

IF-95-5/18-PT
D12554-D12547
30 JANUARY 2009

IT-08-91-PT
D870-D863
30 January 2009
12554 870
PvK TR

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. John Hocking, Acting Registrar

Date Filed: 30 January 2009

THE PROSECUTOR

v.

MICO STANISIC
-and-
STOJAN ZUPLJANIN

THE PROSECUTOR

v.

RADOVAN KARADZIC

PUBLIC

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

The Office of the Prosecutor:

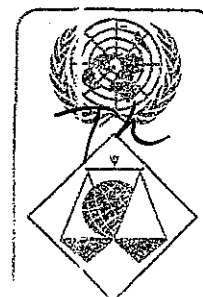
Tom Hannis
Joanna Korner QC
Alan Tieger
Hildegard Uertz-Retzlaff

Counsel for the Accused:

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 2009, Mr. Zupljanin requested that his case 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. On 6 January 2009, the Specially Appointed Chamber denied Mr. Zupljanin's motion (the "**Joinder Decision**").
2. On 12 January 2009, Mr. Zupljanin sought certification to appeal the Joinder Decision. On 19 January 2009, Dr. Karadzic joined that motion. On 23 January 2009 the prosecution filed a consolidated response, opposing Mr. Zupljanin and Dr. Karadzic's requests for joinder (the "**Consolidated Response**").
3. The Zupljanin defence requests leave pursuant to Rule 126 *bis* to reply to the Consolidated Response. The Zupljanin defence does not raise any new issues in relation to certification. Rather, the Zupljanin defence responds to various submissions made by the prosecution and to the way in which the prosecution has attempted to characterise Mr. Zupljanin's request for joinder and certification. The Zupljanin defence focuses its Reply by replying to the Consolidated Response paragraph by paragraph. It is neither necessary nor appropriate address every point made in the Consolidated Response and any failure to address a point is not a concession; the Zupljanin defence relies on its position as already articulated to the Chamber.

II. The Zupljanin Reply

4. As to paragraph 3 of Consolidated Response, the prosecution suggests that the Trial Chamber should refrain from exercising its discretion to grant certification "*given the unlikelihood of a successful appeal in this matter.*" Mr Zupljanin does not share the prosecution's assessment of the likelihood of success. In any event, the prosecution cites

no authority in support of this being the test for certification. In fact, the appropriate enquiry for the Chamber is whether Mr. Zupljanin has showed 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 unreasonable as to constitute an abuse of the Trial Chamber's discretion.¹ The Zupljanin defence submits that its request for certification has met this standard.

5. **As to paragraph 5 of the Consolidated Response**, the Zupljanin defence submits that the issues raised in relation to his request for joinder are indeed exceptional and the Trial Chamber should exercise its discretion by granting certification.
6. **As to paragraph 7 of the Consolidated Response**, the prosecution submits that the Chamber's denial of joinder preserves (rather than curtails) the fair trial rights of Mr. Zupljanin. The prosecution suggests that two of the authorities cited by the Accused are distinguished on that basis. The Zupljanin defence submits that there is no distinction and any attempt to distinguish the cases ignores the basis on which Mr. Zupljanin's request for joinder – that his right to a fair trial will be preserved by joinder (rather than by separate but simultaneous trials). Any delay caused by a joint trial (which in any event is hypothetical and unspecified) must be weighed against the interests of justice and Mr. Zupljanin's right to a fair trial.
7. As to the prosecution's reliance on the fact that Dr. Karadzic will conduct his own defence as being a factor against joinder, the Zupljanin defence suggests that it cannot be right that joinder is foreclosed in cases of self-represented accused. Indeed, it is surprising that the Office of the Prosecutor would tend toward such a submission. Turning the prosecution's submission on its head, a joint trial where some accused are legally represented is likely to enhance the overall fairness of the trial of Dr. Karadzic.

¹ *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

8. Next the prosecution submits that Mr. Zupljanin cannot argue that joinder would significantly affect the outcome of his trial without contradicting one of the premises of his request for joinder. The Zupljanin defence rejects the premise of the prosecution's submission. A decision to join Mr. Zupljanin's case to that of Dr. Karadzic will indeed affect the outcome of his trial. A joint trial will ensure that those judges who decide upon Mr. Zupljanin's responsibility for the crimes alleged will do so cognisant of the totality of the relevant evidence and able to assess relative degrees of responsibility. This obviously impacts upon the outcome of Mr. Zupljanin's trial.
9. **As to paragraph 8 of the Consolidated Response**, the prosecution suggests that the Joinder Decision does not involve issues the immediate resolution of which may materially advance the proceedings. The Zupljanin defence submits that these proceedings are indeed advanced by the Appeals Chamber considering the correctness of the legal principles in issue.² As to the prosecution's suggestion that issues of joinder have been decided many times by the Appeals Chamber such that further adjudication of the issues is unnecessary, the Zupljanin defence is surprised by the adoption of a position that would apparently prohibit the Office of the Prosecutor seeking certification of any future joinder decision. The issues raised by Mr. Zupljanin are novel and difficult and should be considered by the Appeals Chamber following submissions from all of the interested parties.
10. **As to paragraph 10 of the Consolidated Response**, the prosecution criticises the Zupljanin defence for basing one aspect of its request for certification on that fact that the Chamber only considered the operative indictment in the Karadzic case. The prosecution says that basing a decision on a motion to amend an indictment would render that decision open to legitimate challenge. As a matter of strict legal principle, the Zupljanin defence agrees there is some force in the prosecution's position. However, the Zupljanin

² *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)

defence's submission was that the Trial Chamber should not have only considered the operative indictment in the Karadzic case while ignoring the proposed indictment. The Zupljanin defence's submission was that the Chamber should have at least considered the proposed indictment.³ As the Zupljanin defence noted, any objection by Dr. Karadzic to the new indictment in his case is unlikely to have the effect of broadening the scope of the alleged criminal conduct or underlying charges. As a matter of common sense, therefore, it is submitted that the Chamber should have turned its mind to the proposed indictment against Dr. Karadzic.

11. The prosecution then attempts to make submissions in relation to the proposed Karadzic indictment, suggesting that the Chamber's use of the operative indictment was in fact more favourable to Mr. Zupljanin's request for joinder such that he in fact benefited from the Chamber's failure to consider the new indictment. With respect, the Chamber is not in a position to make such a determination on this issue (an issue it did not consider in the Joinder Decision) when ruling upon certification. It is submitted that this requires a decision by the Appeals Chamber following full submissions from all of the interested parties.

12. **As to paragraph 11 of the Consolidated Response**, the prosecution characterises Mr. Zupljanin's submission that the Chamber should have considered the effect joinder would have on consistency in judgments from Mr. Zupljanin's perspective as being "unsubstantiated." The prosecution then seeks to distinguish justice's interest in consistent judgments from Mr. Zupljanin's right to a fair trial. The Zupljanin defence submits that in this instance there is no distinction. A decision to hold separate but simultaneous trials risks: inconsistent assessments of evidence; inconsistent findings based on that evidence; leading to inconsistent findings of guilt; and/or inconsistent sentences (should any be imposed). On any analysis, this engages an accused's right to a fair trial as well as the wider interests of justice.

³ See Zupljanin's Motion for Certification, para. 8.

13. **As to paragraph 12 of the Consolidated Response**, it is correct the Chamber includes the presiding judges from both cases. However, the conclusion that the cases are at such different stages as to foreclose joinder is not supported or explained. There are numerous examples where joinder has been granted in cases where their stage of trial preparation was more distinct than Mr. Zupljanin and Dr. Karadzic, not least the joinder of Mr. Zupljanin's case to that of Mr. Stanisic.
14. **As to paragraph 13 of the Consolidated Response**, the prosecution criticises the Zupljanin defence's request for partial joinder. The prosecution submits that 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. Mr. Zupljanin notes that there is no jurisprudence suggesting that an accused cannot make such a request, especially where his right to a fair trial is engaged. The Zupljanin defence also notes that Dr. Karadzic has requested certification of the Joinder Decision. Moreover, Dr. Karadzic has opposed a "*Milosevic-like mega-trial*" in his case.⁴ The Zupljanin defence does not know what position Dr. Karadzic takes in relation to partial joinder; therefore it is submitted that this issue merits consideration by the Appeals Chamber once submissions from all the interested parties have been heard.
15. As to the "well-known debate" and the prosecution's citation of the *Milosevic* Decision as support for its position in opposing partial severance of the Karadzic case, it is submitted there is indeed a well-known debate as to the correct prosecutorial approach in conducting large and complex war crimes trial relation to allegations spanning a lengthy period. Moreover, it is a debate which is known to members of this Chamber. In referring to the *Milosevic* trial and the prosecution's approach to joinder taken in that case, Judge Bonomy has noted (in a non-judicial capacity) that,

"[S]hould a similar situation arise in the future, careful thought should be given to whether joining such massive indictments together may make a trial unwieldy, bearing in mind the adversarial approach to be followed, and may delay judgment unduly in a long leadership case involving an elderly accused. It may be that the approach now being

⁴ *Prosecutor v Karadzic*, Case No. IT-95-05/18-PT, *Response to motion to amend indictment* (28 January 2009), para. 35.

*taken to the proceedings against Saddam Hussein, which appear to be divided into a number of separate trials, has been informed by the lessons from the Milosevic Trial"*⁵

16. Similarly, Judge O-Gon Kwon has noted (in a non-judicial capacity) the reluctance of the Office of the Prosecutor at the ICTY to reduce the size of cases against defendants:

*"the persistent resistance of the Prosecutor and her senior staff to the idea of trying Slobodan Milosevic first on the charges relating to Kosovo, and later on charges relating to Bosnia and Croatia- even as recently as December 2005, when the Trial Chamber proposed severing the Kosovo Indictment and rendering judgment on it before rendering judgment on the other two indictments – is a prime example of [the attitude of an unwillingness, in most instances, to voluntarily reduce the number of charges in their indictments]."*⁶

17. Therefore, it is in the interests of justice that the issue of Mr. Zupljanin's request for joinder be determined by the Appeals Chamber following submissions by all of the interested parties.

18. **As to paragraph 14 of the Consolidated Response**, the prosecution submits that the Zupljanin defence may monitor as much or as little of the Karadzic trial (or any other proceeding pending before the Tribunal) as it chooses but that it is under no obligation to do so. In fact, those who represent Mr. Zupljanin are obligated to follow the Karadzic trial closely: the case against Dr. Karadzic encompasses the case against Mr. Zupljanin. It would be remiss of those who represent Mr. Zupljanin to devote anything less than forensic scrutiny to the proceedings against Dr. Karadzic. They must be alert to inconsistencies in the evidence of witnesses who are testifying about exactly the same events - events for which, if convicted, Mr. Zupljanin could face a significant prison sentence. With respect, the prosecution has missed the point.

⁵ Iain Bonomy, "The reality of conducting a war crimes trial", *Journal of International Criminal Justice* (2007) Vol. 5, pages 348-359 at page 358.

⁶ O-Gon Kwon, "The challenge of an international criminal trial as seen from the bench," *Journal of International Criminal Justice* (2007) Vol. 5, pages 360-376 at page 373.

Case No. IT-08-91-PT

30 January 2009

Stojan Zupljanin's Reply to the Prosecution's Consolidated Response to Motions for Certification for
Interlocutory Appeal of Decision on Joinder

III. Relief Sought

19. For the reasons given above and for the reasons in its motion for certification the Zupljanin defence respectfully requests that the Specially Appointed Chamber grant certification to appeal its decision on joinder.

Word Count: 2250

Respectfully submitted



Tomislav Visnjic
Igor Pantelic
Counsel for Stojan Zupljanin

