



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-A  
Date: 22 April 1999  
Original: English

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**IN THE APPEALS CHAMBER OF THE INTERNATIONAL TRIBUNAL**

**Before:** Judge Rafael Nieto-Navia, Presiding  
Judge Wang Tieya  
Judge Almiro Simões Rodrigues  
Judge David Hunt  
Judge Mohamed Bennouna

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

**Order of:** 22 April 1999

**PROSECUTOR**

v.

**ZEJNIL DELALIĆ  
ZDRAVKO MUCIĆ a/k/a "PAVO"  
HAZIM DELIĆ  
ESAD LANDŽO a/k/a "ZENGA"**

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**DECISION ON MOTION TO PRESERVE AND PROVIDE EVIDENCE**

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**The Office of the Prosecutor:**

Mr. Yapa Upawansa  
Mr. Christopher Staker  
Mr. Rodney Dixon

**Counsel for the Respondents and Cross-Appellants:**

Mr. John Ackerman, Mr. Eugene O'Sullivan, for Zejnil  
Delalić  
Ms. Nihada Buturović, Mr. Howard Morrison, for  
Zdravko Mucić  
Mr. Salih Karabdić, Mr. Thomas Moran, for Hazim Delić  
Ms. Cynthia Sinatra, Mr. Peter Murphy for Esad Landžo

## I. INTRODUCTION

Esad Landžo ("Appellant") was found guilty, with others, of grave breaches of the Geneva Conventions after a trial before a Trial Chamber, known as the *Čelebići* case. He has appealed against his conviction, and he has included as a ground of appeal an allegation that his right to a fair and expeditious trial under Article 20 of the Tribunal's Statute, and his right to a fair trial under Article 21, were violated because the verdict [sic] and sentence had been rendered by a Trial Chamber whose Presiding Judge had been permitted to sleep through much of the proceedings.

## II. SUBMISSIONS OF THE PARTIES

The appellant has filed a Motion to Preserve and Provide Evidence (“Motion”),<sup>1</sup> by which he seeks orders preserving the daily video record of the trial produced by Camera 3 in Courtroom 1 and the production of a copy of that record to his counsel. The Motion alleges that, in addition to the observations of counsel, evidence to support his assertion that the Presiding Judge was asleep during substantial portions of the trial is contained in that daily video record.

In its Response to this Motion (“Response”),<sup>2</sup> the Prosecution points out that no order is necessary to preserve the video recording as the Registrar is required by sub-Rule 81(A) of the Rules of Procedure and Evidence (“Rules”) to preserve it as part of the record of the trial proceedings. As to the production of a copy of the video recording to counsel for the Appellant, the Prosecution submits that the ground of appeal itself should be dismissed *in limine* because the Appellant failed to object to such conduct on the part of the Judge at the trial. Alternatively, the Prosecution submits that a decision upon the Motion should be deferred until each party has filed the appeal briefs.

In his Reply (“Reply”),<sup>3</sup> the Appellant disputes that there is any requirement by the Rules to make such a complaint at the trial, and asserts that his counsel had in any event, and in order to avoid a direct confrontation with the Judge, informally brought the matter to the attention of the Legal Officer assigned to the Trial Chamber and to the then President of the Tribunal. Alternatively, the Appellant submits that the Judge’s conduct was an irregularity of such a fundamental nature that the Appeals Chamber should nevertheless take it into account in the interests of justice even if no such action had been taken at the trial. It is also suggested that the Appeals Chamber should take judicial notice of the Judge’s conduct. The Appellant accepted the Respondent’s submission regarding sub-Rule 81(A), obviating the need for an order to preserve the video recording and, consequently, the application was withdrawn.

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<sup>1</sup> Motion to Preserve and Provide Evidence, filed on 4 February 1999.

<sup>2</sup> Prosecution’s Submissions Concerning Esad Landžo’s Motion to Preserve and Provide Evidence, filed on 26 February 1999.

<sup>3</sup> Response of Appellant, Esad Landžo, to Prosecution’s Submissions Concerning Motion to Preserve and Provide Evidence, filed on 11 March 1999.

### III. DISCUSSION

The Appeals Chamber declines either to dismiss the relevant ground of appeal summarily or to defer a decision upon the Motion as is being sought by the Prosecution. While the validity of the ground of appeal is an issue to be determined in the appeal on the merits, it is unnecessary to defer a decision on the Motion until the appeal briefs have been filed. The Appellant has raised the issue of the Presiding Judge's alleged conduct by his ground of appeal. The Appeals Chamber will decide in the appeal whether it constitutes a valid ground of appeal. If the video recording does tend to establish the truth of what is alleged in that ground of appeal, then it is directly relevant to the appeal as a propitious means by which that allegation may be proved. However, the order to produce a copy of the video recording to the Appellant's counsel does not necessarily follow.

The absence of any complaint at the trial concerning the Judge's alleged conduct does no more than to raise the issue as to whether, by the Appellant's silence during the trial, he waived his right to complain of that alleged conduct on appeal. Whether such a waiver should be implied from a failure to complain at the trial is a matter to be determined in the appeal. The Appellant is alleging in the Reply that he did not waive his right to complain at trial because the Judge's alleged conduct was informally brought to the attention of the Legal Officer and the then President of the Tribunal. The Appellant is seeking to rely on the alleged admissions of the former President and Legal Officer in order to establish that there was no waiver of the right to complain and to show the need for access to the video recording. They cannot be subpoenaed to testify as witnesses on matters relating to their official duties or functions because their work is integral to the operation of the Tribunal which must be protected by confidentiality. The Appeals Chamber will decide in the appeal whether the Appellant waived his right to complain of the alleged conduct of the Presiding Judge on appeal and, in relation to this issue, whether evidence of the informal communications with the former President and the Legal Officer is admissible.

In the present case, the Appellant is seeking a copy of the video recording on the basis of the alleged observations of his counsel asserted in the Motion and Reply. The Respondent is disputing the Appellant's right of access. Under these circumstances, first-hand and detailed evidence citing specific instances is necessary in affidavit form in accordance with the law and procedure of the State in which such affidavits are signed before access can be granted.

Accordingly, as no such evidence has been provided by the Appellant, the relief sought must be declined. However, if the Appellant files a fresh Motion, supported by evidence of a first-hand (that is, not hearsay) and detailed nature which demonstrates that access to the video recording is likely to materially assist in the presentation of his case on appeal, and if the Appeals Chamber (after considering the submissions of the parties) considers that the evidence falls within that description, relief will be granted.

**IV. DISPOSITION**

Pursuant to Rule 54, the Appeals Chamber dismisses the Appellant's Motion.

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

Done this 22<sup>nd</sup> day of April 1999

At The Hague

The Netherlands



Rafael Nieto-Navia

Presiding Judge

Judge David Hunt attaches his separate, concurring, opinion to this Decision.

**[Seal of the Tribunal]**