



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: 26 August 2009
Original: English

IN THE TRIAL CHAMBER III

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

Registrar: Mr. John Hocking

Decision of: 26 August 2009

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON ACCUSED'S MOTION FOR ORDER RE: INTERVIEW OF
PROSECUTION WITNESS KDZ222**

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 Accused’s “Motion for Order Re: Interview of Prosecution Witness KDZ222”, filed on 3 August 2009 (“Motion”), and hereby renders its decision thereon.

I. Background and Submissions

1. According to the Motion, Witness KDZ222 (“Witness”), who is listed on the Rule 65 *ter* witness list filed by the Office of the Prosecutor (“Prosecution”) on 18 May 2009, has agreed to be interviewed by the Accused personally at the United Nations Detention Unit (“UNDU”) in The Hague. In the course of communication between one of the Accused’s legal associates and the Witness, the Witness also requested that the Tribunal pay the costs of his travel to The Hague for the interview.¹ Upon request by the Accused’s legal associate, the Registry sent a letter to the Accused on 31 July 2009, indicating that they would consider allowing the Witness to meet with him at the UNDU, but refusing to pay the associated travel expenses. The Accused claims that, as he is indigent, he is unable to bear these travel costs himself.²

2. In the Motion, the Accused asks the Chamber to quash this decision of the Registrar and to order the Registry to pay the Witness’s travel costs to come to The Hague to be interviewed by him.³ He argues that the decision of the Registrar operates to deny him the right to interview Prosecution witnesses before trial and thus impacts the fairness of the proceedings.⁴ The Accused refers to the Chamber’s Decision on Motion for Order for Contact with Prosecution Witnesses, filed 19 June 2009 (“19 June 2009 Decision”), which stated that it would not “order the Registry to pay for the transportation of witnesses to The Hague for the purposes of interview by the Accused at the present time.”⁵ He argues that the phrase “at the present time” suggests that the Chamber is open to consideration of individual circumstances.⁶ He also argues that it is unfair that a witness who would travel to the Tribunal to meet with the Prosecution would have his expenses paid, while one who meets with the defence does not.⁷ Additionally, the Accused states that the cost to the Tribunal of sending out representatives of his Defence team and the Prosecution (as the Witness

¹ Motion, para. 3.

² Motion, para. 4.

³ Motion, para. 15.

⁴ Motion, para. 6.

⁵ 19 June 2009 Decision, para. 9.

⁶ Motion, para. 9.

⁷ Motion, para. 11.

indicated that he wishes a representative from the Prosecution to be present at the interview) to meet with the Witness elsewhere will be more than paying for the Witness's travel expenses to The Hague.⁸

3. The Accused states that the Witness is of particular importance to his case because his evidence pertains to the shelling at the Markale Market in Sarajevo, which is a subject that he has more knowledge of than others on his Defence team, rendering an interview by him necessary.⁹

4. Finally, the Accused argues that the Registrar's decision penalizes him for his self-represented status because a represented accused could have his counsel meet the Witness at Tribunal expense. He also asserts that the decision penalizes him for his indigent status because a wealthy accused could afford to pay the travel expenses of the Witness.

5. The Tribunal's Registry filed a submission in response to the Motion under Rule 33(B), at the invitation of the Chamber, on 18 August 2009 ("Registry Submission").¹⁰ The Registry submits that the Accused has misinterpreted the 19 June 2009 Decision and that the phrase "at the present time" in that Decision does not support the view of the Accused that the Chamber was open to consideration of individual circumstances. Rather, the Registry states that the Chamber clearly found that it was unnecessary for witnesses to be brought to The Hague for interview, at Tribunal expense, at the present stage of proceedings, and that this applies to all witnesses of the Prosecution whom the Accused plans to interview.¹¹

6. The Registry further submits that the above position is consistent with the Chamber's 9 April 2009 Decision, where the Chamber held that, with regard to potential defence witnesses, the Registry's responsibility to make the necessary travel arrangements for witnesses who are to be brought to The Hague arises only when the Accused has decided to bring the witnesses to testify.¹²

7. The Registry also states that the Directive on Allowances for Witnesses and Expert Witnesses of 5 December 2001, IT/2000 ("Directive"), specifically Articles 9(A) and 16(B), provides that the provision of travel arrangements for potential witnesses for interviewing purposes is outside the scope of the functions of the Registry.¹³

⁸ Motion, para. 12.

⁹ Motion, para. 13.

¹⁰ Registry Submission on Accused's Motion to Interview Prosecution Witness, filed 18 August 2009.

¹¹ Registry Submission, para. 10.

¹² Registry Submission, para. 12.

¹³ Registry Submission, para. 13.

8. On the issue of fairness between the Prosecution and Defence, the Registry notes that it is a neutral organ of the Tribunal and that it is duty-bound to ensure that its financial resources are fairly dispersed between the parties to a case. Thus, should the Prosecution similarly request that the Registry's Victims and Witnesses Section ("VWS") pay for the travel expenses of a potential witness to be brought to The Hague for interview, the VWS would deny that request too. As the Prosecution could use its own resources to pay travel expenses for potential witnesses to come to The Hague to be interviewed, so must the Defence.¹⁴ Thus, the Accused's interviews of potential witnesses should be conducted through his legal associates, or, if he wishes to conduct them personally, he could do so by other means, such as telephone or mail.¹⁵

9. In response to the Accused's argument that it would be cheaper to bring the Witness to The Hague than to send representatives of both the Accused and Prosecution to him for the purposes of the interview, the Registry submits that the cheapest method of conducting the interview would be by way of a three-way telephone call.¹⁶

10. The Registry also submits that there is no basis for the Accused's assertion that he is being penalised for his self-representation and indigent status as he has not been prevented from interviewing witnesses. Rather his preferred choice of means for doing so is simply not being facilitated by the Registry, in the form of payment for the Witness's travel expenses.¹⁷

11. While the Registry has stated that it is willing to permit the Accused to interview this Witness in the UNDU, although it will not cover the associated travel expenses, it raises several concerns in its Submission concerning the practical arrangements for conducting such interviews in the UNDU or other Tribunal buildings.¹⁸ It notes that witness interviews by self-represented accused may place the security and good order of the UNDU, or other premises, at risk and thus can only be supported by the Registry in exceptional circumstances. The Accused must therefore demonstrate why it is necessary for him to interview this Witness at the UNDU, rather than use the other means available to him. The Registry also states that it is in the process of developing a policy to regulate witness proofing by self-represented accused.¹⁹

¹⁴ Registry Submission, para. 14.

¹⁵ Registry Submission, para. 15.

¹⁶ Registry Submission, para. 16.

¹⁷ Registry Submission, para. 17.

¹⁸ Registry Submission, para. 18-24.

¹⁹ Registry Submission, note 28.

12. The pre-trial Judge heard further submissions from the Accused and the Registry at the Status Conference held on 20 August 2009.²⁰

II. Applicable Law

13. A Trial Chamber may intervene in a matter that is within the primary competence of the Registry where that matter goes to the fairness of the trial.²¹ Judicial review of an administrative decision made by the Registry is concerned initially with the propriety of the procedure by which the Registry reached the particular decision and the manner in which it reached it.²²

14. An administrative decision will be quashed if the Registry, in making its decision (i) has failed to comply with legal requirements; (ii) has failed to observe the basic rules of natural justice and procedural fairness towards the person affected by the decision; (iii) has taken into account irrelevant material or failed to take into account relevant material; or (iv) has reached a conclusion that is unreasonable, in the sense that it is a conclusion which no sensible person who has properly applied his mind to the issue could have reached.²³

15. In the review, the Accused bears the burden of persuasion. He must persuade the Chamber conducting the review that (a) an error of the nature described has occurred, and (b) such error has significantly affected the Registrar's decision to his detriment."²⁴

III. Discussion

16. In the "Decision on Accused Motion for Interview of Defence Witness and Third Motion for Disclosure," filed on 9 April 2009, this Chamber declined to order the Registry to pay for a potential defence witness's travel to the Tribunal to be interviewed by the Accused.²⁵ In that Decision, the Chamber held that the Accused's fair trial rights had not been affected by the Registry's refusal to arrange for and fund the travel of such witnesses "at this stage of the

²⁰ T. 404–412 (20 August 2009), Status Conference.

²¹ *Prosecutor v. Delalić et al.*, Case No. IT-96-21-A, Order on Esad Landžo's Motion for Expedited Consideration, 15 September 1999, cited by the Appeals Chamber in *Prosecutor v. Blagojević*, Case No. IT-02-60-AR73.4, Public and Redacted Reason for Decision on Appeal by Vidoje Blagojević to Replace his Defence Team, 7 November 2004; see also *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Order Concerning Court-Assigned Counsel's Terms of Engagement, 8 April 2005, p. 4.

²² *Prosecutor v. Kvočka, et al.*, Case No. IT-98-30/1-A, Decision on Review of the Registrar's Decision to Withdraw Legal Aid from Zoran Žigić, filed on 7 February 2003, para. 13 ("Kvočka Decision").

²³ Kvočka Decision, para. 13.

²⁴ Kvočka Decision, para. 14.

²⁵ Decision on Accused Motion for Interview of Defence Witness and Third Motion for Disclosure, filed on 9 April 2009, paras. 3, 20 ("9 April 2009 Decision").

proceedings”, nor had the standards for judicial review of an administrative decision of the Registrar been met.²⁶

17. Similarly, in the 19 June 2009 Decision the Chamber stated that:

[i]t is unnecessary for witnesses to be brought to The Hague for interview by the Accused or his associates *at this stage in the proceedings*, and that such interviews can be carried out by members of his defence team in the region of the former Yugoslavia, or in other locations where they are. The Chamber will not, therefore, order the Registry to pay for the transportation of witnesses to The Hague for the purposes of interview by the Accused, at the present time.²⁷

The earlier reference to “this stage in the proceedings” shows that the phrase “at the present time” indicates the pre-trial phase of the proceedings, and the Chamber’s conclusion that the Registry need not pay for the transportation of potential witnesses (witnesses who are listed on the Prosecution’s Rule 65 *ter* list, whom the Accused wishes to interview in case they should have information relevant to his defence, rendering them potential defence witnesses) in the pre-trial phase. This decision was predicated on the fact that the Accused has other means available to him to speak with potential defence witnesses, such as through his legal associates, or indeed by telephone or in writing. Insofar as the Accused wishes to interview witnesses listed on the Prosecution’s Rule 65 *ter* witness list for the purposes of preparing to cross-examine them, such interviews can be conducted when the witnesses travel to The Hague immediately prior to their testimony.

18. The Chamber notes that the Directive on Allowances for Witnesses and Expert Witnesses provides that “[t]he Tribunal shall provide and arrange transportation necessary for witnesses to travel to and from the location *where they testify*, including arrangements and costs for any travel documents which may be required.”²⁸ There is no mention of the Registry arranging or paying for transportation of witnesses solely for interviewing purposes. Except for Rule 92 *bis* witnesses,²⁹ the Registry’s responsibility for the travel of witnesses does not arise until the witness is brought to testify.

19. The Chamber reiterates that the Accused’s fair trial rights are not affected by the Registry’s refusal to fund the travel of potential witnesses to The Hague for interview by him. As stated by the Registry, he has other means at his disposal for contacting the witnesses, including interviews

²⁶ 9 April 2009 Decision, para. 20.

²⁷ 19 June 2009 Decision, para. 9 (emphasis added).

²⁸ Directive on Allowances for Witnesses and Expert Witnesses, 5 December 2001, IT/200, Article 9(A) (emphasis added).

²⁹ For Rule 92 *bis* witnesses, the responsibility of the Registry to pay for expenses arises when they are making their declarations. See Article 16(B) of the Directive.

through legal associates and direct interviews by mail or telephone. Telephone or written interviews also incur the least costs, and the Registry has indicated that it may, in exceptional circumstances, consider arranging video-link interviews from the UNDU.³⁰ There is no merit in the Accused's argument that he is being penalised for choosing to represent himself, or because he claims to be indigent, as the Registry's decision would be the same were he represented by counsel. In such circumstances, it would be his counsel who would be required to make arrangements to interview potential witnesses, and such interviews would not be funded by the VWS. Similarly, his assigned legal associates can make the necessary arrangements to interview the Witness, and seek reimbursement of their expenses from the Registry's Office of Legal Aid and Detention Matters, as appropriate.

20. Once again, as the Chamber does not consider that the Accused's fair trial rights are affected by the Registry's decision, nor that the standards for judicial review of an administrative decision of the Registry have been met, it will not interfere with that decision. Despite the small amounts involved for this particular Witness, the Chamber is indeed satisfied that the Registry has legitimate financial concerns regarding paying witnesses to travel to The Hague for interview by the Accused, and that the Accused has other means available to interview him.

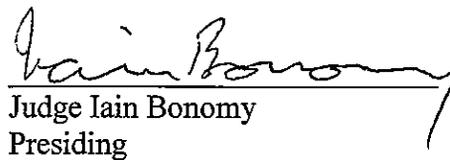
21. Although the Registry has raised legitimate concerns about the security implications of allowing witnesses to be interviewed at the UNDU or other Tribunal premises, the Trial Chamber notes that it may be necessary, either now or during the trial itself, to permit the Accused to conduct such interviews in person. The Chamber therefore encourages the Registry to consider whether to permit in person witness interviews on a case-by-case basis, and to finalise its policy to regulate such interviews as soon as possible.

³⁰ Registry Submission, para. 15.

IV. Disposition

22. Accordingly, the Trial Chamber, pursuant to Rule 54 of the Rules, hereby **DENIES** the Motion.

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


Judge Iain Bonomy
Presiding

Dated this twenty-sixth day of August 2009
At The Hague
The Netherlands

[Seal of the Tribunal]