

**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-
AR73.1
Date: 16 October
2008
Original: English

IN THE APPEALS CHAMBER

Before: Judge Liu Daqun, Presiding
Judge Mohamed Shahabuddeen
Judge Andréia Vaz
Judge Theodor Meron
Judge Wolfgang Schomburg

Registrar: Mr. Hans Holthuis

Decision: 16 October 2008

PROSECUTOR

v.

**Milan Lukić &
Sredoje Lukić**

PUBLIC

**DECISION ON THE PROSECUTION'S APPEAL AGAINST
THE TRIAL CHAMBER'S ORDER TO CALL ALIBI
REBUTTAL EVIDENCE DURING THE PROSECUTION'S
CASE IN CHIEF**

The Office of the Prosecutor:

Mr. Dermot Groome

Counsel for the Accused:

Mr. Jason Alarid for Milan Lukić
Mr. Djuro Đ. Čepić and Mr. Jens Dieckmann for Sredoje Lukić

1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons responsible for Serious Violations of International Law Committed in the Territory of the Former Yugoslavia since 1991 (“Appeals Chamber” and “International Tribunal”, respectively) is seized of the “Prosecution Appeal of Oral Decision to Call Prosecution’s Alibi Rebuttal Evidence During its Case-in-Chief” filed on 3 September 2008 (“Appeal”) by the Office of the Prosecutor (“Prosecution”), against an oral decision rendered by Trial Chamber III (“Trial Chamber”) on 9 July 2008 (“Impugned Decision”).¹ Neither Milan Lukić nor Sredoje Lukić (“Accused”) filed a response.

I. PROCEDURAL HISTORY

2. The Accused filed notices indicating that they intended to present alibi evidence in accordance with Rule 67(B)(i)(a) of the Rules of Procedure and Evidence (“Rules”).² The Prosecution objected to the notices, arguing that they needed to be further clarified, a request which was upheld by the Trial Chamber.³ In addition, the Prosecution informed the Trial Chamber that it intended to call witnesses to rebut the alibi evidence to be led in the Defence case.⁴ Consequently, the Trial Chamber ordered that “[f]ollowing the case law of the Tribunal, these witnesses are to be called during the Prosecution’s case in chief”.⁵ The Trial Chamber added that its decision was based on the decision of the Appeals Chamber in *Delalić et al.* where the standard for rebuttal evidence had been established.⁶

3. The Trial Chamber denied the Prosecution’s request for reconsideration of the Impugned Decision but granted its alternative request for certification to appeal it.⁷ The Prosecution has accordingly appealed the Impugned Decision, arguing as its main contention that the Trial Chamber

¹ Impugned Decision, T. 199.

² As amended on 28 February 2008.

³ Status Conference, 12 June 2008, T.175; *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-PT, (Confidential) Decision on the Prosecution’s Motion for an Order Requiring the Accused Milan Lukić to Clarify Alibi Notice Served Under Rule 67(A)(i)(a) and on the Defence of Milan Lukić’s Second Motion Concerning Protective Measures for Alibi Witnesses, 8 May 2008; *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-PT, Decision on Prosecution’s Motion for an Order requiring the Accused Sredoje Lukić to Clarify Alibi Notice Served Under Rule 67(A)(I)(a), 15 May 2008.

⁴ *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-PT, Prosecutor’s Response to “Decision on Prosecution’s Motion to Amend Rule 65ter Witness List and on Related Submissions”, 25 April 2008, para. 27 and Annex A.

⁵ Impugned Decision, T. 199.

⁶ Impugned Decision, T. 207.

⁷ *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-PT, Decision on Prosecution Motion for Reconsideration of or in the Alternative, Certification to Appeal Oral Decision of the Trial Chamber, 27 August 2008 (“Certification Decision”), para. 24.

committed a discernible error based on an incorrect interpretation of the law with respect to rebuttal evidence and the application of Rule 85 of the Rules.⁸

II. STANDARD OF APPELLATE REVIEW

4. Trial Chambers exercise broad discretion in relation to trial management and the admissibility of evidence.⁹ The Trial Chamber's decision in this case to require that the Prosecution lead its alibi rebuttal evidence in chief is a procedural matter relating to the management of the trial. Such a decision is to be accorded deference by the Appeals Chamber.

5. Deference implies that the Appeals Chamber will reverse such decisions only when an abuse of such discretion is established. The Appeals Chamber will overturn a Trial Chamber's exercise of its discretion where it is found to be (i) based on an incorrect interpretation of governing law; (ii) based on a patently incorrect conclusion of fact; or (iii) so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion. The Appeals Chamber will also consider whether the Trial Chamber has given weight to extraneous or irrelevant considerations or has failed to give weight or sufficient weight to relevant considerations in reaching its decision.¹⁰

6. The question before the Appeals Chamber is thus not whether it agrees with a decision but whether the Trial Chamber has correctly exercised its discretion in reaching this decision.¹¹ For the Appeals Chamber to intervene in a discretionary decision of a Trial Chamber, it must be demonstrated that the Trial Chamber has committed a "discernible error".¹²

III. DISCUSSION

7. The Prosecution raises four grounds of appeal which the Appeals Chamber will consider in turn.

⁸ Appeal, para. 8.

⁹ *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-AR73.5, Decision on Vujadin Popović's Interlocutory Appeal Against the Decision on the Prosecution's Motion to Reopen its Case-in-Chief, 24 September 2008 ("*Popović* Decision on Reopening the Prosecution's Case in Chief"), para. 3; *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR73.4, Decision on Prosecution Appeal Concerning the Trial Chamber's Ruling Reducing Time for the Prosecution Case, 6 February 2007 ("*Prlić* Decision on Time Reduction"), para. 8; *Prosecutor v. Slobodan Milošević*, Case Nos.: IT-99-37-AR73, IT-01-50-AR73, IT-01-51-AR73, Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder, 18 April 2002 ("*Milošević* Decision on Joinder"), para. 3.

¹⁰ *Popović* Decision on Reopening the Prosecution's Case in Chief, para. 3; *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR73.6, Decision on Appeals against Decision Admitting Transcript of Jadranko Prlić's Questioning into Evidence, 23 November 2007, para. 8; *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-AR108bis.2, Decision on the Request of the United States of America for Review, 12 May 2006 ("*Milutinović* Decision on Review"), para. 6.

¹¹ *Milošević* Decision on Joinder, para. 4; *Milutinović* Decision on Review, para. 6.

¹² *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-AR73.2, Decision on Defence Appeal of the Decision on Defence Appeal of the Decision on Future Course of Proceedings, 16 May 2008, para. 5.

1. Whether the Trial Chamber erred in law by failing to distinguish between evidence that proves the Accused's presence during the crime charged, and evidence rebutting the alibi

8. Under its first ground of appeal, the Prosecution submits that the Trial Chamber erred in law in failing to distinguish between evidence which strengthens the Prosecution's case, which it must lead in its case in chief, and evidence which rebuts allegations raised in the Defence case.¹³ Specifically, the Prosecution submits that the presence of the Accused during the incidents charged is a fundamental aspect of its case, while evidence that challenges the Accused's presence in other locations as set out in the alibi is not.¹⁴ The latter evidence arises specifically out of the Defence case.¹⁵ Accordingly, in the Prosecution's view, evidence that challenges or refutes the alibi introduced in the Defence case is evidence that should be led after the Defence case.¹⁶

9. The preliminary question which arises is whether there is a difference between evidence going to prove the Prosecution case in chief and evidence directed at eliminating the possibility that an alibi is true. In order to examine this question, the Appeals Chamber finds it instructive to consider the nature of the Prosecution's burden in a case in which an alibi is introduced.

10. The only purpose of an alibi defence is to cast reasonable doubt on the Prosecution's case, which must always be proven beyond reasonable doubt.¹⁷ The Appeals Chamber recalls that:

an alibi 'does not constitute a defence in its proper sense.' In general, a defence comprises grounds excluding criminal responsibility although the accused has fulfilled the legal elements of a criminal offence. An alibi, however, is nothing more than the denial of the accused's presence during the commission of a criminal act.¹⁸

The Appeals Chamber further recalls that:

[i]n alleging an alibi, the accused merely obliges the Prosecution to demonstrate that there is no reasonable likelihood that the alibi is true. In other words, the Prosecution must establish beyond a reasonable doubt that, 'despite the alibi, the facts alleged are nevertheless true'.¹⁹

¹³ Appeal, paras 9 and 10.

¹⁴ Appeal, para. 9.

¹⁵ Appeal, para. 9.

¹⁶ Appeal, para. 10.

¹⁷ *Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Judgement, 28 November 2007 ("*Nahimana et al.* Appeal Judgement"), para. 417; *Niyitegeka* Appeal Judgement, para. 60 (internal citations omitted). See also *Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21-A, Judgement, 20 February 2001 ("*Delalić et al.* Appeal Judgement"), para. 581; *Prosecutor v. Alfred Musema*, Case No. ICTR-96-13-A, Judgement, 16 November 2001 ("*Musema* Appeal Judgement"), para. 202; *Prosecutor v. Clément Kayishema and Obed Ruzindana*, Case No. ICTR-95-1-A, Judgement, 1 June 2001 ("*Kayishema and Ruzindana* Appeal Judgement"), para. 113.

¹⁸ *Jean de Dieu Kamuhanda v. The Prosecutor*, Case No. ICTR-99-54A-A, Judgement, 19 September 2005, para. 167 (internal citations omitted), repeated in *Emmanuel Ndinabahizi v. The Prosecutor*, Case No. ICTR-01-71-A, Judgement, para. 66.

¹⁹ *Nahimana et al.* Appeal Judgement, para. 417.

11. While the Prosecution's obligation to prove its case in chief is closely related to its interest in eliminating the reasonable likelihood that an alibi is true, the Appeals Chamber finds that these two objectives have to be distinguished. As a general rule, the Prosecution must present the evidence in support of its case during its case in chief. In contrast, whether evidence is brought to specifically counter an alibi will depend on the Prosecution's strategy. The Appeals Chamber therefore concludes that evidence challenging an alibi is rebuttal evidence, arising out of an issue raised in the Defence case.

12. The Appeals Chamber thus finds that the Trial Chamber committed a discernible error in failing to recognise in the Impugned Decision the distinction between evidence which strengthens the Prosecution's case, which it must lead in its case in chief, and evidence which challenges allegations raised in the Defence case. The effect of this error, if any, on the order in which such evidence should be heard is considered below.

2. Whether the Trial Chamber erred in law by basing its decision on the *Delalić et al.* Appeal Judgement without accounting for the significant differences in the issues at question

13. The Prosecution submits under its second ground of appeal that the Trial Chamber erred in law in finding that the *Delalić et al.* Appeal Judgement "set the standard for leading rebuttal evidence" and basing its decision on this finding.²⁰ In the Prosecution's view, the said pronouncement "is an overly broad characterization of the *Delalić* findings".²¹

14. The Prosecution submits that the *Delalić et al.* Appeal Judgement addressed a particular question which was substantially different from the one raised in the instant case, namely whether the evidence sought to be admitted in rebuttal could properly be characterised as such. According to the Prosecution, neither the *Delalić et al.* Trial Chamber nor Appeals Chamber had in mind the particular nuanced scenario of alibi rebuttal.²² The Prosecution adds that consequently, the Appeals Chamber did not have occasion to deal with the key issue in the instant case, being the proper timing of rebuttal evidence, which falls within the ordinary application of Rule 85 of the Rules.²³ It points out that rebuttal evidence relating to an alibi is a clear response to evidence led during the Defence case suggesting that the Accused was not present when the crime was committed, rather than an attempt to fill a gap in the Prosecution's evidence in chief.²⁴

²⁰ Appeal, para. 13.

²¹ Appeal, para. 13.

²² Appeal, para. 14.

²³ Appeal, paras 15, 16.

²⁴ Appeal, para. 18.

15. The Appeals Chamber notes that, relying on the *Delalić et al.* Appeal Judgement, the Trial Chamber in the instant case held that:

[t]he Prosecution has indicated that it intends to call four witnesses to rebut alibi evidence to be led during the Defence case. Following the case law of the Tribunal, these witnesses are to be called during the Prosecution's case in chief.²⁵

It went on to hold in this respect that:

[t]he Chamber's decision was actually based on the decision of the Appeals Chamber in *Delalić et al.* where it set the standard for rebuttal evidence. In that case, the Appeals Chamber found that evidence going to a fundamental part of the Prosecution case must be led during the Prosecution's case in chief. And the presence of the accused during the incidents in relation to which a notice of alibi has been entered is a fundamental aspect of the Prosecution's case.²⁶

16. The *Delalić et al.* Appeal Judgement provides a summary of the context relevant to the issue of rebuttal in that case:

At the request of the Trial Chamber during the case of the last of the accused to present his defence, the Prosecution filed a notification of witnesses proposed to testify in rebuttal. It proposed to call four witnesses [...] Oral submissions on the proposal were heard by the Trial Chamber on 24 July 1998, and the Trial Chamber ruled that, with the exception of the witness relating to the case against Landžo, the proposed evidence was not rebuttal evidence, but fresh evidence and that the Prosecution had not put forward anything which would support an application to admit fresh evidence. This decision was reflected in a written Order which noted that the 'rebuttal evidence is limited to matters that arise directly and specifically out of defence evidence'.²⁷

17. The Appeals Chamber finds that, unlike the instant case, the issue in the *Delalić et al.* case did not concern an alleged alibi, but dealt with the evidence that the Prosecution sought to introduce after the closure of its case in chief. The issue of rebuttal evidence was addressed primarily in the context of establishing whether such evidence indeed answered an issue arising out of the Defence case. The separate question of when evidence properly arising out of the Defence case should be heard was not expressly considered.²⁸ This being the case, the Appeals Chamber finds that the Trial Chamber in the instant case erred in finding that the *Delalić et al.* Appeal Judgement established a generally-applicable standard of rebuttal, without further consideration of its applicability to the question at issue before it.

18. The effect of this error, if any, will be considered by the Appeals Chamber below.

²⁵ Impugned Decision, T. 199.

²⁶ Impugned Decision, T. 207-208. The Appeals Chamber also notes that in the Certification Decision the Trial Chamber relied on paras 273 and 275 of the *Delalić et al.* Appeal Judgement in support of its finding.

²⁷ *Delalić et al.* Appeal Judgement, para. 271 (footnotes omitted).

²⁸ The Appeals Chamber notes, however, that the Trial Chamber expressed some doubt as to whether the *Delalić et al.* Appeal Judgement was a relevant precedent for its decision on alibi rebuttal evidence, *see* Impugned Decision, T. 212.

3. Whether the Trial Chamber erred by implicitly conflating the accused's alibi notice with the presentation of Defence evidence

19. Under its third ground of appeal, the Prosecution submits that the Trial Chamber erred in law by implicitly finding that providing notice of alibi evidence means that any evidence countering that alibi is no longer true rebuttal evidence.²⁹ In the Prosecution's submission, the determination of whether something is rebuttal evidence does not depend on the extent of its knowledge of the Defence case.³⁰

20. In support of this submission, the Prosecution argues that there are a number of reasons why it should not present its rebuttal evidence during its case in chief, even when a notice of alibi is presented by the Defence. First, the fact that documents are disclosed for the purposes of alibi does not mean they will be presented or admitted during the Defence case.³¹ Second, it submits that the evidence actually presented in the Defence case could turn out to be different from the contents of the notice, in which case any related submissions in the case in chief would become irrelevant or incomplete. Further, it argues that it need not rebut the allegations in the notice if evidence substantiating them is not adduced in court.³²

21. The Prosecution adds that the Rules do not provide for any variation in the presentation of evidence when an alibi is presented³³ and cites a number of examples from domestic jurisdictions in support of hearing the rebuttal evidence after the Defence case.³⁴

22. In effect, this ground of appeal raises the main issue before us, namely, whether the Prosecution should be required to provide evidence challenging an alibi during its case in chief. The Appeals Chamber notes that Rule 85(A) of the Rules lays down the sequence for the presentation of evidence at trial, pursuant to which, Prosecution evidence in rebuttal shall be heard after the evidence for the Defence. The Rule stipulates that this sequence "shall" be followed, unless the Trial Chamber otherwise directs "in the interests of justice".

23. Rule 67(B)(i)(a) of the Rules obliges the Defence to notify the Prosecution of its intent to offer alibi evidence, which entails the requirement to furnish the names and addresses of witnesses and any other evidence upon which the accused intends to rely to establish the alibi. The purpose of this Rule is to "ensure a good administration of justice and efficient judicial proceedings" and to

²⁹ Appeal, para. 19.

³⁰ Appeal, paras 5, 24.

³¹ Appeal, para. 20.

³² Appeal, para. 21.

³³ Appeal, para. 22.

³⁴ Appeal, paras 23-26.

allow the Prosecution “to organize its evidence and to prepare its case prior to the commencement of the trial on the merits”.³⁵ Hence, while the Rule is intended to facilitate the Prosecution’s ability to prepare for its case,³⁶ it does not change the nature of alibi rebuttal evidence and therefore has no direct impact on the proper timing of the presentation of rebuttal evidence at trial. As noted above, the only justification under the Rules for a change to the normal sequence of the presentation of evidence is where the Trial Chamber finds that it is in the “interests of justice”. The Appeals Chamber notes that the Trial Chamber did not advance any reasons as to why the interests of justice would require the Prosecution to produce evidence related to an alleged alibi during its case in chief.

24. Furthermore, the Appeals Chamber considers that the Prosecution cannot be required to present alibi rebuttal evidence during its case in chief simply because the Defence has provided notice of alibi. While having notice of alibi might facilitate the Prosecution in the preparation of its case, the Prosecution would still be forced to pre-empt the exact details of the Defence’s alibi evidence without having heard and examined it in court. This would not only raise the possibility of prejudice to the Prosecution’s case, but such an exercise would also be inadvisable in view of the interest in judicial economy, given that the Defence might choose not to call its alibi evidence in any event or decide to present it in a completely different way than anticipated by the Prosecution. Moreover, by following the proper sequence of the presentation of evidence as set out in Rule 85(A) of the Rules, the Trial Chamber would generally be in a better position to decide on a specific request from the Prosecution to bring alibi rebuttal evidence since it would have heard the alibi evidence as presented by the Defence as well as the Prosecution’s submissions in support of its request to bring rebuttal evidence. In light of the foregoing, the Appeals Chamber finds that the Trial Chamber committed a discernible error in rendering the Impugned Decision.

IV. CONCLUSIONS

25. On the basis of the foregoing, the Appeals Chamber finds that the Trial Chamber erred by (1) failing to distinguish between evidence relevant to the Prosecution case in chief and evidence going to rebuttal of an alibi; (2) relying on the *Delalić et al.* case in order to determine the timing of the hearing of rebuttal evidence concerning an alibi; and (3) requiring the Prosecution to present evidence rebutting the alibi in its case in chief where notice of alibi has been given. Having so found, the Appeals Chamber finds that it is not necessary to address Ground 4 of the Prosecution’s

³⁵ *Prosecutor v. Georges Rutaganda*, Case No. ICTR-96-3-A, Judgement, 26 May 2003, paras 243, 241.

Appeal that the Trial Chamber failed to give sufficient weight to the prejudice resulting from the Impugned Decision.³⁷

26. Consequently, the Appeals Chamber concludes that the Trial Chamber committed a discernible error in requiring the Prosecution to present alibi rebuttal evidence during its case in chief. Thus, the Appeals Chamber reverses the Trial Chamber's decision.

V. DISPOSITION

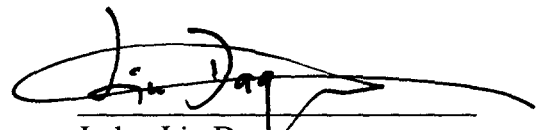
For the foregoing reasons, the Appeals Chamber,

GRANTS the Prosecution's Appeal; and

REVERSES the Impugned Decision.

Done in English and French the English text being authoritative.

Dated this 16th Day of October 2008,
At The Hague, The Netherlands



Judge Liu Daqin
Presiding

[Seal of the Tribunal]

³⁶ See *Kayishema and Ruzindana* Appeal Judgement, para. 111 (finding that the purpose of entering an alibi or establishing it at the stage of reciprocal disclosure of evidence "is only to enable the Prosecutor to consolidate evidence of the accused's criminal responsibility with respect to the crimes charged").

³⁷ Appeal, paras 27-29.