**UNITED NATIONS**

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-95-5/18-T

Date: 8 November 2012

Original: English

**IN THE TRIAL CHAMBER**

**Before:** **Judge O-Gon Kwon, Presiding Judge**
**Judge Howard Morrison**
**Judge Melville Baird**
**Judge Flavia Lattanzi, Reserve Judge**

**Registrar:** **Mr. John Hocking**

**Decision of:** **8 November 2012**

**PROSECUTOR**

**v.**

**RADOVAN KARADŽIĆ**

***PUBLIC***

# DECISION ON INTERVIEW OF DEFENCE WITNESSES BY THE PROSECUTION

**Office of the Prosecutor**

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

**The Accused**

Mr. Radovan Karadžić

**Standby Counsel**

Mr. Richard Harvey

**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") held a Pre-Defence Conference on 15 October 2012, during which a discussion ensued on the procedure to be applied to interviews of witnesses on the Accused's witness list by members of the Office of the Prosecutor ("Prosecution"), and hereby issues a decision in relation thereto.

## I. Background and Submissions

1. On 2 June 2009, the Accused filed a motion seeking an order from the Pre-Trial Chamber directing the Tribunal's Victims and Witnesses Section ("VWS")[1] to contact certain witnesses on the Rule 65 *ter* witness list filed by the Prosecution in order to ascertain whether they would consent to be interviewed by the Accused or a member of his defence team.[2] The Accused explained that this issue arose after he wrote to the Prosecution requesting the contact information of some of the witnesses on its Rule 65 *ter* witness list so that he could contact them to ask if they were willing to be interviewed by his defence team. In response, the Prosecution told him that it does not disclose witness contact information without first obtaining the permission of the relevant witness, and thus offered to communicate with the witnesses identified by the Accused in order to determine whether they would be willing that their contact details be given to him. The Accused argued, however, that it was not appropriate for the Prosecution to contact the witnesses first on this issue, as doing so would present a conflict of interest and thus asked that the VWS get involved.[3] At the Status Conference held on 3 June 2009, the Prosecution responded orally, stating that it did not have a particular objection to the VWS contacting the witnesses for this purpose.[4] In the "Registry Submission on the Accused's Motion on Contact with Prosecution Witnesses", filed on 10 June 2009 ("Registry Submission"), the Registry raised its concern that its neutral role could be compromised if the VWS was ordered to contact Prosecution witnesses on behalf of the Accused.[5] It further submitted that facilitating appointments for interviews of Prosecution witnesses by the Accused or his defence team was not something normally performed by the VWS, but rather the defence team itself.[6] It concluded that should the VWS be required to contact Prosecution witnesses at the request of the Accused, it would be willing only to ask them whether or not they consented

[1] Under Rule 34 of the Tribunal's Rules of Procedure and Evidence, the VWS is under the authority of the Registrar.
[2] Motion for Order for Contact with Prosecution Witnesses ("Motion for Order for Contact"), 2 June 2009.
[3] Motion for Order for Contact, paras. 2–4.
[4] Status Conference, T. 300–301 (3 June 2009).
[5] Registry Submission, para. 5.
[6] Registry Submission, para. 10.

to their contact information being provided to the Accused and his defence team.[7] On 19 June 2009, the Pre-Trial Chamber issued its Decision on Motion for Order for Contact with Prosecution Witnesses ("First Decision") denying the Accused's motion and instead ordering the Prosecution to provide to the Accused current contact details for the witnesses requested by him, except witnesses who have been granted protective measure of delayed disclosure, so that he could contact them directly.[8]

2. On 24 June 2009, the Pre-Trial Chamber granted a Prosecution motion for stay of the First Decision, on the basis that the Prosecution intended to file a request for reconsideration or application for certification to appeal the First Decision.[9]

3. On 26 June 2009, the Prosecution filed the "Prosecution Motion for Reconsideration of Trial Chamber's Decision on Motion for Order for Contact with Prosecution Witnesses" ("Reconsideration Motion"), requesting the Pre-Trial Chamber to reconsider its First Decision and order either the Prosecution or the VWS to contact the witnesses identified by the Accused.[10] Alternatively, the Prosecution sought certification to appeal the First Decision.[11] In his response to the Reconsideration Motion, the Accused joined the Prosecution in requesting the Pre-Trial Chamber to reconsider its First Decision and agreed with the Prosecution to the extent that the Chamber should order the VWS to contact the witnesses in question.[12] Upon the invitation of the Pre-Trial Judge,[13] the Registry filed another submission again emphasising its neutral role and some of the difficulties that may be encountered should the VWS be required to ask Prosecution witnesses if they are willing to be interviewed by the Accused and/or his defence team. Nonetheless, the Registry stated that the VWS could carry out the task of contacting the relevant witnesses, as proposed by the Prosecution.[14]

4. Accordingly, on 15 July 2009, the Pre-Trial Chamber issued its "Decision on Motion for Reconsideration of Decision on Motion for Order for Contact with Prosecution Witnesses" ("Second Decision"). It found that the Prosecution failed to demonstrate a "clear error of reasoning" in the First Decision. Nevertheless, in light of the joint proposal by the Prosecution and the Accused that the VWS be called upon to make contact with the witnesses listed on the

[7] Registry Submission, para. 11.
[8] First Decision, para. 10.
[9] Prosecution Motion for Stay of Trial Chamber's Decision on Motion for Order for Contact with Prosecution Witnesses, 24 June 2009; Decision on Motion for Stay of Decision on Contact with Prosecution Witnesses, 24 June 2009.
[10] Reconsideration Motion, para. 15.
[11] Reconsideration Motion, para. 18.
[12] Response to Prosecution Motion for Reconsideration: Contact with Prosecution Witnesses, 6 July 2009, para. 4.
[13] Order Setting a Deadline for Registry Submission, 1 July 2009.
[14] Registry Submission on Order for Contact with Prosecution Witnesses, 6 July 2009, para. 8.

Prosecution's Rule 65 *ter* witness list, it decided to vary the First Decision to that effect.[15] The Pre-Trial Chamber therefore ordered as follows: (i) the Accused was to immediately provide the VWS with a confidential list of those witnesses on the Prosecution's Rule 65 *ter* witness list whom he wished to interview; (ii) the Prosecution was to furnish the VWS with current contact information for the witnesses on the list provided by the Accused; (iii) the VWS was then to make contact with the listed witnesses, as expeditiously as possible, to establish whether they would agree to be interviewed by a member of the Accused's defence team, and, if so, whether they wished that a representative of the Prosecution be present at that interview; (iv) the VWS was to advise the Accused of the results of these inquiries, and provide him with the contact information of those witnesses who agreed to be interviewed by his defence team; and (v) the Accused was to notify the Prosecution of the time and location of the interviews of those witnesses who wished a representative of the Prosecution to be in attendance.[16] Accordingly, this procedure was used throughout the Prosecution case and resulted in the Accused and his defence team interviewing a large number of witnesses who were called to give evidence by the Prosecution.

5. On 21 September 2012, some weeks before the Accused's defence case was about to start, the Chamber was contacted by the VWS and informed that the Prosecution had asked that VWS contact some of the witnesses on the Accused's Rule 65 *ter* list and inquire whether they would be willing to submit to an interview with the Prosecution. Subsequently, a number of emails were exchanged between the VWS and the parties, on notice to the Chamber's legal officer, through which it transpired that, with the exception of a few early witnesses, the Prosecution did not want the VWS to be involved to the same extent as it had been during the Prosecution case. Instead, the Prosecution wished to contact the witnesses whose contact details it had in its possession directly. On 25 September 2012, the Chamber informed the parties, via email, that the procedure that was put in place by the Second Decision would continue to apply until the Pre-Defence Conference when the issue would be discussed further.

6. The Pre-Defence Conference was held on 15 October 2012 and both parties were given an opportunity to make submissions on the issue of interview of witnesses. The Prosecution submitted that this was a matter that should not be before the Chamber as the jurisprudence is clear that parties do not have a property interest in the witnesses they are calling, which is why in other cases the Prosecution has been free to contact defence witnesses directly, with the proviso that it would first advise the defence of its intention to interview those witnesses.[17] The

[15] Second Decision, para. 7.
[16] Second Decision, para. 11.
[17] Pre-Defence Conference, T. 28829–28830 (15 October 2012).

Prosecution also noted that the procedure that was put in place in this case by the Second Decision was introduced at the request of the Accused rather than the Prosecution, and that there was now no need to continue with it because the Prosecution would not engage in any inappropriate contact with the witnesses.[18]

7. In response, the Accused's legal adviser submitted that it was important that the same regime that applied during the Prosecution case continues to apply during the Accused's case, as it worked well and was a neutral way of approaching witnesses.[19] He also pointed out his concern that because they had at some point been considered as suspects by the Prosecution or were concerned about being exposed to domestic prosecution, many of the witnesses on the Accused's 65 *ter* list may become reticent and may refuse to give evidence if "the first contact that they have is from the Prosecution".[20] In case the Chamber was not minded to continue the procedure that was used during the Prosecution case, the Accused's legal adviser proposed that the defence team be allowed to make the initial contact with the witnesses on this issue and ask them if they were willing to share their contact details with the Prosecution.[21]

8. In reply, the Prosecution submitted that there is a distinction between the witnesses whose contact details are already in its possession and those whose contacts it does not possess. With respect to the latter, the Prosecution submitted that it is willing to "discuss the procedure […] if the Prosecution requires the assistance of the Defence in order to obtain contact details" but that the procedure that was put in place in the Second Decision should have nothing to do with the Prosecution's right to be able to contact witnesses with whom it has had contact with over the years.[22] The Prosecution also submitted that it would be willing to alert the Accused of its intention to contact certain witnesses whose contact details it had in its possession or was able to obtain independently of him.[23]

9. Having heard the parties, the Chamber informed them that it would rule on this issue in due course.[24] In light of the detailed submissions made by the Registry at the time the First and the Second Decisions were issued, the Chamber did not consider it necessary to hear from the Registry and the VWS again. The Chamber will therefore proceed to make a determination on the issues raised above, bearing in mind the submissions made by the Registry on 10 June 2009 and 6 July 2009.

[18] Pre-Defence Conference, T. 28830–28831, 28834 (15 October 2012).
[19] Pre-Defence Conference, T. 28832 (15 October 2012).
[20] Pre-Defence Conference, T. 28832, 28836 (15 October 2012).
[21] Pre-Defence Conference, T. 28836 (15 October 2012).
[22] Pre-Defence Conference, T. 28837–28838 (15 October 2012).

## II. Applicable law

10. Neither the Tribunal's Statute ("Statute") nor its Rules of Procedure and Evidence ("Rules") specifically address the issue of whether one party in a case can interview witnesses who are on the other party's Rule 65 *ter* list prior to the witnesses' testimony. However, the jurisprudence of the Tribunal is clear that "witnesses to a crime are the property of neither the Prosecution nor the Defence" and that therefore "both sides have an equal right to interview them."[25] If a particular witness refuses to be interviewed by a party, that party will not have the power to compel the witness to attend an interview or answer questions, and instead must seek the assistance of the Chamber pursuant to Rule 54, usually in the form of a subpoena.[26]. The party seeking an interview may, however, take reasonable steps to persuade the witness to reconsider his or her decision, so long as there is "no interference with the course of justice" in the form of intimidation or coercion of that witness.[27] The Appeals Chamber has held that "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."[28] Various Chambers have also found that as a matter of courtesy and in order to avoid allegations of interference with witnesses, it would be prudent or preferable if a particular witness is not approached until the party calling the witness is notified of the other party's intention to interview him.[29]

## III. Discussion

11. As can be seen from the summary of the background to the Second Decision, the procedure through which the Accused was able to interview the witnesses on the Prosecution's Rule 65 *ter* witness list was put in place by the Pre-Trial Chamber not only at the request of the Accused but also because the Prosecution preferred that option to the alternative of being ordered to disclose to the Accused contact details of witnesses it was intending to call during the trial. In that sense, the Second Decision was the result of a joint proposal by the parties, made in

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[23] Pre-Defence Conference, T. 28837–28838 (15 October 2012).

[24] Pre-Defence Conference, T. 28838–28839 (15 October 2012).

[25] *Prosecutor v. 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 ("*Mrkšić* Appeal Decision"), para. 15. *See also Prosecutor v. Mrkšić*, Case No. IT-95-13/1-T, Decision on the Prosecution's Motion to Interview Defence Witnesses, 1 September 2006 ("*Mrkšić* Trial Decision"), para. 3.

[26] *Mrkšić* Appeal Decision, para. 15; *Mrkšić* Trial Decision, para. 3.

[27] *Mrkšić* Appeal Decision, paras. 15–16; *Mrkšić* Trial Decision, para. 3.

[28] *Mrkšić* Appeal Decision, para. 16.

[29] *Mrkšić* Trial Decision, para. 4; *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, para. 17.

order to alleviate a logistical issue faced by the Accused, namely that of not having contact details for the majority of the witnesses on the Prosecution's Rule 65 *ter* witness list.[30]

12. The Prosecution, however, does not have the same logistical issue and appears to be in possession of contact details for many of the witnesses on the Accused's Rule 65 *ter* witness list, which is why it now wishes to contact those witnesses directly and without the involvement of the VWS. Unlike the Accused and his legal adviser, the Chamber does not consider this to be an unequal "playing field"[31] *per se* since, in the Chamber's view, the fact that one party to a trial may be in possession of more contact details than the other party does not, *without more*, put that party at an unfair advantage. Since, in this particular case, the Accused managed to interview (personally or through his defence team) a large number of witnesses called by the Prosecution, the Chamber sees no substance in his claim that the Prosecution, simply by virtue of possessing the contact details of more witnesses than the Accused had, is somehow in an unfairly advantageous position.

13. Accordingly, given that the Appeals Chamber jurisprudence clearly provides that parties to a case are free to contact any witness to a crime, including those persons who are on the opposing party's witness list, the Chamber considers that the Prosecution indeed has the right to contact any of the witnesses on the Accused's Rule 65 *ter* witness list directly, and also to inquire with them as to whether they are willing to be interviewed by it. For those witnesses who agree to be interviewed, it would be for the Prosecution to make the necessary arrangements for the conduct of the interviews, and to advise the Accused of their time and location in case the witnesses in question wish to have a representative of the Accused's defence team present during the interview.

14. The Chamber acknowledges the Accused's submission to the effect that if the witnesses are contacted by the Prosecution directly, they may become reticent and may even refuse to come and give evidence. However, as stated above, the Prosecution has the right to contact any witnesses, just as the Accused had during the Prosecution case, and the Chamber shall not interfere with that right on the basis of a hypothetical concern to the effect that some witnesses *might* become unwilling to testify in this case. In that context, the Chamber also accepts the Prosecution's undertaking that it would not engage in any inappropriate contact with the witnesses.[32] If that proves not to be the case with a particular witness, the Accused can bring this to the Chamber's attention. It is worth recalling here that the Appeals Chamber has clearly

[30] *See* Second Decision, para. 10.
[31] *See* Pre-Defence Conference, T. 28838 (15 October 2012).
[32] *See supra* para. 6.

stated that "particular caution" should be exercised in cases where the Prosecution is contacting witnesses who are on the defence's witness list as those witnesses may feel coerced and/or intimidated.[33] Accordingly, the Chamber encourages the Prosecution to exercise such caution when contacting the witnesses on the Accused's Rule 65 *ter* witness list and to ensure that they do not feel coerced or intimidated. In addition, in order to avoid any allegation of interference with or intimidation of witnesses, the Prosecution shall give timely notice to the Accused of the witnesses it wishes to interview in order to give him and his team an opportunity to speak to those witnesses, should they wish to do so.

15. With respect to the witnesses the Prosecution wishes to interview but whose contact details are not in the Prosecution's possession and cannot be obtained other than through the assistance of the Accused and/or his defence team, the Chamber suspects, as has been confirmed by the Accused's legal adviser,[34] that there will probably be very few such witnesses. Nevertheless, having now the experience of what transpired between the parties during pre-trial, when the same logistical issue was faced by the Accused, instead of ordering the Accused and his team to hand over contact details of these witnesses to the Prosecution, the Chamber considers that the procedure established in the Second Decision should be used in relation thereto. Accordingly, the VWS shall follow the procedure established by the Second Decision but shall do so only in relation to the witnesses whom the Prosecution wishes to interview but whose contact details are not in the Prosecution's possession and cannot be obtained other than through the assistance of the Accused and/or his defence team.

## IV. Disposition

16. For all of the above reasons, the Trial Chamber, pursuant to Rule 54 of the Rules, hereby **ORDERS** as follows:

(a) the Prosecution shall immediately provide the Accused, on a confidential basis, with a list of those witnesses on his Rule 65 *ter* witness list whom it wishes to interview, distinguishing clearly between (i) witnesses whose contact details are already in its possession or are obtainable independently of the Accused and (ii) those for whom it will require the Accused's assistance in obtaining contact details;

(b) with respect to witnesses referred to in paragraph 16(a)(i), the Prosecution shall be allowed to contact them directly and without the involvement of the VWS for

[33] *See supra* para. 10.

the purpose of inquiring whether they would be willing to submit to an interview with the Prosecution;

(c) with respect to witnesses referred to in paragraph 16(a)(ii), the parties shall follow the procedure set out in the Second Decision, namely:

(i) the Prosecution shall immediately provide the VWS, on a confidential basis, with the list of witnesses referred to in paragraph 16(a)(ii);

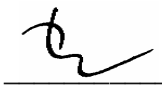
(ii) the Accused shall then furnish the VWS with current contact information for the said witnesses;

(iii) the VWS shall make contact with the said witnesses, as expeditiously as possible, to establish whether they agree to be interviewed by a member of the Prosecution, and, if so, whether they wish a representative of the Accused to be present at that interview;

(iv) the VWS shall advise the Prosecution of the results of these inquiries, and provide it with the contact information of those witnesses who have agreed to be interviewed by the Prosecution; and

(v) the Prosecution shall notify the Accused and his defence team of the time and location of the interviews with those witnesses who have indicated that they wish a representative of the Accused to be in attendance.

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



Judge O-Gon Kwon
Presiding

Dated this eighth day of November 2012
At The Hague
The Netherlands

**[Seal of the Tribunal]**

[34] *See* Pre-Defence Conference, T. 28838 (15 October 2012).