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: 27 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: **27 August 2008**

PROSECUTOR

v.

MILAN LUKIĆ
SREDOJE LUKIĆ

PUBLIC

DECISION ON PROSECUTION MOTION FOR RECONSIDERATION OF OR IN THE ALTERNATIVE, CERTIFICATION TO APPEAL ORAL DECISION OF THE TRIAL CHAMBER

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 reconsideration or in the alternative certification to appeal the Trial Chamber's order requiring the Prosecution to call alibi rebuttal witnesses in its case-in-chief", filed confidentially with an *ex parte* annex on 16 July 2008 ("Motion").

A. Procedural history

1. During the pre-trial conference on 9 July 2008, the Trial Chamber ordered the Prosecution to lead during its case-in-chief any evidence in rebuttal of the Defence's alibi evidence ("9 July Order").[1] The Trial Chamber based its decision, *inter alia*, on the standard for rebuttal evidence laid down by the Appeals Chamber in the case of the *Prosecutor v. Delalić et al.* ("*Delalić* case").[2]

2. On 16 July 2008, the Prosecution filed its Motion requesting the Chamber to reconsider its 9 July Order or, in the alternative, to grant certification to appeal the 9 July Order.

3. On 22 July 2008, the Defence for Milan Lukić ("Defence") responded, arguing that neither the requirements for reconsideration nor the requirements for certification to appeal have been met ("Defence Response").[3] The Defence for Sredoje Lukić did not file a response to the Motion.

B. Arguments of the parties

1. Reconsideration

(a) Prosecution

4. The Prosecution distinguishes two categories of alibi rebuttal evidence: (1) evidence placing the Accused near the alleged crime scene at times relevant to the Indictment, and (2) evidence that would tend to disprove that the Accused was present at the place he asserts he was during the commission of the crimes.[4] The Prosecution submits that the first category of evidence "is appropriately introduced during the Prosecution case in chief".[5] With respect to the second

[1] 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

[2] Pre-trial conference, 9 July 2008, T. 206, 207, 223.

[3] Milan Lukić's response to the Prosecution motion requesting reconsideration or certification to appeal the Trial Chamber order requiring the Prosecution to call rebuttal witnesses in its case-in-chief, filed confidentially on 22 July 2008, para. 2.

[4] Motion, para. 10

[5] Motion, para. 10.

category, however, the Prosecution submits that it should only be required to introduce evidence "to negate where the Accused claims to have been after sworn evidence on that point is introduced during the Defence case".[6]

5. The Prosecution considers the decision of the Trial Chamber to be "fundamentally unfair", as "the defence alibi witnesses, after listening to the testimony of the [Prosecution's] 'rebuttal' witnesses, could fashion their testimony to conform to the evidence", causing "a fundamental flaw in the fact-finding process".[7] The Prosecution submits that "it has been unable to identify any jurisdiction employing an adversarial trial system that requires the Prosecution to call its rebuttal evidence in its direct case".[8]

6. The Prosecution submits that the Trial Chamber, rather than relying on a decision issued by the *Delalić* Appeal Chamber, should have based its 9 July Order on Rule 85 of the Rules of Procedure and Evidence ("Rules"), which Rule prescribes the order of the presentation of evidence and according to which a Trial Chamber has discretion to change that order "in the interests of justice". It further argues that the *Delalić* case and the present case are "completely distinguishable" and that the Trial Chamber, in relying on the *Delalić* decision, provides the Defence with an unfair advantage.[9] The Prosecution submits that the Chamber erred "in concluding that the Prosecution could meaningfully rebut the testimony of defence witnesses prior to them giving sworn testimony at trial".[10] In relation to the *Delalić* criterion requiring that evidence which forms a fundamental part of the Prosecution case should be lead during its case-in-in-chief, the Prosecution argues that evidence lead to rebut Defence alibi evidence "does not arise from a 'fundamental part of the case the Prosecution is required to prove' but rather from a defence of alibi raised by the Defence".[11]

7. Lastly, the Prosecution asserts that the failure of the Defence for Milan Lukić to comply with Rule 67 puts it in a situation where it has to "guess what the alibi defence is but then to investigate and present evidence in rebuttal of an alibi that is yet to be the subject of evidence",[12] an "illogical" situation that would "result in an injustice and a violation of the principle of equality of arms".[13]

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[6] Motion, para. 10.
[7] Motion, para. 7.
[8] Motion, para. 7.
[9] Motion, para. 13.
[10] Motion, para. 14.
[11] Motion, para. 15.
[12] Motion, para. 17.
[13] Motion, para. 18.

(b) Defence

8. The Defence argues that by its notices of alibi pursuant to Rule 67 it "is asserting the whereabouts of the Accused and, through notarized statements, has actually cemented the details of these alibis".[14] As a result, the Defence argues, the Prosecution submission that the Defence alibi witnesses could tailor their evidence to the evidence that is presented by the Prosecution is without merit.[15] The Defence acknowledges that the Prosecution should be allowed to lead evidence in rebuttal, if new information were to arise out of the presentation of the Defence case.[16] Therefore, the Defence argues that there will be no prejudice caused to the Prosecution as it would be allowed to lead evidence in rebuttal if any new information it was not previously aware of was to arise during the Defence cases.[17] The Defence submits that the Prosecution will have the opportunity to test the credibility of the Defence alibi during its case-in-chief through its alibi rebuttal witnesses and during its cross-examination of the Defence alibi witnesses. Therefore, it submits the Trial Chamber's Order does not cause "fundamental unfairness".[18]

9. The Defence asserts that the Trial Chamber followed a proper cause by applying the jurisprudence of *Delalić* Appeals Chamber to the present case. In respect of the Prosecution assertion that in no common law system the Prosecution would be required to lead alibi rebuttal evidence during its case-in-chief, the Defence adverts to Rule 89 (A) of the Rules holding that the Tribunal is not bound by national rules of evidence.[19]

2. Certification to appeal

(a) Prosecution

10. The Prosecution submits that the legal issue on appeal would be "whether the Prosecution is required to speculate as to what alibi witnesses would testify to, investigate the alibi defence, which in the present case is virtually unknown with regard to Milan Lukić, and introduce evidence in its case-in-chief to rebut evidence about which it knows very little".[20]

11. The Prosecution submits that this legal issue meets the standard for certification for appeal, as it is an issue that will significantly affect the fair and expeditious conduct of the proceedings, and asserts that it is reasonable to conclude that the outcome of the trial will be materially affected.

[14] Defence Response, para. 6.
[15] Defence Response, paras 5 and 6.
[16] Defence Response, para. 7.
[17] Defence Response, para. 10.
[18] Defence Response, para. 8.
[19] Defence Response, para. 9.
[20] Motion, para. 23.

Furthermore, it submits the Appeals Chamber would have to remand the case should it find an error in the Trial Chamber's reasoning post-judgement. In the Prosecution's view, therefore, the second prong of Rule 73(B) is also met.[21]

(b) Defence

12. The Defence argues that the Prosecution failed to show that the issue is one that would significantly affect the fair and expeditious outcome of the trial.[22] It further argues that the Prosecution, by its mere assertion that the Appeals Chamber would possibly remand the issue to the Chamber, has failed to show how an interlocutory appeal on the issue may materially advance the proceedings.[23]

C. Applicable law

1. Reconsideration

13. A Trial Chamber may, in exceptional circumstances, reconsider a prior decision if "a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent an injustice".[24]

2. Certification to appeal

14. Pursuant to Rule 73(B) of the Rules, 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 be met in order for certification to be granted.

3. Standard for rebuttal evidence

15. In 2001, the *Delalić* Appeals Chamber set the standard for leading rebuttal evidence:

> The Trial Chamber characterised the nature of rebuttal evidence as "evidence to refute a particular piece of evidence which has been adduced by the defence", with the result that it is "limited to matters that arise directly and specifically out of defence evidence." This standard is essentially consistent with that used previously and subsequently by other Trial Chambers. The Appeals Chamber agrees that this standard – that rebuttal evidence must relate to a significant issue arising

[21] Motion, paras 20, 21 and 23.
[22] Defence Response, para. 15.
[23] Defence Response, para. 16.
[24] *Prosecutor v. Rasim Delić,* Case No. IT-04-83-PT, Decision on the Prosecution Motion for Reconsideration, 23 August 2006, citing *Prosecutor v. Slobodan Milošević,* Case No. IT-02-54-AR108bis.3, Decision on request of Serbia and Montenegro for review of the Trial Chamber's decision of 6 December 2005, filed confidentially on 6 April 2006, para. 25, n. 40.

> directly out of defence evidence which could not reasonably have been anticipated – is correct. It is in this context that the Appeals Chamber understands the Trial Chamber's statement, made later in its Decision on Request to Reopen, that "evidence available to the Prosecution *ab initio*, the relevance of which does not arise *ex improviso*, and which remedies a defect in the case of the Prosecution, is generally not admissible.[25]

16. The test applied of the *Delalić* Appeals Chamber for rebuttal evidence has been applied consistently by Trial Chambers of this Tribunal and other Tribunals.[26]

D. Discussion

17. In respect of the Prosecution's request for reconsideration, the Trial Chamber considers the Prosecution's submission, that "the defence alibi witnesses, after listening to the testimony of the 'rebuttal' witnesses, could fashion their testimony to conform to the evidence", to be fundamentally flawed. The argument ignores the fact that Defence evidence is normally given after the testimony of Prosecution witnesses and thus is generally intended to rebut the Prosecution evidence. If the Prosecution would suspect that Defence witnesses who are testifying under solemn declaration would "fashion their testimony", the Prosecution may challenge their evidence in cross-examination. The Chamber does not accept the Prosecution's argument.

18. The Prosecution stresses that the nature of alibi rebuttal evidence is to respond to defence evidence and that it, therefore, cannot be categorised as a "fundamental part" of the Prosecution case.[27] The Chamber disagrees. Evidence which concerns the presence or absence of the Accused at a specific location other than the alleged crime scene is "evidence probative of the guilt of the accused."[28] It is therefore a fundamental part of the Prosecution's case. In this respect, the Chamber

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[25] *Prosecutor v. Delalić et al*, Case No. 96-21-A, Appeal judgement, 20 February 2001 ("*Delalić* Appeal judgement"), paras 273, 275 (footnotes omitted).

[26] For examples closely related to the present case, see *Prosecutor v. Jean de Dieu Kamuhanda*, Case No. ICTR-99-54A-T, Decision on the Prosecutor's motion for leave to call rebuttal evidence pursuant to Rule 85(a)(iii) of the Rules of Procedure and Evidence, 13 May 2002, paras 18-20; *Prosecutor v. Limaj et al*, Case No. IT-03-66-T, Decision on Prosecution's motion pursuant to Rule 67(A)(i)(a), 16 February 2005. The Chamber notes that this ruling was based on the reply of the Office of the Prosecutor, which concurred with the position taken by the *Limaj* Trial Chamber: "This is a misreading of the rule. The reference to the Prosecution calling witnesses "in rebuttal" of the alibi defence in Rule 67(A)(ii) does not make any reference to the Prosecution's rebuttal case, but only to the act of rebutting the alibi defence, whether in the Prosecution's case-in-chief or in its rebuttal case", *Prosecutor v. Limaj et al*, Case No. IT-03-66-T, Prosecution reply to Defence response to "Prosecution's motion pursuant to Rule 67 (A)(i)(a)," 15 February 2005, para. 1; *Prosecutor v. Brima et al.*, SCSL-04-16-T, Decision on confidential motion to call evidence in rebuttal, 14 November 2006, para. 42.

[27] Motion, para. 14 (emphasis omitted).

[28] *Delalić* Appeal judgement, para. 275, where the Appeals Chamber also held (confirming the Trial Chamber's observation) that "where the evidence which 'is itself evidence probative of the guilt of the accused, and where it is reasonably foreseeable by the Prosecution that some gap in the proof of guilt needs to be filled by the evidence called by it', it is inappropriate to admit it in rebuttal, and the Prosecution 'cannot call additional evidence merely because its case has been met by certain evidence to contradict it' (footnote omitted).

concurs with the finding of the *Delalić* Appeals Chamber that such evidence "should be brought as part of the Prosecution case in chief and not in rebuttal".[29]

19. The Trial Chamber recalls its warning in its 9 July Order that a failure on the part of the Defence to comply with the obligations in Rule 67 of the Rules might have adverse consequences.[30] If the Defence were to provide additional evidence of alibi during its case which was not clearly set out in its alibi notice, the Prosecution will be allowed to seek leave to lead rebuttal evidence.[31]

20. Finally, the Prosecution argument that the Trial Chamber should have used the standard set out in Rule 85 of the Rules – namely that changes to the order in which the evidence is to be led can be ordered "in the interest of justice"[32] – is rejected. The fact that this was not expressly articulated in court does not amount to a finding that the decision of the Trial Chamber was based on a clear error of reasoning or that it would result in an injustice.[33]

21 In light of the foregoing, the Chamber finds that the Prosecution's request for reconsideration should be denied.

22. The Chamber has considered whether the Prosecution has satisfied the criteria of Rule 73(B) for certification to appeal the impugned decision. Regarding the first prong of the Rule, the Chamber holds that issue in question, that is at which stage of the proceedings the Prosecution is to lead its evidence that would tend to disprove that the Accused was present at the place he asserts he was during the commission of the crimes, is one that affects the fair and expeditious conduct of the proceedings or the outcome of the trial. Therefore, it finds that the first prong of Rule 73(B) has been met.

23. With respect to the second prong of Rule 73(B), the Chamber concludes that an immediate resolution by the Appeals Chamber may materially advance the proceedings. As the second prong has also been met, the Chamber will grant the Prosecution Motion in this respect.

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[29] *Id.*
[30] Pre-trial conference, 9 July 2008, T. 205.
[31] Pre-trial conference, 9 July 2008, T. 226.
[32] Motion, paras 5 and 6..
[33] See also *Prosecutor v. Kunarac et al.*, Case No. 96-23-T&23/1-T, Decision on Defence motions for rejoinder, 31 October 2000, para 14: "The argument by the accused that Rule 85(A)(iv) gives him an absolute entitlement to lead evidence in rejoinder is unsustainable. It is the obligation of the Prosecutor to lead all of her evidence in her case-in-chief. It is only if the accused raises a new issue in his evidence that she may lead evidence in rebuttal. She has no absolute entitlement to lead evidence in rebuttal merely because of Rule 85(A)(iii). Rule 85(A)(iii) does not deal with her entitlement; it merely deals with the order in which evidence is given *where an entitlement to lead such evidence exists*. It is the same with evidence in rejoinder and Rule 85(A)(iv)."

E. Disposition

24 For the foregoing reasons, the Trial Chamber hereby **DENIES** the request for reconsideration and **GRANTS** certification to appeal the 9 July Order.

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

Judge Patrick Robinson
Presiding

Dated this twenty-seventh day of August 2008
At The Hague
The Netherlands

[Seal of the Tribunal]