



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-04-84-T
Date: 1 November 2007
Original: English

IN TRIAL CHAMBER I

Before:

Judge Alphons Orije, Presiding
Judge Frank Höpfel
Judge Ole Bjørn Støle

Registrar:

Mr Hans Holthuis

Decision of:

1 November 2007

PROSECUTOR

v.

**RAMUSH HARADINAJ
IDRIZ BALAJ
LAHI BRAHIMAJ**

PUBLIC

**DECISION ON THE PROSECUTION'S REQUEST TO ADD TWO WITNESSES TO ITS
WITNESS LIST AND TO SUBSTITUTE ONE WITNESS FOR ANOTHER**

Office of the Prosecutor

Mr David Re
Mr Gilles Dutertre
Mr Gramsci di Fazio
Mr Philip Kearney

Counsel for Ramush Haradinaj

Mr Ben Emmerson, QC
Mr Rodney Dixon
Ms Susan L. Park

Counsel for Idriz Balaj

Mr Gregor Guy-Smith
Ms Colleen Rohan

Counsel for Lahi Brahimaj

Mr Richard Harvey
Mr Paul Troop

1. On 13 September 2007, the Prosecution requested to add two witnesses to its witness list in relation to Counts 25 and 26, and to substitute one witness with another, who is further specified in paragraph 3 of the Confidential Annex A to the Motion.¹ With regard to the two additional witnesses in relation to Counts 25 and 26 the Prosecution submits that the witnesses are able to add three important facts as further outlined in the Confidential Annex A to the Motion.²

2. The Defence for Mr Balaj and the Defence for Mr Brahimaj opposed adding the above mentioned three witnesses to the Prosecution's witness list, while the Defence for Mr Haradinaj did not address this issue.³ The Defence for Mr Balaj and the Defence for Mr Brahimaj argue that the Prosecution's failure to seek addition of the witnesses to its list at an earlier time is in itself cause to deny the requested amendment to the list.⁴ The Prosecution replied on 3 October 2007.⁵

3. Pursuant to Rule 73bis(F) of the Rules of Procedure and Evidence ("Rules"), the Trial Chamber may grant a motion for an amendment to the witness list if satisfied that this is in the interests of justice.

4. In reaching its decision, the Trial Chamber has taken several factors into consideration.⁶ One such factor is the general requirements for admissibility under Rule 89(C) of the proposed evidence, which must be relevant and have probative value. The probative value of the proposed evidence must not be outweighed by the need to ensure a fair trial pursuant to Rule 89(D). No prejudice should be caused to the Defence by the late addition of the witnesses. Further, the Prosecution must show good cause why it did not seek to add the witnesses to the list at an earlier stage. The Trial Chamber is also entitled to consider the actual stage of the trial and other circumstances specific to the case.

¹ Prosecution's Third Amended Witness List and Application to Admit Two Statements pursuant to Rule 92bis, 13 September 2007 ("Motion"), para. 2; Confidential Annex A to the Motion, paras 3, 6.

² Motion, para. 3, Confidential Annex A to the Motion, para. 7.

³ Idriz Balaj's Response to the Prosecution's Third Amended Witness List Regarding Substitution of Witnesses and Addition of two 92bis Witnesses, 26 September 2007 ("Balaj's Response"), paras 4, 43; Lahi Brahimaj's Response to Prosecution's Third Amended Witness List and Application to Admit Two Witness Statements Pursuant to Rule 92bis, 25 September ("Brahimaj's Response"), para. 7; Response on Behalf of Ramush Haradinaj to Prosecution's Motion to Amend Witness List and to Admit Witness Statements under Rule 92bis, 25 September 2007, para. 13.

⁴ Balaj's Response, paras 15, 29; Brahimaj's Response, para. 7.

⁵ Prosecution's Reply to Defence Responses to Prosecution's Third Amended Witness List and Application to Admit Two Statements Pursuant to Rule 92bis, 3 October 2007.

⁶ These factors were relied upon by other Trial Chambers in the following cases: *Prosecutor v. Milutinović et al.*, Decision on Prosecution Second Renewed Motion for Leave to Amend Its Rule 65ter List to Add Michael Phillips and Shuan Byrnes, 12 March 2007, para. 18; *Prosecutor v. Slobodan Milošević*, Decision on Prosecution's Request to Call Witness C-063, 18 February 2004, p. 2; *Prosecutor v. Mrkšić et al.*, Decision on Prosecution Motion to Amend Its Rule 65ter List, 6 June 2002, para. 6.

5. With regard to the two witnesses in relation to Counts 25 and 26, the anticipated evidence of these two witnesses seems in large portions to be based on hearsay and to be speculative, and therefore of limited probative value. As noted above, while this is primarily an admissibility consideration, it may also be utilized in connection with a Rule 73bis(F) application.

6. The anticipated evidence of the two proposed witnesses would mainly corroborate material which was already known to the Defence and which was introduced as evidence in court through the testimony of another witness, Witness 54, who testified on the same incident on which the proposed witnesses are expected to testify. Therefore no prejudice should arise to the Defence by the late addition of these two witnesses. The statements of these two witnesses were disclosed to the Defence on 6 September 2007, before the Defence decided on the cross-examination of Witness 54 who testified on 11 September 2007. The Trial Chamber cannot see any prejudice resulting from this sequence of events.

7. However, the Prosecution has failed to show good cause for its late request to add these two witnesses to its list. The Prosecution should have been aware earlier that these persons might have had evidence relevant to Counts 25 and 26, as Witness 54 informed the Prosecution in his statement of 12 October 2005 that he told certain persons, amongst them the two proposed witnesses, about the incident related to Counts 25 and 26.⁷ It is important for fair and expeditious proceedings that the parties discharge their responsibility towards an orderly and timely case management.

8. Taking the above factors into account, and considering the proximity of the close of the Prosecution's case, it is not in the interests of justice that the two witnesses who are expected to testify on Counts 25 and 26 be added to the Prosecution's witness list.

9. As far as the addition to the list of the substitute witness is concerned, the Trial Chamber observes that the witness is expected to provide relatively important evidence on the inner structure and operation of a KLA unit. This evidence is relevant and has probative value.

10. Secondly, the Trial Chamber does not find that any prejudice may be caused to the Defence by the late addition of this witness. The substitute witness is expected to testify on similar matters as the substituted witness.⁸ The substitute witness's statement of 19 February 2006 was disclosed to the Defence on 7 March 2006. This statement refers to specific paragraphs in the Indictment, namely paragraphs 9 and 31. Thus the Defence has information at hand to adequately prepare for this witness. The Defence was alerted to a possible testimony of this witness by the Prosecution's

⁷ Witness 54, witness statement, 12 October 2005, para. 25.

⁸ Substituted Witness, Rule 65ter Summary.

Motion of 13 September 2007. In addition, the scheduling of the witness at the end of the Prosecution's case assists in giving the Defence maximum preparation time.

11. The substituted witness refused to testify on 23 March 2007. The Prosecution requested the witness's substitution only with its Motion of 13 September 2007. Nevertheless, the Prosecution has provided the Trial Chamber with good cause to explain this delay, namely the serious obstacles the Prosecution has faced in this case to obtain the testimony in court of witnesses who are willing to cooperate during both the investigation and trial stages. The substitution of a witness who refuses cooperation at the last moment cannot always be decided rapidly.

12. Finally, the Trial Chamber takes into account that this is a mere substitution, not an addition of a witness to the list. Taking all these factors into account, even though the Prosecution's request is submitted at a very late stage in its case, the Trial Chamber considers that it is in the interests of justice that this witness be added to the Prosecution's witness list.

13. For all of the foregoing reasons, and pursuant to Rule 73bis(F) of the Rules, the Trial Chamber:

1. **DENIES** the request to add two witnesses to the Prosecution's witness list to supplement the testimony of Witness 54;
2. **GRANTS** the request to substitute one witness in the list for another.

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

Judge Alphons Orie
Presiding Judge

Dated this 1st day of November 2007
At The Hague
The Netherlands

[Seal of the Tribunal]