



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: 13 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: 13 July 2009

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC WITH CONFIDENTIAL ANNEX

**DECISION ON MOTION REQUESTING LORD DAVID OWEN TO TESTIFY AS A
COURT WITNESS**

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’s Motion Requesting the Trial Chamber Order Lord David Owen to Testify as a Court Witness”, filed on 19 May 2009 (“Motion”) and hereby renders its decision thereon.

1. The Motion was initially filed confidentially by the Office of the Prosecutor (“Prosecution”), but this status, except for appendices A and B, was lifted by the Trial Chamber in its “Decision on Motion to Lift Confidential Status of Prosecution Motion”, filed on 4 June 2009, because the matters discussed in the body of the Motion were already in the public domain as part of the public witness statement provided by Lord Owen in the *Slobodan Milošević* case.¹

2. In the Motion, the Prosecution requests the Trial Chamber to call Lord Owen to testify as a Chamber witness pursuant to Rule 98 of the Rules of Procedure and Evidence (“Rules”), as this was the manner in which he testified in the *Milošević* case.² In *Milošević*, Lord Owen took the position that the future independence and impartiality of international negotiators would be jeopardised if international negotiators were called upon to testify in cases involving parties to a dispute they were charged with mediating. He indicated that he wanted to avoid the impression that he was taking sides in the trial and therefore wished not to be associated too closely with the Prosecution.³ According to the Prosecution, Lord Owen has expressed the same reservations to a request to testify in this case.⁴ Therefore, the Prosecution requests the Trial Chamber to call Lord Owen as a Chamber witness.

3. In the “Response to Motion to Summon Lord Owen As a Court Witness”, filed publicly on 25 June 2009 (“Response”),⁵ the Accused argues that the Motion should be denied because the jurisprudence of the Tribunal has already established that a witness is not the property of any party and that it is of no substantive significance whether a witness is called by one party or the other.⁶ Additionally, the Accused submits that Rule 85(A) of the Rules provides that Chamber witnesses

¹ Decision on Motion to Lift Confidential Status of Prosecution Motion, 4 June 2009, para. 3.

² *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Order Concerning the Testimony of Lord Owen, 17 October 2003.

³ Motion, paras. 1–5.

⁴ Motion, para. 9 and confidential Appendix B.

⁵ The Accused’s time for a response to this Motion did not start running until he was disclosed a copy of a confidential order from the *Milošević* case relating to this issue. *See* Motion, footnote 1.

⁶ Response, para. 2.

be heard after the parties have called all their witnesses. While this Rule also provides that the Trial Chamber may vary this order, the Accused contends that this is not justified in this case.⁷

4. The Accused further argues that, by calling Lord Owen as a Chamber witness, the latter will be allowed to make a statement before examination by the parties, and that there is no justification for this variation of regular procedures normally followed when a witness is called by one of the parties.⁸ The Accused also notes that there is no known privilege for international negotiators giving evidence at the Tribunal, and points out that the order in *Milošević* was made without opposition from the accused.⁹

5. The Chamber notes that Rule 98 of the Rules provides that it may *proprio motu* summon witnesses and order their attendance. The Trial Chamber is not in a position to assess the significance of the evidence Lord Owen is expected to provide in this case and thus is not in a position to determine that it is appropriate to summon him as a witness pursuant to Rule 98 of the Rules. Furthermore, the Prosecution has failed to indicate to it any reason why Lord Owen is to be treated differently from other witnesses, other than the fact that this was the procedure followed in the *Milošević* case. However, as pointed out by the Accused, unlike here, that procedure was not contested by the accused. Additionally, different circumstances pertained in leading to the procedure followed in the *Milošević* case. These are discussed in the confidential Annex attached to this Decision. Accordingly, the Chamber is of the view that there is no basis at this stage of the proceedings on which it could ask Lord Owen to come and give evidence as the Chamber's witness.

6. The Prosecution is, therefore, invited to consider adding Lord Owen to its Rule 65 *ter* witness list and to consider that he could come as a witness called by the Prosecution so long as he is not proofed. Since the main concern of Lord Owen is to be regarded as impartial and neutral, the Trial Chamber, will, if he is to appear as a witness, consider giving him the opportunity to make a statement to this effect at the commencement of his testimony. However, it should be noted that it is well established in the jurisprudence of the Tribunal that a "witness to a crime is the property of neither the Prosecution nor the Defence."¹⁰ The Chamber also does not consider that the fact that an international negotiator gives evidence in the case of one party or another could reasonably be regarded as justifying loss of confidence in his total impartiality in that role.

⁷ Response, para. 4.

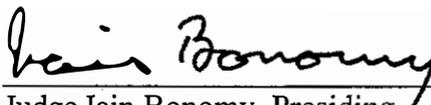
⁸ Response, para. 5.

⁹ Response, para. 6.

¹⁰ *Prosecutor v. Mrkšić*, Case No. IT-95-13/1-AR73, Decision on Defence Interlocutory Appeal on Communication with Potential Witnesses of the other Party, 30 July 2003, para. 15

7. For the reasons outlined above, pursuant to Rules 89 and 98 of the Rules, the Trial Chamber hereby **DENIES** the Motion.

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


Judge Iain Bonomy, Presiding

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

[Seal of the Tribunal]