

**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

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

**DECISION ON MIĆO STANIŠIĆ'S MOTION SEEKING
ADMISSION OF ADDITIONAL EVIDENCE PURSUANT TO
RULE 115**

The Office of the Prosecutor

Ms. Laurel Baig

Counsel for Mićo Stanišić

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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 the “Rule 115 Motion on Behalf of Mićo Stanišić Seeking Admission of Additional Evidence with Annex”, filed publicly by Mićo Stanišić on 2 July 2013 (“Motion” and “Stanišić”, respectively).¹ The Office of the Prosecutor (“Prosecution”) filed its response to the Motion on 10 July 2013.² On 15 July 2013, Stanišić filed a reply.³

I. BACKGROUND

2. On 27 March 2013, Trial Chamber II of the Tribunal (“Trial Chamber”) issued its judgement in the case of *Prosecutor v. Mićo Stanišić and Stojan Župljanin*, Case No. IT-08-91-T (“Trial Judgement” and “*Stanišić and Župljanin* case”, respectively). The Trial Chamber found that Stanišić and Stojan Župljanin (“Župljanin”) participated in a joint criminal enterprise (“JCE”) and convicted them for persecutions, as a crime against humanity, as well as murder and torture, as violations of the laws or customs of war.⁴ In addition, Župljanin was found guilty of extermination as a crime against humanity.⁵ Stanišić, Župljanin, and the Prosecution have appealed the Trial Judgement.⁶

3. On 23 July 2013, President Theodor Meron (“Judge Meron”) issued an order assigning the Motion to Judge Carmel Agius (“Judge Agius”), on the basis that references to Judge Meron in the document Stanišić seeks to have admitted as additional evidence give rise to a conflict of interest.⁷ On 24 July 2013, Judge Agius, assigned Judge William H. Sekule to replace Judge Meron on the Bench for the purpose of considering the Motion.⁸

¹ On 9 September 2013, Župljanin joined the Motion (*see* [Župljanin’s Second Request to Amend his Notice of Appeal and Supplement his Appeal Brief, 9 September 2013 (“Župljanin Motion to Amend Notice of Appeal”), para. 6).

² Prosecution Response to Rule 115 Motion on Behalf of Mićo Stanišić Seeking Admission of Additional Evidence, 10 July 2013 (“Response”).

³ Reply on Behalf of Mićo Stanišić to Prosecution Response to Rule 115 Motion Seeking Admission of Additional Evidence, 15 July 2013 (“Reply”).

⁴ Trial Judgement, vol. 2, paras 955-956. *See also* Trial Judgement, vol. 2, paras 313-315, 489-530, 729-781.

⁵ Trial Judgement, vol. 2, para. 956.

⁶ Notice of Appeal on Behalf of Mićo Stanišić, 13 May 2013 (“Stanišić Notice of Appeal”); Notice of Appeal on Behalf of Stojan [Župljanin], 13 May 2013; Prosecution Notice of Appeal, 13 May 2013.

⁷ Order Assigning a Motion to a Judge, 23 July 2013.

⁸ Order Replacing a Judge in Respect of a Rule 115 Motion Before the Appeals Chamber, 24 July 2013, p. 1. 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 [Župljanin’s Motion Requesting Recusal of Judge Liu Daqun from Adjudication of Motion to Vacate Trial Judgement, 21 October 2013 *referring to* Stojan [Župljanin’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

II. ARGUMENTS OF THE PARTIES

4. Stanišić seeks the admission of excerpts from a letter written by Judge Frederik Harhoff (“Judge Harhoff”) on 6 June 2013 and published in a Danish newspaper on 13 June 2013,⁹ as additional evidence before the Appeals Chamber (“Letter” and “Proposed Evidence”, respectively).¹⁰

5. Stanišić submits that the Proposed Evidence was neither available at trial, nor discoverable through the exercise of due diligence, since it only came to light when the Letter was published on 13 June 2013.¹¹ He also argues that the Proposed Evidence is credible since it expresses Judge Harhoff’s views “as to what is required for a conviction under JCE liability”.¹²

6. Stanišić claims that the Proposed Evidence is relevant to his fourth and sixth grounds of appeal,¹³ as well as to the proposed ground of appeal 1(*bis*) that he seeks to add to his Notice of Appeal through a separate motion.¹⁴ According to Stanišić, the Proposed Evidence is relevant to material issues, specifically how his *actus reus* and *mens rea* were assessed.¹⁵ Stanišić argues that the Proposed Evidence demonstrates that Judge Harhoff found him guilty under JCE liability on the basis of a manifestly incorrect and prejudicial legal standard, namely a much lower standard than the one established in the jurisprudence of the Tribunal.¹⁶ Therefore, he contends that his right to be tried fairly by an independent and impartial tribunal and his right to be presumed innocent until proved guilty have been “undeniably” breached.¹⁷

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.).

⁹ Stanišić seeks admission of excerpts from the English version of the Letter as found on the Danish newspaper’s website (*see* Motion, fns 1-2, Annex).

¹⁰ Motion, paras 2, 9, p. 7.

¹¹ Motion, paras 3, 13.

¹² Motion, paras 3, 14. *See also* Motion, paras 11-12.

¹³ Motion, paras 3, 28, *referring to* Stanišić Notice of Appeal, paras 30-34, 38-42. In his fourth ground of appeal, Stanišić argues that the Trial Chamber committed an error of fact when assessing his *mens rea* with regard to the JCE. In his sixth ground of appeal, Stanišić submits that the Trial Chamber committed a mixed error of law and fact in its findings related to his membership and contribution to the common plan.

¹⁴ Motion, paras 3, 28, *referring to* Motion on Behalf of Mićo Stanišić Seeking Leave to Amend Notice of Appeal with Annexes A, B and C, 2 July 2013 (“Stanišić Motion to Amend Notice of Appeal”). In the Stanišić Motion to Amend Notice of Appeal, Stanišić also seeks leave to amend his fourth ground of appeal by modifying the alleged error of fact to a mixed error of law and fact (*see* Stanišić Motion to Amend Notice of Appeal, paras 15-21).

¹⁵ Motion, para. 16.

¹⁶ Motion, paras 16-23.

¹⁷ Motion, para. 22.

7. Stanišić further submits that the Proposed Evidence demonstrates that his conviction is unsafe.¹⁸ He submits that he “could only rely upon the presumption that all three Judges of [the Trial Chamber] would approach the assessment of his individual responsibility by applying the correct legal standards” and that the Proposed Evidence shows “that this was not the case”.¹⁹ Stanišić alleges that, had he known Judge Harhoff’s position *at trial*, at a minimum he would have sought to have Judge Harhoff “recused” and that, had the Proposed Evidence been available prior to the Trial Judgement, he would have sought a trial *de novo* before a newly constituted bench.²⁰ He argues that the Proposed Evidence will allow him to establish that the Trial Chamber applied the erroneous standard outlined by Judge Harhoff in the Letter rather than the correct legal standard of JCE liability as established in the jurisprudence.²¹ Finally, Stanišić submits that the “revelation that one of the Trial Judges was predisposed to convict without the necessary proof to do so clearly demonstrates that [his] conviction is unsafe”.²²

8. The Prosecution opposes the Motion. It submits that there is no basis for the admission of the Proposed Evidence under Rule 115 of the Rules since it is neither relevant to a material issue in the case, nor capable of demonstrating that Stanišić’s conviction is unsafe.²³ The Prosecution contends that the Motion relies on the flawed premise that the Proposed Evidence reflects the legal criteria on which Stanišić’s conviction is based.²⁴ It argues that: (i) the legal standards which the Trial Chamber applied are set out in the Trial Judgement;²⁵ (ii) if Stanišić believes that the Trial Chamber committed a legal error in convicting him, he must challenge the Trial Judgement “by reference to the terms in which the [Trial] Judgement is expressed”;²⁶ and (iii) the statements concerning law included in the Proposed Evidence cannot form the basis of a challenge to his conviction or substitute the official written Trial Judgement.²⁷

9. The Prosecution also submits that the Proposed Evidence does not demonstrate that Judge Harhoff or the Trial Chamber had a “predisposition” to convict Stanišić in circumstances where the legal elements for criminal responsibility were not satisfied.²⁸ Finally, the Prosecution argues that Stanišić fails to rebut the “strong assumption” of Judge Harhoff’s lack of bias²⁹ and does not satisfy

¹⁸ Motion, paras 24-27.

¹⁹ Motion, para. 24.

²⁰ Motion, para. 25.

²¹ Motion, para. 26.

²² Motion, para. 27.

²³ Response, para. 1.

²⁴ Response, para. 2.

²⁵ Response, para. 2.

²⁶ Response, para. 2.

²⁷ Response, para. 2.

²⁸ Response, para. 3.

²⁹ Response, para. 4, citing *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-R77.2-A, Decision on Motion for Disqualification of Judges Fausto Pocar and Theodor Meron from the Appeals Proceedings, 2 December 2009, para. 7.

the “high threshold” for demonstrating that reasonable apprehension of bias is “firmly established”.³⁰

10. In his Reply, Stanišić reiterates the arguments contained in his Motion.³¹ He adds that: “[t]he impartiality of Judge Harhoff and his actual bias or unacceptable appearance of his bias [...] fatally undermined [his] right to a fair trial before an independent and impartial Trial Chamber.”³² Stanišić also argues that: “[g]iven that deliberations are and should remain secret, the true effect of Judge Harhoff’s incorrect view of the law of JCE I and the full extent to which [it] coloured the final assessment of the evidence and proof in [his] case can never be fully known. Consequently, it simply cannot be concluded that due process was guaranteed to [him].”³³

III. APPLICABLE LAW

11. Pursuant to Rule 115(A) of the Rules, a party may apply by motion to present additional evidence before the Appeals Chamber. The motion must be filed not later than thirty days from the date for filing of the brief in reply, unless good cause or, after the appeal hearing, cogent reasons are shown for a delay.³⁴

12. For additional evidence to be admissible under Rule 115 of the Rules, the applicant must first demonstrate that it was not available to him at trial or discoverable through the exercise of due diligence.³⁵ The applicant must then show that the evidence is both relevant to a material issue and credible.³⁶ Evidence is relevant if it relates to findings material to the conviction or sentence, in the sense that those findings were crucial or instrumental to the conviction or sentence.³⁷ Evidence is credible if it appears to be reasonably capable of belief or reliance.³⁸

13. The applicant must further demonstrate that the evidence *could* have had an impact on the verdict, in other words, the evidence must be such that, if considered in the context of the evidence

³⁰ Response, para. 4, citing *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-R77.3, Decision on Motion by Professor Vojislav Šešelj for the Disqualification of Judges O-Gon Kwon and Kevin Parker, 22 June 2010, para. 8.

³¹ Reply, paras 4, 6-37.

³² Reply, para. 29. See Reply, paras 19-28, 30-34.

³³ Reply, para. 29.

³⁴ Rule 115(A) of the Rules; *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-A, Decision on Drago Nikolić’s First Motion for Admission of Additional Evidence on Appeal Pursuant to Rule 115 of the Rules, 19 November 2013 (“*Nikolić Decision*”), p. 1; *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-A, Decision on Radivoje Miletić’s First and Second Motions for Admission of Additional Evidence on Appeal Pursuant to Rule 115, 15 April 2013 (“*Miletić Decision*”), para. 5.

³⁵ Rule 115(B) of the Rules; *Nikolić Decision*, p. 2; *Miletić Decision*, para. 6; *Prosecutor v. Ante Gotovina and Mladen Markač*, Case No. IT-06-90-A, Public Redacted Version of the 21 June 2012 Decision on Ante Gotovina’s and Mladen Markač’s Motions for the Admission of Additional Evidence on Appeal, 2 October 2012 (“*Gotovina and Markač Decision*”), para. 7.

³⁶ *Nikolić Decision*, p. 2; *Gotovina and Markač Decision*, para. 8.

³⁷ *Miletić Decision*, para. 7; *Gotovina and Markač Decision*, para. 8.

³⁸ *Miletić Decision*, para. 7; *Gotovina and Markač Decision*, para. 8.

presented at trial, it could show that the verdict was unsafe.³⁹ A decision will be considered unsafe if the Appeals Chamber ascertains that there is a realistic possibility that the trial chamber's verdict might have been different if the new evidence had been admitted.⁴⁰ If the additional evidence could have been a decisive factor in reaching the decision at trial, the Appeals Chamber will consider the additional evidence and any rebuttal material along with that already on the record to arrive at a final judgement.⁴¹

14. If the evidence was available at trial or could have been obtained through the exercise of due diligence, it may still be admissible on appeal if the applicant shows that the exclusion of the additional evidence would lead to a miscarriage of justice, in that if it had been admitted at trial, it *would* have affected the verdict.⁴²

15. The applicant bears the burden of identifying with precision the specific findings of fact made by the trial chamber to which the additional evidence pertains, and of specifying with sufficient clarity the impact the additional evidence could or would have had upon the trial chamber's verdict.⁴³ A party that fails to do so runs the risk that the tendered material will be rejected without detailed consideration.⁴⁴

16. Finally, the significance and potential impact of the tendered material shall not be assessed in isolation, but in the context of the evidence presented at trial.⁴⁵

IV. DISCUSSION

17. As a preliminary issue, the Appeals Chamber notes that the Motion was filed within the temporal requirements set out in Rule 115(A) of the Rules.⁴⁶

18. The Appeals Chamber is satisfied that the Proposed Evidence was neither available at trial nor discoverable through the exercise of due diligence. Indeed, the Trial Judgement was issued on 27 March 2013 and the Letter was written on 6 June 2013.⁴⁷

19. The Proposed Evidence concerns excerpts of a letter written by Judge Harhoff that was published in a Danish newspaper,⁴⁸ and its credibility has not been challenged.⁴⁹ Therefore, the

³⁹ *Nikolić* Decision, p. 3; *Miletić* Decision, para. 8; *Gotovina and Markač* Decision, para. 9.

⁴⁰ *Miletić* Decision, para. 8; *Gotovina and Markač* Decision, para. 9.

⁴¹ Rule 115(B) of the Rules.

⁴² *Miletić* Decision, para. 9; *Gotovina and Markač* Decision, para. 10.

⁴³ *Miletić* Decision, para. 10; *Gotovina and Markač* Decision, para. 11.

⁴⁴ *Miletić* Decision, para. 10; *Gotovina and Markač* Decision, para. 11.

⁴⁵ *Miletić* Decision, para. 11; *Gotovina and Markač* Decision, para. 12.

⁴⁶ The Motion was filed on 2 July 2013, and therefore before the appeal briefs which were filed on 19 August 2013.

⁴⁷ Motion, Annex; Response, Annex A.

Appeals Chamber finds the Proposed Evidence credible for the purposes of being considered admissible as additional evidence on appeal pursuant to Rule 115 of the Rules.

20. With respect to the relevance of the Proposed Evidence, the Appeals Chamber notes that Stanišić has been found guilty of committing crimes through participation in a JCE.⁵⁰ Judge Harhoff was one member of the Bench that convicted Stanišić. The Appeals Chamber considers that in the Letter, Judge Harhoff criticises a number of recent decisions issued by different chambers of the Tribunal concerning JCE liability and appears to set out his understanding of the JCE doctrine.⁵¹ Therefore, without prejudice to the adjudication of the appeal, the Appeals Chamber finds that the Proposed Evidence relates to findings material to Stanišić's conviction and sentence and is therefore relevant within the meaning of Rule 115 of the Rules.

21. The Appeals Chamber will now determine whether Stanišić has demonstrated that the Proposed Evidence *could* have had an impact on the verdict. As stated above, in the Letter, Judge Harhoff criticises a number of recent decisions issued by different chambers of the Tribunal concerning JCE liability and appears to set out his own understanding of the JCE doctrine.⁵² Had the Proposed Evidence been available during the trial, the Appeals Chamber believes that there is a strong probability that Stanišić would have relied upon it. By its very nature, however, the Proposed Evidence is not "typical" additional evidence, in that it was not the kind of evidence likely to be admitted before the Trial Chamber itself, but in proceedings concerning the composition of the Trial Chamber.

22. Indeed, the Proposed Evidence, while relevant to the Trial Chamber's findings, has the potential to affect the Trial Judgement as a whole, as well as Stanišić's rights to a fair trial, as set out in Article 21 of the Tribunal's Statute. Having carefully reviewed the Letter, the Appeals Chamber considers that it is possible that the Proposed Evidence could have had an impact on the proceedings and the verdict, insofar as Stanišić could have sought to utilize the Proposed Evidence in an effort to demonstrate that Judge Harhoff was predisposed towards convicting him, by applying an incorrect legal standard for JCE liability. The Appeals Chamber therefore considers that there is a realistic possibility that the Proposed Evidence could demonstrate that Stanišić was not tried by a Trial Chamber constituted of three impartial Judges and that his fair trial rights might have been

⁴⁸ See *supra*, para. 4.

⁴⁹ See Response, paras 1-5. See also Reply, para. 2.

⁵⁰ Trial Judgement, vol. 2, para. 955. See also Trial Judgement, vol. 2, paras 729-781. The Appeals Chamber notes that Stanišić has appealed the Trial Chamber's findings on his *mens rea* and *actus reus* for the JCE in his fourth and sixth grounds of appeal (see Stanišić Notice of Appeal, paras 30-34, 38-42; Stanišić Motion to Amend Notice of Appeal, paras 15-21).

⁵¹ Response, Annex A.

⁵² See *supra*, para. 20.

violated, which, consequently, might have resulted in a differently composed trial chamber reaching a different verdict.

23. Moreover, taking all the circumstances of this case and the specific nature of the Proposed Evidence into account, the Appeals Chamber considers that any ambiguity as to whether the Proposed Evidence “could show that the verdict was unsafe” on the basis of a potential violation of the fair trial rights of an accused, ought to be resolved in favour of the accused, in order to provide an opportunity for all relevant issues raised on appeal to be fully aired, albeit without prejudice as to their merits. Based on the foregoing, the Appeals Chamber finds that the Proposed Evidence *could* have had an impact on the verdict and *could* have shown that the verdict was unsafe for the purposes of Rule 115 of the Rules.

24. Finally, the Appeals Chamber notes that Stanišić only requests the admission of excerpts of the Letter. The Appeals Chamber finds that, in the absence of any reason to the contrary, admitting the Letter in its entirety will allow for a proper consideration of the excerpts in their full context. Therefore, the Appeals Chamber considers that, for the good administration of justice, it is more appropriate to admit the Letter into evidence in its entirety.

25. Rule 115(A) of the Rules provides that parties are permitted to file supplemental briefs on the impact of the additional evidence. In this regard, the Appeals Chamber however notes that in two separate decisions today, it has granted Stanišić’s and Župljanin’s motions to amend their Notices of Appeal⁵³ in relation to the Letter and ordered Stanišić and Župljanin to file additions to their appeal briefs.⁵⁴ Submissions with regard to the impact of the additional evidence, if any, should therefore be addressed in these additional briefs.

26. The Appeals Chamber emphasises that its findings in this decision pertain strictly to the admissibility of the Proposed Evidence and the Letter and not to the merits of the appeals filed by the parties.

V. DISPOSITION

27. In light of the foregoing, the Appeals Chamber:

GRANTS the Motion;

⁵³ Stanišić Motion to Amend Notice of Appeal; Župljanin Motion to Amend Notice of Appeal.

⁵⁴ See Decision on Mićo Stanišić’s Motion Seeking Leave to Amend Notice of Appeal, 14 April 2014, para. 24; Decision on Župljanin’s Second Request to Amend his Notice of Appeal and Supplement his Appeal Brief, 14 April 2014, para. 19.

ADMITS the Letter in its entirety;

INSTRUCTS Stanišić to provide the Registry with a full version of the Letter no later than 28 April 2014;

INSTRUCTS the Registry to assign an exhibit number to the Letter; and

ORDERS the Prosecution to present rebuttal evidence, if any, no later than 1 May 2014.

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

Done this 14th day of April 2014,
At The Hague,
The Netherlands.



Judge Carmel Agius
Presiding

[Seal of the Tribunal]