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: 9 April 2009

Original: English

IN TRIAL CHAMBER III

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

Acting Registrar: **Mr. John Hocking**

Decision of: **9 April 2009**

PROSECUTOR

v.

MILAN LUKIĆ
SREDOJE LUKIĆ

PUBLIC

DECISION ON MOTION FOR RECONSIDERATION OR CERTIFICATION TO APPEAL THE DECISION ON REBUTTAL WITNESSES

The Office of the Prosecutor

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TRIAL CHAMBER III ("Trial Chamber") 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 certification for an appeal of the Trial Chamber's 'Decision on rebuttal witnesses'", filed confidentially on 1 April 2009 ("Motion"), in which the Prosecution requests reconsideration of the Trial Chamber's "Decision on rebuttal witnesses" ("Decision") and grant the Prosecution leave to call Lt. Col. Raymond Lane and John H. Ralston in rebuttal, or grant certification to appeal the Decision.

1. Background

1. On 25 March 2009 the Trial Chamber issued the Decision in which it held, *inter alia*, that the evidence of Lt. Col. Raymond Lane and John H. Ralston is inadmissible as rebuttal evidence.[1]

2. On 2 April 2009, the Trial Chamber ordered that any responses to the Motion were to be filed by 6 April 2009.[2] Neither the Defence of Milan Lukić nor the Defence of Sredoje Lukić responded to the Motion.

2. Submissions

(a) Submissions in relation to request for reconsideration

3. The Prosecution submits that the Trial Chamber should reconsider its Decision as it contains two errors of reasoning and has the consequence of "undermining the reliance that can be placed on adjudicated facts."[3]

4. In the Prosecution submission, the Trial Chamber erred in holding that the Prosecution should have led evidence relating to the occurrence of the Pionirska fire in its case-in-chief because the Trial Chamber had acknowledged the occurrence of the fire as an adjudicated fact pursuant to Rule 94 (B) of the Rules of Procedure and Evidence ("Rules").[4] Further, the Prosecution submits that the Trial Chamber erred in holding that the Prosecution should have anticipated that the Defence would challenge the occurrence of the fire because "the Defence gave no indication this fact was in dispute until after the Prosecution had rested its case".[5]

[1] Decision, pp. 7, 8.
[2] Hearing, 2 April 2000, T. 6588.
[3] Motion, para. 1.
[4] Motion, para. 2.
[5] Motion, paras 3, 10, 12.

5. In the Prosecution submission, it is not possible to reconcile the finding that the judicial notice of the occurrence of the fire shifted the burden of production of evidence with the finding that the Prosecution should have anticipated that the fire would be challenged and that it should have brought evidence in its case-in-chief.[6]

6. The Prosecution avers that "the two erroneous rulings could have the effect of rendering Rule 94 (B) a dead letter".[7] It further argues that "no litigants before the International Tribunal will be able to confidently rely on Rule 94 (B) in deploying their limited litigation sources" and that "each party will feel compelled to extensively litigate each issue in its case, regardless of whether that issue has been previously heard in other proceedings".[8] The Prosecution accepts that "Rule 94 (B) does not absolve it of its ultimate burden to establish each element of the case beyond reasonable doubt and that Rule 85 limits rebuttal evidence to rebutting evidence the Prosecution could not have reasonably anticipated", but it argues that "the Chamber's construction of those two rules together, however, has the effect of punishing the Prosecution for relying on adjudicated facts to streamline its presentation of its case."[9]

7. The Prosecution submits that "denying the Prosecution the opportunity to call witnesses Lt. Col. Raymond Lane and John H. Ralston in rebuttal, could also deprive the Chamber of the information it would need to properly assess whether the adjudicated fact that there was a fatal fire at Pionirska Street remains viable."[10] In the Prosecution submission, the Chamber may only properly assess those adjudicated facts by either reviewing "the transcripts, documentary evidence and audio-visual recordings of all the evidence led to prove the fact in the previous trial" or by allowing the Prosecution "to place the Defence evidence in the proper context via a robust rebuttal case."[11]

(b) Submissions in relation to the request for certification to appeal

8. In support of the request for certification to appeal the Decision, the Prosecution submits that the question whether the Prosecution may call the witnesses in rebuttal could affect both the fair and expeditious conduct of the proceedings, or, potentially, the outcome of the trial.[12] It also submits that immediate resolution by the Appeals Chamber would materially advance the proceedings, as the Prosecution would otherwise be "limited to challenging the Rebuttal Decision

[6] Motion, paras 7-8.
[7] Motion, paras 4, 16.
[8] Motion, para. 9.
[9] Motion, para. 15.
[10] Motion, para. 17.
[11] Motion, para. 17.
[12] Motion, para. 20.

on post-judgment appeal, where the remedy would be remand to the Trial Chamber for new proceedings or the submission of the expert reports of Lane and Ralston to the Appeals Chamber under Rule 115".[13]

9. In addition, the Prosecution argues that the issue raised in the Motion is "an important legal question" and "has consequences for the use of and the reliance upon adjudicated facts in all other cases" and refers to a separate opinion of Judge Bonomy in the *Halilović* case in that regard.[14]

3. Applicable law

10. A Trial Chamber has a discretionary power to reconsider a previous interlocutory decision "if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent an injustice".[15]

11. 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 and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings. Both prongs must be met in order for certification to be granted.[16]

12. This Trial Chamber endorses the finding of the Trial Chamber in the *Halilović* case that "even when an important point of law is raised [...], the effect of Rule 73 (B) is to preclude certification unless the party seeking certification establishes that both conditions are satisfied."[17] The Trial Chamber further notes that in his separate opinion Judge Bonomy did not dispense with the two prongs of Rule 73 (B), when he stated that "[i]n view of the importance of these criteria, a Trial Chamber should be cautious about refusing certification when they are met."[18] In Judge Bonomy's view, the involvement of an important legal question limits the discretion of the Trial Chamber to deny certification to appeal, provided that the two prongs of Rule 73 (B) are met.

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[13] Motion, para. 20.
[14] Motion, para. 20 referring to *Prosecutor v. Halilović*, Case No. IT-01-48-PT, Separate and concurring opinion of Judge Iain Bonomy in the decision on the Prosecution request for certification for interlocutory appeal of "Decision on Prosecutor's motion seeking leave to amend the indictment", filed on 17 January 2005, para. 3.
[15] *Prosecutor v. Rasim Delić*, Case No. IT-04-83-PT, Decision on the Prosecution motion for reconsideration, 23 August 2006, pp. 3-4 referring to *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR108*bis*.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 and further references.
[16] *Prosecutor v. Sefer Halilović*, Case No. IT-01-48-PT, Decision on Prosecution request for certification for interlocutory appeal of "Decision on Prosecutor's motion seeking leave to amend the indictment", 12 January 2005, p. 1.
[17] Ibid., p. 1.
[18] *Prosecutor v. Halilović*, Case No. IT-01-48-PT, Separate and concurring opinion of Judge Iain Bonomy in the decision on the Prosecution request for certification for interlocutory appeal of "Decision on Prosecutor's motion seeking leave to amend the indictment", filed on 17 January 2005, para. 3.

4. Discussion

(a) Reconsideration

13. The Trial Chamber, by majority, Judge Van den Wyngaert dissenting, is not satisfied that the Prosecution has demonstrated a clear error of reasoning in the Decision denying the Prosecution request to call Lt. Col. Raymond Lane and John H. Ralston.

14. The Trial Chamber considers, by majority, that the Prosecution argument that it is entitled to rebut Defence evidence challenging the occurrence of fire at the Pionirska Street site at the rebuttal stage because the occurrence of a fire was the subject of several adjudicated facts is misconceived.

15. Rule 94 (B) aims at achieving judicial economy and harmonising judgements of the Tribunal.[19] The Trial Chamber recalls that by taking judicial notice of an adjudicated fact pursuant to Rule 94 (B), a Chamber establishes a well-founded presumption for the accuracy of this fact.[20] However, it is well-established that an adjudicated may be challenged at trial. The Prosecution is thus only relieved of its initial burden to produce evidence on a particular issue and the Defence may then put that issue into question by introducing evidence to the contrary.[21] As the Trial Chamber held in its Decision and as the Prosecution acknowledges, "the judicial notice of adjudicated facts does not shift the "ultimate burden of proof beyond reasonable doubt which remains with the Prosecution".[22]

16. The Trial Chamber recalls its finding that "the fact that the Defence challenges the accuracy of one or several adjudicated facts does not, in and of itself, give the Prosecution a right to bring evidence in rebuttal".[23] In light of the well-established case-law, the majority finds, Judge Van den Wyngaert dissenting, that this finding is not erroneous. Whether or not an issue in the trial was the subject of adjudicated facts, the standard for rebuttal evidence remains the same, i.e. that such evidence must relate to a significant issue arising directly out of Defence evidence which could not reasonably have been anticipated.[24]

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[19] *Prosecutor v. Perišić*, Case No. IT-04-81-PT, Decision on Prosecution motion for judicial notive of adjudicated facts concerning Sarajevo, 26 June 2008, para. 14.
[20] Decision, p. 8 referring to *Karemera et al.*, Case No. ICTR-98-44-AR73(C), Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice, 16 June 2007 ("*Karemera* Appeal Decision"), para. 49; see also *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts with Annex, 26 September 2006, para. 20; *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR73.5, Decision on the Prosecution's Interlocutory Appeal against the Trial Chamber's 10 April 2003 Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, 28 October 2003, p. 4.
[21] *Karemera* Appeal Decision, para. 42.
[22] Decision, p. 9 referring to *Karemera* Appeal Decision, para. 49.
[23] Decision, p. 8.
[24] See Decision, p. 3 with further references.

17. The Trial Chamber also considers, by majority, Judge Van den Wyngaert dissenting, that the Prosecution argument that Rule 94 (B) would become a "dead letter" as the Prosecution would be forced to extensively litigate each issue, even where an issue has been admitted as an adjudicated fact, is misconceived. As the admission of adjudicated facts has the effect of shifting the initial burden to produce evidence on an issue, the Prosecution is not obliged to bring additional evidence relating to that issue. It is useful to recall that in order to be admissible as an adjudicated fact, several requirements enumerated in the Tribunal's case law must be fulfilled including that the proposed fact must not relate to the acts, conduct or mental state of the accused.[25] For example, the admission of adjudicated facts relating to the historical and political background of the case in most cases will not require the parties to extensively litigate those issues and will help to avoid unnecessary consumption of court time. However, the closer proposed facts relate to significant issues in the case and the acts and conduct of the accused, it is to be expected that the Prosecution will lead additional evidence in proof of such issues in court.

18. The Trial Chamber, by majority, Judge Van den Wyngaert dissenting, also dismisses the Prosecution argument that the Trial Chamber erred when it applied the standard for rebuttal evidence to the request to call Lt. Col. Raymond Lane and John H. Ralston. It recalls that it denied the Prosecution request to call the two witnesses in rebuttal holding that the Prosecution should have anticipated that the Defence would challenge the occurrence of the fire, as this is a significant issue in the case.[26]

19. In view of the significance of the issue for the present case, which is a case of direct perpetration, the Trial Chamber, by majority, Judge Van den Wyngaert dissenting, finds that it was not erroneous to hold that the Prosecution should have anticipated that the Defence would challenge the occurrence of the fire. It is also noteworthy that the Prosecution did in fact bring a large amount of evidence relating to the occurrence of fire at Pionirska Street during its case-in-chief, thus bolstering the presumption of accuracy established by the admission of several adjudicated facts.[27]

20. The Trial Chamber further notes that as early as 10 March 2008 the Defence of Sredoje Lukić opposed the list of adjudicated facts relating to the Pionirska Street fire and argued that judicial notice of these facts would compromise the Accused's right to a fair trial, especially in light of the fact that "these facts are subject to reasonable dispute between the Parties".[28] The Defence for

[25] See Decision on Prosecution motion for judicial notice of adjudicated facts, 22 August 2008, paras 20 et seq. with further references.
[26] Decision, pp. 7, 8.
[27] The Trial Chamber received evidence from VG-013; VG-018; VG-038; VG-084; Huso Kurspahić; VG-115.
[28] Sredoje Lukić's response to "Prosecution's motion for judicial notice of adjudicated facts with public Annex A", filed publicly on 10 March 2008, para. 16.

Milan Lukić in essence concurred with the position taken by the Defence of Sredoje Lukić.[29] Contrary to the Prosecution submission, the Prosecution was in fact on notice already in March 2008 that the Defence would take issue with facts relating to the Pionirska Street fire which were later admitted as adjudicated facts.

(b) Certification to appeal

21. With regard to the request for certification of an interlocutory appeal, the Trial Chamber must consider whether the two prongs of Rule 73 (B) are met. Relevant to the Trial Chamber's assessment of the second prong is also the expected delay of the proceedings as a consequence of the appeal.[30]

22. The Trial Chamber takes note of the very advanced stage of the proceedings in the present case. The Trial Chamber has ordered that evidence will be heard until 9 April 2009, that the deadline for the filing of the final trial briefs is 22 April 2009 and that the closing arguments will be heard on 27 April 2009.[31] In view of the trial schedule, the Trial Chamber, by majority, Judge Van den Wyngaert dissenting, considers that the proceedings will not be advanced by a decision of the Appeals Chamber.

23. Having found that the second prong of Rule 73 (B) is not met, the Trial Chamber will not further discuss the first prong of Rule 73 (B).

5. Disposition

24. For the foregoing reasons, pursuant to Rules 54 and 73 (B) of the Rules, the Trial Chamber, by majority, Judge Van den Wyngaert dissenting,

DENIES the Motion.

Judge Van den Wyngaert attaches a dissenting opinion.

[29] Milan Lukić's response to "Prosecution's motion for judicial notice of adjudicated facts with public Annex A", filed confidentially on 31 March 2008, para. 24.
[30] Decision on Prosecution motion for certification to appeal the Trial Chamber's Decision on Prosecution motion to amend the second amended indictment, 19 August 2008, para. 20.
[31] Hearing, 26 March 2009, T. 6380; Hearing 7 April 2009, T. 6971-6972.

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

Judge Patrick Robinson
Presiding

Dated this ninth day of April 2009
At The Hague
The Netherlands

[Seal of the Tribunal]

DISSENTING OPINION OF JUDGE CHRISTINE VAN DEN WYNGAERT

1. The majority of the bench decided to deny the Prosecution request for reconsideration of the "Decision on rebuttal witnesses" ("Decision") in which the Trial Chamber denied a Prosecution request to call, *inter alia*, Lt. Col. Raymond Lane and John H. Ralston as rebuttal witnesses. The alternative Prosecution request to grant certification to appeal the Decision was also denied. I respectfully disagree with both decisions and deem it appropriate to give the reasons for my dissent.

Reconsideration

2. As far as the request for reconsideration is concerned, I am not convinced that the Prosecution should have brought Lt. Col. Raymond Lane and John H. Ralston as witnesses during its case-in-chief because their evidence relates to a "significant issue" in this case. As is set out in the Decision, the admission of several facts relating to the occurrence of a fire at Pionirska Street as adjudicated facts shifted the burden to produce evidence on that issue to the Defence. Furthermore, facts may only be judicially noticed under strict requirements. With the Trial Chamber having taken judicial notice of the adjudicated facts relating to the Pionirska Street fire, the Prosecution was not obliged to bring any additional evidence to prove any of those adjudicated facts during its-case-in-chief. I share the view expressed by the Prosecution that any other finding entails the risk that Rule 94 (B) of the Rules of Procedure and Evidence could become a "dead letter".

3. During the Defence case, the occurrence of the fire became a live issue between the parties. The occurrence of a fire at Pionirska Street became a significant issue in the case and it would assist the Chamber in assessing the adjudicated facts relating to the fire. I therefore believe that the Prosecution should have been allowed to call Lt. Col. Raymond Lane and John H. Ralston.

4. Furthermore, I disagree with the majority that the Prosecution should have anticipated that the occurrence of a fire would be challenged by the Defence of Milan Lukić. The Defence of Milan Lukić, before its Rule 98 *bis* submissions, did not give sufficient notice that it was going to challenge the occurrence of the fire at Pionirska Street. The fact that the Defence of Sredoje Lukić and the Defence of Milan Lukić opposed the list of adjudicated facts relating to the Pionirska Street fire arguing that "these facts are subject to reasonable dispute between the Parties"[1], is not specific enough to put the Prosecution on notice that the Defence was going to challenge the occurrence of

[1] Sredoje Lukić's response to "Prosecution's motion for judicial notice of adjudicated facts with public Annex A", filed publicly on 10 March 2008, para. 16, referred to in the Decision, para. 20.

the fire through expert evidence. In the pre-trial briefs, the Defence of Milan Lukić merely stated that it "denies all factual allegations in the Second Amended Indictment".[2]

5. It was, therefore, not foreseeable for the Prosecution that the Defence would challenge the occurrence of the fire. For this reason, I believe that the Prosecution is entitled to bring Lt. Col. Raymond Lane and John H. Ralston to rebut the evidence of Defence experts Cliff Jenkins Martin McCoy, Stephen O'Donnell, and Benjamin Dimas in relation to the Pionirska Street fire and to "testify that the methods and results of the Defence witnesses were improper and inaccurate".[3]

Certification to appeal

6. Having outlined the reasons why I would have granted the request for reconsideration, it is, strictly speaking, unnecessary to further deal with the alternative request for certification to appeal. For the sake of completeness, however, I deem it appropriate to give my views in relation to the request for certification to appeal.

7. I agree, as the other judges did, with the finding of the Chamber in the *Halilović* case that "even when an important point of law is raised [...], the effect of Rule 73 (B) is to preclude certification unless the party seeking certification establishes that both conditions are satisfied."[4]

8. In my view, the two prongs of Rule 73 (B) are met. Not only involves the Decision an issue that significantly affects the fairness of the trial, but an immediate resolution would also materially advance the proceedings, as the Trial Chamber must make findings that are crucial to the verdict that it is called upon to render, i.e. whether the fires that allegedly happened in Pionirska Street and in Bikavac occurred. I am not convinced that the advanced stage of the proceedings in this case generally prevents an interlocutory appeal. I further note that the case is not formally closed yet.

9. I also endorse Judge Bonomy's view[5] that the involvement of an important legal question limits the discretion of the Trial Chamber when dealing with a request to grant certification to appeal. I believe that the decision rendered today involves an important legal question, namely he question under which circumstances the Prosecution is entitled to bring evidence in rebuttal when

[2] Milan Lukić's further submissions required by the Trial Chamber decision of 15 May 2008 with regard to the Defence Pre-trial brief, para. 19.
[3] Prosecution's submission with regard to rebuttal witnesses, filed confidentially on 20 March 2009, para. 35.
[4] *Prosecutor v. Sefer Halilović*, Case No. IT-01-48-PT, Decision on Prosecution request for certification for interlocutory appeal of "Decision on Prosecutor's motion seeking leave to amend the indictment", 12 January 2005, p. 1.
[5] *Prosecutor v. Halilović*, Case No. IT-01-48-PT, Separate and concurring opinion of Judge Iain Bonomy in the decision on the Prosecution request for certification for interlocutory appeal of "Decision on Prosecutor's motion seeking leave to amend the indictment", filed on 17 January 2005, para. 3.

the Defence has brought evidence to challenge adjudicated facts in its Defence case. I would therefore have certified the appeal.

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

Judge Christine Van den Wyngaert
Judge

Dated this ninth day of April 2009
At The Hague
The Netherlands

[Seal of the Tribunal]