

**UNITED
NATIONS**

IT-08-91-PT
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22 APRIL 2009

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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-PT
Date: 22 April 2009
Original: English

IN TRIAL CHAMBER III

Before: **Judge Iain Bonomy, Presiding**
Judge Ole Bjørn Støle
Judge Frederik Harhoff

Registrar: **Mr John Hocking, Acting Registrar**

Decision: **22 April 2009**

PROSECUTOR

v.

**MIĆO STANIŠIĆ
STOJAN ŽUPLJANIN**

PUBLIC

DECISION ON DEFENCE MOTIONS FOR CERTIFICATION

The Office of the Prosecutor:

Mr Thomas Hannis
Ms Joanna Korner

Counsel for the Accused:

Mr Slobodan Zečević and Mr Slobodan Cvijetić for Mićo Stanišić
Mr Tomislav Višnjić and Mr Igor Pantelić for Stojan Župljanin

THIS TRIAL 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 (“Tribunal”) is seised of Stojan Župljanin’s “Motion for Certification to Appeal the Trial Chamber’s Decision of 19 March 2009 on the Form of the Indictment”, filed on 25 March 2009 (“Motion”) and of Mićo Stanišić’s Joinder thereof (“Joinder Motion”),¹ filed on 27 March 2009, and hereby renders its decision thereon.

I. BACKGROUND

1. On 27 October 2008, the Stanišić Defence filed a motion regarding the form of the Indictment and a request for additional and adequate particulars² to which the Prosecution filed a response on 10 November 2008.³
2. On 17 November 2008, the Župljanin Defence filed a motion challenging the consolidated Indictment.⁴ The Prosecution responded on 1 December 2008.⁵ On 9 December 2008, the Župljanin Defence filed a reply to the response.⁶
3. On 19 March 2009, the Trial Chamber rendered its Decision on the Defence motions (“Impugned Decision”).⁷
4. On 25 and 27 March 2009 respectively, the Župljanin and Stanišić Defence filed motions for certification of this Decision. The Prosecution responded to these motions on 3 April 2009.⁸ On 14

¹ *Prosecutor v. Mićo Stanišić and Stojan Župljanin*, Case No. IT-08-91-PT, “Submission by Mr. Stanišić to Join Stojan Župljanin Motion for Certification to Appeal the Trial Chamber’s Decision on 19 March 2009 on the Form of the Indictment, 27 March 2009 (“Stanišić Joinder Motion”).

² *Prosecutor v. Mićo Stanišić and Stojan Župljanin*, Case No. IT-08-91-PT, “Mićo Stanišić Defence Motion Regarding Form of the Indictment and Request for Additional and Adequate Particulars”, 27 October 2009.

³ *Prosecutor v. Mićo Stanišić and Stojan Župljanin*, Case No. IT-08-91-PT, “Prosecution Response to Mićo Stanišić Defence Motion Regarding Form of the Indictment and Request for Additional and Adequate Particulars”, 10 November 2008.

⁴ *Prosecutor v. Mićo Stanišić and Stojan Župljanin*, Case No. IT-08-91-PT, “Stojan Župljanin’s Motion Challenging the Consolidated Indictment (and Motion for Exceeding the Prescribed Word Limit)”, 17 November 2008.

⁵ *Prosecutor v. Mićo Stanišić and Stojan Župljanin*, Case No. IT-08-91-PT, “Prosecution Response to Stojan Župljanin’s Motion Challenging the Consolidated Indictment (and Motion for Exceeding the Prescribed Word Limit)”, 1 December 2008.

⁶ *Prosecutor v. Mićo Stanišić and Stojan Župljanin*, Case No. IT-08-91-PT, “Stojan Župljanin’s Reply to the Prosecution’s Response on the 29 September 2008 Indictment”, 9 December 2008.

⁷ *Prosecutor v. Mićo Stanišić and Stojan Župljanin*, Case No. IT-08-91-PT, “Decision on Mićo Stanišić and Stojan Župljanin’s Motions on Form of the Indictment”, 19 March 2009 (“Impugned Decision”).

⁸ *Prosecutor v. Mićo Stanišić and Stojan Župljanin*, Case No. IT-08-91-PT, “Prosecution’s Response to Stojan Župljanin’s Motion for Certification to Appeal the Trial Chamber’s Decision of 19 March 2009 on the Form of the Indictment, and to Mićo Stanišić’s Submission to Join the Motion”, 3 April 2009 (“Response”).

April 1009, the Župljanin Defence filed a request for leave to reply to the Response and a reply to the Response.⁹ Leave to reply shall be granted.

II. SUBMISSIONS

5. The Župljanin Defence seeks certification to appeal two aspects of the Impugned Decision.¹⁰ Firstly, it submits that the Trial Chamber erred in law when finding that Tribunal jurisprudence establishes that an accused can be held responsible for participation in a joint criminal enterprise (“JCE”) by virtue of omissions.¹¹ It argues that the question of whether an accused may be held responsible for participation in a JCE through omission is one that impacts upon the expeditiousness of trial, as an accused is entitled to receive adequate and clear notice of the forms of liability with which he is charged.¹² It further submits that the fundamental issue at stake is whether or not the Tribunal has jurisdiction over omissions in the manner the prosecution has pleaded, and that therefore, resolution of this issue impacts upon the outcome of the trial.¹³

6. Secondly, the Župljanin Defence submits that the Trial Chamber’s holding in the Impugned Decision that the Prosecution is not required to provide further identification of “local Bosnian Serbs” for the purposes of the Indictment effectively provides the Prosecution with a carte blanche to “mould its case … as the trial unfolds” resulting, *inter alia*, in a lack of notice to the Accused Župljanin of the case he must answer.¹⁴ It submits that the Trial Chamber approved a “vastly expanded and intolerably unclear indictment”, which may adversely affect the expeditiousness as well as the fairness of trial.¹⁵ A resolution by the Appeals Chamber at this stage of the proceedings would materially advance the proceedings, it submits, by “striking out” a category of individuals for whose acts the Accused is alleged to be criminally responsible.¹⁶

7. By its Joinder Motion, the Stanišić Defence adopts and joins the submissions by the Župljanin Defence.

⁹ *Prosecutor v. Mićo Stanišić and Stojan Župljanin*, Case No. IT-08-91-PT, “Stojan Župljanin’s Proposed Reply to the Prosecution’s Response on Župljanin’s Motion for Certification to Appeal the Trial Chamber’s Decision of 19 March 2009 on the Form of the Indictment”, 14 April 2009 (“Reply”).

¹⁰ Motion, para 2.

¹¹ Motion, paras 3, 10.

¹² Motion, para 9.

¹³ Motion, para 10. The Chamber notes that the Župljanin Defence raised the issue of alleged lack of jurisdiction of the Tribunal with respect to omissions as pleaded in paragraph 12 of the Indictment for the first time in their Motion for certification. This issue had not been framed as a jurisdictional issue in the Župljanin Defence’s original motion, nor in its reply to the Prosecution’s response to that motion, in which it appears to have argued an error of law instead.

¹⁴ Motion, paras 2, 4.

¹⁵ Motion, para 15.

¹⁶ Motion, para 16.

8. The Prosecution submits that the Motion fails to meet the requirements for certification. As regards the question of the participation in a JCE by omission, it submits that there is settled case-law that an omission or failure to act, like a positive act, can contribute to the common criminal purpose of a JCE.¹⁷ Further, it argues that the Defence has not demonstrated that this issue would affect the fair and expeditious conduct of proceedings or outcome of trial, or that the immediate resolution of the issue would impact upon the duration of trial.¹⁸

9. With regard to the issue of sufficient identification of “local Bosnian Serbs” in the Indictment, the Prosecution submits that the phrase is qualified and does not stand on its own; these individuals are alleged, in the Indictment, to be acting under the instruction or pursuant to the direction of named Serb forces.¹⁹ In addition, the Prosecution submits, it has put the Defence on notice of the materials it will intend to rely upon to prove this allegation.²⁰ Finally, it submits that instead of materially advancing the proceedings, further adjudication of this issue by the Appeals Chamber would only serve to delay the proceedings.²¹

10. In its Reply, the Župljanin Defence argues that the Prosecution, in its Response, misrepresented a fundamental issue of the law in that the three Appeals Chamber Judgements to which it refers do not support its proposition that an omission can constitute the *actus reus* of participation in a JCE.²² While the Župljanin Defence concede that the passage in the Kvočka Appeals Judgement offers “limited support for the proposition”, it argues that this articulation of the law has since been rejected by the Brđanin Appeals Chamber, and moreover, that this case may be distinguished from the Accused’s case in that *Kvočka* was a case that alleged only the “systemic” form of JCE, which has different elements than the other two forms.²³ Finally, it submits that an immediate resolution of the issue by the Appeals Chamber is necessary because “[a] trial conducted on the basis that any omission could constitute the *actus reus* of participation in a JCE (whether there is a legal duty to act or not) would be intolerably large and unclear”.²⁴

III. APPLICABLE LAW

11. The Impugned Decision was delivered pursuant to Rule 72 of the Rules of Procedure and Evidence (“Rules”), concerning preliminary motions, such as motions challenging jurisdiction and motions alleging defects in the form of the indictment. Rule 72(B) provides that decisions on

¹⁷ Response, para 9.

¹⁸ Response, para 10.

¹⁹ Response, para 13.

²⁰ Response, para 15.

²¹ Response, para 16.

²² Reply, paras 1, 3, 12.

²³ Reply, para 10-11.

preliminary motions are without interlocutory appeal, save in the case of motions challenging jurisdiction and in other cases where certification has been granted by the Trial Chamber. The criteria for granting certification set out in Rule 72(B)(ii) are, however, identical to those set out in Rule 73(B), which governs the exercise of the Trial Chamber's discretion to grant certification for an interlocutory appeal.²⁵ The case-law regarding the latter Rule is thus of relevance to the consideration of motions for certification to appeal decisions on preliminary motions. The effect of Rule 73(B) is to preclude certification unless the conditions set out in this Rule are satisfied, but, even where these conditions have been satisfied, certification remains in the discretion of the Trial Chamber.²⁶ Rule 73(B) requires that two criteria be satisfied before a Trial Chamber may certify a decision for interlocutory appeal: a) the decision in question involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and b) an immediate resolution of the issue by the Appeals Chamber may, in the opinion of the Trial Chamber, materially advance the proceedings. A request for certification is not concerned with whether a decision was correctly reasoned or not, which is a matter for appeal whether interlocutory or one after the final judgement has been rendered.²⁷

IV. DISCUSSION

12. The Chamber recalls that the Accused are charged with commission through participation in a JCE pursuant to Article 7(1) of the Statute. The Indictment sets out the manner in which the Accused are alleged to have participated in the JCE, including a failure to protect the civilian population²⁸ and encouraging and facilitating the commission of crimes by not taking adequate steps to investigate, arrest and/or punish the perpetrators of those crimes.²⁹ There is adequate authority to support the proposition that a failure to act – especially in cases where there is a legal duty to do so - can lead to criminal responsibility both under Article 7(1) and 7(3) of the Statute.³⁰

²⁴ Reply, para 13.

²⁵ *Prosecutor v. Zdravko Tolimir*, Case No. IT-05-88/2-PT, "Decision on Tolimir's Request for Leave to File an Interlocutory Appeal", 19 February 2009, p 4; *Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Case No. IT-04-82-PT, "Decision on Motion for Certification", 17 November 2006, p 4 fn 19.

²⁶ *Prosecutor v Pavle Strugar*, Case No. IT-01-42-T, "Decision on Defence Motion for Certification", 17 June 2004, para 2.

²⁷ *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, "Decision on Prosecution Motion for Certification of Trial Chamber Decision on Prosecution Motion for Voir Dire Proceedings.", 20 June 2005 para 4; *Prosecutor v. Ivan Čermak and Mladen Markač*; *Prosecutor v. Ante Gotovina*, Case Nos. IT-03-73-PT; IT-01-45-PT, "Decision on Defence Application for Certification to Appeal Decision on the Prosecution's Consolidated Motion to Amend the Indictment and for Joinder", 14 August 2006 , para 10; *Prosecutor v. Milan Milutinović et al*, Case No. IT-05-87-T, "Decision on Defence Application for Certification of Interlocutory Appeal of Rule 98bis Decision", 14 June 2007, para 4.

²⁸ Indictment, paras 11(g) and 12(f) respectively.

²⁹ Indictment, paras 11(h) and 12(g) respectively.

³⁰ *Prosecutor v. Momčilo Krajišnik*, Case no. IT-00-39-A, Appeal Judgement, 17 March 2009, para 217 and footnote 537; *Prosecutor v. Stanislav Galic*, Case no. IT-98-29-A, Appeal Judgement, 30 November 2006, paras 175-178; *Prosecutor v. Miroslav Kvočka*, Case no. IT-98-30/1-A, Judgement, 28 February 2005, para 187; *Prosecutor v. Tihomir*

The pleading of the manner of participation of the Accused in the alleged JCE is consistent with this authority. The question of whether an omission by an accused contributes to the common purpose of a JCE significantly enough to be regarded as participation in that JCE³¹ and thus give rise to individual criminal responsibility is a matter of evidence. The Chamber also notes that this is only one of a number of modes of participation in the alleged JCE by the Accused. The final determination of the question whether they may be held responsible for the charged crimes on account of their participation in the alleged JCE will be made in light of a review of all available evidence adduced at trial with respect to the acts and omissions listed in the Indictment. The issue of whether an omission is charged in the Indictment in relation to the alleged JCE cannot, in the view of this Chamber, “significantly affect the fair and expeditious conduct of the proceedings or the outcome of trial”, as required by the Rule.

13. With regard to the issue of adequate identification of “local Bosnian Serbs” the Chamber considers that sufficient notice of the Prosecution case thereon is given in the Indictment and that the precise identity of these individuals, the question to what extent they are indeed linked to any of the named Serb forces in the Indictment, and the degree to which they contributed to the alleged JCE are evidentiary matters to be dealt with during trial. Moreover, the Prosecution will be confined to the witnesses and exhibits of which they have given notice in this regard. As such, the Chamber is of the view that the issue identified by the Defence would not significantly affect either the expeditiousness or fairness of the trial or its outcome.

14. In addition, in light of the imminent commencement of the trial, it is the view of this Chamber that the Appeals Chamber’s consideration of the matter would delay the start of trial and would therefore not materially advance the proceedings.

V. DISPOSITION

15. For the foregoing reasons, and pursuant to Rules 72(B)(ii) and 73(B), and 126bis of the Rules, the Chamber

- GRANTS the Župljanin Defence leave to Reply; and

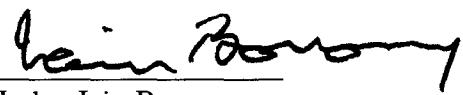
- DENIES the Župljanin Motion and the Stanišić Joinder Motion.

³¹ *Blaskic*, Case no. IT-85-14-A, Appeal Judgement, 28 July 2004, apras 660-663; *see also Prosecutor v. Milan Milutinović et al*, Case no. IT-05-87-T, “Oral Decision on Motions for Acquittal pursuant to Rule 98bis”, 18 May 2007, T 12776; *Prosecutor v. Jean Mpambara*, Case no. ICTR-01-65-T, Judgement, 11 September 2006, para 24.

³¹ *Prosecutor v. Brđanin*, Case no. IT-99-36-A, Appeals Chamber Judgement, 3 April 2007, paragraph 430.

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

Dated this twenty-second day of April 2009
At The Hague
The Netherlands


Judge Iain Bonomy
Judge Iain Bonomy
Presiding

[Seal of the Tribunal]