



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: 21 September 2006  
Original: English

25-75-12/1-T  
07078-07075  
21 SEPTEMBER 2006

7078  
J/-

**IN TRIAL CHAMBER II**

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

**Registrar:** Mr Hans Holthuis

**Decision:** 21 September 2006

**PROSECUTOR**

v.

**MILE MRKŠIĆ  
MIROSLAV RADIĆ  
VESELIN ŠLJIVANČANIN**

**DECISION ON DEFENCE MOTION FOR CERTIFICATION**

**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 the Trial Chamber is in respect of the Defence motion of 8 September 2006 (“Motion”)<sup>1</sup> to grant certification to appeal from the “Decision on Prosecution’s Motion to Interview Defence Witnesses” of 1 September 2006 (“Decision”) in which the Chamber found that the Prosecution has the right to interview Defence witnesses. The Motion was filed within 7 days of the filing of the Decision and thus in due time, pursuant to Rule 73(C) of the Rules of Procedure and Evidence (“Rules”).

2. In the Motion the Defence refers to the Pre-Trial Chamber’s decision on certification given in the pre-trial phase of this case (“Previous Decision on Certification”) and by which certification was granted to appeal against a ruling concerning the Defence’s communication with potential witnesses for the Prosecution.<sup>2</sup> The Defence submits that interviews by the Prosecution may affect relations the Defence has established with its witnesses and that they might feel coerced or intimidated. The issue of interviews may therefore, in the view of the Defence, significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial. The Defence is of the opinion that, in view of the recent opening of the Defence case, an immediate resolution of the issue may materially advance the proceedings.

3. On 15 September 2006, the Prosecution filed its “Response to Joint Defence Request for Certification pursuant to Rule 73(B)”, by which it requests the Chamber to deny the Motion. The Prosecution submits that the Defence has not substantiated its contention that witnesses may get the impression of being intimidated. The Prosecution further submits that an interlocutory appeal at this time could delay the proceedings, in case the Prosecution is not allowed to interview witnesses and they are prevented from testifying until the matter is resolved by the Appeals Chamber.

4. Pursuant to Rule 73(B) of the Rules, decisions on motions are “without interlocutory appeal save with certification by the Trial Chamber”. The Chamber may exercise its discretion to grant certification “if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings”.

5. A major concern the Defence seems to have and on which it primarily relies in its application for certification is the danger of witnesses feeling coerced or intimidated. The Defence has not provided specific grounds for this assertion. Nor has the Defence demonstrated how and to what extent, at least in its view, the potential risk of intimidation could affect the fair conduct of the

---

<sup>1</sup> Joint Defence Request for Certification Pursuant to Rule 73(B).

<sup>2</sup> Reference is made to: Decision on Granting Certification to Appeal, 29 May 2003.

proceedings. As discussed earlier, it must be shown that the influence the contested issue might have on the conduct of the proceeding is significant. The Defence has not explored it in the Motion. In addition, the Chamber recalls that the impugned Decision does address the issue of potential interference with witnesses and, if the recommendation given in the Decision is followed, the risk of interference may be substantially diminished or eliminated. Therefore, it is not established, in the circumstances of the present case, that the issue whether there exists a risk of interference is such as to significantly affect the conduct of the proceedings or the outcome of the trial. Similarly, the Defence has failed to demonstrate how the alleged risk of adverse effects which the interviews might have on the relations it has managed to establish with witnesses could affect the proceedings.

6. Further, as it was mentioned earlier, there is another condition to be met in order for the Trial Chamber to be able to exercise its discretion. The Chamber must be of the opinion that an immediate resolution of the disputed issue by the Appeals Chamber may materially advance the proceedings. The Defence case for Mile Mrkšić is well under way. Therefore, the question whether the Accused should appeal at *this stage* of the proceedings, rather than at the conclusion of the case, becomes of particular significance.<sup>3</sup> If the Defence files its appeal at this stage, there may well be a need to stay the proceedings pending the determination of the appeal. This would delay the conclusion of the trial. It thus cannot be said that, in the circumstances, the intervention of the Appeals Chamber would materially advance the proceedings. The Chamber is of the view that the interest of all parties and the interests of justice will be better served if the issue is not brought before the Appeals Chamber at this stage and, instead, the Defence case continues without interruption.

7. The Defence refers to the Pre-Trial Chamber's decision on certification given at an earlier stage of the proceedings in this case. However, as discussed earlier, the case has now reached an advanced stage, whereas the Previous Decision on Certification was given at the pre-trial stage, when there was no prospect of a need to delay the commencement of the trial or of an imminent review of the whole case by the Appeals Chamber. The Previous Decision was thus given in materially different circumstances. It is therefore of little relevance to the matter at hand. In addition, it is to be noted that in the proceedings initiated by the appeal of the Defence at the time the Appeals Chamber did address the issue of limitations to the right of the Prosecution to interview Defence witnesses.<sup>4</sup> If the Trial Chamber were to consider the question of discretion, discussed

<sup>3</sup> See *Prosecutor v. Pavle Strugar*, Case No.: IT-01-42-T, Decision on Defence Motion for Certification, 17 June 2004, para 6.

<sup>4</sup> Decision on Defence Interlocutory Appeal on Communication with Potential Witnesses of the Opposing Party, 20 July 2003, paras 13-16.

earlier,<sup>5</sup> the decision of the Appeals Chamber would be of no encouragement to the view that the underlying proposition that is now being put forward by the Defence is correct, a matter which weighs against the exercise of discretion to grant certification to appeal at this stage of the trial.

8. For these reasons, and in the particular circumstances of the present case, the Trial Chamber is not persuaded that the issue put to it by the Defence is one that could significantly affect the conduct of the proceedings or the outcome of the trial. Nor is the Chamber of the opinion that an immediate resolution by the Appeals Chamber may materially advance the proceedings.

The Trial Chamber therefore **DENIES** the Motion.

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



---

Judge Kevin Parker  
Presiding

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

[Seal of the Tribunal ]

---

<sup>5</sup> See *supra* para 4.