



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-01-48-T

Date: 7 February 2005

Original: English

**IN TRIAL CHAMBER I, Section A**

**Before:** Judge Liu Daqun, Presiding  
Judge Amin El Mahdi  
Judge György Szénási

**Registrar:** Mr. Hans Holthuis

**Decision of:** 7 February 2005

**PROSECUTOR**

v.

**SEFER HALILOVIĆ**

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**DECISION ON PROSECUTION'S MOTION TO VARY ITS  
RULE 65 TER WITNESS LIST**

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**The Office of the Prosecutor:**

Mr. Philip Weiner  
Ms. Sureta Chana

**Counsel for the Accused:**

Mr. Peter Morrissey  
Mr. Guénaél Mettraux

**TRIAL CHAMBER I, SECTION A**, (“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”),

**BEING SEISED** of the “Prosecution’s Motion to Vary its Rule 65*ter* Witness List”, filed with a *Confidential Annex* listing the proposed witnesses by the Office of the Prosecutor (“Prosecution”) on 16 December 2004 (“Motion”), in which the Prosecution seeks leave to reduce its witness list from 114 witnesses (52 *viva voce* witnesses and 62 Rule 92 *bis* witnesses) to 46 (37 *viva voce* witnesses, eight Rule 92 *bis* witnesses and one expert witness), including seven new witnesses,

**NOTING** that the case was transferred from Trial Chamber III to Trial Chamber I on 17 January 2005,

**NOTING** the “Defence Response to Prosecution Motion to Add and to Withdraw Witnesses”, filed with *Confidential Annexes* by the Defence on 29 December 2004 (“Response”),

**NOTING** the “Prosecution’s Reply to Defence Response to Prosecution Motion to Add and Withdraw Witnesses”, filed with a *Confidential Annex* by the Prosecution on 6 January 2005 (“Reply”); and the “Prosecution’s Submission of Summaries for Proposed New Witnesses Pursuant to Rule 65*ter* (E) (ii)”, filed with a *Confidential Annex* by the Prosecution on 10 January 2005,

**NOTING** the “*Addendum* to ‘Defence Response to Prosecution Motion to Add and to Withdraw Witnesses’”, filed by the Defence on 18 January 2005 (“Defence *Addendum*”), and the “*Corrigendum* to *Addendum* to ‘Defence Response to Prosecution Motion to Add and to Withdraw Witnesses’”, filed by the Defence on 19 January 2005,

**NOTING** the “*Further Addendum* to ‘Defence Response to Prosecution Motion to Add and to Withdraw Witnesses’”, filed *confidentially* by the Defence on 24 January 2005 (“Defence *Further Addendum*”),

**NOTING** “the Prosecution’s Response to Defence *Addendum* to ‘Defence Response to Prosecution Motion to Add and to Withdraw Witnesses’”, filed by the Prosecution on 25 January 2005 (“Prosecution Response to Defence *Addendum*”); and the “Prosecution’s Response to Defence *Further Addendum* to ‘Defence Response to Prosecution Motion to Add and to Withdraw Witnesses’ (“Prosecution Response to Defence *Further Addendum*”) and Leave to disclose Statement Pursuant to 7 May 2004 Trial Chamber Order”, filed *confidentially* by the Prosecution on 26 January 2005,

**NOTING** the “Reply *Re* Defence *Addendum* of 18 January 2005”, filed by the Defence on 27 January 2005 (“Reply *Re* Defence *Addendum*”),

**NOTING** the “Reply *Re* Further *Addendum* of 24 January 2005”, filed *confidentially* by the Defence on 27 January 2005,

**NOTING** the “Second further *Addendum* to ‘Defence Response to Prosecution Motion to Add and to Withdraw Witnesses’”, filed *confidentially* by the Defence on 31 January 2005,

**NOTING** that the Prosecution submits in its Motion that:

- 1) it seeks a variation of the witness list seven weeks before the commencement of trial;
- 2) it has provided advance notice to the Defence of this proposed variation before filing its Motion;
- 3) it seeks to add three witnesses;<sup>1</sup>
- 4) the Defence will not be prejudiced in its pre-trial preparation as the reduction in the number of witnesses will reduce the time necessary to prepare for cross-examination, “will expedite the proceedings, enable the parties to refine the issues, render the case more manageable and is hence in the interests of justice”,

**NOTING** that the Defence submits in its Response that:

- 1) on 19 November 2004, during a Rule 65 *ter* conference, the Prosecution indicated that it would be seeking to cut out a substantial number of witnesses as well as adding some witnesses;
- 2) on 25 November 2004, the Prosecution sent a letter to the Defence with the list of witnesses it intended to call as of 25 November 2004;
- 3) of the original 99 witnesses which had been listed in the Prosecution’s Pre-Trial Brief dated 17 June 2002, only 35 remain on the Prosecution witness list;
- 4) it does not object to the transfer of 11 witnesses from the Rule 92 *bis* list to the live witness list;

**NOTING** that as it concerns the withdrawal of witnesses, the Defence submits in its Response that:

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<sup>1</sup> The Trial Chamber notes that the Prosecution seeks in fact to add seven witnesses.

- 1) it does object to the withdrawal of eight witnesses (listed in the Response) who are “essential to establish the truth”, but not to the withdrawal of the remaining 11 witnesses if certain guarantees are given to the Defence;
- 2) the Prosecution “should not be permitted to select witnesses in a partisan manner, but should do so according to the extent to which particular witnesses might be able to assist the court in uncovering the truth of a particular incident”;
- 3) the Prosecution should not be permitted during the examination in chief of its witnesses to use the statements of witnesses which it has renounced to call;
- 4) the Prosecution should not be permitted to use in cross-examination witness statements of witnesses which it has renounced to call unless the Defence has had recourse to that statement in its examination in chief of a particular witness;
- 5) if the Prosecution intends to use any such statements as part of its case or if it considers the possibility that it might have to do so, it should immediately seek to have the evidence of those witnesses admitted pursuant to Rule 92 *bis* of the Rules;
- 6) the Prosecution should not be permitted to seek to re-instate at a later stage any of its witnesses which it is now seeking to withdraw from its witness list, either as part of its case in chief or as part of its case in rebuttal unless exceptional circumstances so require,

**NOTING** that as it concerns the Motion to add witnesses, the Defence submits in its Response *inter alia* that:

- 1) it objects to the Motion to add witnesses to the Prosecution witness list;
- 2) contrary to the Motion the proposed amended witness list contains seven new witnesses;
- 3) the Prosecution has failed to show good cause or that it was in the interests of justice to be allowed to add new witnesses “at such a late and inappropriate stage”;
- 4) the Prosecution has not disclosed the statements of the seven witnesses in question according to Rule 66 (A) (ii) and the Defence has still not received all statements of those witnesses;
- 5) none of the seven proposed new witnesses are “recent ‘discoveries’ of the Prosecution” or people whom it interviewed for the first time recently,

**NOTING** that the Prosecution submits in its Reply *inter alia* that:

- 1) it “accepts” the Defence submission that leave should be sought to add seven and not three witnesses;
- 2) the proceedings at the Tribunal are essentially governed by the principles of an adversarial system and in that system a party is at liberty to call witnesses of its choosing;
- 3) the Defence will have ample time to prepare for the cross-examination of the added witnesses as the Prosecution will call them later in its case,

**NOTING** that the Defence submits in the Defence *Addendum* and Defence Further *Addendum* specific concerns as to two of the witnesses added to the Prosecution witness list, namely Ramiz Delalić and another witness listed *confidentially*,

**NOTING** that in the Prosecution Response to Defence *Addendum* the Prosecution argues that Ramiz Delalić was untraceable until late last year and it was therefore impossible for the Prosecution to interview him and place him on the witness list at an earlier stage,

**NOTING** that in the Reply *Re* Defence *Addendum* the Defence argues that it is the first time that the Prosecution submits that Ramiz Delalić was not traceable until recently and that the Prosecution does not offer any evidence to support this assertion, which conflicts with the fact that the Prosecution has interviewed Ramiz Delalić in 1998,

**NOTING** that in the Prosecution Response to Defence Further *Addendum* the Prosecution argues that any issues in relation to the credibility of the witness listed *confidentially* may be assessed by the Trial Chamber at the appropriate time in the proceedings,

**NOTING** the oral submissions of the Parties provided during the Pre-Trial Conference on 27 January 2005<sup>2</sup> and during the trial hearing of 3 February 2005<sup>3</sup> in order to clarify their written submissions,

**NOTING FURTHER** the oral submissions of the Prosecution during the trial hearing of 4 February 2005<sup>4</sup> as to why it seeks at the actual stage of the proceedings the withdrawal of witnesses it relied upon when the confirmation of the indictment was sought,

**CONSIDERING** that pursuant to Articles 20 (1) and 21 (4) (b) of the Statute the Accused is entitled to a fair and expeditious trial and to have adequate time and facilities for the preparation of his defence,

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<sup>2</sup> Pre-Trial Conference, 27 January 2005, T. 46-52.

<sup>3</sup> 3 February 2005, T. 7-10.

<sup>4</sup> 4 February 2005, T. 29-37.

**CONSIDERING** the “Decision on Defence Objection to Prosecution Continued Disclosure” issued by Trial Chamber III on 7 May 2004,

**CONSIDERING** that in principle it is for each Party to decide which witnesses to call to prove its case,

**CONSIDERING** that the Defence is at liberty, if it deems it beneficial to the presentation of its case, to call the witnesses the Prosecution seeks to withdraw from its witness list during the Defence case,

**CONSIDERING** that pursuant to Rule 98 of the Rules the Trial Chamber may order either party to produce additional evidence or *proprio motu* summon witnesses and order their attendance,

**CONSIDERING** that it is in the interests of justice that the Defence has adequate time to prepare properly for trial, which includes the preparation for the cross-examination of the Prosecution witnesses,

**CONSIDERING** that as a general rule, unsworn statements taken by the Prosecution of people who do not appear on the witness list should not be used to support or impeach other witnesses’ testimony,

**CONSIDERING** that the Prosecution is not allowed to call any of the withdrawn witnesses during its case in chief; that, however, it can produce rebuttal evidence with respect to matters arising directly and specifically out of Defence case,

**PURSUANT** to Rules 54 and 65 *ter* (E) (ii) of the Rules,

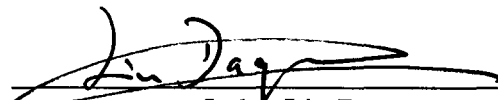
**HEREBY GRANTS** the Motion;

**ORDERS** the Prosecution:

1. to file a revised witness list by 9 February 2005,
2. to fulfill its obligations under Rule 66(A)(ii) in relation to the additional witnesses by 9 February 2005, and
3. to call the seven additional witnesses at a later stage in order to allow the Defence to prepare for their cross-examination;

**INFORMS** the Defence that if necessary it can seek leave for additional time to prepare the cross-examination of the seven witnesses added to the Prosecution witness list.

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



Judge Liu Daqun  
Presiding

Dated this seventh day of February 2005,  
At The Hague,  
The Netherlands.

**[Seal of the Tribunal]**