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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-01-48-A
		Date:	27 October 2006
		Original:	English

IN THE APPEALS CHAMBER

Before: **Judge Mehmet Güney, Presiding**
Judge Mohamed Shahabuddeen
Judge Andrésia Vaz
Judge Theodor Meron
Judge Wolfgang Schomburg

Registrar: **Mr. Hans Holthuis**

Decision: **27 October 2006**

PROSECUTOR

v.

Sefer HALILOVIĆ

DECISION ON DEFENCE MOTION FOR PROMPT SCHEDULING OF APPEAL HEARING

The Office of the Prosecutor:

Mr. Peter M. Kremer
Ms. Christine Dahl

Counsel for Sefer Halilović:

Mr. Peter Morrisey
Mr. Guénaël Mettraux

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 "International Tribunal", respectively), is seized of the "Motion for Prompt Scheduling of Appeals Hearing" filed by Mr. Sefer Halilović on 21 September 2006 ("Motion" and "Applicant", respectively).

I. BACKGROUND

2. On 12 September 2001, the Applicant was indicted and charged with one count of murder, a violation of the laws or customs of war, pursuant to Articles 3 and 7(3) of the Statute of the International Tribunal ("Statute"). His trial started on 31 January 2005 and closed on 31 August 2005. On 16 November 2005, Trial Chamber I rendered its Judgement in the Applicant's case: it acquitted him of all charges contained in the Indictment and ordered his immediate release pursuant to Rule 99(A) of the Rules of Procedure and Evidence ("Rules").

3. The Office of the Prosecutor ("Prosecution") filed a notice of appeal against the Judgement on 16 December 2005, pursuant to Article 25 of the Statute and Rule 108 of the Rules ("Appeal"). On 20 September 2006, the Applicant filed the "Re-Filed Responsent's (*sic*) Brief on Appeal – *Partly Confidential*" ("Respondent Brief"). The Motion was filed the next day. The filings of written briefs on appeal pursuant to Rules 111 to 113 of the Rules were completed on 22 September 2006.[1]

4. On 2 October 2006, the Prosecution filed the "Prosecution's Response to Halilović's Motion for Prompt Scheduling of Appeal Hearing" ("Response"), in which it opposes the Motion. On 6 October 2006, the Applicant filed the "Reply *Re* Motion for Prompt Scheduling of Appeals Hearing – *Confidential Annexes*" ("Reply"), in which he, *inter alia*, seeks leave from the Appeals Chamber to reply to the Response pursuant to Rule 126*bis* of the Rules.

5. Rule 126*bis* requires the moving party to seek leave before filing a reply "[u]nless otherwise ordered by a Chamber either generally or in the particular case". Since the relevant Practice Direction does not require the moving party in a motion filed during an appeal from judgement to seek leave prior to filing a reply, there is no such requirement in the present case.[2]

[1] The Prosecution filed the "Re-Filed Prosecution's Brief in Reply" on 22 September 2006.
[2] Practice Direction On Procedure For The Filing Of Written Submissions In Appeal Proceedings Before The International Tribunal, IT/155 Rev. 3, 16 September 2005, para. 14.

II. DISCUSSION

6. In the Motion, the Applicant refers to the arguments in his Respondent Brief where he contends that the Appeal fails to meet many procedural and formal requirements to be considered on the merits[3] and where he submits that, even if considered on the merits and as a whole, the Prosecution "would still have failed to establish that the verdict of acquittal could not reasonably have been reached".[4] Thus, the Applicant requests the Appeals Chamber to summarily dispose of the Appeal by determining it entirely on the basis of written submissions.[5] Alternatively, he seeks an order pursuant to Articles 21(2), 21(4)(b), 21(4)(c) of the Statute and Rules 54 and 114 of the Rules scheduling "promptly and without any delay" an Appeal Hearing.[6] Should the Motion not be granted in full, the Applicant requests the Appeals Chamber to give "due weight and consideration" to the arguments put forward in the Motion in setting the date for hearing.[7] The Applicant submits that the summary dismissal of the Appeal or an order scheduling a prompt Appeal Hearing is necessary to guarantee his fundamental rights and interests.[8]

Summary Disposition of the Appeal

7. An expedited appeals procedure is available under Rule 116*bis* of the Rules, paragraph (A) of which provides that

> [an] appeal under Rule 72 or Rule 73 or appeal from a decision rendered under Rule 11*bis*, Rule 54*bis*, Rule 65, Rule 73*bis*(E), Rule 77 or Rule 91 [...] may be determined entirely on the basis of written briefs.

8. In the instant case, the Appeal is an appeal from Judgement, filed pursuant to Article 25 of the Statute and Rule 108 of the Rules. Therefore, the expedited appeals procedure provided for by Rule 116*bis*(A) of the Rules is not the proper procedure for hearing this Appeal. Appeals from judgement are governed by Rule 114 of the Rules, which prescribes in mandatory language that "the Appeals Chamber shall set the date for the hearing" after the expiry of the time-limits for filing the briefs on appeal.[9] In the present case the Prosecution opposes the request for summary disposition of the Appeal.[10] As a result, the question of whether or not it is open to the parties to waive their entitlement to an oral hearing does not arise for consideration.

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[3] Motion, para. 6.
[4] *Ibid.*, paras 6 (referring to the Respondent Brief, par. 1) and 7.
[5] *Ibid.*, para. 7.
[6] *Ibid.*, para. 8.
[7] *Ibid.*, para. 16.
[8] *Ibid.*, paras 7, 8 and 15.
[9] *Cf. Ibid.*, para. 8.
[10] Response, p. 2, fn. 3.

9. The request for the summary disposition of the Appeal entirely on the basis of written submissions is therefore dismissed.

Prompt Scheduling of the Appeal Hearing

10. The Applicant was indicted more than five years ago and has now been acquitted of all charges. On that basis, he submits that his right to be tried without undue delay under Article 21(4)(c) of the Statute requires that the Appeal Hearing take place "as soon as possible".[11] The Applicant also submits that resources allocated to him for the purpose of appellate proceedings have now been exhausted.[12] He submits that, unless the Appeal is heard expeditiously, Defence counsel might be obliged to work with no resources and no remuneration. Such a situation, he contends, would violate his fundamental rights to adequate resources to prepare, to equality of arms and to access the court.[13]

11. The Applicant also contends that any delay in hearing the Appeal might prejudice him.[14] He submits that he had to resign his position as Minister as a result of the Prosecutor's decision to indict him. He contends that though he has been cleared of any wrongdoing, "stress and remaining stigma which attach to the Prosecution's appeal" will last until the Appeals Chamber delivers its Judgement.[15] He submits that his effort to re-build his life and to contribute to the reconstruction of Bosnia and Herzegovina would be undermined if the Appeal is not heard expeditiously.[16] In addition, the Applicant submits that disclosure by the Prosecution has been belated and on-going, and that material has been disclosed to him well into the appellate proceedings.[17] He contends that the scheduling of the Appeal Hearing at the earliest possible time is the most appropriate means to protect him "from any prejudice that might result from any further, and belated, disclosure or from any other procedural incidents which would require resources which the Defence has now almost exhausted."[18]

12. The Prosecution opposes the Motion on the ground that the Applicant "has failed to

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[11] Motion, para. 9. In this paragraph, the Applicant refers to Article 21(4)(d) of the Statute, but the Appeals Chamber understands his argument as relating in substance to Article 21(4)(c) of the Statute.
[12] *Ibid.*, para. 10 and Reply, para. 5.
[13] Motion, para. 10. According to the Applicant, "[t]his situation raises an issue of equality of arms considering that prosecution counsel suffer no limitation of principle in the number of hours –and number of people– which can be allocated to preparing this appeal. By scheduling an appeal's hearing within a short period of time such inequality could be significantly reduced." (*Ibid.*, p. 3, fn. 7).
[14] *Ibid.*, para. 11.
[15] *Ibid.*
[16] *Ibid.*
[17] *Ibid.*, para. 12.
[18] *Ibid.*, para. 14. In the Reply, the Applicant indicates that "[a]t this stage, all resources have been used up by the Defence. They only formally remain available since invoices from May 2006 onwards have either not been sent by counsel or not yet been paid by the Registry." (Reply, para. 5).

demonstrate good cause for taking [his] case out of turn."[19] It relies on the *Delalić* Severance Decision[20] and submits that good cause "depends on the facts and circumstances of each case, considered in the context of all cases before the Appeals Chamber that are ready for hearing."[21] It submits that all accused enjoy the right to be tried without undue delay and that advancing any one case in the absence of good cause may unduly delay another.[22] The Prosecution submits that none of the concerns raised by the Applicant amount to good cause.[23] In particular, the fact that he has been acquitted does not itself justify giving his case priority over the case of those appellants who are incarcerated.[24]

13. The Prosecution further responds that the concerns raised in the Motion are not ripe for consideration.[25] It submits that the Applicant alleges only potential prejudice, not undue delay, and that such speculation cannot justify giving his case priority.[26] The Prosecution submits that the length of the appellate proceedings to date has been reasonable.[27] It also submits that it would be improper to hurry a decision in order to prevent new evidence from being discovered before the case is heard.[28] The Prosecution has a continuing obligation to disclose exculpatory or other relevant material, and Rules 115 and 119 of the Rules carefully prescribe the conditions under which a party can present new material that is revealed by the passage of time.[29] It submits that the Applicant's complaint that future disclosure will consume Defence resources has no relevance to scheduling matters.[30] It also submits that remuneration of Defence counsel is a matter for the Registrar in the first instance.[31] Finally, the Prosecution submits that the Applicant has constructed an incomplete and inaccurate picture of disclosure. It therefore attaches as an Annex two recent letters written to Defence Lead counsel, which allegedly demonstrate its compliance with disclosure obligations, as well as the "unreasonableness" of the Applicant's demands.[32]

14. The Applicant replies that there is no requirement of "good cause" in this matter[33] and that the Prosecution's reliance upon the *Delalić* Severance Decision is misplaced.[34] The Applicant also

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[19] Response, para. 1.
[20] *Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21-A, Order On Motion By Zejnil Delalić To Sever His Appeal From That Of Other Čelebići Appellants, 29 July 1999.
[21] Response, para. 1, referring to the *Delalić* Severance Decision.
[22] *Ibid.*, para. 1.
[23] *Ibid.*, para. 2.
[24] *Ibid.*, para. 3.
[25] *Ibid.*, para. 2.
[26] *Ibid.*, para. 3.
[27] *Ibid.*
[28] *Ibid.*, para. 5.
[29] *Ibid.*, paras 5-6.
[30] *Ibid.*, para. 6.
[31] *Ibid.*, para. 4.
[32] *Ibid.*, para. 7 and Annex A.
[33] Reply, para. 4.
[34] *Ibid.*, p. 2, fn. 1.

submits that the two letters filed by the Prosecution publicise personal attacks at Defence Co-counsel and have no apparent relevance to the matter at issue.[35] In reply to the alleged "unreasonableness" of his demands, the Applicant has confidentially filed as Annexes 23 letters either written to or received from the Prosecution, which allegedly reveal "a pattern of obstructionism on the part of the Prosecution."[36] The Applicant "reiterates" his submission that the Appeal "has not been conducted with the required degree of diligence" by the Prosecution, and that an Appeal Hearing in this case should be scheduled promptly.[37]

15. As a preliminary consideration, the Appeals Chamber notes that the Motion is explicit as to the fact that the Applicant reserves his right to formally complain about alleged breaches of the Prosecution's disclosure obligations.[38] The issue, therefore, is not properly before the Appeals Chamber and it has not been requested to intervene.[39] Nonetheless, by virtue of the Motion, the Appeals Chamber is now on notice that disclosure material has been provided to the Applicant by the Prosecution in the course of appellate proceedings. The fact that additional disclosure material could be provided to the Applicant is a matter that the Appeals Chamber will consider in examining his submissions regarding the risk of prejudice.[40]

16. Turning to the request for prompt scheduling of the Appeal Hearing, the Appeals Chamber observes that no requirement of "good cause" applicable to the present matter can be deduced from the *Delalić* Severance Decision. First, no such criterion was applied in that case. Second, in dismissing the motion to sever appeals, the Appeals Chamber did not address the issue as to whether Zejnil Delalić, who was acquitted of all charges, was entitled for that reason to obtain a judgement on the Prosecution's appeal as soon as possible.[41] Third, although arguments similar to those put forth in the Motion were submitted by Zejnil Delalić, the issue of prejudice did not form part of the reasons underlying the Appeals Chamber's *Delalić* Severance Decision.[42] This decision is therefore not relevant to the case at hand.

17. With respect to the Applicant's arguments that his right to be tried without undue delay requires that the Appeal Hearing take place "as soon as possible" and that any delay in scheduling

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[35] *Ibid.*, paras 7-8.
[36] *Ibid.*, para. 7 and Confidential Annexes 1-23.
[37] Reply, para. 42. The Appeals Chamber understands that the reasons underlying this submission are essentially expressed in paras 7-9 and 38-39 of the Reply.
[38] Motion, p. 4, fn. 8.
[39] The Appeals Chamber notes that the Prosecution is of the same opinion (Response, para. 7).
[40] *See* Motion, paras 12 and 14.
[41] *See Delalić* Severance Decision, pp. 2-3.
[42] *See Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21-A, Zejnil Delalić's Additional Submissions On His Motion To Sever The Appeal of Zejnil Delalić From That Of Other Čelebići Defendants, 12 March 1999, paras 3-4.

the hearing might prejudice him,[43] the Appeals Chamber emphasises that it has a "primary obligation to ensure that the accused has a fair *and* expeditious trial – a fundamental guarantee – as set out in Articles 20(1) and 21(4)(c) of the Statute and embodied in the major international human rights instruments."[44] The Appeals Chamber recognises that the "right to an expeditious trial is an inseparable and constituent element of the right to a fair trial."[45] Article 21(4)(c) of the Statute provides that "[i]n the determination of any charges against the accused [...] the accused shall be entitled [...] to be tried without undue delay." This applies to all stages of the proceedings, including an appeal.[46] The text of Article 21(4)(c) of the Statute makes clear that the right to be tried without undue delay does not protect against *any* delay in the proceedings; it protects against *undue* delay. Such standard applies equally to appellate proceedings whether they involve a convicted or an acquitted person.[47] Whether the length of the proceedings has been excessive or caused prejudice will depend on the circumstances of each case.

18. In this case, the Applicant does not allege undue delay. As stated, Article 21(4)(c) of the Statute provides him with a right to be tried without undue delay, not to be tried "as soon as possible". The Appeals Chamber agrees with the Prosecution that the length of the appellate proceedings to date has been reasonable. The Appeal has proceeded so far in accordance with the timeline set out in the Rules; the only exceeding periods of time being those agreed to or caused by the Applicant himself.[48] For these reasons, the Appeals Chamber finds that the fact that the Appeal Hearing is not scheduled "without any delay" in this case does not infringe the Applicant's right to a fair and expeditious trial and to be tried without undue delay. The Appeals Chamber now turns to the issue of whether any delay in scheduling the Appeal Hearing, though not unreasonable, would prejudice the Applicant in this case.

19. The Applicant refers to the stress and stigma attached to the Appeal, which purportedly

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[43] Motion, paras 9 and 11. *See* also paras 10-11 *supra*.

[44] *Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30/1-AR73.5, Decision On Interlocutory Appeal By The Accused Zoran Žigić Against The Decision Of Trial Chamber I Dated 5 December 2000, 25 May 2001, para. 20 ("*Kvočka et al.* Decision"). *See* also Article 14(3)(c) of the International Covenant on Civil and Political Rights and Article 6(1) of the European Convention on Human Rights. *See* further *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR73.2, Decision On Joint Defence Interlocutory Appeal Against The Trial Chamber's Oral Decision of 8 May 2006 Relating To Cross-Examination By Defence Counsel's Request For Leave To File An *Amicus Curiae* Brief, 4 July 2006, ("*Prlić et al.* Decision"), fn. 18.

[45] *Kvočka et al.* Decision, para. 20. *See* also *Prlić et al.* Decision, p. 4.

[46] In the *Prlić* Decision, the Appeals Chamber referred to the Human Rights Committee General Comments No. 13 of 1984, para. 10 of which states that "all stages [of the proceedings] must take place 'without undue delay'" and that the guarantee must be "effective [...] both in first instance and on appeal." (*Prlić* Decision, p. 4, n. 18). In addition, while the text of Article 21(4)(c) refers to an accused person, it also applies to an acquitted person when the Prosecution appeals the acquittal.

[47] *Cf.* Motion, para. 9. Article 21(1) of the Statute provides that "[a]ll persons shall be equal before the International Tribunal."

[48] *See* Decision On Motion For Extension Of Time To File Respondent's Brief, 23 March 2006 and Decision On Prosecution's Motion To Strike Annexes To The Respondent's Brief, 6 September 2006.

would undermine his efforts to re-build his life and contribute to the reconstruction of Bosnia and Herzegovina unless the Appeal were to be heard expeditiously. While the Applicant has been cleared of all charges and is presumed innocent, his acquittal is not final until the Appeal is completed. This is the consequence of Article 25 of the Statute, which provides that the Prosecution may appeal against an acquittal.[49] Stigmatisation may be the consequence of pending criminal allegations and any stress resulting from possible disruption of social life and work, or uncertainty as to the outcome, may remain until the completion of the proceedings. Articles 20(1) and 21(4)(c) of the Statute ensure that proceedings before the International Tribunal are fair and held within a reasonable time, so that any stigma and stress are brought to an end within a reasonable period of time. In this case, and as noted above, the length of the appellate proceedings up to now has been reasonable.

20. In the context of the right to have adequate facilities for the preparation of his defence, the Applicant submits that all resources allocated for the purpose of appellate proceedings have now been exhausted and that unless the Appeal is heard expeditiously, his Defence counsel might be obliged to work with no resources and no remuneration, which would violate his right under Article 21(4)(b) of the Statute. It may be expected that Defence counsel may have to engage in additional work as a consequence of the purported ongoing disclosure of material by the Prosecution. So far, however, the length of the appellate proceedings has not caused any actual prejudice to the Applicant and has not impaired his right to adequate facilities for the preparation of his defence. Should any delay in scheduling the Appeal for hearing, though not unreasonable, cause further concerns to the Applicant regarding the resources at his disposal, he should first raise the matter with the Registrar. The Appeals Chamber will schedule the Appeal Hearing in accordance with its obligation to ensure that the Applicant receives a fair and expeditious trial.

III. DISPOSITION

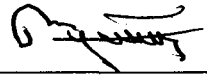
FOR THE FOREGOING REASONS;

DISMISSES the requests for summary disposition of the Appeal and prompt scheduling of the Appeal Hearing; and

INDICATES that an Appeal Hearing will be scheduled in this case in due course.

[49] *Prosecutor v. Ignace Bagilishema*, Case No. ICTR-95-1A-A, Judgement (Reasons), 3 July 2002, para. 8, referring to Article 24 of the Statute of the ICTR.

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



Judge Mehmet Güney
Presiding

Dated this twenty-seventh day of October 2006,
At The Hague, The Netherlands.

[Seal of the International Tribunal]