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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: IT-98-29-AR73

Date: 14 December 2001

Original: English

BEFORE A BENCH OF THREE JUDGES OF THE APPEALS CHAMBER

Before: Judge David Hunt
Judge Mehmet Güney
Judge Theodor Meron

Registrar: Mr Hans Holthuis

Decision of: 14 December 2001

PROSECUTOR

v

Stanislav GALIĆ

DECISION ON APPLICATION BY PROSECUTION FOR LEAVE TO APPEAL

Office of the Prosecutor:

Mr Mark Ierace, Senior Trial Attorney

Counsel for the Defence:

Ms Mara Pilipović
Mr S A Piletta-Zanin

1. Pursuant to Rule 73(D) of the Tribunal's Rules of Procedure and Evidence ("Rules"), the Office of the Prosecutor ("prosecution") seeks leave to appeal from two orders made by Trial Chamber I.[1] The orders were made following the Pre-Trial Conference held on 8 and 12 November last.[2] The first order restricted the prosecution's case-in-chief to a maximum of 280 hours, such period to include the prosecution's opening statement, the examination and re-examination of all its witnesses and any questions asked by the judges, but not to include any on-site visit of the Trial Chamber to Sarajevo.[3] The second order was the rejection of documents or other evidentiary material which had not by the date of the Decision been disclosed by the prosecution to the Defence if that material was known or it had been made available to the prosecution prior to 1 October 2001, "unless otherwise later decided by the Trial Chamber seized of the case".[4]

2. Two preliminary points arise for determination.

(1) (a) Neither of the orders made by the Trial Chamber of which the prosecution complains had been sought by Stanislav Galić, the accused ("Galić"). Each was made *proprio motu* by the Trial Chamber. Although the Defence reminded the Trial Chamber that it had the power pursuant to Rule 65*ter*(N) to "not accept some or all of the documents or materials that were submitted by the Prosecutor outside the delay of the time period of six weeks",[5] the relief based upon Rule 65*ter*(N) which was formally sought by Galić was only for more time for the parties to prepare for trial.[6]

(b) The prosecution has therefore very properly raised for determination an issue as to whether Rule 73, which is concerned with decisions upon all motions other than preliminary motions under Rule 72, is the appropriate rule governing its right to appeal from these two orders. Although no motion was made by Galić for the relief which was granted, this Bench considers that:

(i) the relief granted *proprio motu* was nevertheless relief which may have been sought pursuant to Rule 73,

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1 Prosecution's Application for Leave to File an Interlocutory Appeal, 23 Nov 2001 [date-stamped 26 Nov 2001] ("Motion").

2 Decision, 16 Nov 2001 ("Decision").

3 Decision, Order (ii). Although not expressly stated, the 280 hours does not include the time taken in cross-examination of the prosecution witnesses.

4 *Ibid,* Order (vi).

5 Status Conference, Transcript p 504. The reference to six weeks appears to be to the minimum time prior to the Pre-Trial Conference before which the prosecution was to file its pre-trial brief.

6 *Ibid,* Transcript p 554.

(ii) the fact that it was granted *proprio motu* cannot reasonably be interpreted as denying the prosecution the right to seek leave to appeal from the orders made, and

(iii) the provisions of Rule 73(D) are accordingly the appropriate ones to apply to this application for leave to appeal.

(2) (a) The Motion was submitted to the Tribunal's Registry for filing at approximately 5.35 pm on 23 November, the last of the seven days within which an application for leave to appeal pursuant to Rule 73(D) must be filed.[7] The Registry date-stamped the document "26 November 2001", not "23 November 2001". The prosecution seeks an extension of time within which to file its Motion.[8] It explains its delay as a misunderstanding that, having been informed by the Registry that the latest time documents would be received for filing was 5.30 pm, documents filed within that time would still be date-stamped the day of physical production for filing.[9]

(b) The Directive for the Registry – Judicial Department – Court Management and Support Services,[10] provides, by Article 25, that the date of filing is the date on which the document was placed in the custody of the Registry, and that (subject to Articles 26 through 29 of the Directive) the Registry shall date-stamp the document with the date of its "submission [...] to the Registry". Article 27, as it appears in IT/121,[11] provides that the normal business hours of the Registry are 9.00 am to 5.30 pm, and that permission is required for "after-hours" filings.

(c) It is understandable, in those circumstances, that anyone filing a document before 5.30 pm would entertain the belief that his document would be date-stamped the day on which it was submitted to the Registry in accordance with Article 25. However, on 23 May 2000, the Co-ordinator of Court Management and Support

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[7] Rule 73(E).

[8] Prosecution's Request for an Extension of Time for the Filing of its Application for Leave to File an Interlocutory Appeal, 26 Nov 2001 ("Request").

[9] Request, par 4.

[10] IT/121, 1 Mar 1997 ("Directive").

[11] IT Documents are available on the M Drive of the Tribunal's computer system, under "Basic Documents". Some IT Documents, such as IT/32 (Rules of Procedure and Evidence), IT/38 (Rules of Detention) and IT/73 (Directive on the Assignment of Counsel) are included within the Tribunal's "Basic Documents", as published in the 2001 collection, and in the "Basic Documents" section of the Tribunal's web site. The latter also includes other IT Documents, such as IT/125 (The Code of Professional Conduct for Defence Counsel Appearing before the International Tribunal) and IT/144 (The Code of Ethics for Interpreters and Translators Employed by the International Criminal Tribunal for the Former Yugoslavia). All of these documents remain on the M Drive, and, if amended, a revised version of the IT Document is included on the M Drive as well. No such amendment has been made to IT/121 (this appears only on the M Drive), which retains Article 27 in its original form.

Services, by a document headed "Internal Memorandum" and issued "through" the Registrar, announced that, as from 1 June 2000, Article 27 had been amended to provide that the opening hours for filing documents would be from 9.00 am to 4.00 pm, that no documents could be filed after hours and that documents submitted for after hours filing would be filed during the opening hours of the next working day.[12] Article 25 has not been amended. The amendment to Article 27 was not incorporated in IT/121.

(d) The request for an extension of time is made pursuant to Rule 127(B), which applies Rule 127(A) to applications for leave to appeal. Rule 127(A) permits the grant, upon good cause being shown, of an extension of a time prescribed by the Rules for doing an act *before* the expiration of that time, or a recognition of the act as validly done where the act was done *after* the expiration of that time. An application for an extension of time may appropriately be interpreted as including an application for recognition of the act as validly done.[13] The Motion was filed within five minutes of the time specified by Article 27 as it appears in IT/121. The extra delay involved of five minutes was *de minimis*. Ignorance of such provisions as the amended form of Article 27 of the Directive is not an excuse, but it may be the basis for the grant of leniency where there has been no prejudice caused to the other party. The lateness of the filing has not delayed the resolution of the Motion, nor the conduct of the trial, which commenced on 3 December.[14] This Bench is satisfied that, in the circumstances outlined, good cause has been established for recognising the filing of the Motion as an act validly done.

3. The first order, restricting the prosecution case-in chief to a maximum of 280 hours, was made pursuant to Rule 73*bis*(E) which permits the Trial Chamber to determine the time available for the prosecution to present evidence.[15] Rule 73*bis*(F) permits the Trial Chamber

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[12] This "Internal Memorandum" was sent to the Judges, all Senior Legal Officers, the Prosecutor and her senior staff and all Defence Counsel.

[13] *Prosecutor v Kupreškić et al*, Case IT-95-16-AR65.3, Decision on Application for Leave to Appeal, 29 Sept 1999, p 2; *Prosecutor v Kupreškić et al*, Case IT-95-16-A, Order on Application for Extension of Time, 13 Sept 2000, p 2.

[14] Galić has objected to the extension of time sought by the prosecution, but makes no reference to Rule 127. He has also submitted that leave to appeal should be refused, but he does not add anything relevant to what was said at the Status Conference: Réponse Apportée par la Défense aux Requêtes du Procureur en date du 23 Novembre 2001 et 26 Novembre 2001, Mais Déposée Après les Délais Utiles, 7 décembre 2001 "avant 16 heures".

[15] The Pre-Trial Judge may conduct the Pre-Trial Conference: Rule 65*ter*(C).

during the trial to grant a request for additional time to present evidence "if this is in the interests of justice".

4. The prosecution case is that Galić is responsible as the Commander of the Sarajevo Romanija Corps, part of the Bosnian Serb Army, for a military strategy implemented by the Sarajevo Romanija Corps over a long period which used shelling and sniping to kill, maim, wound and terrorise the civilian inhabitants of Sarajevo, killing and wounding thousands of civilians of both sexes and all ages, including children and the elderly. The events charged have often been referred to as the "siege" of Sarajevo. The real issue between the parties discussed at the Pre-Trial Conference appears to have depended not so much upon whether the incidents of shelling and sniping upon which the prosecution case depended occurred, as upon the direction from which the shelling and sniping originated. Yet the discussion (at times confused) as to the number of witnesses to be called by the prosecution did not focus upon how many witnesses were necessary for that more limited issue. There were concessions made by the prosecution that some witnesses it had proposed to call were repetitious. The prosecution stated, without contradiction, that the Defence had rejected its proposal to tender statements pursuant to Rule 92*bis* in relation to the basic incidents of shelling and sniping upon which its case depended.[16] The Pre-Trial Judge's response was that the Trial Chamber which was to hear the case could deal with that problem by requiring the Defence to provide reasons why it had done so.[17]

5. The prosecution pointed out that, in order to prove its case,[18] it had to establish a large number of shelling and sniping incidents which took place over a long period,[19] that these incidents did not lend themselves easily to the identification of those who carried out the shelling and snipping and that its case was a circumstantial one.[20] Expert evidence was

16 Status Conference, 8 Nov 2001, Transcript p 482.
17 *Ibid*, p 483. The reference is to Rule 65*ter*(F)(iii).
18 *Ibid*, p 485.
19 There are thirty-two incidents now nominated in the Schedules to the indictment, but the discussion at the Status Conference appears to have contemplated that the prosecution would also seek to prove unscheduled incidents as well. There has been no examination by this Bench of its right to do so: cf *Prosecutor v Brđanin & Talić*, Case IT-99-36-PT, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26 June 2001, pars 60-63; *Prosecutor v Kupreškić et al*, Case IT-95-16-A, Appeal Judgment, pars 113-114. That is a matter for the new Trial Chamber to determine.
20 In such a case, the prosecution must establish that the guilt of the accused is the only reasonable conclusion available from the evidence; if there is another conclusion which is also reasonably open from the evidence, and which is consistent with the innocence of the accused, he must be acquitted: *Prosecutor v Delalić et al*, Case IT-96-21-A, Judgment, par 458.

needed to establish the direction from which the shelling and sniping originated. The Pre-Trial Judge drew attention to the possibility that, if the Defence did not accept the report of a prosecution expert, the Trial Chamber could limit the time it could spend on the cross-examination of the expert, or perhaps that the Trial Chamber could restrict the Defence to producing contradictory evidence from its own expert – apparently without any cross-examination of the prosecution's expert.[21] Such a course would hardly be likely to produce a clear issue between the parties, and it would be in breach of Rule 90(H)(ii) (which requires a party to put the nature of his case to his opponent's witnesses in cross-examination where it is in contradiction of the evidence of those witnesses). The Defence stated that it required the prosecution to establish the authenticity of all the medical records relating to the victims of the shelling and sniping, as well as the authenticity of the maps upon which it relied.[22]

6. When the Pre-Trial Conference resumed four days later, the prosecution indicated that it had deleted twenty-nine persons from its initial witness list of 217, and that it would produce statements from sixteen of the remaining witnesses pursuant to Rule 92*bis*, in addition to the twenty-two witnesses in relation to which it had already made an application under Rule 92*bis*. There was no further discussion in relation to the identity of the real issues in dispute, and no discussion in relation to any restriction to be imposed upon the length of the prosecution case.

7. Rule 73(E) is a powerful tool for preventing excessive and unnecessary time being taken by the prosecution, and it is intended to ensure that the prosecution litigates only those issues which are really in dispute and which are necessary to determine for the purposes of its case. Its introduction followed serious excesses by prosecution teams in the past. Taken by itself, or in conjunction with Rule 73*bis*(C) (which permits the Trial Chamber to set for itself the number of witnesses the prosecution may call), Rule 73*bis*(E) requires the Trial Chamber to consider with care whether the issues really in dispute have been clearly identified so that a proper assessment of the time needed for the prosecution can be made. Unfortunately, as the brief description of the Pre-Trial Conference demonstrates, it was anything but clear what the final issues in dispute were to be at the time when the Trial Chamber imposed the restriction

[21] Status Conference, 8 Nov 2001, Transcript pp 493-494.
[22] *Ibid*, pp 500-501.

upon the length of the prosecution case. The Trial Chamber's discretion in fixing that restriction therefore miscarried, and error has been established.

8. The second order, rejecting evidence which had been known to or made available to the prosecution prior to 1 October 2001 if it had not been disclosed by the date of the Decision (16 November 2001) was made pursuant to Rule 65*ter*(N). The prosecution had sought to justify its non-disclosure of the material in question by the delays in translation of its documents.[23] This is a constant problem within the Tribunal, but no inquiry was made of the prosecution as to when they had submitted the documents for translation, a fact which was vital to the nature of the sanction to be imposed.

9. Moreover, as already stated, the relief sought by Galić pursuant to that Rule was not for the evidence to be excluded but only for more time for the parties to prepare for trial.[24] No indication was given to the prosecution that the Trial Chamber was considering going beyond what had been sought by Galić. At one stage, the Pre-Trial Judge said that the Trial Chamber would do everything so that the trial would open on the date set, 3 December, taking into account "this idea of continuous preparation", that some "elements" could be presented at the beginning of the trial, and that there would then be the Winter Vacation, when there would be more time for "continuous preparation".[25] Such an approach would have accommodated the reasonable attitude expressed by Galić. Both parties were agreed that they would not be ready for trial by the date set but that they would be ready for trial by the beginning of next year.[26] Taking into account the start of the Winter Vacation on 14 December, the restricted access to the Tribunal's building on 11 December and the plenary meeting of the judges during the last three days of Term, there were only six days during which the trial could be heard during December, so that the amount of time lost by a later start was minimal. The Pre-Trial Judge insisted, however, that the trial was going to start on time, even if both parties requested more time.[27] What was conceded by him to be an authoritarian approach[28] was justified by the Pre-Trial Judge upon the basis that, if the trial did not start on 3 December, the parties might have to wait "a year or longer" for another

[23] *Ibid*, p 521.
[24] Paragraph 2(1), *supra*.
[25] Status Conference, 8 Nov 2001, Transcript p 546.
[26] *Ibid*, pp 524-526, 554.
[27] *Ibid*, p 537.
[28] *Ibid*, p 537.

date. He did not explain how the loss of six day's hearing would produce such a delay. Nor is there any satisfactory explanation available.

10. The Pre-Trial Judge had acknowledged that, as there was to be a completely new Trial Chamber hearing the case, it was not up to the old Trial Chamber to make any decisions regarding the future.[29] The decision to exclude this evidence was therefore all the more surprising, and it was perhaps unwise in the circumstances for the old Trial Chamber to have made that decision. It certainly denied the prosecution the opportunity to explain its position, and to rely upon the concession made by Galić that a later start would meet any problem arising out of non-disclosure of these documents. The prejudice to the prosecution, which was never investigated by the Trial Chamber before making the order, may well be immense. Again, error has been established.

11. Neither of the two errors made by the Trial Chamber is, in the spirit of Rule 73(D), of such general importance to proceedings before the Tribunal or in international law generally as to warrant its further consideration by five judges of the Appeals Chamber. However, Rule 73(D) also permits leave to appeal to be granted by this Bench if the impugned decision would cause such prejudice to the case of the party seeking leave as could not be cured by the final disposal of the trial, including post-judgment appeal.

12. Reference has already been made to Rule 73*bis*(F), which permits the Trial Chamber during the trial to grant a request by the prosecution for additional time to present evidence "if this is in the interests of justice".[30] This provision, however, appears to contemplate an extension of the time originally determined principally (although not necessarily wholly) because of circumstances which have arisen since the original determination was made. The exercise of the power given by Rule 73*bis*(F) does not therefore automatically cure any prejudice created by an error made in the original determination.

13. A Trial Chamber may nevertheless always reconsider a decision it has previously made, not only because of a change of circumstances but also where it is realised that the

[29] *Ibid*, pp 491, 547.
[30] Paragraph 3, *supra*.

previous decision was erroneous or that it has caused an injustice.[31] Where such a decision is changed, there will be a need in every case for the Trial Chamber to consider with great care and to deal with the consequences of the change upon the proceedings which have in the meantime been conducted in accordance with the original decision.

14. As to the error made in the first order, the Bench understands that the trial has very sensibly proceeded since it commenced on 3 December with a suspension of the limitation imposed upon the time allowed for the prosecution case, awaiting the decision upon the present application. In the circumstances already outlined, the whole issue needs to be reconsidered afresh by the new Trial Chamber, after the real issues in dispute have finally been determined and in the light of the extent of co-operation of the Defence (or its lack of co-operation). That will cure any prejudice caused by the error made by the old Trial Chamber.

15. As to the error made in the second order, this whole issue too needs to be reconsidered by the new Trial Chamber. The procedural deficiencies before the old Trial Chamber would necessitate such a reconsideration, when it will be possible for the prosecution to explain its position (including when it sent the documents in question for translation, and the specific nature of the prejudice it will suffer if the order remains unaltered), when it will be possible for a balance to be made between that prejudice and any prejudice Galić would suffer if the documents were to be admitted into evidence, but more particularly when proper weight may be given to the concession made by Galić that a later start would meet any problem arising out of non-disclosure of the documents in question.

16. Leave to appeal is accordingly refused.

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[31] Although a Trial Chamber has held that motions for reconsideration of a previous decision are not provided for in the Rules and that they do not form part of the procedures of the Tribunal (*Prosecutor v Kordić & Čerkez*, Case IT-95-14/2-PT, Decision on Prosecutor's Motion for Reconsideration, 15 Feb 1999, p 2), that ruling has not been followed. In *Prosecutor v Delalić et al*, Case IT-96-21-A, Order of the Appeals Chamber on Hazim Delić's Emergency Motion to Reconsider Denial of Request for Provisional Release, 1 June 1999, p 4, the Appeals Chamber held that it was appropriate to reconsider its previous decision (refusing provisional release of an appellant) where "particular circumstances" justified such reconsideration, although it rejected the application for reconsideration on its merits. In *Prosecutor v Brđanin & Talić*, Case IT-99-36-PT, Order on the Prosecution's Motion for Reconsideration of the Order Issued by the President on 11 September 2000, 11 Jan 2001, p 4, President Jorda also considered and rejected on its merits an application for reconsideration of a previous decision.

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

Dated this 14th day of December 2001,
At The Hague,
The Netherlands.

Judge David Hunt
Presiding Judge

[Seal of the Tribunal]