

IT-95-13/1-A473
A 50 - A 48
30 July 2003

**UNITED
NATIONS**



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-
AR73
Date: 30 July 2003
Original: English

IN THE APPEALS CHAMBER

Before: Judge Theodor Meron, presiding
Judge Fausto Pocar
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Inés Weinberg de Roca

Registrar: Mr. Hans Holthuis

Decision: 30 July 2003

PROSECUTOR

v.

MILE MRKŠIĆ

**DECISION ON DEFENCE INTERLOCUTORY APPEAL
ON COMMUNICATION WITH POTENTIAL
WITNESSES OF THE OPPOSITE PARTY**

The Office of the Prosecutor:

Mr. Jan Wubben

Counsel for the Appellant

Mr. Miroslav Vasič

I. Background

1. The Appeals Chamber is seised of the “Defence Brief on an Interlocutory Appeal on Trial Chamber’s Decision on Defence Motion Requesting the Determination of Rules for Communicating with Potential Witnesses of the Opposite Party”, filed by the Mrkšić Defence on 4 June 2003 (“Appellant’s Brief”).¹
2. The interlocutory appeal challenges the decision of Trial Chamber II of 7 May 2003, which dismissed a Defence motion seeking precise rules for communication between the parties and prospective witnesses of the opposing party (“Impugned Decision”).² The Trial Chamber stated that at the pre-trial stage the potential witnesses are not attached to either party and that the fact that a potential witness may have given a statement to a party does not preclude the other party from seeking an interview. If the witness refuses to grant an interview, either party may apply to the Chamber for appropriate relief pursuant to Rule 54 of the Rules of Procedure and Evidence of the International Tribunal (“Rules”).
3. On 29 May 2003 the Trial Chamber granted the Defence certification to appeal the Impugned Decision pursuant to Rule 73(B) of the Rules.³
4. The Appellant’s Brief was filed on 4 June 2003. The Prosecution responded on 16 June 2003 (“Respondent’s Brief”).⁴ On 30 June 2003 the Pre-Appeal Judge dismissed an application by the Appellant for an extension of time to file a reply.⁵

¹ *Prosecutor v. Mile Mrkšić*, Case No. IT-95-13/1-AR 73, “Defence Brief on an Interlocutory Appeal on Trial Chamber’s Decision on Defence Motion Requesting the Determination of Rules for Communicating with Potential Witnesses of the Opposite Party”, 4 June 2003.

² *Prosecutor v. Mile Mrkšić*, Case No. IT-95-13/1-PT, “Decision on Defence Motion Requesting the Determination of Rules for Communicating with Potential Witnesses of the Opposing Party”, 7 May 2003.

³ *Prosecutor v. Mile Mrkšić*, Case No. IT-95-13/1-PT, “Decision Granting Certification to Appeal”, 29 May 2003.

⁴ *Prosecutor v. Mile Mrkšić*, Case No. IT-95-13/1-AR 73, “Prosecution’s Response to the ‘Defence Brief on an Interlocutory Appeal on Trial Chamber’s Decision on Defence Motion Requesting the Determination of Rules for Communicating with Potential Witnesses of the Opposite Party’”, 16 June 2003.

⁵ *Prosecutor v. Mile Mrkšić*, Case No. IT-95-13/1-AR 73, “Decision on Motion for Extension of Time to File a Reply”, 30 June 2003.

II. Submissions

(a) Submissions of the Appellant Mrkšić

5. The Appellant Mrkšić asks the Appeals Chamber to set aside the Impugned Decision. In substance, the Appellant seeks to place limits on the Prosecution's contact with potential witnesses for the Defence who have explicitly declined to be interviewed by the Prosecution.⁶ The Appellant submits that a potential witness has the freedom to choose not to speak to the opposing party.⁷ In the view of the Appellant, further requests based on an alleged "obligation to communicate with the Prosecution" place pressure on the witness and endanger the equality between the parties.⁸

6. The Appellant submits, moreover, that he is in an "inferior position" to the Prosecution because the Defence cannot rely on state institutions to convince potential witnesses of the Prosecution to speak with Defence investigators.⁹ The Appellant asserts that the ability of the Defence to seek the assistance of the Trial Chamber for orders pursuant to Rule 54 is not equivalent to the Prosecution's ability to access state channels.¹⁰

7. The Appellant defines "potential witnesses" as those persons, who are not suspects themselves, who have agreed to testify in favour of the Accused. The Appellant asserts that it is irrelevant whether the potential witness has been included on any list of witnesses of the Defence, so long as he has informed the Prosecution of his intention to testify for the Defence.¹¹ The Appellant specifies that a determination of general rules of communication is required at the pre-trial phase, because most of the investigations are completed during this phase and unauthorized communication with witnesses may impede the Defence's ability to find potential witnesses and to prepare its case.¹²

⁶ Appellant's Brief, paras. 9, 20.

⁷ Appellant's Brief, para. 7.

⁸ Appellant's Brief, para. 8.

⁹ Appellant's Brief, para. 6.

¹⁰ Appellant's Brief, paras. 11, 14.

¹¹ Appellant's Brief, paras. 12-15.

(b) Submissions of the Prosecution

8. The Prosecution submits that the interlocutory appeal should be dismissed because the Appellant has failed to demonstrate any error committed by the Trial Chamber or to argue that the Impugned Decision violates the rights of the Accused.¹³

9. The Prosecution considers that it has a statutory power derived from Articles 16 and 18 of the Statute and Rule 39 of the Rules to compel a potential Defence witness to submit to an interview with the Prosecution and that the witness cannot be relieved of this obligation merely by agreeing to testify for the Defence.¹⁴ In the absence of a Rule 75 order for protective measures, or an agreement between the parties, the Prosecution does not consider that there are any restrictions on contacting witnesses and argues that the Appellant's request is therefore premature.¹⁵

10. The Prosecution denies that the powers to summon witnesses and to utilise official state authorities disadvantage the Defence or create an inequality of arms, since either party may seek the assistance of the Trial Chamber to secure necessary measures pursuant to Rule 54.¹⁶

11. The Prosecution asserts that restricting the power to summon and interview witnesses would obstruct the Prosecution from carrying out its statutory duty to investigate crimes, would negate the purpose of the Tribunal, would frustrate the discovery of inculpatory and exculpatory evidence in relation to this and other cases, would prejudice other accused and witnesses, and would adversely affect judicial expediency.¹⁷

III. Discussion

(a) Preliminary considerations

12. The Prosecution argues that the appeal should be dismissed because the defence failed to specify the error in the Impugned Decision. In this case, the Appellant is challenging the outcome of the Impugned Decision, arguing that it impedes the ability of the Defence to find witnesses and

¹² Appellant's Brief, paras. 6, 18.

¹³ Respondent's Brief, paras. 13-14.

¹⁴ Respondent's Brief, paras. 3, 22, 24, 27.

¹⁵ Respondent's Brief, para. 31.

¹⁶ Respondent's Brief, paras. 15-17.

¹⁷ Respondent's Brief, paras. 19-21, 23, 25-29.

therefore infringes the right of the Defence to prepare its case and the right to an equitable trial. Thus, the Appellant has explained the grounds on which the appeal is made and has specified the relief sought.

(b) Right of the Prosecution to interview a potential Defence witness

13. In the Impugned Decision, the Trial Chamber rejected the Defence request to establish rules governing communication with the witnesses of the opposing party. The Appeals Chamber upholds this decision, but emphasizes that this freedom to contact potential witnesses is not without limitation.

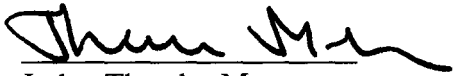
14. Article 18(2) of the Statute vests the Prosecution with “the power to question suspects, victims and witnesses”. In doing so, the Prosecution may “seek the assistance of the State authorities concerned.” Rule 39 of the Rules provides that in conducting an investigation the Prosecution may “summon and question suspects, victims and witnesses”. Thus it is clear that the Prosecution has the power to request interviews with potential defence witnesses and may seek assistance from state authorities to facilitate this contact.

15. Witnesses to a crime are the property of neither the Prosecution nor the Defence; both sides have an equal right to interview them. Where, however, a person for any reason declines to be interviewed, the Prosecution does not have the power to compel the person to attend an interview or to respond to questions posed by the Prosecution. As the Trial Chamber correctly indicated, if the Prosecution or the Defence wishes to compel an unwilling person to submit to a pre-trial interview, then it must seek the assistance of the Chamber pursuant to Rule 54. Only subpoenas and other orders issued by the Tribunal have a legally binding effect that is enforceable by the application of criminal sanctions.

16. When a person has declined to be interviewed, the Prosecution is entitled to take reasonable steps to persuade the person to reconsider his decision. However, the mere fact that the person has agreed to testify for the Defence does not preclude the Prosecution from interviewing him provided of course that there is no interference with the course of justice. 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.

17. For the foregoing reasons, the Appeal is dismissed.

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



Judge Theodor Meron
Presiding

Dated this 30th day of July 2003,
At The Hague,
The Netherlands.

[Seal of the Tribunal]