IT-95-14/2-A
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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-95-14/2-A

Date: 11 September 2001

Original: English

IN THE APPEALS CHAMBER

Before: Judge David Hunt, Pre-Appeal Judge

Registrar: Mr Hans Holthuis

Decision of: 11 September 2001

PROSECUTOR

v

Dario KORDIĆ & Mario ČERKEZ

DECISION ON APPLICATION BY MARIO ČERKEZ FOR EXTENSION OF TIME TO FILE HIS RESPONDENT'S BRIEF

Office of the Prosecutor:

Mr Upawansa Yapa and Mr Norman Farrell

Counsel for the Defence:

Mr Mitko Naumovski for Dario Kordić
Mr Božidar Kovačić and Mr Goran Mikuličić for Mario Čerkez

1. The appellant Mario Čerkez ("Čerkez") has sought an order, pursuant to Rule 127(B) of the Rules of Procedure and Evidence ("Rules"), extending the time within which he must file his Respondent's Brief to the Appellant's Brief filed by the prosecution on 9 August 2001.[1] The prosecution has filed a Response to the Motion,[2] and Čerkez has filed a Reply.[3]

2. The application follows, and is associated with, an earlier flurry of filings by the parties. The prosecution had sought an extension of time in which to file its Respondent's Brief to the Appellant's Briefs filed by Čerkez and his fellow appellant, Dario Kordić ("Kordić"), also on 9 August 2001.[4] The extension sought was from 10 September to 1 October 2001, and in support of that application the prosecution had relied upon specific matters arising from the nature and the complexity of the issues raised in the Appellant's Briefs which had been filed.[5] The prosecution's argument was accepted,[6] and the extension sought was granted.[7]

3. In the meantime, Čerkez filed a document entitled "Appellant Mario Čerkez's Notice Pursuant to Rule 126 of the Rules of Procedure and Evidence",[8] in which he stated that a copy of the prosecution's Appellant's Brief (which had been filed on 9 August and sent by the Registry to Croatia on that date) had been received by his counsel only on 14 August, at approximately 6.30 pm and thus after the close of business on that day.[9] He asserted that the time for filing his Respondent's Brief to the prosecution's Appellant's Brief therefore began to run from the following day, 15 August,[10] so that his Respondent's Brief did not need to be filed until 13 September. The prosecution responded that it did not necessarily oppose such an interpretation of the Rules, but it sought a clarification from the Appeals Chamber as to

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1 Appellant Mario Čerkez's Motion for Variation of Time Limit for Filing Response to the Prosecutor's Appeal Brief, 31 Aug 2001 ("Motion").
2 Prosecution's Response to the Motion of Appellant Mario Čerkez Seeking a Variation of Time Limit in Which to File Response to Prosecution Appeal Brief, 5 Sept 2001("Response").
3 Appellant Mario Čerkez's Reply to Prosecution Response to Appellant Mario Čerkez's Motion for Variation of Time Limit for Filing Response to the Prosecutor's Appeal Brief, 6 Sept 2001 ("Reply").
4 The history of these filings is recounted in the Decision Authorising Respondent's Brief to Exceed the Limit Imposed by the Practice Direction on the Length of Briefs and Motions and Granting an Extension of Time to File Brief, 30 Aug 2001 ("Decision Extending Time to File Prosecution's Respondent's Brief").
5 Decision Extending Time to File Prosecution's Respondent's Brief, par 10.
6 *Ibid,* par 14.
7 *Ibid,* par 16.
8 15 August 2001 ("Notice").
9 Notice, pars 1-2.
10 *Ibid,* par 2.

whether it was correct.[11] The present Motion filed by Čerkez renders the resolution of that issue largely unnecessary, as he puts forward a considerably bolder proposition.

4. Čerkez says that, because the prosecution obtained an extension of time until 1 October to file its Respondent's Brief to his Appellant's Brief, he (Čerkez) must be entitled to a similar extension of time to file his Respondent's Brief to the prosecution's Appellant's Brief.[12] He argues that he is entitled to a similar extension of time *not* because he needs the additional time in order to file his Respondent's Brief (indeed, he expressly disclaims such an argument),[13] but because of the principle of equality of arms, and because the situation would otherwise be "manifestly prejudicial" to him.[14] He identifies the prejudice as an unjustified advantage to the prosecution in two ways:

(i) the prosecution will have twenty days more to file its Respondent's Brief to his Appellant's Brief than he will have to file his Respondent's Brief to the prosecution's Appellant's Brief;[15] and

(ii) the prosecution will become aware of the arguments he puts in his Respondent's Brief to its Appellant's Brief before it has to file its Respondent's Brief to his Appellant's Brief, and thus will have "an exceptional opportunity" to use its Respondent's Brief to answer those arguments. Čerkez adds:[16]

> Every counsel would do that and every counsel would know how to use the opportunity.

5. The argument based upon the principle of equality of arms is wholly misconceived. That principle, taken from the jurisprudence of the European Court of Human Rights, was adopted by Article 21.1 of the Tribunal's Statute.[17] The principle of equality of arms is described as being only one feature of the wider concept of a fair trial.[18] That wider concept includes not only the need for an independent and impartial tribunal but also such things as

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[11] Prosecution's Request for Clarification, 17 Aug 2001, par 3.
[12] Motion, par 3.1.
[13] Reply, par 4.
[14] *Ibid*, par 10.
[15] *Ibid*, pars 10,12.
[16] *Ibid*, par 12.
[17] *Prosecutor v Aleksovski*, Case IT-95-14/1-AR73, Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 Feb 1999, par 23. Article 21.1 provides: "All persons shall be equal before the International Tribunal."
[18] *"Neumeister" Case*, 27 June 1968, Series A Vol 8, par 22; *Delcourt v Belgium* (1970) 1 EHRR 355, par 28; *Monnell v UK* (1988) 10 EHRR 205, par 62; *Isgrò v Italy*, 21 February 1991, Series A Vol 194, par 31; *Borgers v Belgium*, 30 October 1991, Series A Vol 214, par 24.

the right of each party to call witnesses "under the same conditions as witnesses against him",[19] an equal opportunity to present his case,[20] and what is described as the fundamental right that criminal proceedings are adversarial in nature – defined as meaning the opportunity for both the prosecution and the accused to have knowledge of and comment on the observations filed or evidence adduced by either party.[21]

6. The wider concept of a fair trial is thus correctly described in many of those and other cases in terms of its application to both parties in the trial (including a criminal trial). In *Ekbatani v Sweden*,[22] the European Court of Human Rights held that the court below had observed the principle of equality of arms because neither the accused nor the prosecution had been allowed to appear in person but each had been given equal opportunities to present their cases in writing. In *Barberà v Spain*,[23] the Court emphasised that the provisions of Art 6(1) entail equal treatment of the prosecution and the defence. In *Brandstetter v Austria*,[24] the Court emphasised that both the prosecution and the accused must be given equal opportunities in relation to the evidence tendered by the other. In *Dombo Beheer BV v The Netherlands*,[25] when referring to the Court's case law concerning the requirements of a fair trial, described the requirement of equality of arms as providing a "fair balance" between the parties and as implying that each party must be afforded a reasonable opportunity to present his case – including his evidence – under conditions that do not place him at a substantial disadvantage *vis-à-vis* his opponent.

7. The principle of equality of arms has been given a liberal interpretation in its application to the Tribunal's procedures, in recognition of the peculiar difficulties under which both parties have to operate in this Tribunal.[26] But the purpose behind the principle remains the same – to give to each party equal access to the processes of the Tribunal, or an equal opportunity to seek procedural relief where relief is needed.[27] In relation to the present

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[19] *Engel v The Netherlands (No 1)* (1976) 1 EHRR 647, par 91; *Bönisch v Austria* (1985) 9 EHRR 191, par 32; *Barberà v Spain* (1988) 11 EHRR 360, par 78. Article 6(1)(d) of the Convention is in the same terms as Art 21.4(e) of the Tribunal's Statute.
[20] *Ekbatani v Sweden* (1988) 10 EHRR 510, par 30.
[21] *Brandstetter v Austria* (1991) 15 EHRR 378, pars 66-67.
[22] At par 30.
[23] At par 78.
[24] At par 67.
[25] (1993) 18 EHRR 213 at par 33. This was a civil case, but the Court was considering whether the requirement of equality of arms recognised in criminal cases should apply to civil cases also.
[26] *Prosecutor v Tadić*, Case IT-94-1-A, Judgment [on Conviction Appeal], 15 July 1999, par 52.
[27] *Ibid*, pars 48, 50, 52.

issues, the Rules provide that either party may apply for relief, by obtaining an extension of time in which to file its Respondent's Brief, provided that "good cause" is shown by the party applying.[28] The obligation to show "good cause" is placed equally upon both parties.

8. In the present case, the prosecution was able to show "good cause" for the extension by reason of the nature and the complexity of the issues raised in each of the Appellant's Briefs. It was said that those Briefs raised some thirty-one issues to which the prosecution had to respond, including issues relating to the prosecution's conduct at the trial (when the members of the prosecution trial team were either no longer available or otherwise engaged),[29] and therefore that additional time was *needed* by the prosecution to file its Response. On the other hand, the prosecution's Appellant's Brief to which Čerkez is required to respond is only thirty-seven pages in length, and raises only two grounds of appeal – one as to the reasonableness of a finding by the Trial Chamber as to his individual responsibility for the Ahmići attack, and the other as to the sentence which was imposed.[30] Čerkez, as it has already been stated, expressly disclaims any suggestion that he *needed* additional time to respond to the prosecution's Appellant's Brief.[31]

9. Where then does Čerkez show "good cause" for relief under Rule 127? It cannot be "good cause" for an extension of time to be granted to Čerkez to file his Respondent's Brief to the prosecution's Appellant's Brief simply because the prosecution has shown "good cause" for an extension of time to file its Respondent's Brief to the Appellant's Briefs filed by Čerkez and Kordić. That is to read into the right to equality of *arms* a right to equality of *relief*, even when the circumstances are quite different in each case and provide no basis whatsoever for granting equal relief. The argument is rejected.

10. The other ground put forward by Čerkez was that the prosecution will become aware of the arguments he puts in his Respondent's Brief to its Appellant's Brief before it has to file its Respondent's Brief to his Appellant's Brief, and thus will have "an exceptional opportunity" to use its Respondent's Brief to answer those arguments. It may be that *some* counsel would, as Čerkez suggests, take advantage of such an opportunity, although I would

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[28] Rule 127 ("Variation of Time-limits").
[29] Decision Extending Time to File Prosecution's Respondent's Brief, par 10.
[30] Response, footnote 6 and par 12.
[31] Reply, par 4.

not subscribe to his suggestion that *every* counsel would do so. It is difficult to imagine how the prosecution could do so in the present case with any real pretence of legitimacy, as the only common issue in the two appeals relates to the sentence imposed, with Čerkez directing his attention to matters of mitigation and the prosecution directing its attention to matters of aggravation. But what are the prejudicial consequences to Čerkez if the prosecution *were* to use its Respondent's Brief to answer matters relating to these issues put by Čerkez in his Respondent's Brief? The prosecution would have been entitled in any event to answer those matters when the oral hearing of these appeals takes place. If anyone would be advantaged (rather than disadvantaged) by this unlikely scenario, it would be Čerkez, who will have additional time to prepare his refutation at the oral hearing of the appeal of any answer the prosecution may slip into its own Respondent's Brief.

11. Čerkez is, nevertheless, entitled to have consideration given to his application for an extension of time upon the lesser basis by implication put forward in his Notice, that he did not receive a copy of the prosecution's Appellant's Brief until 14 August, after the close of business on that day.

12. Rule 112 provides that a Respondent's Brief is to be filed "within thirty days of the filing" of the Appellant's Brief. Čerkez has submitted that the reference to "filing" in Rule 112 must, however, be interpreted in accordance with Rule 126, which provides:

> Where the time prescribed by or under these Rules for the doing of any act is to run as from the occurrence of an event, that time shall begin to run as from the date on which notice of the occurrence of the event would have been received in the normal course of transmission by counsel for the accused or the Prosecutor as the case may be.

There is certainly an argument available that the filing of the Appellant's Brief referred to in Rule 112 constitutes "the occurrence of an event" from which the time for filing runs, so that (in accordance with Rule 126) time would not commence to run in the present case pursuant to Rule 112 until the time when a copy of the Appellant's Brief would have been received by Counsel for Čerkez in Croatia "in the ordinary course of transmission". It is an attractive argument, and minds may differ as to whether it is correct. However, such an interpretation of the interaction between Rules 112 and 126 has already been rejected by a Bench of three

judges of the Appeals Chamber.[32] The present case is hardly an appropriate vehicle for seeking a reconsideration of that decision. Indeed, the difficulty in determining in *any* particular case just when a document sent by the Registry to Croatia (for example) "would have been received in the normal course of transmission" suggests that the whole of Rule 126 requires a further consideration by the Rules Committee.[33]

13. So far as the further submission made by Čerkez in the present case is concerned – that time began to run from the day *after* his counsel received the prosecution's Appellant's Brief – the fact that he received it after the close of business hours, or even that in the normal course he would have received it after the close of business hours, is irrelevant. Even under Rule 126, it is the "date" when the copy would have been received in the normal course which is relevant, not the time. There is no provision in the Rules which gives to a party an extra day because a copy of a document which has been filed is in fact received by him out of office hours, or even that it would have been received by him out of office hours in the ordinary course.

14. Čerkez thus lost only five days of the time fixed by Rule 112 in which to file his Respondent's Brief to the prosecution's Appellant's Brief by reason of the delay in delivery of a copy. Pursuant to Rule 127, Čerkeze is accordingly granted an extension of five days to do so – that is, until 13 September 2001.[34]

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

Dated this 11th day of September 2001,
At The Hague,
The Netherlands.

David Hunt

Judge David Hunt
Pre-Appeal Judge

[Seal of the Tribunal]

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[32] *Prosecutor v Naletilić and Martinović*, Case IT-98-34-AR73.2, Decision on Defence's Motion to the Bench of Three Judges of the Appeals Chamber for Application of Rule 126 of the Rules of Procedure and Evidence, 11 May 2001, p 2.

[33] In relation to all but longer documents, the Registry transmits a copy of a filed document by facsimile to Defence Counsel on the same day that the document is filed. This particular document was not sent by facsimile.

[34] Counsel for Čerkez has already been informed that this is the order which would be made.