



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-05-87-T

Date: 22 May 2008

Original: English

IN THE TRIAL CHAMBER

Before: Judge Iain Bonomy, Presiding
Judge Ali Nawaz Chowhan
Judge Tsvetana Kamenova
Judge Janet Nosworthy, Reserve Judge

Registrar: Mr. Hans Holthuis

Decision of: 22 May 2008

PROSECUTOR

v.

**MILAN MILUTINOVIĆ
NIKOLA ŠAINOVIĆ
DRAGOLJUB OJDANIĆ
NEBOJŠA PAVKOVIĆ
VLADIMIR LAZAREVIĆ
SRETEN LUKIĆ**

PUBLIC

**DECISION ON LUKIĆ REQUEST FOR RECONSIDERATION OF
THE TRIAL CHAMBER'S ADMISSION INTO EVIDENCE OF HIS INTERVIEW
WITH THE PROSECUTION (EXHIBIT P948)**

Office of the Prosecutor

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Counsel for the Accused

Mr. Eugene O'Sullivan and Mr. Slobodan Zečević for Mr. Milan Milutinović
Mr. Toma Fila and Mr. Vladimir Petrović for Mr. Nikola Šainović
Mr. Tomislav Višnjić and Mr. Norman Sepenuk for Mr. Dragoljub Ojdanić
Mr. John Ackerman and Mr. Aleksandar Aleksić for Mr. Nebojša Pavković
Mr. Mihajlo Bakrač and Mr. Đuro Čepić for Mr. Vladimir Lazarević
Mr. Branko Lukić and Mr. Dragan Ivetić for Mr. Sreten Lukić

THIS 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 “Sreten Lukic’s Objection to Exhibit P948 (Lukic Interview)”, filed 6 May 2008 (“Motion”), and hereby renders its decision thereon.

Submissions

1. In the Motion, the Lukić Defence “objects to the submission of the interview transcript [of the Accused] into evidence, given the problems with translation and the failure of the OTP to provide an opportunity at the time to allow for it to be discovered”.¹ The Lukić Defence continues, “[N]o such transcript was ever provided at the conclusion of the interview sessions, and no feasible means existed to review the video-transcript in advance of the next interview session so as to use that opportunity to correct any found deficiencies.”² The Lukić Defence also makes generalised complaints about the possibility of translation difficulties during the Accused’s interview with the Prosecution.³ Finally, the Prosecution is accused of grossly violating the procedures for the interview in bad faith in order to undermine the protections offered to the Accused as part of his suspect interview.⁴

2. On 7 May 2008, the Prosecution filed a response to the Motion, requesting the Chamber to repel the objection on the basis that it is untimely because the English version of the transcript was admitted into evidence on 10 October 2006 and the combined English–B/C/S transcript on 10 October 2007; the grounds advanced by the Lukić Defence have thus been known, or were at least knowable, for months.⁵ The Prosecution also argues that the Lukić Defence’s contentions go to the weight to be attributed to the exhibit, not its admissibility. Finally, the Prosecution strongly objects to the Lukić Defence’s allegation as unfounded and untrue that the Prosecution conducted the interview of the Accused in bad faith.⁶

3. On 16 May 2008, at the request of the Chamber, the Lukić Defence filed a reply, arguing that “the extent and magnitude of the errors in translation could not have been made known until the voluminous combined or merged transcript was recently provided by the Prosecution, setting forth the English and the Serbian. This was done on 7 February 2008, in the midst of a very hectic

¹ Motion, p. 3.

² Motion, para. 2.

³ Motion, paras. 4–6.

⁴ Motion, para. 7.

⁵ See paragraph 4 for the Prosecution’s correction of this submission.

⁶ Prosecution Response to Sreten Lukić’s Objection to Exhibit P948 (Lukić Interview), 7 May 2008.

defence case. Prior to this time there was no Serbian language translation, let alone a real time transcript of the Serbian being translated to Mr. Lukic in the course of the OTP's interview of him." The Lukić Defence then goes on to re-allege that the Prosecution has acted in bad faith.⁷

4. On 19 May 2008, the Prosecution, at the request of the Chamber, filed a sur-reply in which it represents that its Response erroneously stated that the combined English–B/C/S transcript was admitted on 10 October 2007. It is stated that this information was taken from eCourt, and should be corrected. The Prosecution then sets forth the procedural history of the disclosure of P948, as follows:

- a. On 20 April 2005, the video recording of the interview was disclosed, pursuant to Rule 66(A)(i).
- b. On 22 August 2005, the English transcript of the video recording of the interview was disclosed, pursuant to Rule 68.
- c. On 10 May 2006, both of the above were disclosed again, pursuant to Rule 65 *ter*.
- d. On 7 February 2008, the merged English–B/C/S transcript of the interview was disclosed, pursuant to Rule 65 *ter*.⁸

5. In light of these foregoing submissions, the Chamber will now turn to its consideration of the Motion.

⁷ Sreten Lukic's Motion Seeking Leave of the Trial Chamber to File Reply Brief, Including Annex – "Reply in Support of Objection to the Lukic Interview", 16 May 2008, paras. 2–3.

⁸ Prosecution Sur-Reply to Sreten Lukić's Reply in Support of His Objection to Exhibit P948 (Lukić Interview), 19 May 2008.

Discussion

6. The interview of the Accused took place on 21, 22, and 23 May 2002. At the beginning of the interview, the Accused was warned that he was under suspicion of committing crimes in Kosovo, for which he might be tried later by the Tribunal.⁹ On 2 October 2003, an indictment against the Accused (Case No. IT-03-70-I), charging him with responsibility for crimes allegedly committed in Kosovo, was confirmed. The Accused was therefore a suspect at the time of his interview with the Prosecution, and Rules 42 and 43 governed the taking of this interview:

Rule 42

Rights of Suspects during Investigation

- (A) A suspect who is to be questioned by the Prosecutor shall have the following rights, of which the Prosecutor shall inform the suspect prior to questioning, in a language the suspect understands:
- (i) the right to be assisted by counsel of the suspect's choice or to be assigned legal assistance without payment if the suspect does not have sufficient means to pay for it;
 - (ii) the right to have the free assistance of an interpreter if the suspect cannot understand or speak the language to be used for questioning; and
 - (iii) the right to remain silent, and to be cautioned that any statement the suspect makes shall be recorded and may be used in evidence.
- (B) Questioning of a suspect shall not proceed without the presence of counsel unless the suspect has voluntarily waived the right to counsel. In case of waiver, if the suspect subsequently expresses a desire to have counsel, questioning shall thereupon cease, and shall only resume when the suspect has obtained or has been assigned counsel.

Rule 43

Recording Questioning of Suspects

Whenever the Prosecutor questions a suspect, the questioning shall be audio-recorded or video-recorded, in accordance with the following procedure:

- (i) the suspect shall be informed in a language the suspect understands that the questioning is being audio-recorded or video-recorded;

⁹ P948, p. 1.

- (ii) in the event of a break in the course of the questioning, the fact and the time of the break shall be recorded before audio-recording or video-recording ends and the time of resumption of the questioning shall also be recorded;
- (iii) at the conclusion of the questioning the suspect shall be offered the opportunity to clarify anything the suspect has said, and to add anything the suspect may wish, and the time of conclusion shall be recorded;
- (iv) a copy of the recorded tape will be supplied to the suspect or, if multiple recording apparatus was used, one of the original recorded tapes;
- (v) after a copy has been made, if necessary, of the recorded tape, the original recorded tape or one of the original tapes shall be sealed in the presence of the suspect under the signature of the Prosecutor and the suspect; and
- (vi) the tape shall be transcribed if the suspect becomes an accused.

7. The audiovisual recording of the interview was disclosed over three years ago. The English transcript of the interview was disclosed almost three years ago. Both were disclosed again to the Accused during the pre-trial phase of the proceedings.¹⁰ When tendered as evidence by the Prosecution, the Lukić Defence formally opposed the admission of the interview, but stated no specific objection, in particular no objection based upon the lack of a merged transcript.¹¹ (The Chamber admitted the interview into evidence on 10 October 2006.¹²) The combined English–B/C/S transcript was available on 7 February 2008. Finally, there has been *extensive* litigation in this trial over the manner in which interviews of the Accused are to be used evidentially by the Chamber.¹³

8. It is only at this late stage that an objection to the interview based upon the absence of a merged transcript has been made by the Lukić Defence. An accused, who has been represented by counsel at each step of the process, cannot take no action over a lengthy period of time, and then raise—at the eleventh hour—a matter of this kind. The Motion is, in effect, an application to the

¹⁰ Prosecution’s Submissions Pursuant to Rule 65ter(E) with *Confidential* Annex A and Annexes B and C, 10 May 2006, Annex B, p. 103 (Rule 65 ter number 4.564).

¹¹ During the litigation over the admission of the interview into evidence, the Lukić Defence’s opposition to the document consisted of the following general objection: “Exhibits objected to because they contain statements of [sic] potential witnesses that essentially constitute improper testimony under Rule 92 bis”. Sreten Lukić’s Response in Objection to the “Prosecution’s Second Submission with Annex in Response to 6 June 2006 Order on Prosecution’s Motion to Admit Document Evidence”, 4 August 2006, pp. 11, 29 (Rule 65 ter number 4.564).

¹² Decision on Prosecution Motion to Admit Documentary Evidence, 10 October 2006, para. 52(1)(hh).

¹³ E.g., Decision on Use of Prosecution Interviews of Accused, 20 March 2008.

Chamber to reconsider its decision to admit the interview into evidence, which was made over a year and seven months ago.

9. The legal standard for reconsideration is as follows: “a Chamber has inherent discretionary power to reconsider a previous interlocutory decision in exceptional cases ‘if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent injustice.’”¹⁴

10. It seems as though the Lukić Defence is arguing that the Prosecution has not complied with Rule 43(iii) because (a) it did not provide the transcript to the Accused in time for him to make any corrections or (b) it did not provide the means by which the Accused could review the audiovisual recording. Rule 43(iii) requires that the accused be given, at the conclusion of the questioning, an opportunity to clarify anything that he or she has said during the interview. Such an opportunity is not predicated upon being furnished with a merged English–B/C/S version of the transcript of the interview, and there is no representation by the Lukić Defence that the Accused was not given an opportunity to correct anything he had stated during the interview or that he was not given an audiovisual recording of his interview. Moreover, the Chamber notes that, pursuant to Rule 43(vi), a transcript of an interview needs to be made once a suspect becomes an accused, but that there is no definite time limit in which this must be accomplished. There is no submission from the Lukić Defence that the transcript has not now been provided, and it has been open to the Lukić Defence for some time now to make any corrections it deems fit to the interview.

11. Any prejudice that may have occurred would have been remedied by the provision of the merged English–B/C/S transcript, and the Chamber notes that the Accused has been represented by counsel throughout these proceedings. The Chamber also notes that corrections to the interview have been identified and are being attended to on a case-by-case basis.¹⁵ The Lukić Defence is at liberty to request that any other purported deficiencies in the record of the interview be rectified.

12. The Chamber will take into account all the circumstances surrounding the interview when it assesses what weight to attribute to it in its final deliberations in the above-captioned proceedings.

13. Finally, the Lukić Defence offers no basis for its accusation against the Prosecution that it intentionally violated the rights of the Accused in “bad faith.”

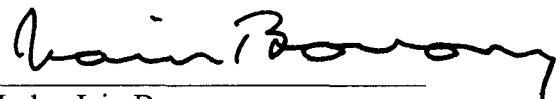
¹⁴ See Decision on Prosecution Motion for Reconsideration of Oral Decision Dated 24 April 2007 Regarding Evidence of Zoran Lilić, 27 April 2007, para. 4.

¹⁵ See, e.g., Hearings on 16 and 21 May 2008.

Disposition

14. For the foregoing reasons, the Chamber considers that the Lukić Defence has not demonstrated that there was a clear error of reasoning in the Chamber's decision to admit into evidence the Accused's interview with the Prosecution or that it is necessary for the Chamber to reconsider its decision in order to prevent injustice. Accordingly, the Trial Chamber, pursuant to Rules 42, 43, 54, and 89 of the Rules of Procedure and Evidence of the Tribunal, hereby DENIES the Motion and INSTRUCTS the Registry to correct in eCourt the date of admission into evidence of the merged English-B/C/S transcript of the interview of the Accused with the Prosecution (exhibit P948).

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



Judge Iain Bonomy
Presiding

Dated this twenty-second day of May 2008
At The Hague
The Netherlands

[Seal of the Tribunal]