



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: 20 March 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: 20 March 2008

PROSECUTOR

v.

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

PUBLIC

DECISION ON USE OF PROSECUTION INTERVIEWS OF ACCUSED

Office of the Prosecutor

Mr. Thomas Hannis

Mr. Chester Stamp

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”) hereby renders this Decision on the issue of the manner in which the Accused’s interviews conducted by the Prosecution prior to the commencement of the trial are to be used evidentially in the case.

1. The Trial Chamber finds it useful to set forth an abbreviated procedural history of this matter.

2. On 25 May 2006, the Prosecution filed a “Motion to Admit Documentary Evidence with Annexes,” in which it requested, *inter alia*, the admission into evidence of the interviews of the Accused given to the Prosecution. In the course of the litigation over the admission of these interviews, the Prosecution, on 18 August 2006, filed the “Prosecutor’s Reply to Defence Responses to Motion for Admission of Documentary Evidence and Motion for Variation of Word Limit,” arguing that “the statements [of an accused given to the Prosecution] are to be used in their entirety as evidence against the proponent of the statement, and against the co-accused except portions that address the acts and conduct or mental state of other accused.”¹ On 10 October 2006, the Chamber admitted the interviews of the Accused into evidence pursuant to Rule 89(C) of Rules of Procedure and Evidence of the Tribunal.²

3. On 7 May 2007, during the oral Rule 98 *bis* submissions, the Prosecution confirmed that it does not intend to “renege” its previous position in relation to the use of the interviews of the Accused.³

4. On 15 August 2007, during the testimony of the first witness called by the Milutinović Defence, the Presiding Judge observed the following regarding the use of the interviews of the Accused:

What Pavković said in that interview is not evidence against your client [Milutinović]. We’ve made that clear. The only relevance of his interview in your case is that Mr. Hannis can put the terms and ask a witness whether he agrees or disagrees, and it’s only what the witness says that is relevant to evidence against your client.⁴

¹ *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-PT, Prosecutor’s Reply to Defence Responses to Motion for Admission of Documentary Evidence and Motion for Variation of Word Limit, 18 August 2006, para. 22.

² *Prosecutor v. Milutinović et al.*, Decision on Prosecutor Motion to Admit Documentary Evidence, 10 October 2006, para. 44.

³ T. 12762–12763 (7 May 2007).

⁴ T. 13654 (15 August 2007).

5. At the hearing held on 13 March 2008, in light of the *Prlić* Appeal Decision,⁵ the Chamber raised the subject of how the Accused's interviews conducted by the Prosecution prior to the commencement of the trial were to be used evidentially in the case. The Prosecution indicated that it would "stand ... with the Court of Appeal."⁶ The Milutinović and Pavković Defences advanced views upon the issue, including that the Prosecution should be bound by its previous positions upon the matter and that it would be beneficial to settle the issue in advance of the filing of final trial briefs pursuant to Rule 86(B).⁷ On 14 March 2008, the Trial Chamber invited the parties to address the issue in written submissions and scheduled an oral hearing.⁸ On 19 March 2008, the Defence and the Prosecution made their written submissions on the matter,⁹ and the Chamber heard oral argumentation on 20 March 2008.

6. The position of the Prosecution, as indicated most recently in its written submissions on 19 March 2008 and its oral submissions on 20 March 2008, is that it will adhere to its previous position, namely that it will not invite the Chamber to rely upon the interview of an Accused to prove the acts and conduct of his co-Accused (where the Accused giving the statement was not available for cross-examination). However, the Prosecution then argues that the Chamber "is bound to apply the law as it currently stands, to apply the law properly," and thus should apply the *Prlić* Appeal Decision in its final assessment of all the evidence in the case, namely that the Chamber ought to use the interviews in its assessment of the acts and conduct and mental state of the co-Accused.¹⁰

7. The Defence argue that their right to a fair trial would be infringed by such an approach, due to the fact that they relied upon the restrictive approach the Prosecution itself placed upon the evidence.¹¹

8. The issue before the Chamber is whether it would be unfair to the Defence to use the interviews in accordance with the *Prlić* Appeal Decision, when the Prosecution has maintained

⁵ *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, Decision on Request for Admission of the Statement of Jadranko Prlić, 22 August 2007, para. 28 (holding that statement of accused may be used against other co-accused without cross-examination, even when such statement goes to acts and conduct of those other co-accused, but noting that "it will take into account the possible lack of cross-examination when determining the probative value to be accorded to the statement and will demand corroborative elements before giving it any weight"). The Appeals Chamber affirmed this decision on interlocutory appeal. *Prosecutor v. Prlić et al.*, Case No. IT-04-74-AR73.6, Decision on Appeals Against Decision Admitting Transcript of Jadranko Prlić's Questioning Into Evidence, 23 November 2007, paras. 56–60.

⁶ T. 24295 (13 March 2008).

⁷ T. 24300–24306 (13 March 2008).

⁸ Order on Submissions of Parties on Issue of Use of Prosecution Interviews of Accused, 14 March 2008.

⁹ Joint Defence Submission on Use of Prosecution Interviews of Accused, 19 March 2008; Prosecution's Submissions on the Issue of Use of Prosecution Interviews of the Accused, 19 March 2008.

¹⁰ T. 24609 (20 March 2008).

¹¹ T. 24601–24608 (20 March 2008).

throughout the trial that it will adopt a more restrictive approach. The Chamber is of the view that the Defence was entitled to rely upon the position of the Prosecution when preparing and conducting both their cross-examination of Prosecution witnesses and their own adducement of evidence during their defence cases. It would be unfair to the Defence to now use the interviews in a more expansive manner.

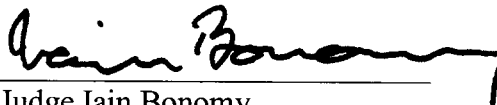
9. It is true that the Chamber is not bound by the parties' submissions upon the law. For example, if the parties happen to agree upon the general requirements of Article 5 in their final trial briefs, and the Chamber disagrees with their view, it is free to—and indeed must—apply the correct law. However, this situation here is different because the Defence has relied upon the Prosecution's position in law, and was entitled to do so, throughout the trial for over twenty months. This holding of the Chamber is reinforced by the Prosecution's pronouncement at the hearing on 20 March 2008:

Since last Thursday, we have given this matter further reflection, and we believe that in fairness to the Defence, given that we have stated this position and have reiterated it during the course of this case and the Defence have indicated that they have relied on the assertions we have made, we do not intend to change or we intend to adhere to the position that we have stated with respect to the use we will give these suspect interviews.¹²

The Chamber notes that the Prosecution has stated its ultimate position on the basis that to do otherwise risks unduly prejudicing the Accused's right to a fair trial.

10. The Chamber notes, as a final matter, that Lazarević took the stand and was available to the co-Accused for cross-examination. Lazarević's interview is thus admissible against his co-Accused for all purposes.

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


Judge Iain Bony
Presiding

Dated this twentieth day of March 2008
At The Hague
The Netherlands

[Seal of the Tribunal]

¹² T. 24611–24612 (20 March 2008).