UNITED
NATIONS

IT-05-87-T
D19798 - D19793
22 MAY 2008

19798 AT

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 DEFENCE ALTERATION OF OFFICIAL TRANSLATIONS OF WITNESS STATEMENTS

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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 of (1) the confidential "Submission of Sreten Lukic Relative to the Witness Statement of 6D-2," filed 22 April 2008; (2) the "Submission of Sreten Lukic Relative to Defence Witness Statements," filed 22 April 2008 (collectively "Submissions"); and (3) the "Prosecution Response to Submission of Sreten Lukić Relative to Defence Witness Statements," filed 6 May 2008 ("Motion"), and hereby renders its decision thereon.

Background

1. In connection with the evidence of witness 6D2, it came to light that the Lukić Defence had introduced amendments to B/C/S witness statements, following their translation by the Conference and Language Services Section ("CLSS") and then inserted into the CLSS English versions of the statements its own translation of these amendments without further reference to CLSS. The Chamber notes that there were errors in the tendered documents and the "official" CLSS footers were left therein.

2. Pursuant to an oral ruling on 16 April 2008, the Chamber ordered the Lukić Defence to identify all instances where it had altered a CLSS translation in the above manner and to furnish revised, CLSS translations of the statements as soon as possible. The Prosecution stated that, after this was done, it may seek to recall any witnesses whose statements were altered in this fashion.[1]

3. On 21 May 2008, the Lukić Defence informed the parties and the Chamber that it had received revised translations from CLSS and uploaded them to eCourt. The Prosecution did not object to these revised translations being substituted for the previous ones, and the statements' revised translations were admitted into evidence via oral ruling of the Chamber.

Submissions

4. In the Submissions, the Lukić Defence informs the Chamber and the parties of the alterations it made to the statements of 6D2 (6D1631), Miroslav Mijatović (6D1492), Milivoje Mihajlović (6D1530), Branislav Debeljković (6D1533), Dragan Živaljević (6D1606), and Nebojša Bogunović (6D1614). The Lukić Defence provided to CLSS original versions of the statements

[1] T. 25333–25335 (15 April 2008), 25454–25457 (16 April 2008).

that were sent to CLSS for translation and the versions of the statements that were uploaded to eCourt, in order to enable CLSS to compare the documents and prepare revised translations.

5. In the Motion, the Prosecution requests the Chamber to direct CLSS to make available to all the parties and the Chamber copies of the original CLSS translations so that it can compare them with the Lukić-altered versions so that the Prosecution can make a determination of whether it wishes to request leave to recall these witnesses for additional cross-examination. The Prosecution also requests the Chamber to enquire with the Lukić Defence whether any other documents with CLSS-translations have been changed or modified prior to being tendered as evidence.

6. Upon the request of the Chamber, the Lukić Defence filed a reply to the Motion, opposing the request of the Prosecution for the versions of the statements initially received from CLSS and informing that the Lukić Defence has not changed or modified other exhibits translated by CLSS without leave of the Chamber.[2]

Discussion

Tenor of the Lukić Defence's submissions

7. As a preliminary matter, the Chamber expresses its dismay at the almost hysterical, and certainly exaggerated and excessive, language in which the Lukić Defence has couched its written submissions in reply. The Chamber has commented upon the Lukić Defence's wayward employment of this mode of argumentation in the past,[3] and had hoped that, by this stage in the trial, the Lukić Defence would have come to realise that it is inappropriate and unhelpful to the Chamber to pursue motion practice using such language, which tends to consist of irrelevant comments that largely fail to address the real issues before the Chamber. Nevertheless, the Chamber, as it has done before, will identify the substantial, relevant submissions, and decide these matters upon their merits.

8. The Lukić Defence also continues its ceaseless complaints about not having enough time to present its case, for example to prepare statements of its witnesses.[4] The Chamber reiterates that "[t]here is no reason for witnesses to be proofed—and for their Rule 92 *ter* statements to be prepared—upon the witnesses' arrival in The Hague to give evidence; these are routine trial

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[2] Reply of Sreten Lukic in Support of His Submission Relative to Defence Witness Statements, 13 May 2008 ("Reply").

[3] *E.g.*, Decision on Lukic Defence Objection to February 2008 Report on Use of Time, 16 April 2008, para. 14; Decision on Lukić Motion for Alteration of Court Schedule, 20 February 2008, para. 7; T. 13615 (14 August 2007).

[4] Reply, paras. 6, 9, 11.

preparation practices that can be done well in advance."[5] The Chamber therefore rejects these submissions as without foundation, especially based upon the fact that the Lukić Defence did not even utilise all the time allotted to it for the presentation of its case.[6]

Prosecution request for original statements sent to CLSS for translation

9. The Prosecution essentially requests the original versions of the statements so that it can ascertain what the Lukić Defence changed in them before they were uploaded to eCourt. This request is founded upon the purported need for the information so that the Prosecution can decide whether it would like to call the witnesses back to the Tribunal for additional cross-examination. The Lukić Defence strenuously opposes this request on the basis that there is no disclosure obligation of what are, in essence, draft witness statements that are to be tendered as evidence pursuant to Rule 92 *ter*. The Chamber thus considers that it first must decide how to characterise the documents in question. It will then decide whether they are subject to disclosure under the Rules.

10. The Chamber has previously held, regarding the definition of "statement" for purposes of Rule 66, the following:[7]

> The parties have not endeavoured to precisely define the terms "statement" and "interview notes"; however, the Chamber infers from the representations of the parties throughout the litigation of this matter (and the case as a whole) that, in a functional sense, a "statement" is more or less a verbatim account of what the witness has told the Prosecution, which has been reviewed and signed by the witness; whereas, "interview notes" are a less than verbatim account and are not necessarily reviewed and signed by the witness. The Chamber uses the above descriptions loosely, and finds, in any event, that "interview notes" fall squarely within the Appeals Chamber's definition of a Rule 66 statement, namely an "account of a person's knowledge of a crime, which is recorded through due procedure in the course of an investigation into the crime."[8]

However, the Chamber notes that the practice that has developed surrounding the "Rule 92 *ter* procedure"—formerly the "Rule 89(F)" procedure—may very well entail the party and the witness creating many different drafts of the Rule 92 *ter* statement, before the final one is tendered as evidence through the witness when he or she appears before the Chamber to adopt the statement as

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[5] Decision on Lukić Motion for Alteration of Court Schedule, 20 February 2008, para. 6.

[6] *See* Report on Use of Time in the Trial, Period Ending 30 April 2008, 16 May 2008.

[7] Decision on Renewed Prosecution Motion for Leave to Amend Its Rule 65 *ter* List to Add Michael Phillips and Shaun Byrnes, 15 January 2007, para. 12.

[8] *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Decision on the Appellant's Motion for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings, 26 September 2000, para. 15. [The remainder of the footnote has been omitted.]

part of his or her evidence. And yet, this is the first time, as far as the Chamber's research can establish, that the issue has ever arisen of a party in these proceedings requiring such material from another party.

11. The Chamber also notes that the practice of the creation of "supplemental information sheets" was followed in this case, whereby information obtained from the witness at the last minute during proofing was disclosed to the other parties. In the case of the Prosecution, such disclosure was accomplished pursuant to the obligations under Rule 66 (prior statements) or Rule 68 (exculpatory information), both of which do not pertain to the Defence.

12. Based upon the specific circumstances of the case that is currently before it, the Chamber is not of the view that, as a general matter, a version of a statement taken by the Defence that it intends to tender pursuant to Rule 92 *ter* is subject to disclosure in this particular trial. The Chamber wishes to make clear that this is based upon the manner in which this case has been litigated for over two years, namely that "drafts" of such statements do not seem to have been the subject of disclosure between the parties. Moreover, the Chamber makes this ruling under the version of the Rules of Procedure and Evidence in place prior to the adoption of new Rule 67(A), which mandates certain disclosure obligations from the Defence to the Prosecution.[9] The Chamber has not been asked to apply the new Rule to the current case, and the Chamber does not express any opinion as to whether it would have made a difference to its holding. Even if the Chamber had been asked to apply the new Rule, it would not have, if the amendment operated to prejudice the rights of the accused pursuant to Rule 6(D).

13. The Chamber therefore does not have to decide whether the new Rule 67(A) would mandate the disclosure of drafts of statements tendered via Rule 92 *ter* or to answer the question of whether the documents are protected from disclosure pursuant to Rule 70(A), as argued by the Lukić Defence.[10] The Chamber also views the Lukić Defence's arguments about the status of the documents as "confidential" under the policy of CLSS as superfluous.[11]

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[9] IT-256, Amendments to the Rules of Procedure and Evidence, 3 March 2008 (stating that new Rule 67(A), pursuant to Rule 6(D), entered into force on 10 March 2008).

[10] Reply, paras. 7–8, 9. (There are two paragraphs consecutively numbered "9". This reference is to the second one.)

[11] Reply, para. 9. In considering this question, the Chamber has considered CLSS's policy that, "[a]s a rule, CLSS resources are ... not available for the translation or review of materials which will not be tendered as evidence." Registry Policy Governing Translation Services Provided by the Registry, 16 November 2006, p. 2. The Chamber does not consider that this policy has any effect upon the characterisation of a document for disclosure purposes under the Rules of Procedure and Evidence of the Tribunal.

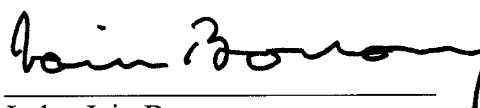
Alteration of other documents

14. Based upon the Lukić Defence's representation that it has not changed or modified other exhibits translated by CLSS without leave, the Chamber considers that the Prosecution's request has been satisfied and there is no need for the Chamber to order any relief in relation thereto.

Disposition

15. Accordingly, the Trial Chamber, pursuant to Rules 54 and 89 of the Rules of Procedure and Evidence of the Tribunal, hereby DENIES the Motion.

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]