

IT-95-5/18-PT  
D12446-D12459  
12 January 2009

IT-08-91-PT  
D784-D777  
12 January 2009

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THE INTERNATIONAL CRIMINAL TRIBUNAL  
FOR THE FORMER YUGOSLAVIA

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

IN THE SPECIALLY APPOINTED CHAMBER

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

Registrar: Mr John Hocking, Acting Registrar

Date Filed: 12<sup>th</sup> January 2009

THE PROSECUTOR

v.

MICO STANISIC

-and-

STOJAN ZUPLJANIN

THE PROSECUTOR

v.

RADOVAN KARADZIC

*-Public-*

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**STOJAN ZUPLJANIN'S MOTION FOR  
CERTIFICATION FOR INTERLOCUTORY APPEAL  
OF THE DECISION ON JOINDER DATED 6 JANUARY 2009**

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**The Office of the Prosecutor**

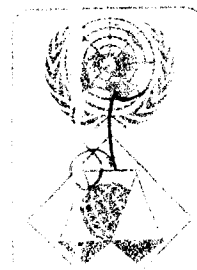
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Mr Tomislav Visnjic and Mr Igor Pantelic for Stojan Zupljanin

**The Accused**

Dr Radovan Karadzic



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*Stojan Zupljanin's Motion for Certification for Interlocutory Appeal of the Decision on Joinder Dated 6 January 2009*

1. Stojan Zupljanin respectfully requests, pursuant to Rule 73(B), certification to appeal the Trial Chamber's *Decision on Stojan Zupljanin's Motion for Joinder* of 6 January 2009 (the "**Impugned Decision**").

2. Rule 73(B) provides:

*"Decision on all motions are without interlocutory appeal save with certification by the Trial Chamber, which may grant such 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."*

3. In other words, a Trial Chamber can exercise its discretion to grant certification for interlocutory appeal if two criteria are satisfied: (1) the decision involves an issue which would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and (2) an immediate resolution of this issue may, in the opinion of the Trial Chamber, materially advance the proceedings. These two criteria are cumulative.<sup>1</sup>

4. The issue of whether resolution by the Appeals Chamber may materially advance the proceedings requires consideration not only of the effect on proceedings assuming that there would be a reversal or modification of the Trial Chamber's decision, but also whether there is serious doubt as to the correctness of the legal principles at issue.<sup>2</sup> The appropriate enquiry is whether a showing has been made that the appeal can succeed. That threshold is met by showing some basis to believe that the Trial Chamber committed an error as to the applicable law; that it made a patently incorrect conclusion of fact, or that it was so unfair or

<sup>1</sup> *Prosecutor v. Popovic et al*, Case No. IT-02-57-PT, *Decision on motion for certification of joinder decision for interlocutory appeal* (6 October 2005), para. 6. See also e.g., *Prosecutor v. Mejacic et al.*, Case No. It-02-65-PT, *Decision on Knezevic's Motion for Certification for Interlocutory Appeal of 'Decision on Prosecution's Motion to Amend Consolidated Indictment Schedules A through F, the Rule 65 Ter Witness Summaries, and the Pre-Trial Brief Incident Summaries'* (25 January 2005).

<sup>2</sup> *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Certification of Appeal Concerning Admission of Written Statement of Witness XXO* (11 December 2003) at para. 6; *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Kabiligi Application for Certification Concerning Defence Cross Examination After Prosecution Cross Examination* (2 December 2005).

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unreasonable as to constitute an abuse of the Trial Chamber's discretion.<sup>3</sup>

### Certification in relation to joinder

5. Trial Chambers have on numerous occasions granted certification to appeal decisions in relation to joinder.<sup>4</sup> It is submitted that, in general, the issues involved in relation to the joinder of accused *a priori* engage the factors to be considered under Rule 73(B). As to Mr. Zupljanin's case in particular, the arguments advanced in his motion for joinder and reply directly concern the fair and expeditious conduct of proceedings. Further, the factors outlined below demonstrate that an immediate resolution by the Appeals Chamber of Mr. Zupljanin's request for joinder will materially advance proceedings.

### Reasons for certification

6. The Zupljanin defence respectfully submits that the Specially Appointed Chamber ("the Chamber") fell into error in the Impugned Decision in a number of ways.

#### I. The Chamber erred by only considering the operative Karadzic Indictment

7. In considering Mr. Zupljanin's request that his case be joined to that of Dr. Karadzic, the Chamber compared the operative indictment against Mr. Zupljanin and Mr. Stanisic ("Stanisic/Zupljanin Indictment") with the indictment against Dr.

<sup>3</sup> *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Motion for Reconsideration Concerning Standards for Granting Certification of Interlocutory Appeal* (17 February 2006) at para. 4.

<sup>4</sup> *Prosecutor v Popovic et al*, No. IT-02-57-PT, *Decision on Motion for Certification of Joinder Decision for Interlocutory Appeal* (6 October 2005); *Prosecutor v Gotovina et al*, No. IT-01-45-PT, *Decision on Defence Applications for Certification to Appeal Decision on Prosecution's Consolidated Motion to Amend the Indictment and for Joinder*; *Prosecutor v. Popovic et al*, Case No. IT-02-57-PT, *Decision on motion for certification of joinder decision for interlocutory appeal* (6 October 2005), para. 6.

Also, In *Milosevic*, a Bench of the Appeals Chamber granted the prosecution leave to appeal a Trial Chamber's decision dismissing in part the application to join the three indictments against Slobodan Milosevic - see *Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder* (1 February 2002).

Karadzic which was confirmed on 31 May 2000 (28 April 2000). Since then, the prosecution has filed a new indictment against Dr. Karadzic.<sup>5</sup> While the latter indictment has not been confirmed, the Zupljanin defence used it as the basis of its arguments for joinder.<sup>6</sup> It is respectfully submitted that the Chamber adopted the incorrect starting point by only considering the operative indictment in relation to Radovan Karadzic and not considering the more recent indictment.

8. In its motion when filing the new indictment against Dr. Karadzic, the prosecution argued that the new indictment “*significantly narrowed the scope of criminal conduct underlying the charges. The Accused is no longer charge with any criminal conduct in relation to 14 municipalities; the indictment has been reduced from 41 to 27 municipalities.*”<sup>7</sup> It is submitted that the Chamber should have addressed its mind to this new indictment: while it is yet to be confirmed, it is reasonable to assume that any objection to the indictment made by Dr. Karadzic will not have the effect of broadening the scope of the alleged criminal conduct or underlying charges. Consequently, by failing to address the new indictment, the Chamber adopted the incorrect starting point such that its conclusion that the case against Dr. Karadzic is “*much broader and charges significant criminal conduct not alleged against Mico Stanisic and Stojan Zupljanin*” should be considered by the Appeals Chamber.<sup>8</sup> By way of example of the importance of the more recent indictment against Dr. Karadzic, it specifically alleges that Dr. Karadzic acted in concert with Mico Stanisic (Mr. Zupljanin’s co-accused) whereas the operative indictment (relied upon by the Chamber) makes no mention of Mr. Stanisic.

<sup>5</sup> *Prosecutor v Karadzic*, Case No. IT-95-5/18-PT, *Motion to amend the first amended indictment* (22 September 2008).

<sup>6</sup> *Stojan Zupljanin's motion for joinder with the case of Radovan Karadzic* (2 December 2008) para. 3.

<sup>7</sup> *Ibid*, para. 2.

<sup>8</sup> Impugned Decision, para. 22.

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**II. The Chamber misdirected itself in assessing the importance to be attached to consistent judgments (and consistency in any sentences)**

9. In seeking joinder, the Zupljanin defence argued that joinder would ensure that evidence which is common to both cases would be assessed on a consistent basis and that it is important to Mr. Zupljanin's defence that the judges hearing his case be able to potentially assess relative degrees of responsibility.<sup>9</sup> In deciding upon this submission, the Chamber held as follows:

*"... the Chamber cannot accept the Zupljanin Defence argument that joinder would ensure consistency in judgments. Considering that the allegations in the Stanisic and Zupljanin Indictment are only a limited part of the allegations in the Karadzic Indictment, the benefit of seeking to ensure this limited consistency of judgments will be outweighed by the need to protect the rights of the Accused and to protect otherwise the interests of justice."*<sup>10</sup>

10. It is respectfully submitted that this passage constitutes a clear error in reasoning. The Zupljanin defence has conceded that Radovan Karadzic is additionally charged with crimes relating to Sarajevo from 1992 through 1995, crimes in Srebrenica in 1995, and the taking of UN personnel hostage in 1995.<sup>11</sup> Nevertheless, the majority of the case against Mr. Zupljanin, including the alleged crime sites, is wholly encompassed by the case against Dr. Karadzic. From Mr. Zupljanin's perspective, his interest in ensuring that his case is assessed consistently with that of Dr. Karadzic's cannot be characterised as an interest in "limited consistency".

11. Further, by raising the importance of a consistent approach to potentially relative degrees of responsibility, an important issue engaged was the consistency of any sentences of imprisonment. While such a submission is purely hypothetical and all accused are presumed innocent, it is respectfully submitted that the Chamber

<sup>9</sup> *Stojan Zupljanin's motion for joinder with the case of Radovan Karadzic* (2 December 2008) paras. 20-23.

<sup>10</sup> Impugned Decision, para. 23.

<sup>11</sup> *Stojan Zupljanin's reply to the responses of the prosecution, Radovan Karadzic and Mico Stanisic to Zupljanin's motion for joinder* (22 December 2008), para. 15.

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misdirected itself by failing to consider Mr. Zupljanin's interest in ensuring that any sentence imposed properly reflects any responsibility on his part.

**III. The Chamber was patently incorrect in presuming that the cases are at "*markedly different stages of pre-trial preparation*"**

12. In assessing the fairness of the proposed joinder to the Accused, the Chamber took into account that Mico Stanisic has been awaiting trial since March 2005 and held as follows:

*"The proceedings in the Stanisic and Zupljanin case are in very advanced stages of pre-trial preparation and it is likely that this trial will commence in the coming months. In contrast, the proceedings against Karadzic are in a noticeably less advanced stage of preparation for trial."*<sup>12</sup>

13. It is respectfully submitted that the above passage is patently incorrect. Mr. Zupljanin came before the Tribunal only one month prior to Dr. Karadzic. It is respectfully submitted that his preparation for trial cannot be considered to be significantly more advanced than Dr. Karadzic's preparations and the Chamber failed to adequately address his submissions on this issue. Moreover, the Chamber placed reliance on the fact that a motion to amend the indictment against Dr. Karadzic is still pending.<sup>13</sup> However, the Chamber did not consider the fact that a motion to amend the indictment against Mr. Zupljanin is similarly outstanding.<sup>14</sup>

**IV. The Chamber failed to consider alternatives when finding that joinder would disrupt the "*completeness and order of the case against Radovan Karadzic*"**

14. It is respectfully submitted that the Chamber adopted a patently incorrect approach in holding that "*[a]ny advantage to be anticipated from a joint trial of the three Accused would be at the significant cost of disrupting the completeness*

<sup>12</sup> Impugned Decision, para. 32.

<sup>13</sup> Impugned Decision, para. 32.

<sup>14</sup> *Prosecutor v Stanisic and Zupljanin*, Case No. IT-08-91-PT, *Prosecution's motion for leave to amend the*

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15. There is a well-known debate, particularly following the *Milosevic* trial, as to the correct prosecutorial approach in conducting large and complex war crimes trials relating to allegations spanning a lengthy period. It is respectfully submitted that the Chamber should not have relied on the "completeness" of the case against Radovan Karadzic as being a relevant consideration, or alternatively that the Chamber failed to consider the nature of the alternatives to a single "complete" trial for Dr. Karadzic. It is respectfully submitted that this issue merits consideration by the Appeals Chamber after hearing submissions by all of the interested parties.

#### **V. The Chamber's conclusion on the burden that separate trials imposes on Zupljanin was patently incorrect**

16. The Zupljanin defence submitted that holding separate but virtually simultaneous trials of Mr. Zupljanin and Mr Stanasic on the one hand and Dr. Karadzic on the other hand would impose a significant burden on the defence as it would have to closely monitor a second trial. In dealing with that argument, the Chamber found as follows:

*"the Zupljanin Defence's submission regarding the burdens it will face if Radovan Karadzic is tried separately from Stojan Zupljanin is based on the understanding that the two trials will cover essentially the same factual allegations. As is evident from the discussion above, while some of the allegations in the Stanasic and Zupljanin Indictment are included in the Karadzic Indictment, the Karadzic Indictment is much broader. A significant part of the Karadzic Indictment is dedicated to criminal conduct which is unrelated to the charges against Mico Stanasic and Stojan Zupljanin. In these circumstances it would be necessary for the Zupljanin Defence to monitor closely the entirety of the Karadzic trial and the related evidence."*<sup>16</sup>

17. It is respectfully submitted that the approach adopted by the Chamber was patently incorrect. While the Zupljanin defence has conceded that there are

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*consolidated indictment* (1 December 2008).

<sup>15</sup> Impugned Decision, para. 26.

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aspects Dr. Karadzic's case that are not directly relevant to Mr. Zupljanin, this will not obviate the need to closely monitor Dr. Karadzic's trial and its related evidence. Indeed, there is a reasonable argument that the admitted differences between the cases will result in an increased burden on the Zupljanin defence as it will have to spend time searching for and identifying relevant witnesses, exhibits and rulings among a larger body of material. This will be an onerous burden made more difficult by the fact that the Zupljanin defence does not have access to the confidential aspects of Dr. Karadzic's case.

### **Requested Relief**

18. For all of the above reasons, the Zupljanin defence respectfully requests that the Chamber grant it Certification to Appeal the decision on joinder dated 6 January 2009.

Word Count: 2283

Respectfully submitted,



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Igor Pantelic

Counsel for Stojan Zupljanin

<sup>16</sup> Impugned Decision, para. 31.

