



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-04-83-T
Date: 24 July 2007
Original: English

IN TRIAL CHAMBER I

Before: Judge Bakone Justice Moloto, Presiding
Judge Frederik Harhoff
Judge Flavia Lattanzi

Registrar: Mr. Hans Holthuis

Decision of: 24 July 2007

PROSECUTOR

v.

RASIM DELIĆ

PUBLIC

**DECISION ON PROSECUTION
MOTION PURSUANT TO RULE 73 *BIS* (F) AND MOTION FOR
LEAVE TO WITHDRAW WITNESSES**

The Office of the Prosecutor

Mr. Daryl A. Mundis
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Mr. Kyle Wood
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Counsel for the Accused

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Mr. Nicholas David Robson

TRIAL CHAMBER I (“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 “Prosecutor’s Motion Pursuant to Rule 73 *bis* (F) and Motion for Leave to Withdraw Witnesses with Confidential Annexes” filed on 16 July 2007 (“Motion”), and hereby renders its Decision.

1. Arguments of the Parties

1. The Prosecution, pursuant to Rule 73 *bis* (F) of the Rules of Procedure and Evidence (“Rules”), requests the Trial Chamber to modify its decision under Rule 73 *bis* (C) of the Rules and permit it to call a total 73 witnesses, of whom 15 are proposed as 92 *bis* witnesses, to testify over a period of 106 hours of direct examination. The Prosecution also requests leave to withdraw the witnesses listed in Confidential Annex C to the Motion.¹

2. The Prosecution argues that “it cannot prove its case against the Accused under the limitations imposed by the Trial Chamber, under Rule 73 *bis* (C)” on the basis of two factors:

a) As a case in which the Accused is charged exclusively under Article 7(3) of the Statute of the Tribunal, it is necessarily more witness-, document-, and time-intensive than it might appear at first, as it requires the Prosecution to prove command relationships, lines of notice and the absence of measures to prevent or to punish.

b) The Trial Chamber’s decisions on the Prosecution’s 29 September 2006 motion requesting the Trial Chamber to take judicial notice of 325 adjudicated facts and its 11 June 2007 motion under Rule 94(B), have also affected the calculation of the amount of time necessary and will require the Prosecution to call more witnesses – and to examine others for longer periods – than might otherwise have been the case.²

3. On 20 July 2007, the Defence filed the “Defence Response to Prosecutor’s Motion Pursuant to Rule 73 *bis* (F) and Motion for Leave to Withdraw Witnesses” (“Response”) in which the Defence stated that it “neither supports nor opposes the Prosecution Motion, but leaves it to the Trial Chamber to consider whether it is in the interests of justice to allow the Prosecution additional time and witnesses.”³ Furthermore, the Defence stated that it does not object to the withdrawal of the witnesses listed in Confidential Annex C to the Motion.⁴

2. Procedural History

4. The Prosecution filed its Witness List pursuant to Rule 65 *ter* of the Rules on 31 October 2006, listing 76 witnesses and 117 hours of direct examination.⁵ Subsequently, the Prosecution filed

¹ Motion, para. 2.

² Motion, para. 1.

³ Response, para. 13.

⁴ Response, para. 12.

⁵ Prosecution Submission Pursuant to Rule 65*ter*, 31 Oct 2006.

a “Motion for Leave to Amend the Prosecution’s Witness and Exhibit Lists” on 4 June 2007 (“Motion for Leave to Amend”), requesting leave to amend its Witness List with the addition of 15 witnesses. On 2 July 2007, by way of an oral order, the Trial Chamber set the time available to the Prosecution for the presentation of evidence at 170 hours for direct-examination, cross-examination, re-examination, questions from the Bench and administrative matters, and the number of witnesses to be called by the Prosecution at 55, pursuant to Rule 73 *bis* (C) of the Rules (“Oral Order”).⁶ In its Oral Order, the Trial Chamber informed the Prosecution that it had taken the Motion for Leave to Amend into consideration in making that Oral Order. The Prosecution was therefore granted leave to select its 55 witnesses from both its original 65 *ter* Witness List, and the list of witnesses proposed in its Motion for Leave to Amend.

5. On 5 July 2007, the Prosecution filed the “Prosecution Motion for Suspension of the Commencement of Trial and All Related Proceedings”, requesting that the Trial Chamber suspend the commencement of the trial and all related proceedings on the basis that:

[a]s a result of the Trial Chamber’s Decision to limit the number of witnesses and time available for the Prosecution to present its case, the Prosecution will have insufficient time to lead evidence relating to charges concerning Maline/Bikoši [...] the practical effect of this decision is that the Prosecution’s case will be cut significantly. Consequently, the scope of the case as it exists after the Rule 73 *bis* (C) Decision now renders the case eligible for transfer pursuant to Rule 11 *bis*.⁷

On 5 July 2007, the Trial Chamber denied the Prosecution’s request.⁸

6. On 5 July 2007, the Prosecution filed an “Urgent Motion by the Prosecutor for Referral of the Indictment Pursuant to Rule 11*bis*” requesting the referral of the present case to the authorities of Bosnia and Herzegovina. This request was denied by way of decision of the Referral Bench on 9 July 2007.⁹

7. On 9 July 2007, the Trial Chamber denied the Prosecution’s “Urgent Omnibus Motion for Reconsideration and Postponement of Commencement of Trial”, filed on 6 July 2007, whereby the Prosecution had requested the Trial Chamber, *inter alia*, to reconsider its Oral Order pursuant to Rule 73 *bis* (C) of the Rules and allow the Prosecution to call 70 witnesses, to allot 110 hours for the direct examination of these witnesses, and to suspend the commencement of the Trial. The Trial Chamber denied the Prosecution’s request on the basis that:

⁶ Pre-Trial Conference, 2 July 2007, Transcript pages 179–180.

⁷ Prosecution Motion for Suspension of the Commencement of Trial and All Related Proceedings, para. 1.

⁸ Decision on Prosecution Motion for Suspension of the Commencement of Trial and all Related Proceedings, 5 July 2007.

⁹ Decision on Motion for Referral of Case Pursuant to Rule 11 *bis*, 9 July 2007.

it would not be in the interests of justice to postpone the commencement of the trial at the present stage of the case, and that to do so would affect the expeditiousness of the trial and the rights of the Accused;

[...] that the Prosecution has not demonstrated good cause that it requires more time and a higher number of witnesses to prove its case, and therefore, reconsideration of the Trial Chamber's Oral Order on Rule 73 *bis* (C) is not warranted.¹⁰

8. On 9 July 2007, the Trial Chamber denied the "Prosecution's Motion for Judicial Notice of Adjudicated Facts", whereby the Prosecution had requested the Trial Chamber to take judicial notice of 250 facts which it submitted were adjudicated in the judgement in the case of *Prosecutor v. Hadžihasanović and Kubura*. Also on 9 July 2007, the Trial Chamber denied the "Prosecution's Motion for Admission of Documentary Evidence Pursuant to Rule 94 (B)" whereby the Prosecution had requested the Trial Chamber to take judicial notice, pursuant to Rule 94 (B) of the Rules, of 462 documents which were admitted into evidence in the case of *Prosecutor v. Hadžihasanović and Kubura*.¹¹

9. At the Hearing on 9 July 2007, the Prosecution informed the Trial Chamber that it was not in a position to proceed and requested:

a few days in order to assimilate the decisions that were rendered earlier this morning and perhaps to be afforded an opportunity to further explain to the Trial Chamber why the amount of time that has been made available to us and the number of witnesses which have been afforded the Prosecution needs to be increased. And we would ask for an opportunity to present further arguments on that issue, in light of the decisions which were just rendered this morning, including the decision rejecting the Prosecution motion for a reconsideration.¹²

10. The Prosecution requested time to provide a more detailed explanation as to why it would require approximately 70 witnesses and "slightly more than 100 hours" of direct examination in order to prove its case.¹³ In considering this request, the Presiding Judge noted that:

this Trial Chamber made a decision on the 2nd of July setting the number of witnesses that the Prosecution may call and the number of hours that may be used by the Prosecution. The Prosecution asked for a reconsideration. Now, again, a decision has been given on that motion for reconsideration, and the reason for the decision that is given is that the motion for reconsideration is not motivated. [...] You are asking us to reconsider and use our inherent discretion to reconsider a motion when we don't have arguments before us for reconsideration. [...] we are prepared to give the Prosecution an opportunity to give a reasoned argument for reconsideration, [...] And this Trial Chamber will look favourably to any reasoned presentation and well-motivated presentation.¹⁴

¹⁰ Decision on Urgent Omnibus Motion for Reconsideration and Postponement of Commencement of Trial, 9 July 2007.

¹¹ Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts and Joint Motion Concerning Agreed Facts, 9 July 2007; Decision on Prosecution's Motion for Admission of Documentary Evidence Pursuant to Rule 94(B), 9 July 2007.

¹² Hearing, 9 July 2007, T. 228.

¹³ Hearing, 9 July 2007, T. 229.

¹⁴ Hearing, 9 July 2007, T. 236.

11. The trial in the present case commenced with the Prosecution Opening Statement on 9 July 2007.

3. Discussion

12. Rule 73 *bis* (F) provides that:

After commencement of the trial, the Prosecutor may file a motion to vary the decision as to the number of crime sites or incidents in respect of which evidence may be presented or the number of witnesses that are to be called or for additional time to present evidence and the Trial Chamber may grant the Prosecutor's request if satisfied that this is in the interests of justice.

13. The Trial Chamber considers that allowing a variation of the Prosecution's original Witness List is in the interests of justice only where good cause for such variation has been shown. In this regard, the Trial Chamber recalls that its denial of the Prosecution's request for reconsideration of its Rule 73 *bis* (C) Oral Order arose from the Trial Chamber's concerns regarding the relevance of the evidence to be presented through the proposed witnesses, based on the information initially provided to the Trial Chamber by the Prosecution. Holding that there was a considerable cumulation of evidence, the Trial Chamber noted that:

there are several areas where the Prosecution intends to call numerous witnesses to testify about the same events or who will provide similar information. In particular, the Trial Chamber considers that in relation to the following areas, the Trial Chamber does not see any need to call all the witnesses listed by the Prosecution or at least no need to hear all of them *viva voce*:

1. the El Mujahid detachment, 2. the alleged killings in Maljine and Bikosi, 3. the operations around Vozuca in 1995, 4. the Kamenica camp, 5. the 3rd Corps structure and command and control, 6. prisoners of war.¹⁵

14. The Trial Chamber notes that in the present Motion, the Prosecution has provided additional information pertaining to the witnesses it wishes to place on its Witness List. The Prosecution provides arguments on the following factors, which, it states, must inform any decision on the scope of the Prosecution's case:

1) the nature of the Prosecution's theory of liability [Article 7(3)]; 2) the circumstantial nature of the case and how this fact interacts with the Prosecution's burden of proof; 3) the temporal distance separating the two crime-base incidents, as detailed in the Prosecution's Pre-Trial Brief; and 4) the effect of the Trial Chamber's 9 July 2007 Decisions.¹⁶

15. In particular, the Trial Chamber accepts the Prosecution argument that the denial of the Prosecution's Motion for Judicial Notice of Adjudicated Facts and Prosecution's Motion for Admission of Documentary Evidence Pursuant to Rule 94 (B) may necessitate that the Prosecution call additional witnesses to lead evidence on the said facts and tender the said documents.

¹⁵ Hearing, 2 July 2007, T. 180.

¹⁶ Motion, para. 17.

16. The Trial Chamber is therefore satisfied that the Prosecution has shown good cause as to why a variation of the Witness List pursuant to Rule 73 *bis* (F) would be in the interests of justice.

17. On 20 July 2007, the Parties discussed the testimony of Witness 61 who had been listed on the original Witness List as requiring 6 hours of direct examination, but listed in the Confidential Annex to the present Motion as requiring only 3 hours. Following the objection of the Defence to the Prosecution's proposed course of action regarding the testimony of Witness 61, the Prosecution determined that it would need 6 hours direct examination for this witness and the Trial Chamber orally informed the Parties that it would take this into account in its determination of the present Motion.¹⁷

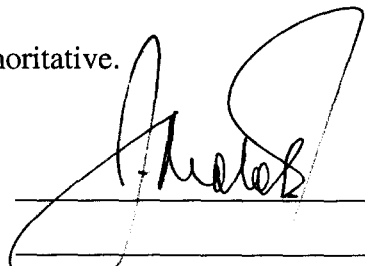
¹⁷ Hearing, 20 July 2007, T. 27.

4. Disposition

18. For the foregoing reasons, the Trial Chamber **GRANTS** the Motion, and **ORDERS**:

1. that the Prosecution shall be permitted to place 73 witnesses, in total, on its Witness List;
2. the Prosecution shall file its updated Witness List by Friday, 27th July 2007;
3. that the Prosecution shall be granted 109 hours for the direct examination of its witnesses, this time includes 6 hours for the direct examination of Witness 61, thus 250 hours in total will be available to the Prosecution for the presentation of evidence;
4. the Prosecution to remove the witnesses listed in Confidential Annex C to the Motion.

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



Judge Bakone Justice Moloto
Presiding

Dated this twenty-fourth day of July 2007

At The Hague

The Netherlands

[Seal of the Tribunal]