



International Tribunal for the
Prosecution of Persons
Responsible for Serious Violations of
International Humanitarian Law
Committed in the Territory of
Former Yugoslavia since 1991

Case No. IT-95-13/1-T
Date: 1 September 2006
Original: English

IN TRIAL CHAMBER II

Before: Judge Kevin Parker, Presiding
Judge Christine Van Den Wyngaert
Judge Krister Thelin

Registrar: Mr. Hans Holthuis

Decision: 1 September 2006

PROSECUTOR

v.

**MILE MRKŠIĆ
MIROSLAV RADIĆ
VESELIN ŠLJIVANČANIN**

**DECISION ON PROSECUTION'S MOTION
TO INTERVIEW DEFENCE WITNESSES**

The Office of the Prosecutor:

Mr Marks Moore
Mr Philip Weiner
Mr Vincent Lunny
Ms Meritxell Regue
Mr Alexis Demirdjian

Counsel for the Accused:

Mr Miroslav Vasić and Mr Vladimir Domazet for Mile Mrkšić
Mr Borivoje Borović and Ms Mira Tapusković for Miroslav Radić
Mr Novak Lukić and Mr Momčilo Bulatović for Veselin Šljivančanin

1. This decision of Trial Chamber II 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 (“Trial Chamber”) is in respect of the “Prosecution’s Motion to Interview Defence Witnesses” (“Motion”), filed confidentially on 17 August 2006, by which the Prosecution seeks leave to interview some of the Defence witnesses, submitting that the Defence counsel objected or, in the case of the Defence for Miroslav Radić, agreed under certain conditions, to the Prosecution interviewing their witnesses.

2. On 25 August 2006, the Defence for the three Accused filed a “Joint Defence Response to the Prosecution Motion to Interview Defence Witnesses” (“Response”), by which the Defence objects to the Motion, or, alternatively, seeks the Chamber’s order regulating the way in which the Prosecution could apply for interviews. The Defence submits that the Motion is too vague, as it does not provide the names of the witnesses the Prosecution seeks to interview, nor the subjects on which the Prosecution would like to interview them. The Defence also requests that the Prosecution provide reasons for each application for an interview. The Trial Chamber notes that two of the Accused are among witnesses included in the Defence lists. It, however, assumes that the Motion and the Response relate to witnesses other than the Accused and therefore the following considerations do not concern the Accused.

3. The Rules of Procedure and Evidence (“Rules”) do not address the issue whether a party can interview witnesses called to testify by the other party. Rule 39 authorises the Prosecutor to question witnesses, but it is located in the section of the Rules concerning the stage of investigations and therefore is of limited relevance to the present case. The absence of a similar rule applying to the pre-trial and trial stages of the proceedings should not be understood as a ban for conducting interviews at those stages. In order to prepare their respective cases and fulfil obligations under Rule 65*ter*, the Prosecution and the Defence should be allowed to interview witnesses. In the Chamber’s view, the Prosecution has a justifiable interest in conducting interviews also after the close of its case, as evidence in rebuttal may later be presented. Interviews may also be necessary at this stage in order for the Prosecution to prepare for cross-examining Defence witnesses. The issue whether interviews can be had with witnesses of the opposing party has been addressed in the jurisprudence. The Appeals Chamber has held that witnesses are “the property of neither the Prosecution nor the Defence” and thus both parties have an equal right to interview them.¹ This ruling was given in the context of pre-trial proceedings, at the time before lists of witnesses under

¹ *Prosecutor v. Mile Mrkšić*, Case No.: IT-95-13/1-AR73, Decision on Defence Interlocutory Appeal on Communication with Potential Witnesses of the Opposite Party, 30 July 2003, para 15; *see also* this Trial Chamber’s ruling in: *Prosecutor v. Mićo Stanišić*, Case No.: IT-04-79-PT, Decision on Prosecution’s Motion for Protective Measures for Victims and Witnesses, 6 June 2005 (“*Stanišić Decision*”), para 17.

Rule 65ter were provided in that case. At the trial stage of proceedings, the *Orić* Trial Chamber affirmed the Prosecution's right to seek an interview with a witness of the Defence. It found that the ruling of this Trial Chamber made in the *Stanišić* pre-trial proceedings in respect of interviewing Prosecution witnesses by the Defence² would equally apply in the inverse situation, where the Prosecution seeks an interview with a Defence witness.³ The Rules, although silent on the matter, contain nothing to suggest that a party's right to interview witnesses of the other party should be restricted. Certainly, principles of a general nature apply, such as those related to the prohibition of interference with witnesses.⁴ Further, it must be borne in mind that the Prosecution learns the names of witnesses to be called by the Defence only after the close of its case, when it is provided with the list of Defence witnesses under Rule 65ter. Only from that moment on is the Prosecution in a position to make inquiries necessary for the preparation of cross-examination, or with a view of determining whether rebuttal evidence would be necessary. To that end, interviewing Defence witnesses may prove to be of importance for the Prosecution, especially in view of the fact that the Rules do not provide for an obligation of the Defence to furnish the Prosecution with statements of witnesses the Defence intends to call. The Trial Chamber is thus of the view that, in the present case, the Prosecution's request to interview Defence witnesses is justified.

4. For these reasons, there is no need for the Trial Chamber to intervene each time the Prosecution intends to interview a Defence witness and for the Prosecution to seek the Chamber's authorisation. However, as a matter of courtesy and in order to avert the risk of allegations of interference with witnesses, it would be preferable for the Prosecution to give notice to the Defence of its intention to interview a witness from the Defence's Rule 65ter list.⁵ Consideration should also be given by the Prosecution to recording the interview.

5. Relying, *inter alia*, on a ruling of the Appeals Chamber in the *Halilović* case, the Defence requests that the Prosecution give reasons for interviewing witnesses, as well as the subject matter of the interviews.⁶ However, the ruling referred to by the Defence is not relevant to the present case as it concerned the issue of a subpoena to a witness for the purpose of an interview and a party's obligation to present reasons for the need to interview a witness in such cases. The ruling does not indicate that reasons should be given in cases where there is no need to make use of subpoenas.⁷ In the Chamber's view the Prosecution may interview potential witnesses who are to be called by the Defence and there is no need for it to justify doing so in every case.

² *Stanišić* Decision, para 17.

³ *Prosecutor v. Naser Orić*, Case No.: IT-03-68-T, Oral ruling of 7 December 2005, transcript page 14519.

⁴ Rule 77(A)(iv).

⁵ See *Stanišić* Decision, para 17.

⁶ Response, paras 4-5.

6. For the foregoing reasons, the Trial Chamber **GRANTS** the Motion and **HOLDS** that:

- the Prosecution can interview witnesses, other than the Accused, included in the Rule 65^{ter} list of the Defence;
- the Prosecution should give notice to the Defence each time it intends to interview one of the witnesses for that Defence.

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



Judge Kevin Parker
Presiding

Dated this first day of September 2006
At The Hague
The Netherlands

[Seal of the Tribunal]

⁷ *Prosecutor v. Sefer Halilović*, Case No.: IT-01-48-AR73, Decision on the Issuance of Subpoenas, 21 June 2004, paras 12 and 14.