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IT-98-32/1-T p.3861

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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-98-32/1-T

Date: 19 August 2008

Original: English

IN TRIAL CHAMBER III

Before: Judge Patrick Robinson, Presiding
Judge Christine Van Den Wyngaert
Judge Pedro David

Registrar: Mr. Hans Holthuis

Decision of: 19 August 2008

PROSECUTOR

v.

**MILAN LUKIĆ
SREDOJE LUKIĆ**

PUBLIC

**DECISION ON PROSECUTION MOTION FOR
CERTIFICATION TO APPEAL THE TRIAL CHAMBER'S
DECISION ON PROSECUTION MOTION TO AMEND THE
SECOND AMENDED INDICTMENT**

The Office of the Prosecutor

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TRIAL CHAMBER III 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 (“Tribunal”) is seised of the “Prosecution motion for certification to appeal the Trial Chamber’s ‘Decision on Prosecution motion seeking leave to amend the Second Amended Indictment’”, filed confidentially on 16 July 2008 (“Motion”), whereby the Prosecution is requesting the Trial Chamber to certify for interlocutory appeal its “Decision denying the Prosecution motion to amend the Second Amended Indictment”, filed on 8 July 2008 (“8 July Decision”).

A. Relevant procedural history

1. On 16 June 2008, the Prosecution filed a motion seeking leave to amend the Second Amended Indictment (“Indictment”), to which both the Defence of Milan Lukić and the Defence of Sredoje Lukić responded 26 June 2008.¹ The Prosecution replied on 3 July 2008.² On 3 July 2008, the Open Society Justice Initiative (“OSJI”) sent a letter to the Registry of the Tribunal, which was provided to the Chamber on 7 July 2008, whereby the OSJI requested leave to file a brief as purported *amicus curiae*.

2. On 8 July 2008, the Chamber denied the Prosecution’s motion of 16 June 2008 and the OSJI request.³ The Chamber, holding that the amendments sought by the Prosecution constituted new charges under Rule 50 of the Procedure and Evidence (“Rules”), found that granting the amendments would result in unfair prejudice to the Accused by depriving them of an adequate opportunity to prepare an effective defence against the new charges and by adversely affecting their right under Article 21 of the Statute to be tried without undue delay.⁴ The Chamber particularly noted the tardiness with which the Prosecution had moved for the amendment of the Indictment.⁵

¹ “Milan Lukić’s response to the Prosecution motion seeking leave to amend the second amended indictment and request for reconsideration or certification for leave to appeal”, filed confidentially on 26 June 2008, and “Sredoje Lukić’s response to ‘Prosecution’s motion seeking leave to amend the second amended indictment’”, filed confidentially on 26 June 2008.

² “Prosecution’s consolidated reply on amendment to the second amended indictment and Rule 115 motion, and response to Milan Lukić’s request for reconsideration or certification to appeal”, filed confidentially on 3 July 2008. Attached to the Reply is Annex A, a “Summary chart of references to joint criminal enterprise”.

³ “Decision on Prosecution motion seeking leave to amend the Second Amended Indictment and on Prosecution motion to include UN Security Council Resolution 1820 (2008) as additional supporting material to proposed Third Amended Indictment as well as on Milan Lukić’s request for reconsideration or certification of the pre-trial Judge’s order of 19 June 2008”, filed on 8 July 2008 (“Impugned Decision”), which contains a full procedural history of this matter.

⁴ Impugned Decision, paras 49-50, 62.

⁵ Impugned Decision, paras 51-54, 60-61.

3. As noted above, the Motion was filed on 16 July 2008. On 22 July 2008, the Defence of Milan Lukić filed its response to the Motion (“Milan Lukić Response”).⁶ On the same day, the Defence of Sredoje Lukić filed its response to the Motion (“Sredoje Lukić Response”).⁷

4. On 24 July 2008, the Prosecution requested leave to reply and replied to the Defence Responses.⁸ Leave to reply is granted.

B. Applicable law

5. Pursuant to Rule 73(B), the Chamber may grant certification of an interlocutory appeal if the impugned decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial (“first prong”) and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings (“second prong”). Both prongs must have been met in order for certification to be granted.

C. Arguments of the parties

6. The Prosecution requests certification to appeal the Trial Chamber’s denial to include in the Indictment: (1) joint criminal enterprise (“JCE”) as an express mode of liability, and (2) allegations of the commission of sexual crimes by the Accused. The Prosecution also argues that the Trial Chamber should certify for appeal its decision denying leave to the OSJI to file an *amicus curiae* brief.

1. Rule 73(B) – First prong

(a) Prosecution

7. The Prosecution submits that the 8 July Decision concerns issues that will materially affect the outcome of the trial.⁹ With respect to the proposed JCE amendments, the Prosecution argues that this mode of liability was already pleaded in the Indictment, and that the amendments merely clarify the Indictment in this respect.¹⁰ The Prosecution argues that “[i]ssues relating to the clarity

⁶ “Milan Lukić’s response to the Prosecution motion requesting certification to appeal the decision denying leave to amend”, 22 July 2008.

⁷ “Sredoje Lukić’s response to ‘Prosecution motion for certification to appeal the Trial Chamber’s decision on Prosecution motion seeking leave to amend the second amended indictment’”, 22 July 2008.

⁸ “Prosecution reply to Defence response to Prosecution motion for certification to appeal the Trial Chamber’s ‘Decision on Prosecution motion seeking leave to amend the Second Amended Indictment’”, 24 July 2008.

⁹ Motion, paras 8-14.

¹⁰ Motion, paras 9 and 10.

and specificity of pleading necessarily impact on the outcome of the trial”.¹¹ It further submits that “failure to accept the Prosecution’s proposed amendments results in a lack of clarity with respect to what mode of liability might form the basis for ultimate criminal culpability, either at Trial or Appeal”, thereby affecting the outcome of the trial.¹²

8. Regarding the Chamber’s denial of the Prosecution’s request to include five new counts alleging crimes of sexual violence, the Prosecution argues that this will affect the outcome of the trial in two ways. First, in that:

[t]he outcome of the trial will be that these witnesses would give their evidence to prove the Accused’s presence at a certain location at a certain time, but their direct harm at the hands of the Accused will go entirely unremedied. A shadow will be cast on the ultimate judgement, resulting in an inaccurate and incomplete record and impunity for the Accused.¹³

9. Secondly, the Prosecution submits that “[w]hile the witnesses had agreed to testify, it is not unreasonable to expect that they may be reluctant to testify about their rape, enslavement and torture by the Accused knowing the Accused will not be held accountable for the crimes they committed against them.”¹⁴ In its Reply, the Prosecution repeats its substantive argument from the First Motion that not charging the Accused with the five new counts would result in a “miscarriage of justice.”¹⁵

(b) Defence

10. Regarding the proposed JCE amendments, it is argued by both Defences that amendment would result in the inclusion of a new form of liability and, as a consequence, a new charge.¹⁶ On this basis, both Defences conclude that the first prong of Rule 73(B) has not been met. The Milan Lukić Defence emphasises that:

there is no lack of clarity in the charges presented in the Second Amended Indictment following the Decision by the Trial Chamber. Therefore, while the judgement is necessarily related to the counts charged in the Indictment, there is no significant impact on the outcome of the trial, as Milan Lukić will thus be tried and judged fairly and expeditiously on those counts present in the Second Amended Indictment.¹⁷

¹¹ Motion, para. 9.

¹² Motion, para. 10.

¹³ Motion, paras 11-13.

¹⁴ Motion, para. 13.

¹⁵ Reply, para. 9, referring to First Motion, para. 66. In this respect, the Trial Chamber notes that the Prosecution did not argue that such a “miscarriage of justice” would impact the fair and expeditious conduct of the trial.

¹⁶ Sredoje Lukić Response, para. 11; Milan Lukić Response, para. 12. Both Responses refer to 8 July Decision, para. 49, where the Chamber held that the inclusion of JCE liability would result in a new charge against the Accused within the meaning of Rule 50 (C) of the Rules.

¹⁷ Milan Lukić Response, para. 12.

With respect to the proposed amendments to include sexual crimes in the Indictment, the Milan Lukić Defence similarly argues that it sees “no significant affectation of the outcome [of the trial] if the new charges are excluded, as the Accused will be tried and judged [on the] existing counts”.¹⁸ The Sredoje Lukić Defence takes issue with the Prosecution’s submission that “[h]ad the Defence provided timely notice of alibi under the Work Plan, the Prosecution’s rebuttal case would consequently have been prepared earlier as well.”¹⁹ In this context, the Sredoje Lukić Defence points to the occasion, referred to by the Prosecution in the First Motion, when the Prosecutor considered seeking leave to add new charges, but elected not to do so in order not to lengthen the Prosecution’s case.²⁰

2. Rule 73(B) – Second prong

(a) Prosecution

11. The Prosecution submits that an immediate resolution by the Appeals Chamber at this stage of the proceedings is warranted “in order to prevent a judgement at trial or appeal which is impacted by the lack of clarity of pleading [regarding JCE] or the need to remand the matter to trial”.²¹ Secondly, it submits that “in a post judgement appeal, the Appeals Chamber would not be able to adjudicate charges [of sexual violence] completely excluded from the indictment”.²² According to the Prosecution, a possible reversal by the Appeals Chamber of the 8 July Decision would lead to “a delay for the required procedure under Rule 50 – roughly four weeks”.²³

(b) Defence

12. In response to the Prosecution’s argument that the Appeals Chamber, in deciding an appeal against the Trial Chamber’s judgement, may remand the case due to alleged errors in the 8 July Decision, the Milan Lukić Defence argues that:

remand will not be required for the counts not added. Any later appeal stemming from the present case will be based on the case presented on the charges of the Second Amended Indictment. The counts not added are not underlying a charge of command responsibility or an already plead joint criminal enterprise, and, therefore, the Appeals chamber would not be forced into a position to remand due to the lack of certification here.²⁴

¹⁸ Milan Lukić Response, para. 13.

¹⁹ Sredoje Lukić Response, para. 12, referring to Motion, para. 11.

²⁰ Sredoje Lukić Response, para. 12, referring to First Motion, para. 14.

²¹ Motion, para. 15.

²² Motion, para. 16.

²³ Motion, para. 21.

²⁴ Milan Lukić Response, para. 21.

Both Defences argue that a resolution by the Appeals Chamber would not materially advance the proceedings since "the rights of the Accused to a fair trial, in particular the right to be tried without undue delay, would be severely infringed if the Appeals Chamber was to decide on this issue at this late stage of the proceedings".²⁵ It is argued that "[t]he only result from certification at this point is delay".²⁶

3. Amicus curiae brief – First and second prongs

13. The Prosecution argues that the Trial Chamber should have granted the OSJI leave to file an *amicus curiae* brief. The Prosecution submits that "there is great potential for this *amici* [*sic*] to have a significant impact upon the Trial Chamber's determination on the matter, including its decision with respect to the proposed amendments".²⁷ This, the Prosecution concludes, "would have an impact on the outcome of the trial."²⁸ It argues that a determination by the Appeals Chamber on this matter "would materially advance the proceedings as such a determination would enable the submission of the *amici* [*sic*] to be properly considered for potential admission".²⁹ Both Defences argue that the Prosecution did not show how the two prongs of Rule 73(B) are met.³⁰ The Sredoje Lukić Defence submits that "there continues to be no basis for the Chamber to exercise its discretion to grant leave for OSJI to file an *amicus curiae* brief."³¹

D. Discussion

14. The purpose of Rule 73(B) is to reduce interlocutory appeals. This is made clear from the manner in which the Rule is formulated: "Decisions on all motions are without interlocutory appeals save with certification by the Trial Chamber [...]." A party suffers no prejudice from the restrictive formulation because Article 25 of the Statute provides for an appeal following a conviction or acquittal on the basis of an error of law or fact made by the Trial Chamber. It is important, therefore, to appreciate the very clear distinction between the regime for an interlocutory appeal and the regime for a post-judgement appeal. Generally, in considering a motion for

²⁵ Sredoje Lukić Response, para. 16.

²⁶ Milan Lukić Response, para. 21.

²⁷ Motion, para. 24.

²⁸ Motion, para. 24.

²⁹ Motion, paras 24 and 25.

³⁰ Milan Lukić Response, para. 20; Sredoje Lukić Response, para. 25.

³¹ Sredoje Lukić Response, para. 20.

certification under Rule 73(B) a Trial Chamber is not concerned with the merits of an appeal because they are properly the province of an appeal pursuant to Article 25 of the Statute.³²

15. The Chamber recalls that the purpose of a request for certification to appeal is not to show that the impugned decision is incorrectly reasoned but rather to demonstrate that the two cumulative conditions set out in Rule 73(B) have been met.³³ Consequently, this is the only matter for consideration by a Trial Chamber seized of a request for certification to appeal. The Chamber will therefore not consider arguments of the parties concerning the merits of the impugned decision, such as that of the Prosecution that the 8 July Decision will lead to a miscarriage of justice.³⁴

1. Rule 73(B) – First prong

16. As to the proposed JCE amendments, the Trial Chamber finds that the potential inclusion of JCE liability in the Indictment as an alternative mode of liability under which the Accused may be held responsible for the crimes already charged in the Indictment is an issue that would significantly affect the outcome of the trial. It thus finds that the first prong of Rule 73 (B) of the Rules has been met in this respect.

17. The Trial Chamber also considers that the proposed inclusion of new charges of sexual violence allegedly committed by the Accused would significantly affect the outcome of the trial. The Chamber therefore concludes that the Prosecution has met the first prong of Rule 73(B) in this respect.

18. With respect to the Prosecution argument that the direct harm to certain witnesses will go unremedied, the Trial Chamber recalls that the Prosecution, while in possession of evidence that sexual crimes were possibly committed by the Accused, made a conscious decision not to pursue charges of sexual violence against the Accused and maintained this position until approximately one month ago.³⁵ The responsibility for not having acted on that evidence earlier, for whatever reason, lies squarely with the Prosecution.³⁶

³² *Prosecutor v. Stanišić and Simatović*, Case No. IT-03-69-PT, “Decision on Defence motion requesting certification for leave to appeal”, 17 March 2008.

³³ *Prosecutor v. Gotovina et al.*, Case No. IT-06-90-PT, “Decision on the Čermak and Markač requests for certification to appeal the decision on Ivan Čermak’s and Mladen Markač’s joint motion to resolve conflict of interest regarding attorney Gregory Kehoe”, filed confidentially on 25 January 2008, para. 13, referring to *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, “Decision on Prosecution motion for certification of a Trial Chamber decision on Prosecution motion for voir dire proceeding”, 20 June 2005, paras 2 and 4.

³⁴ Reply, para. 9, referring to First Motion, para. 66. See *supra* para. 9.

³⁵ Motion, para. 11. In its original motion, the Prosecution submitted that the matter of adding sexual crimes to the Indictment was considered twice, and that on both occasions the Prosecutor decided not to seek leave to add such charges, Prosecution First Motion, para. 12, where the Prosecution stated that “[o]n 11 January 2006 [...] [i]t was also

2. Rule 73(B) – Second prong

19. In the evaluation of the second prong, the Trial Chamber needs to assess whether the proceedings may be materially advanced by a decision of the Appeals Chamber. In view of the fact that the Chamber finds that the Motion will fail with regard to the proposed inclusion of crimes of sexual violence, the Chamber will restrict its evaluation of the second prong to the proposed JCE amendments.

20. Relevant to the Trial Chamber's assessment is the expected delay of the proceedings as a consequence of the appeal. The Prosecution has submitted that a possible reversal by the Appeals Chamber of the 8 July Decision would lead to a delay of "roughly four weeks".³⁷ The Trial Chamber does not share this view. A delay of 30 days of a Prosecution case which is scheduled to take two months (including cross-examination of witnesses) constitutes a considerable delay. Furthermore, the inclusion of new charges is likely to require that the Defence needs additional time to prepare their cases accordingly. Moreover, other than the time required for the filing of preliminary motions on the new charges (30 days), additional time may be necessary for possible responses and replies thereto, and the preliminary motions must be decided by the Chamber before the trial can recommence.³⁸ Lastly, there may be a need for updated pre-trial briefs on the new charges.

21. The Chamber finds that an immediate resolution at this stage of the proceedings by the Appeals Chamber of the proposed amendments would not materially advance the proceedings. Rather, an interlocutory appeal is likely to delay the trial significantly and may result in a violation of the Accused's right to a fair and expeditious trial.

determined that any additional allegations of sex crimes, in light of the pending referral, were more properly investigated and added by the local prosecutor who ultimately received the case." See also *id.*, para. 14, where the Prosecution stated that:

[t]he Prosecutor exercised her discretion not to seek an amendment on the indictment prior to the 15 November 2007, in part, based upon her belief that amending the indictment to include new charges of sex crimes would lengthen the Prosecution's case. She had taken the position that fulfilling her obligations to conclude the work of the Prosecutor in the time frame mandated by the UN Security Council did not permit an amendment to add sex crimes charges which she believed would add to the length of the trial. She directed her staff to prepare the case for trial as expeditiously as possible.

³⁶ Prosecution Motion, para. 11, where the Prosecution stated that "[h]ad the Defence provided timely notice of alibi under the Work Plan, the Prosecution's rebuttal case would consequently have been prepared earlier as well." See also Prosecution First Motion, para. 48, where it was submitted that "[a]ll of the witnesses who would be giving evidence in relation to the sexual violence charges are already on the Prosecution's witness list."

³⁷ Motion, para. 35

³⁸ Rule 65 *ter*(E) and 126 *bis* of the Rules.

3. Amicus curiae brief – First and second prongs of Rule 73(B)

22. As a preliminary matter, the Chamber is not convinced that the Prosecution has standing to request certification to appeal the Chamber’s decision denying the OSJI leave to file an *amicus curiae* brief. However, even if the Prosecution were to be recognised as having standing, the Chamber holds that the Prosecution has not met its burden under Rule 73(B).

23. Rule 73(B) requires that the issue in question – that is, whether leave ought to have been granted to the Prosecution to amend the Indictment as requested in the First Motion – is such that it would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial. However, a submission – such as that of the Prosecution that “there is great potential” that a brief by a purported *amicus curiae* will have “a significant impact upon the Trial Chamber’s determination on the matter, including its decision with respect to the proposed amendments [which] in turn would have an impact on the outcome of the trial – does not meet this standard. Likewise, the Prosecution’s submission in relation to the second prong is flawed. A determination by the Appeals Chamber concerning whether the Chamber erroneously denied leave to OSJI would concern that issue only. As such, it would not touch upon the relevant issue for consideration under Rule 73(B), as just described. An immediate resolution of this matter by the Appeals Chamber would not, therefore, materially advance the proceedings. The Motion will consequently be denied in this respect.

E. Disposition

24. For the foregoing reasons and pursuant to Rule 73(B) of the Rules, the Trial Chamber **DENIES** the Motion.

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



Judge Patrick Robinson
Presiding

Dated this nineteenth day of August 2008

At The Hague

The Netherlands

[Seal of the Tribunal]