

**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: 14 April 2014  
Original: English

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**IN THE APPEALS CHAMBER**

**Before:** Judge Carmel Agius, Presiding  
Judge William H. Sekule  
Judge Patrick Robinson  
Judge Liu Daqun  
Judge Arlette Ramaroson

**Registrar:** Mr. John Hocking

**Decision of:** 14 April 2014

**PROSECUTOR**

v.

**MIĆO STANIŠIĆ  
STOJAN ŽUPLJANIN**

***PUBLIC***

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**DECISION ON ŽUPLJANIN'S SECOND REQUEST TO AMEND  
HIS NOTICE OF APPEAL AND SUPPLEMENT HIS APPEAL  
BRIEF**

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**The Office of the Prosecutor**

Ms. Laurel Baig

**Counsel for Mićo Stanišić**

Mr. Slobodan Zečević and Mr. Stéphane Bourgon

**Counsel for Stojan Župljanin**

Mr. Dragan Krgović and Ms. Tatjana Čmerić

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 “[Ž]upljanin’s Second Request to Amend His Notice of Appeal and Supplement His Appeal Brief” filed by Stojan Župljanin on 9 September 2013 (“Motion” and “Župljanin”, respectively).

## I. BACKGROUND

2. On 27 March 2013, Trial Chamber II of the Tribunal (“Trial Chamber”) issued the judgement in *Prosecutor v. Mićo Stanišić and Stojan Župljanin*, Case No. IT-08-91-T (“Trial Judgement”), finding Mićo Stanišić (“Stanišić”) and Župljanin guilty of committing, through participation in a joint criminal enterprise, the crime of persecutions as a crime against humanity as well as murder and torture as violations of the laws or customs of war.<sup>1</sup> In addition, Župljanin was convicted for the crime of extermination as a crime against humanity.<sup>2</sup> The Trial Chamber sentenced both accused to 22 years of imprisonment.<sup>3</sup>

3. On 13 May 2013, Župljanin filed the “Notice of Appeal on behalf of Stojan [Ž]upljanin”, challenging the Trial Judgement on four grounds (“Original Notice of Appeal”).<sup>4</sup> Stanišić and the Office of the Prosecutor (“Prosecution”) also appealed the Trial Judgement.<sup>5</sup> On 12 August 2013, Župljanin filed a motion requesting leave to add a sub-ground of appeal 1(g) and a ground of appeal 5, which was granted by the Appeals Chamber on 8 October 2013.<sup>6</sup> On 9 October 2013, Župljanin filed his amended notice of appeal (“Amended Notice of Appeal”).<sup>7</sup>

4. On 2 July 2013, Stanišić filed a motion pursuant to Rule 115 of the Tribunal’s Rules of Procedure and Evidence (“Rules”) seeking the admission of excerpts of a letter written by Judge Frederik Harhoff (“Judge Harhoff”) on 6 June 2013 and published in a Danish newspaper on 13 June 2013 (“Judge Harhoff’s Letter”).<sup>8</sup> On 9 September 2013, Župljanin joined the

<sup>1</sup> Trial Judgement, vol. 2, paras 955-956. *See* Trial Judgement, vol. 2, paras 313-315, 489-530, 729-781.

<sup>2</sup> Trial Judgement, vol. 2, para. 956.

<sup>3</sup> Trial Judgement, vol. 2, paras 955-956.

<sup>4</sup> Original Notice of Appeal, paras 7-45.

<sup>5</sup> Notice of Appeal on Behalf of Mićo Stanišić, 13 May 2013; Prosecution Notice of Appeal, 13 May 2013.

<sup>6</sup> [Ž]upljanin Request to Amend Notice of Appeal, 12 August 2013 (“Župljanin Motion of 12 August 2013”), para. 1; Decision on Stojan Župljanin’s Request to Amend Notice of Appeal, 8 October 2013 (“Župljanin Decision of 8 October 2013”), paras 4, 21.

<sup>7</sup> [Ž]upljanin’s Submission of Amended Notice of Appeal, 9 October 2013.

<sup>8</sup> Rule 115 Motion on Behalf of Mićo Stanišić Seeking Admission of Additional Evidence with Annex, 2 July 2013 (“Rule 115 Motion”). The Prosecution filed its response on 10 July 2013. *See* Prosecution Response to Rule 115 Motion on behalf of Mićo Stanišić Seeking Admission of Additional Evidence, 10 July 2013 (“Prosecution Response to Rule 115 Motion”).

Rule 115 Motion.<sup>9</sup> On 14 April 2014, the Appeals Chamber issued a decision admitting as additional evidence, Judge Harhoff's Letter in its entirety.<sup>10</sup>

5. On 19 August 2013, Župljanin filed his appeal brief ("Župljanin Appeal Brief").<sup>11</sup> The Prosecution filed its response on 21 October 2013 ("Response to Župljanin Appeal Brief")<sup>12</sup> and Župljanin filed his brief in reply on 11 November 2013 ("Župljanin Reply Brief").<sup>13</sup>

6. On 9 September 2013, Župljanin filed the present Motion. The Prosecution filed its response to the Motion on 13 September 2013,<sup>14</sup> to which Župljanin replied on 16 September 2013.<sup>15</sup>

7. On 10 September 2013, President Theodor Meron ("Judge Meron") withdrew from considering the Motion and assigned Judge Carmel Agius ("Judge Agius") in his place.<sup>16</sup> On 28 November 2013, Judge Agius assigned Judge William H. Sekule to replace Judge Meron on the Bench for the purposes of considering the Motion.<sup>17</sup>

<sup>9</sup> Motion, para. 6 *referring to* Rule 115 Motion.

<sup>10</sup> Decision on Mićo Stanišić's Motion Seeking Admission of Additional Evidence Pursuant to Rule 115, 14 April 2014, ("Stanišić Rule 115 Decision").

<sup>11</sup> Stojan [Ž]upljanin's Appeal Brief, 19 August 2013 (confidential). Župljanin filed a public redacted version of the Župljanin Appeal Brief on 23 August 2013 (Stojan [Ž]upljanin's Appeal Brief, 23 August 2013 (public redacted)).

<sup>12</sup> Prosecution Response to Stojan Župljanin's Appeal Brief, 21 October 2013 (confidential). The Prosecution filed a public redacted version of its response on 5 November 2013 (Prosecution Response to Stojan Župljanin's Appeal Brief, 5 November 2013 (public redacted)).

<sup>13</sup> Stojan [Ž]upljanin's Reply to Prosecution's Response Brief, 11 November 2013 (confidential). Župljanin filed a public redacted version of the Župljanin Reply Brief on 13 November 2013 (Stojan [Ž]upljanin's Reply to Prosecution's Response Brief, 13 November 2013 (public redacted)).

<sup>14</sup> Prosecution Response to Župljanin's Second Request to Amend His Notice of Appeal and Supplement His Appeal Brief, 13 September 2013 ("Response").

<sup>15</sup> Reply to Prosecution's Response to [Ž]upljanin's Second Request to Amend His Notice of Appeal and Supplement His Appeal Brief, 16 September 2013 ("Reply").

<sup>16</sup> Order Assigning a Motion to a Judge, 10 September 2013.

<sup>17</sup> Order Replacing a Judge in Respect of a Motion Before the Appeals Chamber, 28 November 2013. The composition of the Bench was challenged on 21 October 2013 when Župljanin filed a motion seeking Judge Liu Daqun's ("Judge Liu") recusal from considering his motion to vacate the Trial Judgement (Stojan [Ž]upljanin's Motion Requesting Recusal of Judge Liu Daqun from Adjudication of Motion to Vacate Trial Judgement, 21 October 2013 *referring to* Stojan [Ž]upljanin's Motion to Vacate Trial Judgement, 21 October 2013). This motion was denied on 3 December 2013 by Judge Agius, in his capacity as Acting President (Decision on Motion Requesting Recusal, 3 December 2013, paras 23-24). On 13 December 2013, Župljanin filed a request, joined by Stanišić, asking for the appointment of a Panel to adjudicate on the request for recusal of Judge Liu *de novo* (Župljanin Defence Request for Appointment of a Panel to Adjudicate the Request for Disqualification of Judge Liu Daqun, 13 December 2013; Motion on Behalf of Mićo Stanišić joining Župljanin Defence Request for Appointment of a Panel to Adjudicate the Request for Disqualification of Judge Liu Daqun, 23 December 2013). The appointed Panel denied the request on 24 February 2014 (Decision on Motion Requesting Recusal of Judge Liu from Adjudication of Motion to Vacate Trial Judgement, 24 February 2014, paras 16-17. *See also* Decision on Župljanin Defence Request for Appointment of a Panel to Adjudicate the Request for Disqualification of Judge Liu Daqun, 7 February 2014, issued by Judge Agius in his capacity as Acting President).

## II. ARGUMENTS OF THE PARTIES

8. Župljanin seeks leave to amend his Amended Notice of Appeal and supplement his appeal brief by adding a sixth ground of appeal based on the publication of Judge Harhoff's Letter.<sup>18</sup> This proposed ground of appeal contends that "Stojan [Ž]upljanin's right to a fair trial, including by an impartial, independent and competent court, was violated by the participation of Judge Frederik Harhoff, whose comments subsequent to the issuance of the Judgement reveal either an actual or reasonable apprehension of bias".<sup>19</sup> In this respect, Župljanin relies on the decision concerning the disqualification of Judge Harhoff issued by the chamber specially constituted in the case of *Prosecutor v. Vojislav Šešelj*.<sup>20</sup>

9. Župljanin alleges that participation of a judge who displays a reasonable apprehension of bias in the trial proceedings constitutes a fundamental breach of his right to a fair trial which invalidates his conviction.<sup>21</sup> Further, he submits that the proposed ground of appeal is supported by "good cause" and "that it is in the interests of justice for it to be considered".<sup>22</sup> He also submits that this issue is of "substantial importance to the success of the appeal" and therefore, its exclusion would "lead to a miscarriage of justice".<sup>23</sup> Moreover, he asserts that granting this amendment will neither prejudice the Prosecution, which "already has notice of substantially the same request by [Stanišić]", nor delay the appeal proceedings.<sup>24</sup>

10. The Prosecution opposes the Motion and submits that the request is "untimely and lacks an evidentiary basis".<sup>25</sup> It argues that the fact that Župljanin filed the Motion more than two months after he first heard about Judge Harhoff's Letter shows a lack of due diligence.<sup>26</sup> Furthermore, the Prosecution contends that Župljanin has failed to establish "good cause" for adding the proposed ground of appeal. It submits that while Župljanin refers to bias on the part of Judge Harhoff in the Motion, he has neither rebutted the strong assumption of Judge Harhoff's impartiality in this case, nor satisfied "the 'high threshold' for demonstrating that a reasonable apprehension of bias is

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<sup>18</sup> Motion, paras 1-3.

<sup>19</sup> Motion, para. 1.

<sup>20</sup> Motion, para. 3 referring to *Prosecutor v. Vojislav Šešelj*, IT-03-67-T, Decision on Defence Motion for Disqualification of Judge Frederik Harhoff and Report to the Vice-President, 28 August 2013 ("*Šešelj* Disqualification Decision").

<sup>21</sup> Motion, para. 2.

<sup>22</sup> Motion, para. 3.

<sup>23</sup> Motion, para. 5.

<sup>24</sup> Motion, para. 4. Župljanin also submits that "Judge Harhoff's remarks, now being a matter of judicial record in other proceedings before the Tribunal, do not need to be admitted as evidence [...] in order to be considered and adjudicated in this appeal. Assuming that this view is wrong, however, the Defence hereby joins in Mi[ć]o Stani[š]ić's Motion of 2 July 2013 seeking to admit Judge Harhoff's email as part of the evidential record of the case" (Motion, para. 6). Considering that Judge Harhoff's Letter is now in evidence, the Appeals Chamber will not deal further with the parties' arguments concerning this matter.

<sup>25</sup> Response, para. 1.

<sup>26</sup> Response, para. 2.

‘firmly established’ *with respect to this case*’.<sup>27</sup> In this respect, the Prosecution submits that “factual findings from a particular case do not bind a finder of fact in a subsequent case at the Tribunal”.<sup>28</sup> Moreover, it avers that Župljanin’s reliance on the *Šešelj* Disqualification Decision is misplaced as it was based “on an incorrect interpretation of the governing law and patently incorrect conclusions of fact”.<sup>29</sup>

11. In his Reply, Župljanin argues that the timing of the Motion “was, at the very least, reasonable and justified”,<sup>30</sup> and that even if it was unreasonable, “the Appeals Chamber has not held that untimely amendments of a Notice of Appeal are absolutely barred.”<sup>31</sup> In addition, Župljanin replies that “the finding of bias” in the *Šešelj* Disqualification Decision was not limited to the circumstances or in relation to the accused in that case personally, but rather arose from “a general bias in favour of conviction” on behalf of Judge Harhoff.<sup>32</sup> Further, Župljanin contends that an adequate evidentiary basis for the Motion exists by virtue of the fact that he joined the Rule 115 Motion,<sup>33</sup> and that it would be unjust to preclude the proposed amendment to the Amended Notice of Appeal since it is of “substantial importance” to his appeal and may require a reversal of his conviction.<sup>34</sup> Župljanin also argues that the absence of submissions by the Prosecution on whether the amendment of the Amended Notice of Appeal is prejudicial to it amounts to an acknowledgement that it in fact suffers no prejudice.<sup>35</sup>

### III. APPLICABLE LAW

12. Pursuant to Rule 108 of the Rules, the Appeals Chamber “may, on good cause being shown by motion, authorise a variation of the grounds of appeal” contained in the notice of appeal. A motion requesting a variation should be filed as soon as possible after identifying the newly alleged error or after discovering any other basis for seeking a variation of the notice of appeal.<sup>36</sup> It is the

<sup>27</sup> Response, para. 3 (emphasis in original). *See* Motion, paras 1-2.

<sup>28</sup> Response, para. 3.

<sup>29</sup> Response, para. 4.

<sup>30</sup> Reply, para. 2.

<sup>31</sup> Reply, para. 4.

<sup>32</sup> Reply, para. 3.

<sup>33</sup> Reply, para. 5.

<sup>34</sup> Reply, para. 4, *referring to Prosecutor v. Nikola Šainović et al.*, Case No. IT-05-87-A, Decision on Sreten Lukić’s Re-Filed Second Motion For Leave to Vary His Notice of Appeal and Appeal Brief, 9 September 2011 (“*Šainović* Decision of 9 September 2011”), para. 21.

<sup>35</sup> Reply, paras 4-7.

<sup>36</sup> Decision on Stojan Župljanin’s Request to Amend Notice of Appeal, 8 October 2013 (“Decision of 8 October 2013”), para. 9; *Prosecutor v. Nikola Šainović et al.*, Case No. IT-05-87-A, Decision on Sreten Lukić’s Re-Filed Second Motion For Leave to Vary His Notice of Appeal and Appeal Brief, 9 September 2011 (“*Šainović* Decision of 9 September 2011”), para. 5; *Prosecutor v. Nikola Šainović et al.*, Case No. IT-05-87-A, Decision on Dragolub Ojdanić’s Second Motion to Amend his Notice of Appeal, 4 December 2009 (“*Šainović* Decision of 4 December 2009”), para. 5.

appellant's burden to explain precisely what amendments are sought and to demonstrate that each proposed amendment meets the "good cause" requirement of Rule 108 of the Rules.<sup>37</sup>

13. The concept of "good cause" covers both good reason for including the new or amended grounds of appeal sought and good reason showing why those grounds were not included or were not correctly phrased, in the original notice of appeal.<sup>38</sup> The Appeals Chamber has considered, *inter alia*, the following factors in determining whether "good cause" exists: (i) the variation is so minor that it does not affect the content of the notice of appeal; (ii) the opposing party would not be prejudiced by the variation or has not objected to it; and (iii) the variation would bring the notice of appeal into conformity with the appeal brief.<sup>39</sup> In this respect, the Appeals Chamber has stated that the question of prejudice to an opposing party is an important factor to be considered when assessing a request for variation of grounds of appeal.<sup>40</sup> Where an appellant seeks a substantive amendment broadening the scope of the appeal, "good cause" might also be established under certain circumstances.<sup>41</sup> The Appeals Chamber recalls that no cumulative list of requirements has been established for a substantive amendment to be granted. Rather, the jurisprudence of the Tribunal demonstrates that each proposed amendment is to be considered in light of the particular circumstances of the case.<sup>42</sup>

14. The jurisprudence of the Tribunal establishes that the criteria for variation of grounds of appeal should be interpreted restrictively at the stages in the appeal proceedings when amendments would necessitate a substantial slowdown in the progress of the appeal.<sup>43</sup>

15. Nonetheless, in certain exceptional cases, notably where the failure to include the new or amended grounds of appeal resulted from counsel's negligence or inadvertence, the Appeals Chamber has allowed variations even though "good cause" was not shown by the appellant.<sup>44</sup> Such cases have required a showing that the variation sought, assuming its merits, is of substantial importance to the success of the appeal such that it would result in a miscarriage of justice if

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<sup>37</sup> Decision of 8 October 2013, para. 9; *Šainović* Decision of 9 September 2011, para. 5; *Šainović* Decision of 4 December 2009, para. 5.

<sup>38</sup> Decision of 8 October 2013, para. 10; *Šainović* Decision of 9 September 2011, para. 6; *Šainović* Decision of 4 December 2009, para. 6.

<sup>39</sup> Decision of 8 October 2013, para. 11; *Šainović* Decision of 9 September 2011, para. 6; *Šainović* Decision of 4 December 2009, para. 6.

<sup>40</sup> *Šainović* Decision of 4 December 2009, para. 18; *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-A, Decision on Prosecution's Request for Leave to Amend Notice of Appeal in Relation to Vidoje Blagojević, 20 July 2005, p. 5.

<sup>41</sup> Decision of 8 October 2013, para. 11; *Šainović* Decision of 9 September 2011, para. 6; *Šainović* Decision of 4 December 2009, para. 6.

<sup>42</sup> Decision of 8 October 2013, para. 11; *Šainović* Decision of 9 September 2011, para. 6; *Šainović* Decision of 4 December 2009, para. 6.

<sup>43</sup> *Šainović* Decision of 9 September 2011, para. 8; *Šainović* Decision of 4 December 2009, para. 8.

<sup>44</sup> Decision of 8 October 2013, para. 12; *Šainović* Decision of 9 September 2011, para. 7; *Šainović* Decision of 4 December 2009, para. 7.

excluded.<sup>45</sup> In these limited circumstances, the interests of justice require that an appellant not be held responsible for the failures of his counsel.<sup>46</sup> However, it must be shown that the previous pleadings failed to address the issue adequately and that the amendments sought would correct that failure.<sup>47</sup>

#### IV. DISCUSSION

16. Župljanin requests the inclusion of an additional substantive ground of appeal alleging violation of his right to a fair trial, including by an impartial, independent, and competent court. The Appeals Chamber recalls that: (i) Župljanin filed his Original Notice of Appeal on 13 May 2013; (ii) Judge Harhoff's Letter, which gave rise to the proposed new ground of appeal, was published on 13 June 2013; (iii) Stanišić filed a motion, comprising substantially the same request as the present Motion, on 2 July 2013;<sup>48</sup> (iv) Župljanin filed his first motion requesting leave to amend his Notice of Appeal on 12 August 2013 to which a decision was rendered on 8 October 2013; and (v) the present Motion was filed on 9 September 2013.

17. Based on items (i) and (ii) in the above chronology, Župljanin could not have dealt with Judge Harhoff's Letter in the Original Notice of Appeal. Nevertheless, the Appeals Chamber notes that Župljanin did not act immediately after the publication of Judge Harhoff's Letter: the Motion was filed almost three months after the letter was published and no reference was made to the alleged error of law arising from the Judge Harhoff's Letter in Župljanin's first request to amend his Notice of Appeal on 12 August 2013.<sup>49</sup> The Appeals Chamber also notes, however, that Judge Harhoff's Letter is not "typical" additional evidence and that it has the potential to affect the Trial Judgement as a whole.<sup>50</sup> The Appeals Chamber recalls that each proposed amendment to a notice of appeal is to be considered in light of the particular circumstances of the case.<sup>51</sup> Therefore, the Appeals Chamber is satisfied that, in the unique circumstances of this case, and without prejudice as to the merit of the arguments raised by Župljanin, the addition of the proposed new ground of appeal is necessary to enable issues relevant to the appellate proceedings to be fully aired. In addition, the Appeals Chamber recalls that the question of prejudice to an opposing party is an

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<sup>45</sup> Decision of 8 October 2013, para. 12; Šainović Decision of 9 September 2011, para. 7; Šainović Decision of 4 December 2009, para. 7.

<sup>46</sup> Decision of 8 October 2013, para. 12; Šainović Decision of 9 September 2011, para. 7; Šainović Decision of 4 December 2009, para. 7.

<sup>47</sup> Decision of 8 October 2013, para. 12; Šainović Decision of 9 September 2011, para. 7; Šainović Decision of 4 December 2009, para. 7.

<sup>48</sup> Motion on Behalf of Mićo Stanišić Seeking Leave to Amend Notice of Appeal with Annexes A, B and C, 2 July 2013.

<sup>49</sup> See *supra*, para 12. See also Župljanin Motion of 12 August 2013; Župljanin Decision of 8 October 2013.

<sup>50</sup> Stanišić Rule 115 Decision, para. 21. The Appeals Chamber recalls that the Rule 115 Motion was granted on 14 April 2014, as a result of which, Judge Harhoff's Letter was admitted into evidence in its entirety. See Stanišić Rule 115 Decision, paras 24, 27.

important factor to be considered when assessing a request for variation of grounds of appeal.<sup>52</sup> In this instance, the Appeals Chamber considers that neither the Motion nor the Response identify any basis on which the admission of this new ground of appeal would cause the Prosecution prejudice. Moreover, the Appeals Chamber considers that allowing for the variation of the Amended Notice of Appeal will not unduly interfere with the expeditious administration of justice, given the stage of the proceedings and the complexity of other grounds of appeal.

18. Based on the foregoing, the Appeals Chamber is satisfied that there is good cause for the proposed variation of the Amended Notice of Appeal.

## V. DISPOSITION

19. In light of the foregoing, and pursuant to Rule 108 of the Rules, the Appeals Chamber:

(i) **GRANTS** the Motion;

(ii) **ORDERS** Župljanin to file a further amended notice of appeal no later than 23 April 2014;


(iii) **ORDERS** Župljanin to file an addition to the Župljanin Appeal Brief with respect to the proposed ground of appeal 6 no later than 5 May 2014;

(iv) **ORDERS** the Prosecution to file an addition to its Response to Župljanin Appeal Brief with respect to the proposed ground of appeal 6, if any, no later than 26 May 2014;; and

(v) **ORDERS** Župljanin to file an addition to the Župljanin Reply Brief with respect to the proposed ground of appeal 6, if any, no later than 2 June 2014.

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

Done this 14<sup>th</sup> day of April 2014,  
At The Hague,  
The Netherlands.



\_\_\_\_\_  
Judge Carmel Agius  
Presiding Judge

[Seal of the Tribunal]

<sup>51</sup> See *supra*, para. 13.

<sup>52</sup> See *supra*, para. 13.