



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-PT

Date: 15 July 2009

Original: English

IN THE TRIAL CHAMBER

Before: Judge Iain Bonomy, Presiding
Judge Christoph Flügge
Judge Michèle Picard

Registrar: Mr. John Hocking

Decision of: 15 July 2009

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON MOTION FOR RECONSIDERATION OF DECISION ON
MOTION FOR ORDER FOR CONTACT WITH PROSECUTION WITNESSES**

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused

Mr. Radovan Karadžić

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”), is seised of the “Prosecution Motion for Reconsideration of Trial Chamber’s Decision on Motion for Order for Contact with Prosecution Witnesses”, filed on 26 June 2009 (“Motion”), and hereby renders its decision thereon.

I. Background and Submissions

1. On 2 June 2009, the Accused filed a motion seeking an order from the Chamber directing the Tribunal’s Victims and Witnesses Section (“VWS”), which is part of the Registry, to contact certain witnesses on the Rule 65 *ter* witness list filed by the Office of the Prosecutor (“Prosecution”) in order to ascertain whether they would consent to be interviewed by the Accused or a member of his defence team.¹ At the Status Conference held on 3 June 2009, the Prosecution responded orally, stating that it does not have a particular objection to the VWS contacting the witnesses.² In its “Registry Submission on the Accused’s Motion on Contact with Prosecution Witnesses”, filed on 10 June 2009, the Registry raised the concern that, if the VWS was ordered to contact Prosecution witnesses on behalf of the Accused, this could compromise its neutral role.³

2. On 19 June 2009, the Chamber issued its Decision on Motion for Order for Contact with Prosecution Witnesses (“Decision”) denying the Motion for Order for Contact and ordering the Prosecution to provide to the Accused current contact details for the witnesses requested by him, excepting witnesses who have been granted relevant protective measures.

3. Following the Decision, the Chamber granted a Prosecution motion for a stay of its effect, on the basis that the Prosecution intended to file a request for reconsideration or application for certification to appeal the Decision.⁴

4. On 26 June 2009, the Prosecution filed the current Motion requesting the Chamber to reconsider its Decision and order either the Prosecution or the VWS to contact the witnesses identified by the Accused.⁵ Alternatively, the Prosecution seeks certification to appeal the

¹ Motion for Order for Contact with Prosecution Witnesses (“Motion for Order for Contact”), 2 June 2009.

² Status Conference, T. 300–301 (3 June 2009).

³ Registry Submission on the Accused’s Motion on Contact with Prosecution Witnesses, para. 5.

⁴ 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.

⁵ Motion, para. 15.

Decision.⁶ It bases its Motion on three grounds. First, it contends that the Chamber *proprio motu* granted relief that was not sought and without the benefit of developed arguments against such an approach. Second, the Chamber did not adequately balance the witnesses' rights and expectations of privacy and the efficient administration of justice against the Accused's fair trial rights. Finally, the Prosecution alleges that the Chamber "misconstrued the *Lukić* Decision."⁷

5. In his response to the Motion, the Accused joins the Prosecution in requesting the Chamber to reconsider its Decision.⁸ Specifically, he agrees with the Prosecution to the extent that the Chamber should order the VWS to contact the witnesses in question.⁹ Upon the invitation of the pre-trial Judge,¹⁰ the Registry filed a 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 Defence. Nonetheless, the Registry stated that the VWS could carry out the task of contacting the relevant witnesses, as proposed by the Prosecution.¹¹

II. Discussion

6. There is no provision in the Rules for requests for reconsideration, which are the product of the Tribunal's jurisprudence, and are permissible only under certain conditions.¹² However, the Appeals Chamber has definitively articulated the legal standard for reconsideration of a decision as follows: "a Chamber has inherent discretionary power to reconsider a previous interlocutory decision in exceptional cases 'if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent injustice.'"¹³ Thus, the requesting party is under an obligation to satisfy the Chamber of the existence of a clear error in reasoning, or the existence of particular circumstances justifying reconsideration in order to prevent an injustice.¹⁴

⁶ Motion, para. 18.

⁷ Motion for Reconsideration, para. 2.

⁸ Response to Prosecution Motion for Reconsideration: Contact with Prosecution Witnesses" ("Response"), 6 July 2009.

⁹ Response, para. 4.

¹⁰ Order Setting a Deadline for Registry Submission, 1 July 2009.

¹¹ Registry Submission on Order for Contact with Prosecution Witnesses, 6 July 2009, para. 8.

¹² See *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, Decision Regarding Requests Filed by the Parties for Reconsideration of Decisions by the Chamber, 26 March 2009 ("*Prlić* Decision on Reconsideration"), p. 2.

¹³ *Prosecutor v. Milošević*, Case No. IT-02-54-AR108bis.3, confidential Decision on Request of Serbia and Montenegro for Review of the Trial Chamber's Decision of 6 December 2005, para. 25, note 40 (quoting *Kajelijeli v. Prosecutor*, Case No. ICTR-98-44A-A, Judgement, 23 May 2005, paras. 203–204); see also *Ndindabahizi v. Prosecutor*, Case No. ICTR-01-71-A, Decision on Defence "Requête de l'Appelant en Reconsidération de la Décision du 4 avril 2006 en Raison d'une Erreur Matérielle", 14 June 2006, para. 2.

¹⁴ *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Decision on Defence's Request for Reconsideration, 16 July 2004, p. 2; see also *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Decision on Nikolić's Motion for Reconsideration and Order for Issuance of a Subpoena Duces Tecum, 2 April 2009, p. 2; *Prlić* Decision on Reconsideration, p. 3.

7. The Trial Chamber is not satisfied that the Prosecution has demonstrated a “clear error of reasoning” in the Decision, despite its apparent concern about the effect of the Decision on its internal policies and practices. The Chamber recognises the sensitivity of the issue of contact with witnesses, but there is no clear jurisprudence from this Tribunal on how it should be dealt with, or whether the consent of the witnesses of one party to their information being provided to an opposing party is determinative.¹⁵ However, both the Prosecution and the Accused request reconsideration of the Decision, and jointly propose that the VWS be called upon to make contact with those of the witnesses listed in the Prosecution’s Rule 65 *ter* witness list whom the Accused indicates he wishes to interview, in order to determine whether those witnesses are willing to be interviewed by his defence team. In light of this, the Chamber is satisfied that it is in the interests of justice and the sound administration of this case to vary the Decision to that effect.

8. The Chamber notes that the VWS is a neutral office of the Tribunal’s Registry, set up under Rule 34 of the Rules, which primarily assists with witness protection and support. The Chamber does not consider that this position will be compromised by the VWS making contact with identified witnesses on the Prosecution’s Rule 65 *ter* witness list, to determine whether (a) those witnesses are willing to be interviewed by a member of the Accused’s defence team, and, if so, (b) whether they wish a representative of the Prosecution to be present during such interview. This process would clearly be facilitated by the Prosecution providing the VWS with relevant details concerning the contact history and circumstances of each of the witnesses, as well as accurate and current contact information. The VWS would then convey the relevant responses to the Accused and designated members of his defence team, and the Prosecution. For those witnesses who agree to be interviewed, it would be for the Accused’s defence team to make the necessary arrangements for the conduct of the interviews, and to advise the Prosecution, where appropriate, of their time and location. While it is impossible to predict precisely what questions the witnesses may ask of the VWS concerning the proposed interviews, it should be possible for broad answers to be prepared concerning their nature and general subject. In general, witnesses should be told that the proposed interviews will cover their personal knowledge of events during the period of the Indictment.

9. In light of the number of witnesses whom the Accused has indicated he wishes to interview, the Chamber recognises that it could take some time for the VWS to complete the above described

¹⁵ The *Lukić* and *Lazarević* decisions cited in the Chamber’s Decision (*Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-T, Decision on Milan Lukić’s Motion to Compel Disclosure of Contact Information and on the Prosecution’s Urgent Motion to Compel Production of Contact Information, 30 March 2009, paras. 25, 30; *Prosecutor v. Lazarević*, Case No. IT-03-70-PT, Decision on Prosecution’s Motion for Order of Non-Disclosure to Public of Materials Disclosed Pursuant to Rule 66 (A) and Rule 68, 15 March 2005, p. 3) do not suggest that the consent of the witness to the disclosure of their contact information is determinative of the issue.

process. It therefore encourages the Accused to provide the VWS immediately with a list of the relevant witnesses, stating the order of priority in establishing contact with them. Should the VWS encounter difficulties in contacting these witnesses in a timely manner, it should report those difficulties to both the Prosecution and the Accused, so that alternative solutions to reaching them can be devised.

10. Finally, the Chamber emphasises that it is varying its Decision at the request of the Prosecution and the Accused, and that it is in the interests of both parties to co-operate and co-ordinate closely with the VWS to ensure that efficient progress is made in contacting the relevant witnesses and obtaining the necessary responses from them.

11. For these reasons, pursuant to Rule 54, the Trial Chamber hereby,

(1) **GRANTS** the Motion and varies its Decision;

(2) **NOTES** that the stay of the Decision granted on 24 June 2009 is rendered moot; and

(3) **ORDERS:**

(i) the Accused immediately to provide the VWS on a confidential basis with a list of those witnesses on the Prosecution's Rule 65 *ter* witness list whom he wishes to interview;

(ii) the Prosecution to furnish the VWS with current contact information for the witnesses on the list provided by the Accused;

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

(iv) the VWS to advise the Accused of the results of these inquiries, and provide him with the contact information of those witnesses who have agreed to be interviewed by his defence team; and

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

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


Judge Iain Bonomy
Presiding

Dated this fifteenth day of July 2009
At The Hague
The Netherlands

[Seal of the Tribunal]

