



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: 10 October 2013

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: 10 October 2013

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON THE ACCUSED'S MOTION TO VARY LIST OF WITNESSES
(SARAJEVO COMPONENT)**

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 Accused’s “Motion to Vary List of Witnesses: Sarajevo Component“, filed on 4 October 2013 (“Motion”), and hereby issues its decision thereon.

I. Background and Submissions

1. In the Motion the Accused moves, pursuant to Article 73 *ter*(D) of the Tribunal’s Rules of Procedure and Evidence (“Rules”), for an order allowing him to vary his list of witnesses submitted pursuant to Rule 65 *ter* of the Rules (“Witness List”)¹. He seeks leave to add two witnesses related to the Sarajevo component of the case to the Witness List (“Proposed Witnesses”) and also provides notice of his intention to withdraw 32 Sarajevo-related witnesses already on the Witness List.²

2. The first witness the Accused wishes to add to the Witness List is Prvoslav Davinić who served as the head of the United Nations Centre for Disarmament Affairs in New York between 1992 and 1995 and who is supposed to testify about his contacts with the Accused in relation to the Markale market shelling on 28 August 1995, as well as the information received by his office that the Bosnian Serbs were not responsible for it.³ The second witness is Witness C who will testify to overhearing discussions in which Alija Izetbegović and others made plans to ensure that the Bosnian Serbs were blamed for shelling civilians in order to obtain international intervention.⁴ According to the Accused, the testimony of the Proposed Witnesses will raise doubt that the Bosnian Serbs were in fact responsible for the shelling incidents charged in the Third Amended Indictment (“Indictment”).⁵

3. The Accused argues that any prejudice to the Office of the Prosecutor (“Prosecution”) arising from the addition of the Proposed Witnesses is outweighed by the relevance and the probative value of their testimony, as well as by the time saved through presenting their evidence in lieu of that of the 32 witnesses proposed to be withdrawn.⁶ He also submits that he did not include the Proposed Witnesses on the Witness List earlier because, being the subject of criminal charges in Serbia, Prvoslav Davinić refused to be interviewed until August 2013, while

¹ The Accused’s most recent Witness List was filed on 26 February 2013.

² Motion, para. 1.

³ Motion, paras. 6–9.

⁴ Motion, paras. 10–12.

⁵ Motion, para. 11.

⁶ Motion, para. 13.

Witness C was unknown to the Accused's defence team until earlier this year.⁷ Finally, the Accused attaches the names of the 32 Sarajevo-related witnesses he wishes to withdraw from the Witness List in the confidential Annex A attached to the Motion.⁸

4. On 8 October 2013, the Prosecution filed the "Prosecution's Response to 'Motion to Vary List of Witnesses: Sarajevo Component'" ("Response") stating that it does not oppose the Motion but that it will require the attendance of the Proposed Witnesses for cross-examination.⁹ The Prosecution also notes, with regard to the Accused's proposal to withdraw 32 witnesses, that one of those 32 witnesses has already been dropped while 27 are on the reserve list.¹⁰

II. Applicable Law

5. Rule 73 *ter*(D) of the Rules provides: "After commencement of the defence case, the defence may, if it considers it to be in the interests of justice, file a motion to reinstate the list of witnesses or to vary the decision as to which witnesses are to be called". The Chamber may grant such a motion when it is in the interests of justice.¹¹ In making such a determination, the Trial Chamber shall take into consideration several factors, including whether the proposed evidence is *prima facie* relevant and of probative value. The Chamber shall also balance the defence's right to present available evidence during its case with the Prosecution's right to have adequate time to prepare for cross-examination of the proposed new witnesses.¹² The Chamber must also consider whether the defence has shown good cause for not seeking to add the witnesses to the witness list at an earlier stage of the proceedings. Good cause may exist when witnesses have only recently become available to give evidence or the relevance of the evidence has only recently become apparent.¹³

III. Discussion

6. The Chamber considers that the Proposed Witnesses' anticipated evidence, as described in the Motion, is relevant to the Sarajevo component of the Accused's case and, in particular, the

⁷ Motion, para. 14.

⁸ Motion, para. 15.

⁹ Response, paras. 1–2.

¹⁰ Response, para. 3.

¹¹ Decision on Accused's Motion to Vary List of Witnesses, 21 February 2013, para. 5, citing *Prosecutor v. Gotovina et al.*, Case No. IT-06-90-T, Decision on Čermak Defence's Second and Third Motions to Add a Witness to Its Rule 65 *ter* (G) Witness List, 22 September 2009 ("*Gotovina* Decision"), para. 7; *Prosecutor v. Stanišić and Simatović*, Case No. IT-03-69-T, Decision on Stanišić Defence Motion to Add Witness DST-081 to Its Rule 65 *ter* Witness List, 20 October 2011 ("*Stanišić* Decision"), para. 4.

¹² *Gotovina* Decision, para. 7; *Stanišić* Decision, para. 4.

¹³ *Gotovina* Decision, para. 7; *Stanišić* Decision, para. 4.

responsibility for the shelling incidents alleged in the Indictment. For that reason, the Chamber is satisfied of the *prima facie* relevance and probative value of the anticipated evidence.

7. The Chamber notes that the Prosecution does not object to the addition of the Proposed Witnesses to the Witness List. In any event, the Chamber considers that such additions would not negatively affect the Prosecution's right to have adequate time to prepare for cross-examination. Furthermore, in light of the Accused's notice of withdrawal of 32 Sarajevo-related witnesses from the Witness List,¹⁴ the Chamber considers that the addition of the Proposed Witnesses would neither cause an undue delay to these proceedings nor require an extension of the 300 hours of time allocated to the Accused for the presentation of his defence case.

8. The Chamber is also satisfied that the Accused has shown good cause for not seeking to add the Proposed Witnesses to the Witness List at an earlier stage of the proceedings, as they had only recently become available to him.

9. For the above reasons, the Chamber considers that it is in the interests of justice to grant the addition of the Proposed Witnesses to the Witness List, as well as the withdrawal of 32 Sarajevo-related witnesses listed in confidential Annex A to the Motion.

¹⁴ The Prosecution is correct that the Accused has already indicated that one of those 32 witnesses would not be called (*see* Second Notice of Witness Not to Be Called, 17 December 2012, para. 2) and that another 27 witnesses on the Witness List were designated as reserve witnesses. However, the Chamber also notes that the Accused explained that he placed "the witnesses he does not presently intend to call on a 'reserve list'" and that he may later decide to call some of the persons on the reserve list. *See* Defence Second Revised Rule 65 ter Witness List, 14 December 2012, para. 2.

IV. Disposition

10. Accordingly, the Trial Chamber, pursuant to Rule 73ter(D) of the Rules, hereby:

(a) **GRANTS** the Motion; and

(b) **ORDERS** the Accused to implement the changes to the Witness List by no later than 18 October 2013, as ordered by the Chamber in the “Decision on Accused’s Motions for Severance of Count 1 and Suspension of Defence Case”, issued on 2 August 2013.

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



Judge O-Gon Kwon
Presiding

Dated this tenth day of October 2013
At The Hague
The Netherlands

[Seal of the Tribunal]