing the Trial Chamber's ability to utilise adjudicated facts. The prosecution cites a decision by the Trial Chamber in relation to Stanisic by which judicial notice was taken of 752 agreed facts.[14] The application of this decision in relation to Mr. Zupljanin has not been determined and remains open to challenge. In any event, where it is alleged that Mr. Zupljanin participated in a joint criminal enterprise organised at the highest level, it should be open to Mr. Zupljanin to address the case against him in full.

18. As to the prosecution's reliance on its proposal that evidence be introduced under Rule 92 *bis*[15], the Zupljanin defence notes that it is yet to respond to this proposal and accordingly it should be viewed cautiously by the Chamber. In any event, the spectre raised by the prosecution is of judicial notice being taken of matters pertaining to Dr. Karadzic in Mr. Zupljanin's (separate) trial, yet Dr. Karadzic is litigating those very same issues before different judges who would quite conceivably reach different conclusions. Not only would this undermine the fairness of Mr. Zupljanin's trial, it would undermine the Tribunal.

14 Prosecution's Response, para. 13.
15 Prosecution's Response, paras. 13 and 14.

IV. Joinder need not prejudice the rights of the accused

(1) Joinder need not unduly delay the commencement of trial (paragraphs 15 – 16 of the Prosecution's Response)

19. The prosecution concedes that a trial date has not been set in either case, yet it asserts that the Stanisic/Zupljanin trial is substantially farther along in trial preparation such that joinder would delay the start of the trial. The Stanisic defence also raise concerns about delay to the beginning of the trial.

20. The Zupljanin defence submits that neither the prosecution nor the Stanisic defence have made out their submission that a joint trial will start significantly later than separate trials. Mr. Zupljanin was arrested only one month prior to Dr. Karadzic and on any sensible analysis his defence preparations cannot be considered to be significantly further advanced than those of Dr. Karadzic. Further, should the Chamber order that the prosecution sever those aspects of the indictment that are unique to Dr. Karadzic, the prosecution could more easily be ready for the beginning of trial. In any event, Mr. Stanisic's right to an expeditious trial should not displace Mr. Zupljanin's right to a fair trial, particularly in circumstances where the prosecution only sought to join Mr. Zupljanin's case to that of Mr. Stanisic some three years after Mr. Stanisic surrendered to the Tribunal.

21. As to the prosecution's reliance on its 92*bis,* 92*ter,* 92*quater* motions and Rule 94*bis* notice[16], the Zupljanin defence reiterates that it is yet to respond on these matters and accordingly they should be given very limited weight by the Chamber in deciding upon joinder.

16 Prosecution's Response, para. 15.

(2) Joinder need not unduly increase the length and complexity of the trial (paragraphs 17 – 18 of the Prosecution's Response)

22. The prosecution's complaints in paragraphs 17 and 18 of its response are answered by severing those aspects of the Karadzic Indictment that do not relate to either Mr. Zupljanin or Mr. Stanisic. This is a preferable remedy as it secures the benefits of a joint trial while avoiding the potential pitfalls.

V. Relief sought

23. The Zupljanin defence respectfully requests that, in order to protect Stojan Zupljanin's right to a fair trial and in the interests of justice, the Specially Appointed Chamber order that:

a. the Stanisic/Zupljanin case and Karadzic case shall be joined; and
b. the prosecution shall consolidate and amend the indictments against the accused, if necessary severing certain allegations against Radovan Karadzic, those allegations to be tried separately.

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Respectfully submitted

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22 December 2008
At The Hague, Netherlands