IT-08-91-A
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11 February 2015

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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:	11 February 2015
		Original:	English

IN THE APPEALS CHAMBER

Before: **Judge Carmel Agius, Presiding**
Judge Patrick Robinson
Judge Arlette Ramaroson
Judge Khalida Rachid Khan
Judge Koffi Kumelio A. Afanđe

Registrar: **Mr. John Hocking**

Decision of: **11 February 2015**

PROSECUTOR

v.

MIĆO STANIŠIĆ
STOJAN ŽUPLJANIN

PUBLIC

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

The Office of the Prosecutor
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Mr. Slobodan Zečević and Mr. Stéphane Bourgon

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Mr. Dragan Krgović, Ms. Tatjana Čmerić, and Mr. Christopher Gosnell

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 Application on Behalf of Mićo Stanišić Seeking Admission of Additional Evidence on Appeal with Confidential Annex", filed publicly by Mićo Stanišić on 9 September 2014 ("Motion", "Annex", and "Stanišić", respectively). The Office of the Prosecutor ("Prosecution") filed its response to the Motion on 9 October 2014.[1] On 24 October 2014, Stanišić filed a reply.[2]

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 had participated in a joint criminal enterprise ("JCE"), and convicted him under Article 7(1) of the Statute for persecutions as a crime against humanity, as well as murder and torture as violations of the laws or customs of war.[3] Stanišić and the Prosecution have appealed the Trial Judgement.[4]

3. From 3 to 5 February 2014, Stanišić testified in the case of *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T ("*Karadžić* Testimony" and "*Karadžić* case", respectively).[5]

4. On 28 April 2014, Stanišić filed a notice informing the Appeals Chamber of his intention to seek the admission of the *Karadžić* Testimony as evidence on appeal in this case, subject to the adjudication of certain other pending motions.[6]

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[1] Prosecution Response to Mićo Stanišić's Rule 115 Motion of 9 September 2014, 9 October 2014 ("Response").
[2] Reply on Behalf of Mićo Stanišić to Prosecution Response to Rule 115 Motion Seeking Admission of Additional Evidence on Appeal, 24 October 2014 ("Reply").
[3] Trial Judgement, vol. 2, para. 955.
[4] Notice of Appeal on Behalf of Mićo Stanišić, 13 May 2013; Prosecution Notice of Appeal, 13 May 2013. See also Amended Notice of Appeal on Behalf of Mićo Stanišić, 23 April 2014.
[5] See *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Mićo Stanišić, 3 Feb. 2014, T. 46310-46409; Mićo Stanišić, 4 Feb. 2014, T. 46410-46515; Mićo Stanišić, 5 Feb. 2014, T. 46516-46624.
[6] Notice of Intent on Behalf of Mićo Stanišić to Seek Admission of Additional Evidence on Appeal Pursuant to Rule 115 – if Necessary, 28 April 2014 ("Notice of Intent"), paras 20, 23, 30-31, 33.

II. SUBMISSIONS OF THE PARTIES

5. Stanišić seeks the admission of transcripts of the *Karadžić* Testimony as additional evidence on appeal, pursuant to Rule 115 of the Tribunal's Rules of Procedure and Evidence ("Rules").[7]

6. Stanišić submits that the *Karadžić* Testimony was neither available at trial, nor discoverable through the exercise of due diligence.[8] He submits, in this respect, that his decision not to testify at trial "was guided in particular" by the fact that the interviews he had voluntarily given to the Prosecution before the start of trial ("Interviews") were admitted into evidence.[9] Stanišić points out, further, that he was compelled to testify in the *Karadžić* case "despite his plain refusal to do so pursuant to his right to remain silent."[10]

7. According to Stanišić, the *Karadžić* Testimony is relevant to material issues in this case, as it relates to his acts and conduct during the Indictment period.[11] Stanišić submits that the *Karadžić* Testimony directly relates to the Trial Chamber's: (i) erroneous inference that he was aware of and shared the persecutory intent of the Bosnian Serb leadership to forcibly transfer and deport Muslims and Croats from territories of Bosnia and Herzegovina ("BiH"); and (ii) "implicit finding" that he contributed to the furtherance of the JCE.[12] Stanišić further asserts that the *Karadžić* Testimony, if considered in the context of the evidence presented at trial, could show that the verdict in this case was unsafe, given the realistic possibility that it may have been different had this evidence been available and admitted at trial.[13] Finally, Stanišić argues that the *Karadžić* Testimony is credible, as it was taken under oath and extensively tested in court.[14]

8. The Prosecution opposes the Motion. It submits that the Motion "fails all criteria governing the admission of additional evidence on appeal and should be denied"[15] and furthermore constitutes an abuse of the Rule 115 process.[16] First, the Prosecution submits that the Motion should be

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[7] Motion, para. 3, p. 14.
[8] Motion, paras 2, 6, 22. See also Reply, paras 8-19.
[9] Motion, paras 13-15. The Appeals Chamber notes that the Interviews were admitted at trial as Exhibits P2300-P2313. See also Reply, para. 10.
[10] Motion, para. 21. See also Reply, para. 8.
[11] Motion, paras 6, 23-26.
[12] Motion, para. 5, referring to Trial Judgement, paras 729-765, 769. See also Motion, paras 23-26, 35, 51.
[13] Motion, paras 7, 32-34, 62-63. See also Reply, paras 38-43. Stanišić submits, in particular, that the *Karadžić* Testimony demonstrates that: (i) he never had a close relationship with Radovan Karadžić (Motion, paras 35-40); (ii) the position he held does not demonstrate that he shared persecutory intent (Motion, paras 35, 43); (iii) he was neither involved in the establishment of the Serbian Democratic Party ("SDS") nor was he a key member of the decision-making authorities (Motion, paras 52-56); (iv) he neither supported nor participated in the implementation of the policies of the SDS (Motion, paras 35, 44-46); (v) he openly defied the extended presidency at the risk of his own life and the safety of his family (Motion, paras 35, 47-50); and (vi) he took all possible and necessary measures to investigate crimes and punish perpetrators (Motion, paras 51, 57-61). See also Reply, paras 35-37.
[14] Motion, paras 6, 27-31. See also Reply, paras 20-23.
[15] Response, para. 1.
[16] Response, para. 7.

dismissed as untimely, as Stanišić offers no reasonable explanation for the delay of over seven months between the emergence of the new evidence and the filing of the Motion.[17] The Prosecution argues that notwithstanding the Notice of Intent, it is not up to Stanišić to "dictate the briefing schedule in this regard nor evade the diligence requirement simply because other motions—which Stanišić himself filed—are pending."[18] Second, the Prosecution asserts that the subject of the *Karadžić* Testimony was within Stanišić's personal knowledge, and therefore available to him at trial.[19] The Prosecution also argues that the prior availability of the evidence is further demonstrated by the fact that every material aspect of the *Karadžić* Testimony was already before the Trial Chamber in the form of Stanišić's Interviews.[20] Third, the Prosecution submits that contrary to Stanišić's assertion, the *Karadžić* Testimony is not credible, since Stanišić could have tailored his testimony on the basis of his knowledge of the findings of the Trial Chamber that led to his conviction.[21] The Prosecution adds that Radovan Karadžić would have had a "disincentive to probe too deeply into Stanišić's self-serving answers", as he is charged with participation in a joint criminal enterprise similar to the one in which Stanišić was found to have participated.[22] It also submits that under cross-examination, Stanišić's answers revealed inconsistencies.[23]

9. Finally, the Prosecution submits that the Trial Chamber's unanimous findings that Stanišić shared the intent to transfer and deport Muslims and Croats from BiH and contributed to that goal are not compromised by the *Karadžić* Testimony.[24] The exclusion of this evidence on appeal, it submits, would therefore not engender a miscarriage of justice.[25] According to the Prosecution, the *Karadžić* Testimony and the Interviews are cumulative and contradicted by other evidence considered by the Trial Chamber in relation to the same material issues.[26]

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[17] Response, paras 2-4.
[18] Response, para. 4.
[19] Response, paras 2, 5-8. In support, the Prosecution argues that "the inquiry under Rule 115 is 'not merely a question of whether the document(s) in question were 'available' in a literal sense' [but] whether the *substance* of Stanišić's testimony—the information it conveyed—was accessible during trial". Response, para. 8, quoting *Prosecutor v. Mile Mrkšić and Veselin Šljivančanin*, Case No. IT-95-13/1-A, Decision on Mile Mrkšić's Second Rule 115 Motion, 13 February 2009, para. 6.
[20] Response, para. 10, fns 17-22.
[21] Response, paras 11-12.
[22] Response, para. 13.
[23] Response, para. 13, referring to Annex, *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Mićo Stanišić, 4 Feb. 2014, T. 46432, 46489-46490; Mićo Stanišić, 5 Feb. 2014, T. 46559-46560.
[24] Response, para. 16.
[25] Response, para. 2. See also Response, paras 15-16.
[26] Response, para. 16. See also Response, paras 17-19 (regarding the Trial Chamber's findings that Stanišić had a close relationship with Karadžić); para. 20 (regarding the Trial Chamber's findings of Stanišić's persecutory intent); paras 21-23 (regarding the Trial Chamber's findings that Stanišić implemented discriminatory SDS policies); paras 24-25 (regarding the Trial Chamber's findings of Stanišić's position and actions with respect to paramilitaries); paras 26-30 (regarding the Trial Chamber's findings of Stanišić's involvement in the SDS and his importance in the Bosnian Serb leadership); and paras 31-32 (regarding the Trial Chamber's findings of Stanišić's alleged exculpatory statements and actions).

10. In reply, Stanišić submits that, contrary to the Prosecution's submissions, his Motion should not be dismissed as untimely.[27] First, he refers to "certain interpretation issues" relating to his *Karadžić* Testimony that were pending until 31 March 2014.[28] Second, Stanišić submits that in consideration of judicial economy, and as set out in the Notice of Intent, he purposely postponed the request for admission of the *Karadžić* Testimony until full adjudication of the motions relating to the alleged apprehension of bias on the part of Judge Frederik Harhoff.[29] Stanišić further submits that the litigation of these motions, conducted in parallel to the Stanišić appeal proceedings, was "unprecedented", and that he submitted the Motion as soon as possible after the *Karadžić* Testimony.[30] Stanišić argues that good cause has therefore been shown for the timing of the filing of the Motion, and requests that the Appeals Chamber consider it as validly filed.[31] Finally, Stanišić argues that, contrary to the Prosecution's submissions, the *Karadžić* Testimony expands on evidence adduced at trial with respect to his responsibility, which the Trial Chamber failed to assess and to which it failed to assign the correct probative value.[32] He also submits that while the subject matter covered in the Interviews and the *Karadžić* Testimony is similar, there are material differences between the two in "form, content and nature".[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 no 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

[27] Reply, paras 24-34. The Appeals Chamber notes that the other arguments raised in the Reply simply reiterate submissions already made in the Motion and are considered in relation to those specific submissions already made in the Motion. See *e.g.*, Reply, paras 8-19 (that the evidence adduced during the *Karadžić* Testimony was not available at trial); paras 20-23 (that the evidence adduced during the *Karadžić* Testimony is credible); and paras 35-43 (that the evidence adduced during the *Karadžić* Testimony could show that the verdict was unsafe and that excluding this evidence would occasion a miscarriage of justice).
[28] Reply, para. 25. Stanišić does not explain what he means by "interpretation issues".
[29] Reply, paras 26-30, 33. See also Notice of Intent, paras 20, 23, 30-31, 33.
[30] Reply, para. 26.
[31] Reply, para. 34.
[32] Reply, paras 36-37.
[33] Reply, para. 18. See also Reply, paras 16-17.
[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.

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 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]

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[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; *Miletić* Decision, para. 7; *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.
[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.

IV. DISCUSSION

17. The Appeals Chamber notes that Stanišić's Brief in Reply was filed on 11 November 2013.[46] The thirty day limit prescribed under Rule 115 of the Rules[47] thus expired on 11 December 2013. In these circumstances, and given that no appeal hearing has yet been held in the present case, the Appeals Chamber observes that "good cause", rather than "cogent reasons", must be shown for the delay.[48] Further, the Appeals Chamber recalls that, for all motions filed pursuant to Rule 115 of the Rules after this prescribed deadline, the moving party must "demonstrate that it was not able to comply with the time limit set out in the Rule, and that it submitted the motion in question as soon as possible after it became aware of the existence of the evidence sought to be admitted".[49]

18. The Appeals Chamber notes that the Motion was not filed until 9 September 2014, more than seven months after Stanišić gave the *Karadžić* Testimony. In the Motion, Stanišić provides no explanation for this delay, referring only to his Notice of Intent[50]—filed more than two and a half months after the *Karadžić* Testimony—whereby he had informed the Appeals Chamber of his intention to postpone the filing of the Motion subject to the adjudication of other pending motions.[51]

19. In his Reply, Stanišić alleges that there were "certain interpretation issues" with the *Karadžić* Testimony that were pending until the end of March 2014.[52] However, Stanišić does not provide any explanation of the nature and extent of these interpretation issues,[53] or why they impeded him from filing the Motion at an earlier stage. The Appeals Chamber therefore will not give this factor any weight in determining whether Stanišić has demonstrated good cause for the delay in filing the Motion.

20. The Appeals Chamber is further not convinced by Stanišić's submission that the litigation concerning the appearance of bias on the part of Judge Harhoff impacted his ability to comply with the time limit set out in Rule 115 of the Rules.[54] A party is expected to be able to work on several

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[46] See Brief in Reply on Behalf of Mićo Stanišić, 11 November 2013. The Appeals Chamber notes that Stanišić filed an additional reply on 29 July 2014, but that this reply was limited to the issue of bias on the part of Judge Harhoff (see Additional Brief in Reply on Behalf of Mićo Stanišić, 29 July 2014).
[47] See *supra*, para. 11.
[48] See *supra*, para. 11.
[49] *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-A, Decision on Drago Nikolić's Second Motion for Admission of Additional Evidence on Appeal Pursuant to Rule 115, 23 June 2014 (confidential), para. 16; *Miletić* Decision, para. 28.
[50] Motion, para. 1, fn. 3.
[51] See *supra*, para. 4.
[52] See *supra*, para. 10.
[53] The Appeals Chamber understands issues of interpretation, in the context of witness testimony, as relating generally to challenges to the interpretation of the spoken word, for which verification requests are submitted by the party to the Tribunal's Conference and Language Services Section as a remedy. However, Stanišić has not presented the Appeals Chamber with any such verification requests, leaving it unable to identify the issues upon which to assess his argument.
[54] See Reply, paras 26-27.

motions at the same time, and at no point in time did Stanišić seek remedy from the Appeals Chamber with respect to his inability to comply with the deadlines prescribed by the Rules.

21. Finally, with respect to Stanišić's stated choice to "postpone"[55] filing a Rule 115 motion subject to the possibly unfavourable adjudication of other motions filed by him, the Appeals Chamber finds that an applicant's litigation strategy does not relieve the applicant of his/her obligation under Rule 115 of the Rules to seek admission of additional evidence on appeal "as soon as possible" after becoming aware of the existence of the evidence in question.[56]

22. For these reasons, the Appeals Chamber considers that Stanišić has failed to demonstrate that he was not able to comply with the time limit set out in Rule 115 of the Rules and that he submitted his Motion as soon as possible after giving the Karadžić Testimony.[57] Accordingly, the Appeals Chamber finds that Stanišić has failed to show good cause for the delay in filing the Motion, and considers the Motion to be untimely.

23. Moreover, assuming *arguendo* that the Appeals Chamber had considered Stanišić's Motion to be validly filed, it does not agree with his submissions that the evidence was not available to him at trial or could not have been obtained through the exercise of due diligence. The *Karadžić* Testimony, being Stanišić's own evidence, was always within his personal knowledge and thus always available as such.[58] In this context, the fact that the evidence was not "available" in the

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[55] Notice of Intent, para. 23.

[56] For strict adherence of this standard, see *e.g.*, *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-A, Decision on Drago Nikolić's Third Motion for Admission of Additional Evidence on Appeal Pursuant to Rule 115, 8 July 2014 (confidential), p. 2 (dismissing the motion for insufficient showing of good cause for a delay of approximately two months); *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-A, Public Redacted Version of 2 May 2014 Decision on Vujadin Popović's Third and Fifth Motions for Admission of Additional Evidence on Appeal Pursuant to Rule 115, 23 May 2014, paras 17, 20 (dismissing the motion, despite previously expressed intentions by Popović to file additional Rule 115 motions, on the basis of a failure to show good cause for a delay of two and a half months after the expiration of the deadline). See also *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-A, Decision on Vujadin Popović's Motion for Admission of Additional Evidence on Appeal Pursuant to Rule 115, 20 October 2011, fn. 78.

[57] See *supra*, para. 17.

[58] The Appeals Chamber notes in this regard that the *Karadžić* Testimony overlaps in the relevant material issues with the Interviews, given before the start of the defence phase of the case. Compare *e.g.*, Exhibits P2304, p. 44, P2310, pp 26, 29 with Annex, *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Mićo Stanišić, 3 Feb. 2014, T. 46332-46333, 46352; Mićo Stanišić, 4 Feb. 2014, T. 46440-46441, 46432 (concerning the issue of whether Stanišić had a close relationship with Karadžić); Exhibits P2300, pp 55-56, P2301, p. 8, P2302, pp 36, 37, 50 with Annex, *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Mićo Stanišić, 4 Feb. 2014, T. 46428-46429, 46422, 46432 (on Stanišić's involvement in, and his support and implementation of, the policies of the SDS); Exhibit P2303, pp 1-4 with Annex, *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Mićo Stanišić, 3 Feb. 2014, T. 46343-46344, 46358, 46367-46368, 46379, 46380, 46382-46383-46385, 46386, 46399-46400, 46402; Mićo Stanišić, 4 Feb. 2014, T. 46440; Mićo Stanišić, 5 Feb. 2014, T. 46553-46556 (on Stanišić taking all possible and necessary measures to investigate crimes and punish perpetrators); Exhibits P2300, pp 55-56, P2301, pp 7, 15, 24, 36, P2302, p. 50, P2305, pp 22, 25 with Annex, *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Mićo Stanišić, 3 Feb. 2014, T. 46330, 46343-46345, 46352 (relating to the position taken by Stanišić that he was not interested in politics and only accepted leadership of MUP having been assured that the Ministry would act in accordance with the Cutileiro plan, so that, therefore, the position he held does not demonstrate that he shared a persecutory intent); Exhibits P2303, pp 45-46, P2310, p. 25, P2312, p. 5 with Annex, *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Mićo Stanišić, 3 Feb. 2014, T. 46385-46386, 46379-46380, 46386; Mićo Stanišić, 5 Feb. 2014, T. 46519-46529, 46553-46554, 46556 (on Stanišić's defiance of Bosnian Serb leadership's permissive stance on paramilitaries and his efforts to disband and

precise form of the *Karadžić* Testimony prior to Stanišić's appearance in the *Karadžić* case is immaterial. Further, neither the fact that Stanišić's testimony in the *Karadžić* case was compelled,[59] nor that he was subjected to "lengthy cross-examination",[60] has any impact on the assessment of the evidence's availability. Stanišić, in arguing that the Trial Chamber failed to properly assess and attach the correct probative value to the Interviews,[61] effectively seeks to move that same evidence—in the form of his *Karadžić* Testimony—before the Appeals Chamber through Rule 115 of the Rules. The proper remedy for seeking resolve with respect to this alleged failure by the Trial Chamber, however, is the normal appellate procedure.

24. Having concluded that the evidence was in fact available at trial, the Appeals Chamber further finds that Stanišić has failed to demonstrate that, had it been admitted at trial, the evidence would have affected the verdict. First, the Appeals Chamber notes that while Stanišić submits that there are material differences between the Interviews and the *Karadžić* Testimony, he does not identify or cite to such differences.[62] The Appeals Chamber, upon review, has moreover not identified any novel material issues raised by the *Karadžić* Testimony vis-à-vis the Interviews. Second, the Appeals Chamber notes that the Trial Chamber considered the Interviews—which contain evidence on the same material issues as raised in the *Karadžić* Testimony—when making findings with respect to Stanišić's responsibility.[63] Accordingly, the Appeals Chamber does not find that the exclusion of the *Karadžić* Testimony would lead to a miscarriage of justice, in that had it been admitted at trial, it would have affected the verdict.

V. DISPOSITION

25. In light of the foregoing, and pursuant to Rule 115 of the Rules, the Appeals Chamber:

DISMISSES the Motion, Judge Koffi Kumelio A. Afande, dissenting.

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punish paramilitaries); Exhibits P2303, pp 40, 45-46, P2310, pp 18-19, 25 with Annex, *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Mićo Stanišić, 3 Feb. 2014, T. 46343-46344, 46368, 46379, 46380, 46382-46383, 46385-46386, 46399-46400, 46402; Mićo Stanišić, 4 Feb. 2014, T. 46440; Mićo Stanišić, 5 Feb. 2014, T. 46553-46554, 46556 (relating to the position taken by Stanišić that he did everything in his power to abide by the law).

[59] The Appeals Chamber notes, moreover, the submission by the Prosecution that the vast majority of the *Karadžić* Testimony was not compelled, and that Stanišić frequently volunteered information far beyond what was required (see Response, para. 9). The Appeals Chamber also notes that while Stanišić refers to having exercised his statutory right to remain silent and not give testimony in his own trial (see Motion, para. 13; Reply, para. 8), he clarifies that his decision not to testify was guided "in particular" by the fact that his Interviews had been admitted into evidence (see Motion, para. 13. See also Reply, para. 10).

[60] See Reply, paras 9, 17.

[61] Motion, para. 15.

[62] See Reply, paras 16-19. See also Reply, para. 37.

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

Dated this eleventh day of February 2015,
At The Hague,
The Netherlands.

Judge Carmel Agius
Presiding

Judge Koffi Kumelio A. Afanđe appends a dissenting opinion.

[Seal of the Tribunal]

[63] See Trial Judgement, vol. 2, para. 536 ("The Chamber has considered [exhibits P2300-P2313] in the course of its analysis of the evidence pertaining to Mićo Stanišić's responsibility"), and in particular, paras 538, 543, 545-546, 548, 552, 555, 557, 559, 561, 564, 570, 609, 677, 678.

Dissenting Opinion of Judge Koffi Kumelio A. Afanđe

1. I respectfully disagree with the Majority's Decision to dismiss Mićo Stanišić's Second Motion Seeking Admission of Additional Evidence Pursuant to Rule 115 of the Rules of Procedure and Evidence ("Rule 115 Application ").[1]

2. At the outset, it is worth highlighting that Stanišić's Application pursuant to Rule 115 of the Rules is an issue unique to the Tribunal. To my knowledge, never before has the Tribunal considered an application by a convicted person, seeking, upon prior notice to the Appeals Chamber via a Notice of Intent,[2] the admission on appeal pursuant to Rule 115 of the Rules testimony which he has given in another trial as a result of a subpoena,[3] when he elected not to testify in his own trial.[4]

3. To sum up my views, I cannot but borrow the words of the Canadian Jurist Doherty J.A. as he put it in *R. v. Hamilton* that "[a]ppeals take time. Lives go on. Things change. These human realities cannot be ignored when the Court of Appeal is called upon to impose sentences well after the event."[5] However, I also recognise that attention must be equally paid "to the institutional limitations of appellate courts and the important value of finality. Routinely deciding sentence appeals on the basis of after-the-fact developments could both jeopardize the integrity of the criminal process by undermining its finality and surpass the appropriate bounds of appellate review".[6] In my own words, a case is a living body evolving through various stages, such as indictment, pre-trial, trial and appeal until it is brought to a finality, even without excluding the extraordinary means of review after the appellate proceedings. Therefore it is not because the trial stage has concluded, as in the current case, that nothing is allowed to happen pertaining to that case, or that anything that happens after the conclusion of the trial should be regarded as irrelevant to the appellate proceedings. My belief is that there should be a margin of flexibility in determining the overall interests of justice that allows for the balancing of two competing values of taking into account after-the-fact events and the institutional need of bringing the proceedings to finality.

4. In my humble view, the Majority Decision has overlooked the uniqueness of the issue warranting an innovative solution and erroneously considers: (I) the Rule 115 Application to be

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[1] See *Prosecutor v. Mićo Stanišić and Stojan Župljanin*, IT-08-91-A, Decision on Mićo Stanišić's Second Motion Seeking Admission of Additional Evidence Pursuant to Rule 115, 10 February 2015.
[2] *Prosecutor v. Mićo Stanišić and Stojan Župljanin*, IT-08-91-A, Notice of Intent on Behalf of Mićo Stanišić to Seek Admission of Additional Evidence on Appeal Pursuant to Rule 115- If Necessary, 28 April 2014 ("Notice of Intent").
[3] *Prosecutor v. Radovan Karadžić*, IT-95-5/18-T, Decision on Accused's Motion to Subpoena Mićo Stanišić, 13 December 2013.
[4] I do note however the Appeals Chamber decision of *Prosecutor v. Popović et. al*, IT-05-88-A, Decision on Vujadin Popović's Seventh Motion for Admission of Additional Evidence on Appeal Pursuant to Rule 115, 4 December 2014.
[5] *R. v. Hamilton* (2004), 72 O.R. (3d) 1, at para. 166. See also *R. v. Sipos*, 2014 SCC 47, para. 30.

untimely; (II) Stanišić's testimony in the Karadžić case to be available at Stanišić's own trial and (III) the test as applied in paragraph 24 of the Majority Decision to be correct.

I. THE TIMELINESS TEST OF THE RULE 115 APPLICATION

5. The Decision finds that the Rule 115 Application is untimely.[7] I note that Stanišić testified in the Karadžić trial from 3 to 5 February 2014.[8] Therefore, if one were to consider the Rule 115 Application filed on 9 September 2014 alone, there would be no argument against a finding of untimeliness. Indeed, the deadline contained in Rule 115 of the Rules is prescriptive, not indicative. Therefore, since the Rule 115 Application was filed some seven months after Stanišić testified in Karadžić, the Majority Decision would be correct in finding it untimely. However, I believe that the Majority Decision unfairly states that Stanišić provides "no explanation" for the delay except for the Notice of Intent,[9] and that Stanišić at no point sought "remedy from the Appeals Chamber with respect to his inability to comply with the deadlines".[10]

6. It is my considered view that the Notice of Intent file by Stanišić is crucial in determining the timeliness of his Rule 115 Application, and he does in fact provide adequate explanation for a deferred filing.

7. The Notice of Intent was filed on 28 April 2014.[11] A careful review of the Notice of Intent shows that therein Stanišić provided a clear explanation of his approach to filing motions. Particularly in the Notice of Intent, he explicitly set out his intended postponement of the filing of this particular application based on the outcome of his ongoing litigation regarding Judge Harhoff's disqualification which, if successful, would have rendered a Rule 115 application unnecessary.[12] Moreover, Stanišić clearly put the Appeals Chamber on notice that he will file the intended Rule 115 Application "...if and when it becomes necessary".[13]

8. Once Stanišić filed his Notice of Intent, it was for the Appeals Chamber to render a decision or provide guidance. Of course, because the deadline in Rule 115 is prescriptive, a party is not allowed to derogate from it on its own volition. However, the jurisprudence of the Tribunal shows that even in the case of prescriptive deadlines, the Appeals Chamber may, either upon a motion from a party or *proprio motu* direct otherwise, if good cause is shown. A decision by the Appeals

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[6] *R. v. Sipos*, 2014 SCC 47 para. 30 *referring to R. v. Lévesque*, 2000 SCC 47, Š2000Ć 2 S.C.R. 487, para. 20; *R. v. Smith* (2005), 376 A.R. 389 paras. 21-25.
[7] Majority Decision, para. 22.
[8] Majority Decision, para. 3.
[9] Majority Decision, para. 18.
[10] Majority Decision, para. 20.
[11] See Notice of Intent.
[12] Notice of Intent, para. 23.
[13] Notice of Intent, para. 33.

Chamber on Stanišić's filing of the Notice of Intent would therefore have been the best opportunity for the Appeals Chamber to, firstly, state that at this stage of the procedure only "good cause" would allow an extension of the deadlines contained in Rule 115 of the Rules and, secondly, assess whether the reasons provided by Stanišić in his Notice of Intent amounted to "good cause". The Appeals Chamber could have expressed its agreement with the Notice of Intent or directed Stanišić otherwise. Nevertheless, it is my understanding that the Appeals Chamber did not consider the Notice of Intent or give any guidance whatsoever. In my view, the Appeals Chamber's silence on the Notice of Intent can be fairly interpreted to suggest its non-objection to, or even its acceptance of Stanišić's approach. Moreover, it also appears that the Prosecution failed to express any objection to the Notice of Intent at the time. Therefore, Stanišić's diligence to have put the Appeals Chamber on notice, combined with the Appeals Chamber's silence and the Prosecution's non-objection to the Notice of Intent, as elaborated above, justifies in my opinion that the subsequent Rule 115 Application cannot reasonably be considered untimely as found in the Majority Decision.

9. Having erroneously found the Rule 115 Application to be untimely, the Appeals Chamber goes on, *arguendo,* to assess the availability of Stanišić's testimony in the Karadžić case.

II. THE AVAILABILITY TEST OF THE STANIŠIĆ'S TESTIMONY IN THE KARADŽIĆ CASE

10. Specifically, the Majority Decision finds that Stanišić's testimony in the Karadžić case was available at Stanišić's own trial since:

> "The Karadžić Testimony, being Stanišić's own evidence, was always within his personal knowledge and thus always available as such." [footnote omitted].[14]

11. However, by reasoning so the Majority Decision fails to then properly address the issue when applying the "availability" test pursuant to Rule 115 of the Rules. In fact, the "availability" test in the Majority Decision was surprisingly applied to the information used by Stanišić during his testimony in the Karadžić case. According to the Majority Decision, the said information was already available, because it was in the "knowledge" of Stanišić, at the time of his own trial. For a pure casuistic purpose, it may be true that the information that Stanišić resorted to in his testimony in the Karadžić case was already available through his personal knowledge. But it is obvious that the manner in which Stanišić has used that information to answer the questions put to him during his Karadžić testimony and which were then captured in the transcripts are more than the mere information that may have been in his knowledge before his testimony in the Karadžić case. Clearly, the information in Stanišić's personal knowledge should not be conflated with its

[14] Majority Decision, para. 23.

elaborated form in his Karadžić testimony as suggested in the Majority Decision. It is my belief that even though the information used by Stanišić may have been available during his trial to some extent, the evidence that Stanišić seeks to admit via Rule 115 of the Rules did not exist and only came into existence upon his testimony as a result of questions put to him in the Karadžić case.

12. The role of the Appeals Chamber is to render decisions based on the assessment of nothing else but the only evidence before it and not to speculate on the information that a witness may have had in his knowledge, but that was not communicated to the Chamber. Hence, logically, the availability test should have rather been applied to the testimony of Stanišić in the Karadžić case as evidence *per se*, in order to assess whether it was existing as such at the time of Stanišić's own trial and whether any due diligence could have led to discovered it. Of course, it is obvious that the testimony as generated during the Karadžić case would not have passed the test of having been available as such at trial, as it was created after the closing and sentencing in the Stanišić's trial. In my opinion, the testimony of Stanišić in the Karadžić case can only be considered available from the time at which Stanišić testified in the Karadžić trial.

13. Drawing from legal provisions and case law in some national legal systems, the testimony of Stanišić in the Karadžić case amounts to "fresh evidence". The "fresh evidence" test at the national level assists in considering the issue of availability here. Evidence is "fresh" if it either did not exist at the time of the trial, or could not with reasonable diligence have been discovered at that time. By nature, the testimony of Stanišić in the Karadžić case, consisting as it does of the transcripts, can be nothing but "fresh" evidence since it is created *a posteriori* to Stanišić's own trial and could not have existed or no diligence would have led to discover it during that trial. It is my belief that the fact that the testimony of Stanišić in the Karadžić case took place after Stanišić's own trial also amounts to a reasonable explanation for the failure to have adduced it. It imports to note that the test of "reasonable explanation" is provided for in such circumstances of "fresh evidence" in England and Wales, under section 23(2)(d) Criminal Appeal Act 1968, and also in Scotland pursuant to section 17 of Crime and Punishment (Scotland) Act 1997.[15]

[15] It is pertinent to note that in both jurisdictions the "reasonable explanation" test must be weighed against a court's overriding discretion to receive fresh evidence if it thinks it necessary or expedient in the interests of justice to do so. See *Pendleton, R v.* [2001] UKHL 66, *Gallacher v. H.M. Advocate*, 1951 S.L.T. 158, *Campbell v. H.M. Advocate*, 1998 S.C.C.R. 214. I further note that in the United Kingdom House of Lords case of *Pendleton v. R.* it was stated that close attention must be paid to the explanation advanced for failing to adduce the evidence at the trial, since it is the clear duty of a criminal defendant to advance any defence and call any evidence on which he wishes to rely at the trial. It is not permissible to keep any available defence or any available evidence in reserve for deployment in the Court of Appeal. Thus the practice of the court is to require a full explanation of the reasons for not adducing the evidence at the trial. In Scotland, the term "reasonable explanation" should be interpreted objectively. See *Campbell v. H.M. Advocate*, 1998 S.C.C.R. 214. It is also unlikely that a tactical decision to withhold evidence at trial will be considered a reasonable explanation. See *Harper v. H.M. Advocate*, 2005 S.C.C.R. 245. Although the Scottish Courts have not wholly excluded tactical decisions as a bar to the reasonable explanation test. See *Campbell v. H.M. Advocate*, 1998 S.C.C.R. 214.

14. In support, I wish to invoke the case of *Ladd v. Marshall*,[16] before the Civil Appeals Court of England and Wales, where a witness admitted to have lied at trial and wished to put forward different evidence on appeal. If the reasoning in the Majority Decision were to be applied, the said request to put forward different evidence on appeal should have been denied on the ground that the different evidence that the witness want to put forward on appeal was already existing and available in her personal knowledge at trial, when she chose to not tell the truth. However, it was not the *availability* of the evidence at trial as information in the knowledge of the witness (akin to "personal knowledge" as stated in the Majority Decision) that proved fatal to the application. It was rather the witnesses' *credibility* having admitted to have lied at trial.[17]

15. If the position were to be followed as set out above pertaining to the timeliness of the Rule 115 Application taking into account Stanišić's Notice of Intent and the "freshness" of the evidence in the testimony of Stanišić in the Karadžić case as an element of its non-availability at the time of Stanišić's own trial, the testimony of Stanišić in the Karadžić case could be tendered as additional evidence. The Appeals Chamber would have then had to consider the testimony of Stanišić in the Karadžić case based on a more appropriate and correct standard.

III. THE CORRECTNESS OF THE APPLICABLE STANDARD

16. I am of the view that the standard applied at paragraph 24 of the Majority Decision regarding the admissibility of the transcripts of the testimony of Stanišić in the Karadžić case seems to be at odds with the provision of Rule 115 of the Rules and the Tribunal's jurisprudence that elaborates on the elements of relevancy, credibility and the impact on the verdict. The Majority Decision instead erroneously focuses on (a) whether the Rule 115 Application identifies material differences between Stanišić's pre-trial interviews and the testimony of Stanišić in the Karadžić case, and (b) that the Trial Chamber considered Stanišić's pre-trial interviews, the content of which is similar to that of the testimony of Stanišić in the Karadžić case, when making findings with respect to Stanišić's criminal responsibility.

17. The approach of national jurisdictions where a Court of Appeal can hear evidence, subject to it being considered to be "fresh" and not available to be adduced in the original proceedings supports my finding of legal error on the part of the Majority Decision. Furthermore, the test to be applied in national law mirrors, more or less, the test of relevancy, credibility and impact on the verdict as set in Rule 115 of the Rules. For example, in England and Wales, under sections 23(1)(c) and 23(2)(d) of the Criminal Appeal Act 1968, the test is that the fresh evidence (a) appears capable

[16] *Ladd v. Marshall* [1954] EWCA Civ 1.
[17] See *Ladd v. Marshall* [1954] EWCA Civ 1.

of belief, (b) may afford any ground for allowing the appeal, (c) would have been admissible, (d) is an issue which is the subject of the appeal and (e) there is a reasonable explanation for the failure to adduce it. In Scotland pursuant to section 17 of the Crime and Punishment (Scotland) Act 1997, the evidence can be introduced on appeal where there is a "reasonable explanation" for its failure to be considered at trial. In Australia in order to be admitted, the evidence must be material, and of such weight that the appellate court considers that if it had been placed before the jury together with the other evidence, a different verdict might reasonably have resulted.[18] Specifically, section 359(c) of the South Australia Criminal Law Consolidation Act 1935 states that the Court of Appeal may receive the evidence, if tendered, of any witness (including the appellant) who is a competent but not compellable witness.[19] In Canada, the standard for the admission of fresh evidence, is that subject to the availability and the due diligence test, which the testimony of Stanišić in the Karadžić case in my view has passed, the evidence must be (a) relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial, (b) credible in the sense that it is reasonably capable of belief, and (c) such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.[20] Moreover, given that the evidence in the said testimony was created after the sentencing in Stanišić's own trial an additional test offered by the Canadian law may be of importance. According to that test, where the evidence is post-sentence the additional requirement is that the evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue relating to the sentence.[21]

IV. THE LIKELIHOOD OF ABUSE OF PROCESS

18. Even though the Majority Decision has not raised it, the issue of "abuse of process" needs to be discussed for the purpose of comprehensiveness. Based on the foregoing and taking into account the unforeseeability of the sequence of procedural events in both Stanišić's own case and the Karadžić case, I would express my reservation toward any suggestion of an appearance of abuse of process on the part of Stanišić. "Abuse of process" is understood here as "the use of legal process by illegal, malicious, or perverted means with the aim to contravene the court's sense of justice". A finding of "abuse of process" is a fact-based assessment that can vary from one case or situation to another and, as such requires to be supported by a well reasoned opinion. It is not, and could not be, in dispute that Stanišić chose not to testify in his own case, because by doing so he has exercised the right to remain silent, that the basic provisions of the Tribunal and International Human Rights

[18] http://www.alrc.gov.au/publications/45-post-conviction-use-dna-evidence/avenues-obtaining-review-conviction#_ftn27.
[19] The reference to "including the appellant" is contained in the statute itself. See s.359(c) South Australia Criminal Law Consolidation Act 1935.
[20] *R. v. Sipos*, 2014 SCC 47, paras. 28-31; *R. v. Lévesque*, 2000 SCC 47; *R v. Palmer*, [1980] 1 S.C.R. 759.
[21] *R. v. Sipos*, 2014 SCC 47, paras. 28-31; *R. v. Lévesque*, 2000 SCC 47, para. 35.

Instruments avail to him.[22] Accordingly, what occurred post-trial and could be seen to have undermined Stanišić's very right to remain silent, cannot fairly be connected to his right to remain silent at his trial, without giving the wrong impression that his decision to remain silent as of right is being held against him. What occurred after his trial was that, after having refused to voluntary testify in the Karadžić trial, Stanišić was subpoenaed by the Trial Chamber which granted the Karadžić subpoena request to that effect and Stanišić was compelled to testifying. Simply put, I find the likelihood of this post-trial scenario being an abuse of process so remote as to nullify any such suggestion.

V. CONCLUSION

19. In my view, the Majority's failure to properly consider the timeliness of the Stanišić's application pursuant to Rule 115 of the Rules and the availability of the testimony of Stanišić in the Karadžić case, erroneously prevented the Majority Decision going on to fully and duly explore the relevancy, credibility, impact on the verdict, and decisiveness relating to sentence of the evidence in the testimony of Stanišić in the Karadžić trial, for which the admission is sought as additional evidence pursuant to Rule 115 of the Rules.

20. For all these reasons, the Majority's decision to dismiss the Rule 115 Application cannot be regarded as well informed, substantiated, reasoned and safe of any factual and legal error.

Judge Koffi Kumelio A. Afande

[22] I note Stanišić's Pre-Trial Brief, para. 7 invoking Article 21(4) (g) of the Statute. See also International Covenant on Civil and Political Rights, Article 14 (3) (g), European Convention on Human Rights Article 6, specifically *Murray v. UK*, (1996) 22 EHRR 29, at para. 45, American Convention on Human Rights, Article 8 (2) (g).