



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-05-87-T
Date: 11 December 2006
Original: English

IN THE TRIAL CHAMBER

Before: Judge Iain Bonomy, Presiding
Judge Ali Nawaz Chowhan
Judge Tsvetana Kamenova
Judge Janet Nosworthy, Reserve Judge

Registrar: Mr. Hans Holthuis

Decision of: 11 December 2006

PROSECUTOR

v.

**MILAN MILUTINOVIĆ
NIKOLA ŠAINOVIĆ
DRAGOLJUB OJDANIĆ
NEBOJŠA PAVKOVIĆ
VLADIMIR LAZAREVIĆ
SRETEN LUKIĆ**

**DECISION ON PROSECUTION MOTION FOR LEAVE TO AMEND
ITS RULE 65 TER WITNESS LIST TO ADD SHAUN BYRNES**

Office of the Prosecutor

Mr. Thomas Hannis
Mr. Chester Stamp

Counsel for the Accused

Mr. Eugene O'Sullivan and Mr. Slobodan Zečević for Mr. Milan Milutinović
Mr. Toma Fila and Mr. Vladimir Petrović for Mr. Nikola Šainović
Mr. Tomislav Višnjić and Mr. Norman Sepenuk for Mr. Dragoljub Ojdanić
Mr. John Ackerman and Mr. Aleksandar Aleksić for Mr. Nebojša Pavković
Mr. Mihajlo Bakrač and Mr. Đuro Čepić for Mr. Vladimir Lazarević
Mr. Branko Lukić and Mr. Dragan Ivetić for Mr. Sreten Lukić

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 partly confidential “Prosecution’s Motion for Leave to Amend Its Rule 65 *ter* Witness List With Confidential Annex A”, filed on 24 November 2006 (“Motion”), and hereby renders its decision thereon.

1. In the Motion, the Prosecution seeks leave, pursuant to Rules 73(A), 73 *bis* (F), 75, and 89(C) of the Rules of Procedure and Evidence (“Rules”), to amend its revised witness list filed on 6 July 2006¹ by adding a Rule 70 witness, Shaun Byrnes, as one of its witnesses.²
2. On 8 December 2006, the Defence filed its “Joint Defence Response to Prosecution’s Motion for Leave to Amend its Rule 65 *ter* Witness List With Confidential Annex A” (“Response”), whereby it requests the Trial Chamber to deny the Motion since the Prosecution failed to exercise due diligence and to act in a timely manner in (a) identifying the witness; (b) obtaining a statement from him and disclosing all information to the Accused as required by Rule 66(A)(ii); and (c) taking appropriate steps to secure the witness for the trial.³
3. The Trial Chamber notes that this Response is one day late and reminds the Defence that the fourteen-day response time includes the day of filing, as per Rules 126(A) and 126 *bis*, which state as follows:

**Rule 126
General Provisions**

(A) Where the time prescribed by or under these Rules for the doing of any act is to run as from the occurrence of an event, that time shall begin to run as from the date of the event.

**Rule 126 bis
Time for Filing Responses to Motions**

Unless otherwise ordered by a Chamber either generally or in the particular case, a response, if any, to a motion filed by a party shall be filed within fourteen days of the filing of the motion. A reply to the response, if any, shall be filed within seven days of the filing of the response, with the leave of the relevant Chamber.

Nevertheless, the Chamber will, in this case and *ex proprio motu*, vary the time limits for the filing of the response. The parties are urged to comply with the applicable time limitations in the Rules.

¹ Notice of Filing of Revised 65 *ter* Witness List, 6 July 2006.

² Motion, para. 1.

³ Response, para. 2. The Trial Chamber notes that in this paragraph the Defence refers to eight additional witnesses rather than the one additional witness. The Trial Chamber acknowledges that the error has most likely resulted from the Defence’s previous response in relation to an earlier Prosecution motion to amend the Rule 65 *ter* list by adding another eight witnesses. *See* Decision on Prosecution Motion to Amend Its Rule 65 *ter* Witness List, 8 December 2006.

Applicable Law

4. Pursuant to Rule 73 *bis* (F), the Trial Chamber may grant any motion for an amendment to the witness list if satisfied that this is “in the interests of justice”. In the exercise of this discretion, the Chamber must be guided by the preliminary requirements for admissibility of evidence as set out in Rule 89(C), namely, the relevance and the probative value of the proposed evidence.⁴ Furthermore, the Chamber must also consider whether the probative value of the evidence is substantially outweighed by the need to ensure a fair trial under Rule 89(D).⁵ Of particular relevance here is the question of whether the interests of the Defence are adequately protected.⁶ In this context, the Chamber should ensure that no prejudice will arise to the Defence as a result of late addition of witnesses.⁷

Discussion

5. Shaun Byrnes was a career diplomat and the head of the United States Kosovo Diplomatic Observer Mission from August 1998 through March 1999.⁸ He is a Rule 70 witness who will describe the structure of the VJ and the MUP in Kosovo in 1999, as well as the personalities in charge of the two. Among other things, he is anticipated to testify about the regular meetings he held with the heads of different VJ sections, including the Accused Pavković, and of joint operations conducted by the VJ and the MUP in shelling and attacking villages in Kosovo in 1998 and 1999.⁹

6. The Prosecution submits that procedural history related to this witness was set out in the Prosecution’s submissions filed on 13 September 2006¹⁰ and on 10 November 2006,¹¹ explaining that the delay was due to the Prosecution’s attempts to obtain permission from the United States

⁴ *Prosecutor v. Limaj et al.*, Case No. IT-03-66-T, Decision on Prosecution’s Motion to Amend Witness List and for Protective Measures, 17 February 2005, para. 3; *Prosecutor v. Limaj et al.*, Case No. IT-03-66-T, Decision on Prosecution’s Motion II to Amend Witness List, 9 March 2005, para. 2.

⁵ *Ibid.*

⁶ *Ibid.*

⁷ *Prosecutor v. Limaj et al.*, Case No. IT-03-66-T, Decision on Prosecution’s Motion II to Amend Witness List, 9 March 2005, para. 3. See also *Prosecutor v. Mrkšić et al.*, Case No. IT-95-13/1-T, Decision on Prosecution Motion to Amend its Rule 65 *ter* Witness List, 28 April 2006; *Prosecutor v. Mrkšić et al.*, Case No. IT-95-13/1-T, Decision on Prosecution Motion to Amend its Rule 65 *ter* List, 6 June 2006; *Prosecutor v. Boškoski and Tarčulovski*, Case No. IT-04-82-PT, Decision on Motion for Leave to Amend its Original Rule 65 *ter* Witness List dated 7 November 2005 with Annexes A and B, 5 May 2006.

⁸ Motion, para. 8.

⁹ *Ibid.*, para. 9.

¹⁰ Prosecution’s Response to Joint Defence Motion to Exclude the Testimony of Witnesses for Failure to Comply with Disclosure Obligations, 13 September 2006.

¹¹ Prosecution’s Submission to Trial Chamber Order Dated 8 November 2006 With Confidential Annex A, 10 November 2006.

Government, pursuant to Rule 70, for the witness to be interviewed, for his interview notes to be disclosed, and for him to be allowed to give evidence in this case. The Prosecution also argues that the witness was identified as a provisional witness on the list of 6 July 2006 (Witness No. 159) and that a brief Rule 65 *ter* summary of his anticipated testimony was disclosed to the Defence at the time.¹² In July 2006, the Prosecution obtained authorisation to interview the witness and proceeded to do so on 18 August 2006.¹³ After obtaining the required authorisation from the Rule 70 provider, the Prosecution disclosed, on 21 September 2006, “other rule 70 material” which was based on notes the Prosecution took during the interview “or notes the Prosecution received from the Rule 70 provider for disclosure”.¹⁴ The Prosecution clarified in its submission of 10 November 2006 that it was not in possession of the witness’s statement.¹⁵ The Prosecution further submits that, on 1 November 2006, it disclosed a more detailed Rule 65 *ter* summary and finally, on 17 November 2006, received authorisation from the Rule 70 provider to call this witness to give evidence.¹⁶ Finally, the Prosecution submits that it does not intend to call the witness before February 2007, in order to allow the Defence sufficient time to prepare for his testimony.¹⁷

7. In its Response, the Defence states that it previously filed a joint motion to exclude the testimony of this witness for failure to comply with disclosure obligations and that the Trial Chamber dismissed the request as moot since the witness was not on the Rule 65 *ter* list.¹⁸ The Defence further submits that, to date, it has not received any Rule 66 disclosure with respect to this witness. Furthermore, it points out that, at the Rule 65 *ter* conference, held on 17 May 2006, the Pre-trial Judge ordered the Prosecution to disclose the identities of all Rule 70 witnesses, emphasising that pressure had to be placed on the Rule 70 provider to make up its mind.¹⁹

8. The Trial Chamber considers that the potential evidence of Shaun Byrnes is relevant and has probative value. However, as was the case with another Rule 70 witness,²⁰ the Chamber is concerned that there has been some uncertainty as to the state of disclosure regarding the materials related to this witness. The extent of disclosure, according to the Prosecution, has been limited to interview notes made during the August 2006 interview with the witness, as well as the notes

¹² Motion, para. 7.

¹³ Prosecution’s Response to Joint Defence Motion to Exclude the Testimony of Witnesses for Failure to Comply with Disclosure Obligations, 13 September 2006, para. 5.

¹⁴ Prosecution’s Submission to Trial Chamber Order Dated 8 November 2006 With Confidential Annex A, 10 November 2006, para. 7.

¹⁵ *Ibid.*, para. 6.

¹⁶ Motion, para. 7.

¹⁷ *Ibid.*, para. 11.

¹⁸ Response, para. 4. *See also* Decision on Joint Defence Motion to Exclude Evidence for Failure to Comply with Disclosure Obligations, 18 October 2006, para. 11.

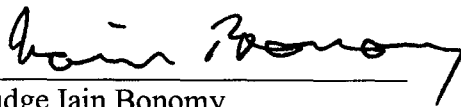
¹⁹ Response, para. 5.

²⁰ Decision on Prosecution Motion to Amend Its Rule 65 *ter* Witness List, 8 December 2006, para. 34.

provided by the Rule 70 provider.²¹ However, the Prosecution's submissions of 13 September 2006 refer to interview notes, or even a possible statement, made for the purposes of the *Milošević* case, something of which the present Motion, as well as the procedural history relating to this witness, makes no mention.²² In addition, one of the grounds on which the Defence is opposing this Motion is the lack of Rule 66 disclosure. Accordingly, uncertainty remains as to what precisely the state of disclosure in relation to this witness is. It is for that reason that the Trial Chamber cannot adequately assess whether the Defence would be unduly prejudiced by his addition to the Prosecution's Rule 65 *ter* witness list.

9. Accordingly, the Trial Chamber DENIES the Motion with respect to the witness, but without prejudice to the Prosecution making another application with additional information on the state of disclosure.

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



Judge Iain Bonomy
Presiding

Dated this eleventh day of December 2006
At The Hague
The Netherlands

[Seal of the Tribunal]

²¹ Prosecution's Submission to Trial Chamber Order Dated 8 November 2006 With Confidential Annex A, 10 November 2006, para. 7.

²² Prosecution's Response to Joint Defence Motion to Exclude the Testimony of Witnesses for Failure to Comply with Disclosure Obligations, 13 September 2006, para. 7. *See also* Decision on Prosecution Motion to Amend Its Rule 65 *ter* Witness List, 8 December 2006, para. 34.