

**THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA**

Case No: IT-05-87-T

IN THE TRIAL CHAMBER

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

Registrar: Mr. Hans Holthuis

DATE: 8 August 2007

THE PROSECUTOR

V.

MILAN MILUTINOVIC
NIKOLA SAINOVIC
DRAGOLJUB OJDANIC
NEBOJSA PAVKOVIC
VLADIMIR LAZAREVIC
SRETEN LUKIC

****PUBLIC****

**Sreten Lukic's Re-filed Motion For An Order Barring Contact with Defense
Witnesses**

The Office of the Prosecutor:

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Mr. Eugene O'Sullivan and Mr. Slobodan Zecevic for Milan Milutinovic
Mr. Toma Fila and Mr. Vladimir Petrovic for Nikola Sainovic
Mr. Tomislav Visnjic and Mr. Norman Sepenuk for Dragoljub Ojdanic
Mr. John Ackerman and Mr. Aleksandar Aleksic for Nebojsa Pavkovic
Mr. Mihailo Bakrac and Mr. Djuro Cepic for Vladimir Lazarevic
Mr. Branko Lukic and Mr. Dragan Ivetic for Sreten Lukic

**Before the International Criminal Tribunal for the Fmr. Yugoslavia
Trial Chamber Proceedings**

No.: IT-05-87-T

PROSECUTOR VS. MILUTINOVIC, ET AL.

****PUBLIC****

**SRETEN LUKIC'S RE-FILED MOTION FOR AN ORDER BARRING CONTACT WITH DEFENSE
WITNESSES**

NOW COMES the Accused, Sreten Lukic, by and through his defense counsels, Mr. Branko Lukic and Mr. Dragan Ivetic, and hereby moves the court to bar certain contact with the Office of the Prosecutor and witnesses disclosed on the Rule 65 ter list of witnesses of the Defense, and in support thereof states as follows:

I. Factual Background and Submissions

1. On 15 June 2007, the defense team of Sreten Lukic disclosed its list of witnesses for the Defense Case in Chief.

2. On 5 July 2007, the Office of the Prosecutor sent a "courtesy" notification to the defense teams in these proceedings that it intended to contact the witnesses named in the various defense Rule 65 ter lists for purposes of seeking to interview them ex-parte prior to their arrival and testimony in the Hague. The Prosecution indicated that it would proceed to commence contacting witnesses if no response was had to the "courtesy" notification within 4 days.

3. On 9 July 2007, within the unilateral time frame established by the Prosecution, the Lukic Defense formally responded to the "courtesy" notification and expressed its opposition to the planned course of action, and gave notice that a written filing would be forthcoming to seek the Trial Chamber's assistance in preventing or limiting the injustice being sought by the Office of the Prosecutor.

4. The Lukic Defense team has time and again tried to apprise the Trial Chamber of the difficulties it has had in the preparation of its defense case, stemming from lack of cooperation from elements within the governmental organs in Serbia, and the outright obstructionism being encountered in some official quarters in Belgrade, as regarding attempts to convince any witnesses with a connection to the MUP to testify in the defense of Sreten

Lukic. Most recently, the consultant expert who had been envisioned to draft and submit an expert report and testify in these proceedings, declined to do so at the 11th hour (13 June 2007) because of fears he expressed as to negative consequences to him from the reaction of authorities within Serbia once it was made public that he was assisting Sreten Lukic. The Lukic Defense team, as the Court is aware, thus had to seek additional time for its expert report, and begin seek an individual complete the report and fill that role. The degree of official (in terms of difficulties accessing documents, obtaining information, and obtaining contact to witnesses) and unofficial (pressure exerted on witnesses) obstruction on the part of elements within the various government structures of Serbia and elsewhere in the preparations of the Lukic Defense case have been a great cause for concern since day one.

5. It should be recalled that Sreten Lukic, while acting within his capacity as an Assistant Minister of the Interior and Chief of the Public Security Sector, in time period following the assassination of Prime Minister Djindjic, spearheaded and commanded over the exhaustive "Operation Sabre" crime-fighting measures, which resulted in a significant number of highly placed persons being detained, investigated and/or arrested for their potential involvement in such things as war crimes, corruption, assassinations, smuggling, etc. Those investigated and detained as part of this operation included persons that now serve as advisors to various political leaders in the Serbian Political Scene.

6. In addition, it should be recalled that the Prosecutor's office in Belgrade (State of Serbia Prosecutor) has likewise been the source of collaboration with the OTP of the ICTY to bring new, witnesses, who have changed their testimony 180 degrees in an attempt to implicate Sreten Lukic. An extreme example of this is witness Bozidar Protic. A more "benign" example is K79, a witness who was a PJP commander whose interview "statement" included an insinuation to Sreten Lukic that the witness negated and denied at trial, emphatically and unequivocally stating that Obrad Stevanovic was the PJP commander and that his unit commander had meetings with Stevanovic and never with Lukic.

7. Meanwhile, in this case as well as in others, the past experience has been that the Office of the Prosecution of the Tribunal, utilizing the guise of "interviews" has harassed, intimidated, and openly threatened potential defense witnesses, including some of those very same persons that find themselves on the witness list. The Office of the Prosecution has attempted to sabotage any efforts to bring defense witnesses from the MUP of the Republic of Serbia, by utilizing the state authorities of Serbia, including the MUP, and Local prosecutor to threaten prospective witnesses with their indictment for criminal charges if they do not provide helpful information to the Office of the Prosecution.

8. By way of an example of the foregoing, in May 2006, shortly before the commencement of the trial proceedings, the OTP sent a communication to the Serbian government authorities, naming multiple persons (now on the defense list) as "Suspects" and thus requiring that they had to submit to interviews with the OTP. It should be noted that as part of the Security Council directives relating to the Completion Strategy, the Office of the Prosecutor at that time no longer had the authority to conduct any further investigations or issue any further indictments. These individuals were not the subject of any existing Indictment. This was purely a tool of intimidation to deprive the witnesses of their right to privacy, and to pressure them in such a way that they would not be willing to testify for the defense in this case.

9. It is known to the defense, by way of a videotape of one such interview, disclosed by the Office of the Prosecutor, pertaining to witness Blagoje Pesic, that during such interviews the Office of the Prosecutor of the Tribunal continued to harass, intimidate, and threaten witnesses, in an effort of depriving them of the rights afforded to them to remain silent, etc. At one point during the interview (Video Disclosure Number V000-6813-1-A) the investigator from the Office of the Prosecutor harangues the witness, and threatens him by stating that upon the order of the OTP, if he did not give the OTP the answers they wanted to hear, he could have negative consequences in the Serbian prosecutor's office and the police, including the institution of criminal charges. Upon information and belief, a similar method was utilized in the videotaped interview of other witnesses. This is a clear act of violating the witness' right to silence, and a brutal and unequivocal method of intimidation that the Office of the Prosecutor has utilized time and again. It should be noted that Mr. Pesic is currently on the list of defense witnesses for Sreten Lukic. The Prosecution's allegations of a "joint criminal enterprise" are so vague and nebulous and far reaching, that it can be reasonably feared that ANY citizen of Serbia who ever served in the Police forces of that Republic can be at risk of being wrongfully accused of being a suspect or accused in such a context.

10. When the defense requested a copy of any interview notes or recordings of the interview of the late David Gajic (which, upon information and belief, was also undertaken in a threatening manner) we were told that no such recordings existed, because the tape recording device in question malfunctioned and no recording was ever made. Likewise, no written notes were taken of the interview. This said interview lasted multiple days, according to the information given to the defense by the decedent before his death. It is inconceivable that the Office of the Prosecution would not have any record from such an extensive interview.

11. The witness on the Lukic Defense list were all subject to applications to the State Authorities of Serbia to be excused of the obligation to keep state secrets. In that way, their identities are known to the State Authorities. Several witnesses have since rebuffed any further attempts at communication, presumably due to pressure and intimidation on the part of elements with influence among the government structures.

12. It is the position of the Lukic Defense team that, given the foregoing, it would be an injustice and indeed a miscarriage of justice to permit the Office of the Prosecutor to have a carte blanche to conduct unrestrained harassment, intimidation, and threats of defense witnesses. It should be noted that the Defense did not have the opportunity to interview any of the OTP witnesses prior to their testifying at trial, due largely to their inability to travel to Kosovo-Metohija, and thus equality of arms would dictate that the Prosecution not be given an advantage over the defense as regards the defense case.

II. Legal Submissions

13. The sole possible “legitimate”¹ justification for the Office of the Prosecution seeking access to interview defense witnesses is to prepare for cross examination.

14. Undoubtedly, the Office of the Prosecution intends, as its justification, to rely upon the Mrksic Appeals Decision² on **PRE-TRIAL** interviews of witnesses, as indeed the e-mail communication from Mr. Hannis dated 9 July 2007 even paraphrases the Mrksic Appeals Decision in stating that “I’ve always operated under the theory that witnesses are not the property of one party or another in criminal cases.”³ It should be noted that this position of the Prosecution is directly contrary to that it took in the Halilovic case, where the witnesses being sought access to were on the 65ter list of the prosecution, wherein it stated:

The Mrksic Decision is not applicable to the situation at hand and as such the Prosecution's stance in this instance does not contradict the stance it took in Mrksic. That Decision concerned communication (and not the issuance of subpoenas) with potential witnesses and not with witnesses placed on official 65ter lists. It is not contested by the Prosecution (and never has been, as it would fall foul of current second instance jurisprudence) that such witnesses are the "property" of neither party. Only

¹ “legitimate” in the sense of as opposed to the efforts to intimidate, harass and threaten witnesses so that they would refuse to testify, or would change their testimony to the benefit of the OTP’s case.

² Office of the Prosecutor vs. Mrksic, et al., IT-95-13/1-PT [Appeals Chamber, 30 July 2003] “Decision on Defense Interlocutory Appeal on Communication with Potential Witnesses of the Opposite Party.” (hereinafter “Mrksic Appeals Decision.”)

³ A holding from both the Mrksic Appeals Decision and the "Decision on Prosecution's Motion to Interview Defense Witnesses" [Trial Chamber, 1 September 2006](hereinafter referred to as "Mrksic Trial Decision II"), which was **not** the subject of Appellate adjudication, and therefore is not binding precedent under the doctrine of *stare decisis*.

following the 65ter filings do such potential witnesses become witnesses of the party. In Mrksic the Prosecution sought to interview (as consonant with its obligation under Article 16 of the Tribunal's Statute and Rule 39 of the Rules of Procedure and Evidence) witnesses that were not official witnesses of the Defense. It is an incomparable situation.⁴

It is respectfully submitted that the doctrine of estoppel bars the OTP from pursuing a contradictory position at this point in time. The Prosecution in Halilovic was absolutely correct that during the trial phase, after witnesses have been placed on Rule 65 ter lists, attempts by the other party to interview them should be treated with caution. It is respectfully submitted that at this stage, they can be deemed efforts to intimidate or threaten witnesses into silence. The end result/effect of the Prosecution seeking to interview witnesses, and conducting those interviews in the manner heretofore utilized, can be the severe prejudice of the defense case, as witnesses can become "spooked" so that they refuse to come testify for the defense, or refuse to be fully open in their testimony.

15. Furthermore, the Mrksic Decision only covers pre-trial interviews⁵, and the jurisprudence of the Tribunal in regards to such issues must be strictly adhered to, which prevents to Prosecution (or any party) from forcing such interviews for the reasons it seeks.

16. Specifically, even the Mrskic Appeals Decision sets forth in pertinent part that while the Prosecution can take reasonable steps (during pre-trial) to obtain an interview of a witness this is "provided of course that there is no interference with the course of justice."⁶ The holding of the Appeals Chamber continues to state "Particular caution is needed where the Prosecution is seeking to interview a witness who has declined to be interviewed by the Prosecution, since in such a case the witness may feel coerced or intimidated."⁷ Clearly, even the Mrksic Appeals Decision envisioned the need to curtail such activities by the OTP if there was a potential of coercion or intimidation.

17. Other cases before the ICTY and the ICTR have enshrined the ideal that a person's right to privacy is sacred, and should be preserved, only being infringed upon when absolutely necessary.⁸

⁴ Office of the Prosecutor v. Halilovic, IT-01-48, "Prosecution Response to Defence Appeal Concerning Issuance of Subpoenas" (23 April 2004) at para. 8.

⁵ The subsequent Mrksic Trial Decision II was not subjected to the scrutiny of the Appeals Chamber.

⁶ Mrksic Appeals Decision.

⁷ Id.

⁸ See, e.g. Mrksic Appeals Decision; Prosecutor v. Semanza, ICTR-97-20-I [Trial Chamber, 24 May 2001] "Decision on the Defence motion for Protection of witnesses (Rule 75)"; Office of the Prosecutor v. Blaskic, IT-95-14-PT [Appeals Chamber, 26 November 2003] "Confidential and Ex Parte Decision on Defense Prosecution's Application for Subpoena."; Prosecutor v. Bizimungu, et al, ICTR-99-50-I [Trial Chamber, 2

18. Likewise, it is well-settled precedent at the ICTY that while a preparation for cross-examination is undeniably a part of the overall preparation for trial, it is not, in and of itself, a sufficient basis for an issuance of a subpoena for a party to interview a witness prior to their appearance at trial.⁹

19. Notably, in the appeal of a denied Defense motion for issuance of subpoenas to reluctant persons in Halilovic, the Appeals Chamber noted " Where the information the Defence seeks before trial from the opposing party's witness will, in any event, be presented at trial during that witness's examination in chief, there is no need to resort to a subpoena. The information will be present both to the court and to the Defence, and the latter will be able to test this information for veracity, accuracy, and reliability during cross-examination."¹⁰

20. Accordingly, insofar as the Prosecution would have the ability to cross examine witnesses of the defense at trial, there is no need to compel their interviews at this stage, particularly in light of the fact that there can be no argument of further investigations on the part of the OTP. The OTP cannot investigate new cases or issue new indictments.

21. Taking the analysis one step further, the ICTR in Semanza stated that cross examination is preferred over interviews, even where interviews were permitted of Prosecution witnesses, as "...the Chamber accepts the potential Defence witnesses and their families may well fear that contacts by the Prosecution could expose them to the unwanted attention of the Rwandan authorities."¹¹ We are in the same situation in this case, where defense witnesses previously interviewed by the OTP were subjected to direct threats that the OTP would cause "negative circumstances" for the witnesses through the local, Serbian authorities.

22. Even where sufficient grounds have been established by the seeking party and such interviews have been granted, it has been held that, any interview of this kind should take place in the presence of a representative of the opposing party to protect the integrity of the process, to clearly avoid any allegations as to tampering with evidence.¹²

October 2003] "Decision on Prosper Mugiraneza's Motion to Require the Registrar to Allow Access to a Witness."

⁹ Office of the Prosecutor v. Halilovic, IT-01-48 [Appeals Chamber, 21 June 2004] "Decision on the Issuance of Subpoenas." (hereinafter "Halilovic Appeals Decision").

¹⁰ Halilovic Appeals Decision, at para. 10.

¹¹ Prosecutor v. Semanza, ICTR-97-20-I [Trial Chamber, 24 May 2001] "Decision on the Defence Motion for Protection of Witnesses (Rule 75)." at para. 13.

¹² See, Prosecutor v. Bizimungu, et al., supra., at para. 26; Mrksic Trial Decision II, at para. 4.

23. Lastly, it cannot be stressed enough that, at the present stage of the proceedings, the Lukic defense team is overwhelmed with efforts to adequately prepare its client's defense case for trial. Adding to this the burden of having to deal with witness interviews pre-cross by the OTP, would stretch the defense resources beyond their capabilities. There simply is no reasonable or feasible way to accommodate the OTP's requested witness interviews, assure they are done in accordance with the laws and procedures, and prepare the defense case within the time allocated. Simply put, acquiescing to the OTP request in this instance would undoubtedly lengthen this phase of the proceedings, causing delays in the trial (particularly if subpoenas are later required to compel witnesses "spooked" by the OTP into actually coming to testify for the defense.)

WHEREFORE, for the foregoing reasons, the Defense of Sreten Lukic respectfully requests that this Honorable Trial Chamber bar the Prosecution from seeking to interview or have contact with defense witnesses, or for such additional relief as this Chamber may deem just and proper, including ordering that the Defense be apprised in advance of any such interview and that such interviews do not take place without the presence of defense counsel.

Word Count: 2,629 words

Respectfully Submitted By the Defense of Sreten Lukic:



Branko Lukic



Dragan Ivetic

Dated this 8th of August 2007

The Hague, Netherlands.