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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

Acting Registrar: Mr. John Hocking

Date filed: 23 January 2009

PROSECUTOR
v.
MIĆO STANIŠIĆ
STOJAN ŽUPLJANIN

PROSECUTOR
v.
RADOVAN KARADŽIĆ

PUBLIC

**PROSECUTION'S CONSOLIDATED RESPONSE TO
MOTIONS FOR CERTIFICATION FOR INTERLOCUTORY
APPEAL OF DECISION ON JOINDER**

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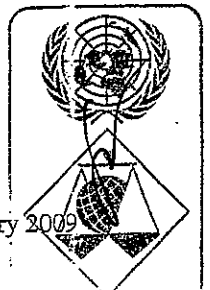
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The Accused:

Mr. Radovan Karadžić



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**PROSECUTION'S CONSOLIDATED RESPONSE TO MOTIONS FOR CERTIFICATION
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I. Introduction

1. On 2 December 2008, Župljanin filed a Motion for Joinder with the Case of Radovan Karadžić ("Joinder Motion") seeking to join the case of *Prosecutor v. Stanišić and Župljanin* with the case of *Prosecutor v. Karadžić*. On 6 January 2009, the Specially Appointed Chamber ("Chamber") denied that motion.¹ Župljanin now seeks certification to appeal the Joinder Decision, and Karadžić has joined that motion.²

2. The Prosecution opposes Župljanin's Motion and Karadžić's Application on the grounds that they fail to meet the requirements of Rule 73 of the Rules of Procedure and Evidence of the Tribunal ("Rules"). Instead, the Motion and Application merely reiterate the largely unsubstantiated arguments raised in Župljanin's Joinder Motion and Reply,³ which have already

¹ *Prosecutor v. Stanišić, et al.*, Case Nos. IT-08-91-PT & IT-95-5/18-PT, Decision on Stojan Župljanin's Motion for Joinder, 6 January 2009 ("Joinder Decision").

² *Prosecutor v. Stanišić, et al.*, Case Nos. IT-08-91-PT & IT-95-5/18-PT, Stojan Župljanin's Motion for Certification for Interlocutory Appeal of the Decision on Joinder Dated 6 January 2009, 12 January 2009 ("Motion"); *Prosecutor v. Stanišić, et al.*, Case Nos. IT-08-91-PT & IT-95-5/18-PT, Karadžić Application for Certification to Appeal Decision on Joinder, 19 January 2009 ("Application").

³ *Prosecutor v. Stanišić, et al.*, Case Nos. IT-08-91-PT & IT-95-5/18-PT, Stojan Župljanin's Reply to the Responses of the Prosecution, Radovan Karadžić and Mićo Stanišić to Župljanin's Motion for Joinder, 22 December 2008 ("Reply").

been fully addressed by the Chamber. Further, even if the Chamber finds that the Motion and Application satisfy the requirements of Rule 73(B), it should refrain from exercising its discretion to grant certification given the unlikelihood of a successful appeal of this matter.

II. Applicable Law

3. Rule 73(B) provides an exception to the general rule that decisions on motions are without interlocutory appeal by permitting a Trial Chamber to exercise its discretion to grant certification to appeal if two cumulative criteria are satisfied:
 - a. The decision involves an issue which would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial; *and*
 - b. An immediate resolution of this issue may, in the opinion of the Trial Chamber, materially advance the proceedings.
4. Moreover, 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.⁴ Where the impugned decision involved the exercise of the Trial Chamber's discretion, the identified error must be "discernable", that is, it must demonstrate that the Trial Chamber "misdirected itself as to the principle to be applied, or as to the law which is relevant to the exercise of the discretion, or that it has given weight to extraneous or irrelevant considerations, or that it has failed to give weight or sufficient weight to relevant considerations, or that it has made an error as to the facts upon which it has exercised its discretion."⁵
5. Even where both criteria under Rule 73(B) are satisfied and a discernable error has been identified, certification remains within the discretion of the Trial Chamber and should be exercised only in exceptional circumstances.⁶

⁴ *Prosecutor v. Strugar*, Case No. IT-01-42-PT, Decision on the Defence's Request for Certification to Appeal the Trial Chamber's Decision Dated 26 November 2003 on the Prosecution's Motion for Separate Trial and Order to Schedule a Pre-Trial Conference and the Start of the Trial Against Pavle Strugar, 12 December 2003, para.6; *Prosecutor v. Jović*, Case No. IT-95-14 & 14/2-R77, Decision on Defence Application for Certification on Interlocutory Appeal, 3 February 2006 ("Jović Decision"), p.3

⁵ *Prosecutor v. Milošević*, Case Nos. IT-99-37-AR73, IT-01-50-AR73 & IT-01-51-AR73, Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder, 18 April 2002 ("Milošević Decision"), para.5.

⁶ *Prosecutor v. Gotovina, et al.*, Case Nos. IT-01-45-PT & IT-03-73-PT, Decision on Defence Applications for Certification to Appeal Decision on Prosecution's Consolidated Motion to Amend the Indictment and for Joinder, 14 August 2006 ("Gotovina Decision"), para.5; *Prosecutor v. Bagosora, et al.*, Case No. ICTR-98-41-T, Decision on Kabiligi Application for Certification Concerning Defence Cross-Examination After Prosecution Cross-Examination, 2 December 2005 ("Bagosora Decision"), para.5.

III. The Motions Fail to Satisfy the Rule 73(B) Criteria

6. Rather than addressing each of the Rule 73(B) criteria, both Accused merely submit 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).”⁷ This unsubstantiated argument runs contrary to the language and purpose of the certification process under Rule 73(B). As another Trial Chamber held with regard to identical certification criteria under Rule 72(B)(ii), “such an unspecific and general approach would, if accepted, justify a certificate to be issued whenever an accused seeks to appeal a decision in which – in his opinion – his claims . . . have not been dealt with to his satisfaction.”⁸
7. Nor could the Accused satisfy the Rule 73(B) criteria. Given its nature and effect, 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. To the contrary, the result of the Chamber’s denial of joinder is the preservation of the fair trial rights of the Accused, rather than their curtailment.⁹ Likewise, the expeditious conduct of the proceedings is fostered by the Joinder Decision because joining cases would inevitably delay the trial against Župljanin and Stanišić, and render the trial against all three Accused lengthier and more complex.¹⁰ This is particularly so when one of the Accused will be conducting his own defence at trial. Moreover, since it is fundamental that a joint trial of multiple accused must not materially affect the individual determination of guilt of each accused, Župljanin and Karadžić cannot argue that joinder would significantly affect the outcome of their trials without contradicting one of the premises of their Joinder Motion.

⁷ Motion, para.5; *see also* Application, paras.3-7 (merely citing prior Trial Chamber decisions granting certification of joinder decisions as a basis for granting certification without discussing how the Rule 73(B) criteria apply to the impugned decision at hand).

⁸ *Prosecutor v. Prlić, et al.*, Case No. IT-04-74-PT, Decision on Milivoj Petković’s Application for Certification to Appeal Decision on Motions Alleging Defect in Form of Indictment, 19 September 2005 (“Prlić Decision”), p.5; *see also Jović Decision*, p.3.

⁹ *Prosecutor v. Milutinović, et al.*, Case No. IT-05-87-T, Decision on Prosecution Request for Certification of Interlocutory Appeal of Second Decision on Addition of Wesley Clark to Rule 65ter List, 14 March 2007 (“Milutinović Decision”), para.12. In this respect two of the three decisions the Accused cite in their motions – which certify for appeal decisions granting joinder and therefore potentially curtailing of the accuseds’ fair trial rights – are readily distinguishable. *See Gotovina Decision*; *Prosecution 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. With regard to the third decision, Karadžić correctly notes that in the *Milošević* case the Appeals Chamber certified a joinder decision for review under an earlier version of Rule 73 with markedly different criteria for certification. *See Prosecutor v. Milošević*, Case Nos. IT-99-37-AR73, IT-01-50-AR73 & IT-01-51-AR73, Decision on Prosecution Application for Leave to File an Interlocutory Appeal, 9 January 2002, p.2; Application, para.4.

¹⁰ Joinder Decision, paras.24, 32. Indeed, Župljanin concedes that joinder is likely to diminish judicial economy. *See Reply*, paras.15-16.

8. With regard to the second criterion, the Joinder Decision does not involve issues the immediate resolution of which may materially advance the proceedings. Of primary importance is whether leaving the matter to be resolved until after trial creates a risk of unnecessarily complicating and delaying the proceedings.¹¹ Such a risk is absent here since granting joinder – not the denial of it – would complicate, delay and prolong the proceedings in both cases. Moreover, because the legal principles pertaining to a joinder application have been widely litigated and reviewed by this Tribunal, the Chamber had adequate guidance to thoroughly address the arguments raised by the Joinder Motion.¹² Accordingly, further adjudication of these issues by the Appeals Chamber would only serve to further delay proceedings in both cases unnecessarily.

IV. The Motions Fail to Identify Any Discernable Errors in the Joinder Decision

9. Župljanin and Karadžić fail to identify any discernable errors in the Joinder Decision, choosing instead simply to repeat the arguments Župljanin raised in his Joinder Motion and Reply. The Chamber comprehensively addressed all of these arguments in its Joinder Decision.¹³ While the Accused may not agree with the reasoning in the Joinder Decision, this does not in and of itself constitute discernable error, particularly in light of the fact that the Chamber has considerable discretion in deciding whether to grant joinder. A brief review of the arguments raised in Župljanin's Motion illustrates the lack of discernable errors.
10. The Accused first assert that the Chamber erred by reviewing the Joinder Motion on the basis of the operative indictment in the *Karadžić* case rather than the pending proposed amended indictment in that case.¹⁴ No jurisprudence is cited to support this novel contention.¹⁵ Basing a decision on a motion to amend an indictment, which another Trial Chamber may or may not grant, would render that decision open to legitimate challenge. In Župljanin's own case, the Trial Chamber reviewed the Prosecution's motion to join him with Stanišić on the basis of the operative indictment in the *Stanišić* case, even though the Prosecution had proposed several

¹¹ *Milutinović* Decision, para.15.

¹² *Prosecutor v. Hadžihasanović, et al.*, Case No. IT-01-47-T, Decision on the Request for Certification to Appeal the Decision Rendered Pursuant to rule 98bis of the Rules, 26 October 2004, p.6 (considering that "the case law of the Tribunal has ruled on repeated occasions" that the elements applied in the impugned decision were correct); *Bagosora* Decision, para.7 (second criterion under Rule 73(B) requires consideration whether there is serious doubt as to the correctness of the legal principles at issue).

¹³ *See 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 (a request for certification is not concerned with whether a decision was correctly reasoned but rather to demonstrate that the two cumulative conditions set out in Rule 73(B) have been met); *Prlić* Decision, p.4 (finding that the Trial Chamber properly addressed and adequately examined the essence of the complaints or arguments in the Defence's motion). To the extent the Chamber re-entertains the Accused's arguments, the Prosecution incorporates by reference the arguments contained within its 15 December 2008 response to the Joinder Motion.

¹⁴ Motion, paras.7-8.

¹⁵ *Prlić* Decision, p.4 (rejecting Defence's unsubstantiated errors raised in the Rule 73(B) certification motion).

amendments to that indictment.¹⁶ Moreover, Župljanin recognizes the logic of this approach, repeatedly insisting in his Reply that the Chamber should afford little weight to Prosecution's pending motions in the *Stanišić and Župljanin* case as their outcomes have yet to be determined.¹⁷ Finally, it is noteworthy that while under the operative *Karadžić* indictment Stanišić and Karadžić have 19 municipalities in common and Župljanin and Karadžić have seven in common, under the proposed amended *Karadžić* indictment this commonality decreases to 13 and six municipalities, respectively. The Chamber's proper reliance upon the operative indictments rather than on the proposed amended indictment was in this respect more favourable to the Defence contention for joinder.¹⁸

11. The Accused next contend that the Chamber should have considered the effect joinder would have on consistency in judgments from Župljanin's perspective.¹⁹ This alleged error is likewise unsubstantiated. Consistency in judgments is a factor that pertains to whether joinder is in the interest of justice, and not, as Župljanin's argument presupposes, whether joinder violates a fair trial right of the accused.²⁰ The Chamber therefore appropriately considered this factor from the perspective of all the parties, as well as the Tribunal and the international community.²¹
12. Moreover, the argument of both Accused that the Chamber incorrectly concluded that the proceedings in the *Stanišić and Župljanin* case are at a markedly different stage of pre-trial preparation than the proceedings in the *Karadžić* case does not constitute a discernable error.²² The Chamber – which includes the presiding judges from both cases – is in the best position to compare the stage at which each case is in the pre-trial process. Indeed, the Joinder Decision shows that the Chamber was fully cognizant of the different dates of arrests and appearances of the three Accused, as well as any pending motions.²³ The mere fact that the Chamber does not

¹⁶ *Prosecutor v. Stanišić, et al.*, Case Nos. IT-04-79-PT & IT-99-36/2-PT, Decision on Prosecution's Motion for Joinder and for Leave to Consolidate and Amend Indictments, 23 September 2008.

¹⁷ Reply, paras.13, 17, 18, 21.

¹⁸ The other amendments to the operative *Karadžić* indictment leave unaltered the numerous allegations and charges that are not alleged in the operative *Stanišić and Župljanin* Indictment (including the other three joint criminal enterprises and the genocide, terror and hostage charges) relied upon by the Chamber in denying joinder. Joinder Decision, para.15.

¹⁹ Motion, paras.9-11.

²⁰ *Prosecutor v. Gotovina, et al.*, Case Nos. IT-01-45-AR73.1, IT-03-73-AR73.1, IT-03-73-AR73.2, Decision on Interlocutory Appeals Against the Trial Chamber's Decision to Amend the Indictment and for Joinder, 25 October 2006, para.17.

²¹ Likewise, while the Chamber did not acknowledge in its Joinder Decision Župljanin's admittedly "purely hypothetical" argument that joinder would ensure consistency in sentences, its failure to do so is not discernable error. Motion, para.11.

²² Motion, para.12-13.

²³ See, e.g., Joinder Decision, paras.3,-5. Furthermore, the Prosecution's pending motion to amend the indictment in the *Župljanin and Stanišić* case does not alter the scope of the charges against either Accused, but rather merely clarifies the *mens rea* elements for these charges in response to issues raised in Župljanin's Rule 72 motion – a motion that Karadžić has yet to file in his case. See *Prosecutor v. Stanišić, et al.*, IT-08-91-PT, Prosecution Motion to Amend the Consolidated Indictment, 1 December 2008.

summarize every point raised by the parties concerning this issue does not render its decision erroneous.²⁴

13. The Accused further contend that the Chamber's rejection of Župljanin's suggestion to allow partial joinder of the Accused – along with severance of the charges against Karadžić that do not relate to all three Accused – was “patently incorrect”.²⁵ This contention is without support in Tribunal jurisprudence.²⁶ In addition, there is no Tribunal jurisprudence which allows an accused in one case to demand that an accused in a wholly separate case have his case severed into two or more trials.
14. Finally, the Accused argue that the Chamber was “patently incorrect” in holding that it would not be necessary for the Župljanin Defence to monitor closely the entirety of the *Karadžić* trial.²⁷ While the Župljanin Defence may monitor as much or as little of the *Karadžić* trial (or any other trial pending before the Tribunal) as it chooses, it is under no obligation to do so. Nor have the Accused cited any authority suggesting that this is a factor typically considered in deciding whether to grant joinder. Indeed, given the interrelatedness of a number of cases before the Tribunal, trial monitoring inures equally to the benefit of most accused. Accordingly, this argument likewise cannot constitute a discernable error.

V. The Chamber Should Exercise its Discretion to Deny Certification

15. Even if the Chamber finds that Župljanin's Motion and Karadžić's Application technically satisfy the requirements of Rule 73(B), it should refrain from exercising its discretion to certify an appeal. As shown above, none of the arguments raised in the Motion and Application are likely to result in a finding that the Chamber abused its discretion in denying joinder. An appeal would therefore only prolong the uncertainty on how to proceed in these cases until the appeals process is complete.

²⁴ *Prlić* Decision, p.4.

²⁵ Motion, paras.14-15.

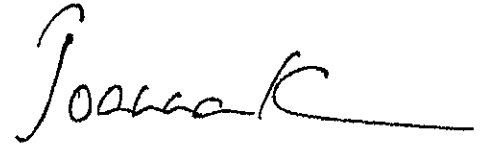
²⁶ The one case on which the Accused rely in support of their argument that there is a “well-known debate” regarding the appropriateness of partial severance in fact found in favor of a single, complete trial against the accused. See *Milošević* Decision.

²⁷ Motion, paras.16-17.

VI. Relief Sought

16. For the foregoing reasons, the Prosecution respectfully requests that the Chamber deny Župljanin's Motion and Karadžić's Application.

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Dated this 23rd day of January 2009

At The Hague, Netherlands

