

UNITED
NATIONS

IT-98-29-T
D9005-D9008
13 MARCH 2003

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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: IT-98-29-AR54
Date: 13 March 2003
Original: English

IN THE APPEALS CHAMBER

Before: Judge Theodor Meron, Presiding
Judge Fausto Pocar
Judge Mohamed Shahabuddeen
Judge David Hunt
Judge Mehmet Güney

Registrar: Mr Hans Holthuis

Decision of: 13 March 2003

PROSECUTOR

v

Stanislav GALIĆ

**DECISION ON APPEAL FROM REFUSAL OF APPLICATION FOR
DISQUALIFICATION AND WITHDRAWAL OF JUDGE**

Counsel for the Prosecutor:

Mr Mark Ierace, Senior Trial Attorney

Counsel for the Defence:

Ms Mara Pilipović & Maître Stéphane Piletta-Zanin

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Procedural background

1. Since 3 December 2001, the case of *Prosecutor v Galić* has been proceeding before a section of Trial Chamber I, comprising Judge Alphons Orié (Presiding), Judge Amin El Mahdi and Judge Rafael Nieto-Navia. The evidence is presently drawing to a close.

2. On 8 November 2002, Judge Orié – as a permanent judge assigned to Trial Chamber I who had been designated by the President in accordance with Rule 28(A) of the Rules of Procedure and Evidence (“Rules”) – confirmed an indictment against Ratko Mladić (“Mladić”). In doing so, and in accordance with Article 19.1 of the Tribunal’s Statute and Rule 47(E) and (F), Judge Orié found that a *prima facie* case had been established against Mladić and he confirmed the indictment.¹ The test which he applied for finding that a *prima facie* case had been established was whether:²

[...] the Prosecution evidence, if accepted and uncontradicted, sufficiently supports the likelihood of the accused’s [*sic*] being convicted by a reasonable trier of fact.

That decision was made public on the same day that it was given.

3. On 24 January 2003, Stanislav Galić (“Galić”) applied to the section of Trial Chamber I hearing his trial for the disqualification and withdrawal of Judge Orié from the trial.³ He pointed out that he was subordinate to Mladić, with an area of responsibility for the “SRK” army corps in the municipality of Vogošća, and that Mladić had been charged with acts of genocide, persecution, extermination and murder committed in that municipality.⁴ Galić alleged that there had been “contamination” between the two cases – his own and that of Mladić – because the facts in both cases are partly the same, and because Mladić had been charged with criminal liability for having participated in a joint criminal enterprise with Galić both to commit crimes with which Galić himself has been charged and to commit crimes with which Galić has not been charged.⁵ Galić complained that, notwithstanding that he had not been given the opportunity to be heard before the indictment against Mladić had been confirmed, Judge Orié had publicly stated that he considered that a case exists against Mladić for these crimes, and that Judge Orié would be understood as considering that a case also exists against Galić for those same crimes.⁶

¹ *Prosecutor v Mladić*, IT-95-5/18-I, Order Granting Leave to File an Amended Indictment and Confirming the Amended Indictment, 8 Nov 2002.

² *Ibid*, par 26.

³ Defence Request for Withdrawal of Judge Alphons Orié, Presiding, 23 Jan 2003 [filed 24 Jan 2003 (in French) and 31 Jan 2003 (in English)].

⁴ *Ibid*, pp 2-3 (English version).

⁵ *Ibid*, pp 5-7 (English version).

⁶ *Ibid*, pp 5-7 (English version).

Galić described such statements as breaching the “almost sacramental” requirement that judges be impartial.⁷

4. The application was considered by Judge Liu Daqun, as the Presiding Judge of Trial Chamber I, who drew attention to the provisions of Rule 15(B).⁸

Any party may apply to the Presiding Judge of a Chamber for the disqualification and withdrawal of a Judge of that Chamber from a trial [...].

Judge Liu stated that, although the application had been addressed erroneously to the section of the Trial Chamber hearing the relevant case, he would deal with it as if it had been correctly addressed to himself.⁹ He dismissed the application, upon the basis that Galić had failed to appreciate the difference in functions performed by the confirming judge and the judges of the Trial Chamber which hears the trial.¹⁰ He said, in effect, that the confirming judge considers the supporting material presented by the Prosecutor upon the assumed basis that it *is* accepted at the trial, whereas the judges of the Trial Chamber have to consider whether the evidence which is placed before it by the prosecution in the trial (which is not always the same as the supporting material presented for confirmation) *should be* accepted, having taken into account everything which is placed before it by the accused. Judge Liu also drew attention to the delay of two and a half months between the confirmation of the *Mladić* indictment and the motion filed by Galić, during which the *Galić* trial was permitted to continue.¹¹

5. On 10 February, Galić applied “pursuant to Rule 73(B)” to the section of Trial Chamber I hearing his trial, “through” Judge Liu, for “certification to appeal”.¹² He claimed that “a final decision must be made on the issue of impartiality at the earliest possible opportunity”.¹³ On 26 February, Trial Chamber I (comprising the three permanent judges of that Chamber –

⁷ *Ibid*, pp 2, 6-10 (English version).

⁸ Decision on the Defence Motion for Withdrawal of Judge Orić, 3 Feb 2003, par 1.

⁹ *Ibid*, par 1.

¹⁰ *Ibid*, par 5.

¹¹ *Ibid*, par 11.

¹² Request for Certification to Appeal Against Judge Liu Daqun’s Decision on the request for the Withdrawal of Judge Alphons Orić Rendered on 3 February 2003 but Delivered on 4 February, 10 Feb 2003 [filed in English 14 Feb 2003]. Rule 73(B) provides: “Decisions on all motions are without interlocutory appeal save with certification by the Trial Chamber, which may grant such certification if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.” Rule 73(C) requires requests for certification to be filed within seven days of the filing of the impugned decision.

¹³ *Ibid*, p 5.

Judge Liu Daqun (Presiding), Judge El Mahdi and Judge Orié) delivered its decision.¹⁴ That decision states:¹⁵

CONSIDERING that the Tribunal's Rules of Procedure and Evidence ("Rules") do not specify a procedure for appeal of decisions taken by a Presiding Judge under Rule 15(B) of the Rules;

CONSIDERING that the general regime available to appeals of motions other than preliminary motions in Rule 73 of the Rules seems to be inapplicable to appeals of decisions rendered by a Presiding Judge under Rule 15(B) of the Rules since it would not be appropriate for the Judge who is the object of the dispute to take part in the decision to grant or deny certification to appeal the impugned decision;

CONSIDERING that, under these circumstances, in the interests of Justice and in order to ensure a fair trial for the Accused and to save time and resources, the Chamber should refer the matter directly to the Appeals Chamber;

PURSUANT to Rule 54 of the Rules;

HEREBY refers the matter to the Appeals Chamber.

The decision does not identify the basis upon which the Trial Chamber, rather than the Presiding Judge, was dealing with the motion which had, again, been addressed erroneously to the section of the Trial Chamber hearing the *Galić* case.

6. Since then, Galić has filed two documents in the Appeals Chamber proceedings. The first seeks an order from the Appeals Chamber to the Trial Chamber to suspend proceedings in his trial until the Appeals Chamber gives a decision on the merits of his application, and leave to make submissions on the merits of his appeal.¹⁶ The second requests the Appeals Chamber to set a timetable for the filing of submissions or, alternatively, to grant Galić an extension of time within which he may file his submissions.¹⁷

Discussion

7. Rule 15(B) has already been quoted in part. It is necessary at this stage to quote in full the relevant part of Rule 15:

Rule 15 Disqualification of Judges

(A) A Judge may not sit on a trial or appeal in any case in which the Judge has a personal interest or concerning which the Judge has or has had any association which might affect his or her impartiality. The Judge shall in any such circumstance withdraw, and the President shall assign another Judge to the case.

¹⁴ Decision on the Defence Request for Certification to Appeal the Presiding Judge's Decision on Withdrawal of Judge Orié, 26 Feb 2003 (Judge Liu's Decision").

¹⁵ *Ibid*, pp 2-3.

¹⁶ Motion to Suspend Proceedings and Make Further Submissions, 5 March 2003 [filed 6 Mar 2003], pp 2-3 (English version). Galić seeks leave to file submissions because, he asserts, a *lacuna* exists in the Rules as to the procedure to be followed in the present case (p 2, English version).

¹⁷ Motion to Extend Time-Limit, 6 Mar 2003 [7 Mar 2003], third unnumbered page (English version).

(B) Any party may apply to the Presiding Judge of a Chamber for the disqualification and withdrawal of a Judge of that Chamber from a trial or appeal upon the above grounds. The Presiding Judge shall confer with the Judge in question, and if necessary the Bureau shall determine the matter. If the Bureau upholds the application, the President shall assign another Judge to sit in place of the disqualified Judge.

8. Rule 15(B) was intended to avoid the problem perceived by Trial Chamber I in its decision referring the application to the Appeals Chamber. The Rule makes it clear that the judge whose disqualification is sought is to have no part in the process by which the application for that disqualification is disposed of. Judge Liu refers, in his decision dismissing the application made by Galić, to having conferred with Judge Orić in accordance with the terms of the Rule and, having confirmation from Judge Orić that he was not in breach of Rule 15(A), to having concluded that it was not “necessary” to refer the matter to the Bureau.¹⁸ That was the appropriate procedure to be followed at that stage. However, once Galić challenged the decision of the Presiding Judge, it *did* become “necessary” for the Presiding Judge to refer the matter to the Bureau for it to determine the matter. There is no appeal to the Appeals Chamber available from the decision of the Presiding Judge pursuant to Rule 15(B), although the Appeals Chamber has, in appeals against conviction, had occasion to consider whether a judge of the Trial Chamber which entered the conviction should have been disqualified on account of his or her lack of impartiality.¹⁹

9. Nor was it appropriate for the Trial Chamber to refer to the Appeals Chamber the application which had erroneously been made to it, as the relevant procedure provided by the Rules requires such an application to be referred to the Bureau. The Presiding Judge should have dealt with that application as if it had been correctly addressed to himself, and referred it to the Bureau. However, as the matter has now been referred to the Appeals Chamber (albeit inappropriately), the most expeditious way of resolving the procedural problem which has arisen is for the Appeals Chamber itself to deal with the application referred to it as if it had been addressed to Judge Liu and, in the place of Judge Liu, to refer that application to the Bureau. In the circumstances, however, it would not be appropriate for the Appeals Chamber to consider the application for an order to the section of Trial Chamber I hearing the *Galić* case to suspend proceedings. That application should be made directly to that section of the Trial Chamber.

¹⁸ Judge Liu’s Decision, par 13. The Bureau is composed of the President, the Vice-President and the Presiding Judges of the Trial Chambers (Rule 23(A)) but, if any member of the Bureau is unable to carry out any of the functions of Bureau, those functions are assumed by the senior Judge available (Rule 23(E)).

¹⁹ See, for example, *Prosecutor v Furundžija*, IT-95-17/1-A, Judgment, 21 July 2000, pars 164 *et seq*; *Prosecutor v Delalić et al*, IT-96-21-A, Judgment, 20 Feb 2001, pars 677 *et seq*.

Disposition

10. Accordingly, the Appeals Chamber deals with the application erroneously made to the section of Trial Chamber I hearing *Prosecutor v Galić* as one made to the Presiding Judge of Trial Chamber I, and, in the place of the Presiding Judge, the Appeals Chamber refers that application to the Bureau to determine the original application made by Galić, namely, the “Defence Request for Withdrawal of Judge Alphons Orié, Presiding”, dated 23 January 2003.

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

Dated this 13th day of March 2003,
At The Hague,
The Netherlands.



Judge Theodor Meron
Presiding

[Seal of the Tribunal]

