



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-96-21-AR72.1

Date: 14 October 1996

Original: English and French

**BEFORE A BENCH OF THE APPEALS CHAMBER**

**Before:** Judge Antonio Cassese, Presiding  
Judge Haopei Li  
Judge Jules Deschênes

**Registrar:** Mrs. Dorothee de Sampayo Garrido-Nijgh

**Decision of:** 14 October 1996

**PROSECUTOR**

v.

**ZEJNIL DELALIĆ  
ZDRAVKO MUCIĆ also known as "PAVO"  
HAZIM DELIĆ  
ESAD LANDŽO**

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**DECISION ON APPLICATION FOR LEAVE  
TO APPEAL (SEPARATE TRIALS)**

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**The Office of the Prosecutor**

Mr. Eric Ostberg  
Ms. Teresa McHenry

**Counsel for the Accused**

**Ms. Edina Rešidović for Zejnil Delalić**

## I

**APPLICATION FOR LEAVE TO APPEAL**

1. In an application for leave to appeal dated 4 October 1996, the accused Zejnil Delalić seeks redress from the Decision of Trial Chamber II on Motions for Separate Trial filed by the Accused Zejnil Delalić and the Accused Zdravko Mucić dated 25 September 1996, and filed in the Tribunal's Registry on 26 September 1996. The Applicant, Delalić, had submitted a preliminary motion under Rule 73(A)(iv) of the Tribunal's Rules of Procedure and Evidence which allows for:

applications for severance of crimes joined in one indictment under Rule 49, or for separate trials under Sub-rule 82(B).

2. The application for leave to appeal is made pursuant to Rule 72 B(ii) which reads:

(B) The Trial Chamber shall dispose of preliminary motions in *limine litis* and without interlocutory appeal, save

[...]

(ii) in other cases where leave is granted by a bench of three Judges of the Appeals Chamber, upon serious cause being shown, within seven days following the impugned decision.

3. On the basis of the above the Applicant seeks leave to appeal in order to challenge the Decision of 25 September 1996 on the following grounds:

- i) Non-compliance with the Rules of Procedure and Evidence;
- ii) Error in fact; and
- iii) Error in law.

4. First, the Applicant alleges non-compliance with the Tribunal's Rules of Procedure and Evidence by virtue of the fact that the Trial Chamber issued a joint decision on 25 September 1996 for him and his co-accused Mucić. The Applicant argues that his separate motion consisted of individualised facts and legal arguments which have "nothing [in] common with the arguments of the other accused persons". The Applicant argues that Rule 87(B) of the Rules of Procedure and Evidence which governs final deliberations should be followed in the preliminary phase *mutatis mutandis*. Rule 87 (B) reads:

(B) The Trial Chamber shall vote separately on each charge contained in the indictment. If two or more accused are tried together under Rule 48, separate findings shall be made as to each accused.

5. With respect to his second challenge, the Applicant argues that the Trial Chamber erred in fact, in having found evidence of a "transaction" which is a condition for joining of the accused and their crimes according to Rules 48 and 49. The Applicant argues that no proof was tendered as to the establishment of a "transaction" which is defined as: "a number of acts or omissions whether occurring as one event or a number of events, at the same or different locations and being part of a common scheme, strategy or plan" (Rule 2).

6. The Applicant also argues that the question of whether he was in a position of authority could be easily settled by consulting the relevant regulations of the former Socialist Federal Republic of Yugoslavia and those of Bosnia and Herzegovina. Moreover, he submits that even if he were regarded as holding a position of command, he could only be held responsible for his individual actions. The Applicant here takes issue with the last sentence in Paragraph 9 of the Trial Chamber's Decision which reads: "[i]t must be appreciated that the issue of command responsibility is unlikely to turn upon mere proof of the holding or not holding of some particular office." The Applicant avers that this is "unjustly stated" because "the norms and facts on [the] organisation and competencies in the field" have already been established in open court.

7. A third error in fact alleged by the Applicant involves the hardship which would be endured by victims and witnesses in a separate trial. The Applicant argues that the evidence to

be adduced at his trial is “completely different and separate” from the other accused and that their witnesses would be irrelevant to his trial.

8. As a final error of fact, the Applicant argues that the Trial Chamber erred when it decided that separate trials would mean greater delay. The Applicant argues that a trial dealing with his command responsibility could be concluded expeditiously.

9. The final challenge made by the Applicant is that the Trial Chamber erred in law. The Applicant argues that Rule 48 (Joinder of Accused) violates his “material right” of being accused on an individual basis, of being tried without delay, and of being subjected to minimal pre-trial detention; in this regard, he states that the interests of justice and the right to a fair trial should be strictly respected. In support of these rights, the Applicant cites the International Covenant on Civil and Political Rights, the European Convention on Human Rights, and Articles 7 and 21 of the Statute of the Tribunal.

## II

### PROSECUTOR’S SUBMISSIONS

10. The Prosecutor of the Tribunal filed her response to the application for leave to appeal on 8 October 1996.

11. The Prosecutor replies that the Applicant “has not been able to demonstrate a significant risk that his defence will be seriously prejudiced by an erroneous ruling by the Trial Chamber”, and that he has not even specifically addressed the issue of “serious cause” referred to in Rule 72(B)(ii). Further, the Prosecutor argues that the Applicant has not specifically addressed the issue of how he would be harmed by the need to defend himself in a joint trial.

12. To the challenge made by the Applicant that the Trial Chamber erred when it issued a joint decision on separate trials when the Applicant had submitted a separate motion with individualised facts and arguments, the Prosecutor responds that there is no reason in law or logic why the Trial Chamber should not issue joint decisions. The Prosecutor argues that joint

decisions in general are efficient and effective while noting that the Trial Chamber's joint Decision addresses the arguments of each accused separately and carefully.

13. As to the Applicant's allegations on the lack of evidence establishing a "transaction", the Prosecutor points out that this claim was not made in the initial motion and therefore cannot be raised on appeal. The Prosecutor goes on to say that even if such a claim were valid, it would only be so in a challenge to the indictment and not with respect to a motion for separate trial. Beyond this, the Prosecutor asserts that a "transaction" did obtain, as all the charges stem from activities which took place at a single detention camp.

14. With respect to the contention by the Applicant that the last sentence in Paragraph 9 of the Trial Chamber's Decision is "unjustly stated", the Prosecutor responds that the statement made in the sentence is both a proper and correct statement in law. The Prosecutor invites the accused to deal with the validity of this statement as a matter of fact or law before the appropriate Chamber at trial.

15. The Prosecutor deals jointly with the contentions of the Applicant regarding the asserted lack of great delay caused by separate trials and the violations of his "material right". This the Prosecutor asserts is the only harm to which the Applicant alludes. The Prosecutor contends that the Applicant believes that if a separate trial took place with respect to superior responsibility he would be found not guilty. However, this, the Prosecutor says, is based on the "unstated and unsupported assumptions that he would receive a preliminary trial based on the issue of superior responsibility (and) that such a trial would occur prior to the trials of the other accused." The Prosecutor asserts that the Applicant does not have a right to be tried before his co-accused and that the fact that the accused would have to stay longer in detention may not be considered as "serious cause" justifying an appeal on a denial of separate trials.

**III****SCOPE OF RULE 72(B)(ii)**

16. This Rule is intended to create a “filter” for appeals relating to matters other than jurisdiction. While for issues of jurisdiction there is an appeal as of right, for other matters a Bench of three Judges has to undertake a preliminary scrutiny. Clearly, the purpose of this “sifting” device is to prevent the Appeals Chamber from being flooded with unimportant or unnecessary appeals which unduly prolong pre-trial proceedings. The “filter” was not considered necessary for questions of jurisdiction, because of the intrinsic importance and preliminary nature of such questions: therefore, they must be decided upon prior to any consideration of the merits.

17. What should the Bench of three Judges consider when deciding whether or not to grant leave? In other words, what is meant by “serious cause” to be shown by the appellant? Since this is the first occasion that this Rule has been invoked by a Party, the Bench considers it advisable to issue guidelines for the future application of this Rule.

18. In the first instance, the Bench should consider whether the application is within the Tribunal’s appellate jurisdiction. For this purpose one must consider the general economy of the Rules of the Tribunal. Part V deals with Pre-trial Proceedings. It contains five Sections. The fifth Section, entitled “Preliminary Motions” contains two articles: 72: General provisions; 73: Preliminary motions by accused.

It is Rule 72(B) which refers to “preliminary motions”, which is an obvious reference to Rule 73 which lists preliminary motions. Rule 72(B) provides that preliminary motions are disposed of *in limine litis* - which, in a sense, goes without saying; but adds, more importantly, that, in principle, they must be disposed of “without interlocutory appeal”.

Exceptions follow which ought to be interpreted restrictively pursuant to a generally accepted principle of interpretation. Rule 73(A) provides a list of preliminary motions by the accused which must be brought within sixty days of the initial appearance and which are, therefore, by their nature important matters which must be decided at an early stage. The Bench holds that only those preliminary motions enumerated in Rule 73(A) (ii), (iii), (iv), (v), are implicitly referred to in Rule 72(B) (ii). Consequently, only if the application for leave to appeal relates to an issue covered by one of these provisions may leave to appeal be granted. It should be added that such leave may be granted whether the application is made by the Defence or by the Prosecutor. Indeed, although Rule 73 only addresses preliminary motions by accused, it follows from the principle of equality of arms based on the fundamental concept of fair trial, that on any of the matters listed in Rule 73 (A) also the Prosecutor is entitled to appeal against a decision by a Trial Chamber rendered upon submission by the accused of a preliminary motion pursuant to Rule 73. The Prosecutor is entitled to appeal against such a decision either as of right (Rule 73(A)(i)), or by requesting leave to appeal from a Bench of three Judges (on matters covered by Rule 73(A)(ii), (iii), (iv),(v)).

It follows that any appeal on matters other than those enumerated in Rule 73(A) (ii), (iii), (iv), (v), should be dismissed out of hand, as being beyond the competence of the Appeals Chamber.

19. Secondly, the Bench should consider whether the application is frivolous, vexatious, manifestly ill-founded, an abuse of the process of court or so vague and imprecise as to be unsusceptible of any serious consideration, in accordance with the age-old maxim *causa vaga et incerta non est causa rationabilis* (a vague and uncertain cause is not a reasonable cause).

20. If the Bench is satisfied that the application passes this “negative test”, then it should finally consider whether the application shows “serious cause”, that is to say either shows a grave error which would cause substantial prejudice to the accused or is detrimental to the interests of justice, or raises issues which are not only of general importance but are also directly material to the future development of trial proceedings, in that the decision by the Appeals Chamber would seriously impact upon further proceedings before the Trial Chamber.

## IV

**DISCUSSION**

21. Applying these criteria to the present case, it is clear that the application relates to one of the issues covered by Rule 73 (A), namely an application for separate trials under Rule 73(A)(iv). The Bench also considers that the application is not frivolous, vexatious, manifestly ill-founded, an abuse of the process of court or so vague and imprecise as to be unsusceptible of any serious consideration.

22. Applying the third criterion, however, the application fails. The applicant has confined himself to relying on his grounds of appeal on the merits. Clearly, he has neither shown a grave error in the decision which would cause substantial prejudice to him or is detrimental to the interests of justice, nor demonstrated that there is a serious cause as to the necessity of ordering separate trials “to avoid a conflict of interest that might cause serious prejudice to an accused, or to protect the interests of justice”, as required under Rule 82.



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V

**DISPOSITION**

The Bench of the Appeals Chamber,

Ruling unanimously,

For the above reasons,

Pursuant to Rule 72(B)(ii) of the Rules of Procedure and Evidence,

REJECTS the application of accused Delalic for leave to appeal the Decision of Trial Chamber II dated 25 September 1996 on Motions for Separate Trial filed by the Accused Zejnil Delalić and the Accused Zdravko Mucić.

DONE in English and French, both versions being authoritative.



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Antonio Cassese

President

Dated this 14th day of October 1996

At The Hague

The Netherlands