



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-T

Date: 4 May 2010

Original: English

IN THE TRIAL CHAMBER

Before: Judge O-Gon Kwon, Presiding Judge
Judge Howard Morrison
Judge Melville Baird
Judge Flavia Lattanzi, Reserve Judge

Registrar: Mr. John Hocking

Decision of: 4 May 2010

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

DECISION ON PROSECUTION'S MOTION TO SUBSTITUTE WITNESS

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused

Mr. Radovan Karadžić

Standby Counsel

Mr. Richard Harvey

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 “Prosecution’s Motion to Substitute Witness” filed on 8 April 2010 (“Motion”), and hereby issues its decision thereon.

I. Submissions

1. In the Motion, the Prosecution seeks leave from the Chamber to amend its list of witnesses filed pursuant to Rule 65 *ter* (E) of the Tribunal’s Rules of Procedure and Evidence (“Rules”) by adding KDZ595 in place of witness KDZ579, who would be removed from the list.¹ The Prosecution submits that making this replacement is in the interests of justice as the evidence of KDZ595 is relevant and of probative value and is the best evidence available concerning matters set out in a confidential appendix to the Motion.² It further argues that the replacement would not result in unfair prejudice to the Accused as he will have adequate time to prepare for KDZ595’s testimony.³

2. In justification for not having included KDZ595 in its original Rule 65 *ter* list of witnesses, the Prosecution merely states that it “was unaware of the nature of the evidence of witness KDZ595 when it filed its list of witnesses”.⁴ In Confidential Appendix A to the Motion the Prosecution gives greater detail as to when it became aware of KDZ595’s evidence, conducted an interview with him, and disclosed his witness statement to the Accused.

3. On 21 April 2010, the Accused filed his “Response to Motion to Substitute Witnesses [*sic*]”, expressing no objections to the Motion.

II. Applicable Law

4. Pursuant to Rule 73 *bis* (F) of the Rules, a Trial Chamber may grant a motion requesting an amendment of the witness list if it is satisfied that doing so is in the interests of justice. In exercising its discretion, the Trial Chamber must balance the Prosecution’s duty to present available evidence to prove its case with the right of the Accused, pursuant to Articles 20(1) and 21(4)(b) of the Statute of the Tribunal, to a fair and expeditious trial and to have adequate time and facilities for the preparation of his defence.

¹ Motion, para. 1.

² Motion, paras. 3–4. The Prosecution notes that protective measures will be sought for KDZ595, should the Motion be granted. For this reason, it describes the witness’s evidence in the confidential appendices to the Motion.

5. In making its determination, the Trial Chamber shall take into consideration several factors, including whether, in accordance with Rule 89 (C) and (D) of the Rules, the proposed evidence is *prima facie* relevant and of probative value, and whether its probative value is substantially outweighed by the need to ensure a fair trial. When assessing whether it is indeed in the interests of justice to permit the Prosecution to vary its witness list the Chamber should also consider whether any prejudice would be caused to the defence by the substitution of the witness, whether the Prosecution has shown good cause for the amendment of the witness list, the repetitive or cumulative nature of the proposed testimony, and whether the defence has adequate time to prepare its cross-examination of the proposed new witness.⁵ The Trial Chamber may further consider the stage of the trial, whether the witness sought to be added is of sufficient importance to justify his or her inclusion on the witness list, whether granting the amendment would result in undue delay of the proceedings, as well as other circumstances specific to the case.⁶

III. Discussion

6. On the basis of the information provided by the Prosecution in Confidential Appendix A to the Motion, the Trial Chamber is satisfied as to the *prima facie* relevance and probative value of KDZ595's anticipated evidence. It is also satisfied of the importance of KDZ595's anticipated evidence to the Prosecution's case, and that the probative value of his anticipated evidence is not substantially outweighed by the need to ensure a fair trial.

7. The Chamber notes that the Prosecution proposes to substitute KDZ595 for a witness already listed on its Rule 65 *ter* witness list, namely KDZ579. Granting the Motion would not, therefore, increase the overall number of witnesses to be brought by the Prosecution. Furthermore, there is substantial overlap between the anticipated evidence of both witnesses and, consequently, permitting the substitution of KDZ579 by KDZ595 would not have a significant impact on the time required for the presentation of evidence by the Prosecution. While the Chamber has some reservations about the reasons why the Prosecution did not seek to

³ Motion, para. 5.

⁴ Motion, para. 4.

⁵ *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-T, Decision on the Prosecution's Request to Add Two Witnesses to its Witness List and to Substitute One Witness for Another, 1 November 2007 ("*Haradinaj Decision*"), para. 4; *Prosecutor v. Popović et al.*, Case No. IT-05-88-AR73.1, Decision on Appeals Against Decision Admitting Material Related to Borovčanin's Questioning, 14 December 2007, para. 37; *Prosecutor v. Lukić and Lukić*, Case No. IT-98-32/1-T, Decision on Prosecution Second Motion to Amend Rule 65 *ter* Exhibit List, 11 September 2008, para. 10.

⁶ *Prosecutor v. Mlutinović et al.*, Case No. IT-05-87-T, Decision on Prosecution Second Renewed Motion for Leave to Amend Its Rule 65 *ter* List to Add Michael Phillips and Shaun Byrnes, 12 March 2007, para. 18; *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Decision on Prosecution's Motion for Leave to Amend Rule 65 *ter* Witness List and Rule 65 *ter* Exhibit List, 6 December 2006, p. 7; *Haradinaj Decision* para. 2.

include KDZ595 on its witness list sooner, it is mindful of the fact that the Prosecution does not anticipate bringing the witness for some time and, additionally, that his evidence covers many of the same events that would have been discussed by KDZ579 and so is not, in significant part, new to the Accused. For these reasons, and as the Accused himself has no objection to the substitution of KDZ579 for KDZ595, the Chamber does not consider that he will suffer any prejudice if it grants the Motion.

8. Taking the above factors into account, the Trial Chamber considers that it is in the interests of justice that KDZ595 be added to the Prosecution's witness list in place of KDZ579, who shall be removed.

IV. Disposition

9. For the foregoing reasons, and pursuant to Rule 73 *bis* (F) of the Rules, the Trial Chamber hereby **GRANTS** the Motion to substitute witness KDZ595 for witness KDZ579 in the Prosecution's Rule 65 *ter* list of witnesses.

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



Judge O-Gon Kwon
Presiding

Dated this fourth day of May 2010
At The Hague
The Netherlands

[Seal of the Tribunal]