



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: 11 December 2008

Original: English

THE VICE PRESIDENT OF THE INTERNATIONAL TRIBUNAL

Before: Judge O-Gon Kwon, Vice-President

Registrar: Mr. Hans Holthuis

Decision of: 11 December 2008

PROSECUTOR

v.

**MILAN LUKIĆ
SREDOJE LUKIĆ**

PUBLIC

**ORDER LIFTING THE CONFIDENTIAL STATUS OF THE "DECISION
ON MILAN LUKIĆ'S APPEAL AGAINST THE REGISTRAR'S DECISION
OF 18 NOVEMBER 2008", FILED ON 28 NOVEMBER 2008**

The Applicant

Milan Lukić

Mr. Jason Alarid, Counsel for the Applicant

The Office of the Prosecutor

Mr. Dermot Groome

Mr. Frédéric Ossogo

Ms. Laurie Sartorio

Mr. Stevan Cole

Ms. Francesca Mazzocco

I, O-GON KWON, Vice President 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");

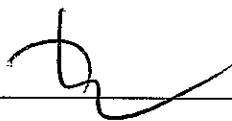
NOTING the confidential "Decision on Milan Lukić's Appeal against the Registrar's Decision of 18 November 2008", filed on 28 November 2008 ("Decision");

CONSIDERING Article 21(2) of the Statute of the Tribunal and the general importance of transparency of proceedings of the Tribunal;

CONSIDERING that the Decision does not disclose any confidential information;

HEREBY lift the confidential status of the Decision and issue a public version of the Decision.

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



Judge O-Gon Kwon
Vice President

Dated this eleventh day of December 2008
At The Hague
The Netherlands

[Seal of the Tribunal]

**UNITED
NATIONS**



International Tribunal for the
Prosecution of Persons
Responsible for Serious Violations
of International Humanitarian Law
Committed in the Territory of the
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Case No.: IT-98-32/1-T

Date: 28 November 2008

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THE VICE PRESIDENT OF THE INTERNATIONAL TRIBUNAL

Before: Judge O-Gon Kwon, Vice-President

Registrar: Mr. Hans Holthuis

Decision of: 28 November 2008

PROSECUTOR

v.

**MILAN LUKIĆ
SREDOJE LUKIĆ**

PUBLIC

**DECISION ON MILAN LUKIĆ'S APPEAL AGAINST THE REGISTRAR'S
DECISION OF 18 NOVEMBER 2008**

The Applicant

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1. On 19 November 2008, Milan Lukić (“the Applicant”) filed before the President 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”) an appeal against a decision by the Acting Commanding Officer of the United Nations Detention Unit (“UNDU”), dated 19 November 2008.¹ On 25 November 2008, in accordance with Rule 15(A) of the Rules of Procedure and Evidence of the Tribunal (“Rules”), the President withdrew from considering the application, owing to a conflict of interest with his role as presiding judge on the Applicant’s case. I was assigned to hear the application in his place.² On 26 November, following my request, the Registry filed a response to the Appeal pursuant to Rule 33(B) of the Rules.³

I. BACKGROUND

2. On 13 November 2008, the UNDU forwarded to the Registrar details of a number of allegedly offensive telephone calls made by the Applicant over the UNDU’s monitored telephone line on 7 and 8 November 2008, pursuant to Regulation 24 of the Regulations to Govern the Supervision of Visits to and Communications with Detainees.⁴ Details of the relevant calls were transcribed and disclosed first to Defence Counsel for the Applicant (“Counsel”) on 18 November 2008, and then to the Prosecution on 19 November 2008.⁵

3. On 18 November, the Prosecutor confidentially informed the Registrar that he had been contacted by a distressed Prosecution witness whose family had received several calls from a person seeking information about the witness’ family.⁶ Though the caller claimed to be calling from Italy, the witness’ brother identified the telephone number as coming from the Netherlands.⁷ The Prosecutor expressed concern that it was the Applicant who was placing these calls, and that the Applicant may intend to intimidate the witness.⁸ The Prosecution requested that the Registrar suspend all of the Applicant’s non-privileged communications in accordance with Rule 64 of the

¹ Appeal of Mr. Milan Lukić against the Decision of the Acting Commanding Officer of the United Nations Detention Unit dated 19 November 2008, confidential, (“Appeal”).

² Order to Consider Application on Conditions of Detention, confidential, 25 November 2008.

³ Registry Submission on Milan Lukić’s Appeal Against the Registrar’s decision of 18 November 2008, dated 26 November 2008, confidential, (“Submission”).

⁴ Submission, para. 2.

⁵ Submission, paras. 3, 6. Disclosure to Counsel was done pursuant to Regulation 27B of the Regulations to Govern the Supervision of Visits to and Communications with Detainees. Submission, para. 3.

⁶ Submission, para. 4.

⁷ Submission, para. 4.

⁸ Submission, para. 4.

Rules of Detention for a period of two weeks, during which time the Prosecutor would investigate the matter further.⁹

4. Later on 18 November 2008, the Registrar granted the Prosecutor's request and issued a decision to suspend the Applicant's non-privileged communications for a period of two weeks in accordance with Rule 64 of the Rules of Detention ("Impugned Decision").¹⁰ The Applicant received a copy of the Impugned Decision the following day.¹¹ Although not required under the Rules on Detention, I note that the Applicant was not warned that his conduct was deemed inappropriate and may incur such restrictions.

5. On 20 November 2008, the Applicant orally sought permission from the Acting Commanding Officer to contact his family, and submitted a written request to this effect to the Registrar on 21 November 2008, upon the advice of the Acting Commanding Officer.¹² The Applicant was subsequently advised that the Impugned Decision remained in force, and if he wished to contact his family he should do so through his Counsel.¹³

II. SUBMISSIONS

A. Appeal

6. The Applicant maintains that he has not made contact with any prosecution witnesses in his case, and that his calls from the UNDU are for the purpose of preparing his defence.¹⁴ The Applicant states that has learned that a number of persons listed as deceased in the indictment against him are in fact still alive, and he is investigating this issue as he prepares his case.¹⁵

7. The Applicant also states that his "conduct on the telephone is civilised and proper", and the limitations imposed upon his telephone calls pursuant to the Impugned Decision renders it impossible for him to prepare his defence "in a fair and proper way".¹⁶

⁹ Submission, para. 4.

¹⁰ Submission, paras. 1, 5.

¹¹ Submission, para. 5. I note that an attempt was made to provide the Applicant with a copy of a UNDU Order implementing the Impugned Decision the same day that the Impugned Decision was made, however the Applicant refused to accept the order. Submission, para. 5.

¹² Submission, para. 8.

¹³ Submission, para. 9. It is not clear when the Applicant was advised of this. *See* Submission, para. 9.

¹⁴ Appeal, p. 1.

¹⁵ Appeal, p. 1.

¹⁶ Appeal, p. 1.

B. Submission

8. The Registry submits that it complied with the appropriate standard for administrative decision making when arriving at the Impugned Decision.¹⁷ The four-pronged test set out by the Appeals Chamber in *Kvočka*¹⁸ has been complied with—first, the Registrar acted in accordance with Rule 64 of the Rules of Detention, second, the Registrar only considered relevant material,¹⁹ third, the Registrar weighed the relevant considerations, and the measure imposed was proportionate, and fourth, the Registrar’s conduct with respect to this matter complied with the basic principles of natural justice and procedural fairness.²⁰

III. DISCUSSION

9. Rule 64(A) of the Rules of Detention provides that “The Prosecutor may request the Registrar [...] to prohibit, regulate or set conditions for contact between a detainee and any other person if the Prosecutor has reasonable grounds for believing that such contact (i) could prejudice or otherwise affect the outcome of [...] the proceedings against the detainee [or] (ii) could be harmful to the detainee or any other person.” In deciding whether to grant such a request, the Registrar must have regard to the conditions set out in *Kvočka*, namely compliance with laws, compliance with the rules of natural justice and procedural fairness, consideration of only relevant material and compliance with basic standards of reasonableness.²¹

10. I am satisfied that the standards of natural justice and procedural fairness have been complied with in this case. All parties concerned were kept fully informed of developments and the Applicant was properly advised of the Impugned Decision and his avenues of appeal in a timely manner.

11. The Registrar considered three categories on material in this case: transcripts of the relevant telephone conversations, the Prosecutor’s letter of 18 November 2008 and information on the

¹⁷ Submission, para. 13.

¹⁸ See *Prosecutor v. Kvočka et al.* IT-98-30/1-A, Decision on Review of Registrar’s Decision to Withdraw Legal Aid from Zoran Žigić, 7 February 2003 (“*Kvočka* Decision”), para. 13, which provides: “The administrative decision will be quashed if the Registrar has failed to comply with the legal requirements of the Directive. This issue may in the particular case involve a consideration of the proper interpretation of the Directive. The administrative decision will also be quashed if the Registrar has failed to observe any basic rules of natural justice or to act with procedural fairness towards the person affected by the decision, or if he has taken into account irrelevant material or failed to take into account relevant material, or if he has reached a conclusion which no sensible person who has properly applied his mind to the issue could have reached (the “unreasonableness” test).”

¹⁹ Such material being transcripts of the relevant telephone conversations, the Prosecutor’s letter of 18 November 2008 and further information on the matter provided by the Tribunal’s Victims and Witnesses Section. Submission, para. 6.

²⁰ Submission, paras. 13–18.

²¹ *Kvočka* Decision, para. 13.

matter provided by the Tribunal's Victims and Witnesses Section. I am satisfied that this material is relevant to the matter at hand and the Registrar acted appropriately in having recourse to it.

12. The Registrar's conclusion that there was *prima facie* evidence of a breach of the Rules of Detention was made on the basis of these three categories of material. The Registrar "was satisfied that there were reasonable grounds to believe that the Applicant had contacted family members of a Prosecution witness using a false identity and had attempted to gather information about family members' whereabouts".²² The Prosecutor's initial suspicion that that the Applicant may have the intention to intimidate the witness²³ does not appear to be supported by the evidence.²⁴ What the evidence does support is the existence of potential harm to another person (*i.e.* the witness and her family members). I am satisfied that by assuming a false identity and making statements to the witness' family which contradict her testimony, the Applicant could cause harm to the witness and her family. In this regard, the Registrar acted in accordance with Rule 64(A) of the Rules of Detention when issuing the Impugned Decision.

13. In arriving at the Impugned Decision, the Registrar weighed the wellbeing of the witness and her family against the Applicant's access to unrestricted telephone calls.²⁵ In doing so, the Registrar considered the concern of further interference with witnesses in this case, the Prosecutor's intention to investigate the matter further, and the fact that the restriction was imposed for a limited two week period.²⁶ The Registrar contends that the Impugned decision does not hamper the Applicant's ability to prepare his case, as he retains access to full and free communication with his Counsel.²⁷

14. Notwithstanding the assistance provided by the Applicant's Counsel, I consider that the Impugned Decision does restrict preparation which the Applicant may wish to undertake independent of, or in cooperation with, his Counsel. In addition, the Applicant has communicated to the Acting Commanding Officer that he is affected by not being able to communicate with his family.²⁸ Given the lack of evidence of the Applicant's intent to intimidate the witness, as well as the fact that the Applicant was not put on notice of the inappropriateness of such conduct before the Impugned Decision was issued, I find a two week restriction on his non-privileged calls to be

²² Submission, para. 15.

²³ See Submission, para. 4.

²⁴ In addition to lack of evidence to this effect, I note that the Prosecution closed its case in the Applicant's trial on 11 November 2008 (See T. 3508-3509 (11 November 2008)). It follows then, that the calls were not made with the intent to influence the witness' testimony.

²⁵ Submission, para. 17.

²⁶ Submission, para. 17.

²⁷ Submission, para. 17.

²⁸ Submission, para. 7.

somewhat excessive. Noting that ten days have elapsed, I consider this to be appropriate and thereby find that the continued restriction on the Applicants calls is not warranted.

IV. DISPOSITION

15. On the basis of the foregoing, I hereby allow the Application in part and order that the ban on the Applicant's non-privileged calls be lifted as of the time of issue of this decision.

16. The Application is denied in all other respects.

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

Judge O-Gon Kwon
Vice President

Dated this twenty-eighth day of November 2008
At The Hague
The Netherlands

[Seal of the Tribunal]