

UNITED
NATIONS



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-05-87/1-T
Date: 12 March 2009
Original: English

IN TRIAL CHAMBER II

Before: Judge Kevin Parker, Presiding
Judge Christoph Flügge
Judge Melville Baird

Registrar: Mr John Hocking, Acting Registrar

Decision: 12 March 2009

PROSECUTOR

v.

VLASTIMIR ĐORĐEVIĆ

PUBLIC

**DECISION ON PROSECUTION'S MOTION TO AMEND THE
RULE 65 *TER* WITNESS LIST**

The Office of the Prosecutor:

Mr Chester Stamp
Ms Daniela Kravetz
Mr Matthias Neuner
Ms Priya Gopalan
Ms Silvia D'Ascoli

Counsel for the Accused:

Mr Dragoljub Đorđević
Mr Veljko Đurđić

1. 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 (“Chamber”) is seized of a motion from the Office of the Prosecutor (“OTP or Prosecution”) dated 6 February 2009, seeking to add five witnesses and remove one other from its witness list (“Motion”).¹ A summary of the anticipated evidence of the proposed five witnesses is attached in Annex to the Motion. On 20 February 2009, the Defence objected to the Motion in its entirety (“Response”).² On 3 March 2009, the Prosecution requested leave to reply to the Response (“Leave to Reply”).³ The Chamber would indicate here that pursuant to Rule 126*bis* of the Rules of Procedure and Evidence (“Rules”) a reply should be filed not later than seven days after the filing of a response, with a leave of the Chamber; therefore, a party seeking leave to reply should file a request for leave to reply simultaneously with its submission in reply within the seven day deadline. In the present circumstances it is not apparent to the Chamber that the submissions to be included in the Prosecution’s reply could not have been included in the Motion. Therefore, leave to reply will not be granted.

A. Submissions

2. The Prosecution submits that the evidence of the proposed witnesses is relevant and has probative value, and that their addition to the witness list is in the interests of justice as their evidence would provide the Chamber with an “increased understanding of relevant issues in the case”.⁴ The Prosecution submits that it has provided the Defence with all relevant material for the five witnesses.⁵

3. The Defence argues that the Prosecution has not shown good cause as to why the addition of the witnesses was not sought earlier, and, more specifically, submits that the Prosecution has failed to provide any reasons as to why the five proposed witnesses were not contacted until months after the filing of the Rule 65*ter* list on 1 September 2008, and not noticed at the time of submission of the revised witness list on 12 December 2008.⁶ The Defence further argues that, now that the trial has begun, it no longer has time at its disposal to conduct investigations and interview new

¹ *Prosecutor v Vlastimir Đorđević*, Case No. IT-05-87/1-T, “Prosecution’s Motion to Amend the Rule 65*ter* Witness List with Annex A”, 6 February 2009.

² *Prosecutor v Vlastimir Đorđević*, Case No. IT-05-87/1-T, “Vlastimir Đorđević’s Response to Prosecution’s Motion to Amend the Rule 65*ter* Witness List with Annex A”, 20 February 2009.

³ *Prosecutor v Vlastimir Đorđević*, Case No. IT-05-87/1-T, “Prosecution’s Request for Leave to Reply to Vlastimir Đorđević’s Response to the Prosecution’s Motion to Amend the Rule 65*ter* Witness List”, 3 March 2009.

⁴ Motion, paras 3 and 6.

⁵ Motion, para 4.

⁶ Response, paras 4 and 5.

witnesses that can counter the evidence of the five proposed witnesses, and that, therefore, granting the Motion would be contrary to the interests of justice.⁷

B. Law

4. Under Rule 73bis(F) of the Rules, the Chamber may grant a motion for an amendment to the witness list “if satisfied that this is in the interests of justice.” The factors to be taken into account when assessing if amendments to the witness list would be in the interests of justice include: (a) whether the moving party has shown good cause for its request, (b) the stage of the proceedings at which the request is made, (c) whether granting the amendment would result in undue delay in the proceedings, (d) the repetitive and cumulative nature of the testimony, (e) the complexity of the case, (f) on-going investigations, (g) translation of documents and other materials, and (h) whether the moving party has exercised due diligence in identifying proposed witnesses at the earliest possible moment in time.⁸ Good cause may exist where witnesses have only recently agreed to testify or become available to give evidence, or where the relevance of the evidence has only recently become apparent.⁹

5. In exercising its discretion, the Chamber will consider the relevance and probative value of the proposed evidence and whether the interests of the Defence and the fairness of the proceedings are adequately protected.

C. Discussion

Velibor Veljković

6. Velibor Veljković was a police corporal working in the Suva Reka/Suharekë police station at the time of the Indictment. His anticipated evidence relates to the alleged deportation and killing of Kosovo Albanians from Suva Reka/Suharekë and in particular the killing of the Berisha family in late March 1999. Velibor Veljković is expected to testify about an order given by the commander of the police station Radojko Repanović to a group of officers to go from house to house and to kill Albanian civilians; about police officers shooting at civilians and about him assisting in the loading

⁷ Response, paras 4 and 7.

⁸ *Prosecutor v. Lukić et al.*, Case No. IT-98-32/1-T, “Decision on Prosecution’s Motion to Amend Prosecution’s Witness List (Dr. Fagel)”, 3 November 2008, p 3; *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-PT, “Decision on Prosecution Motion to Amend its Rule 65ter Witness List”, 21 December 2006, para 10; *See also, Prosecutor v. Nahimana et al.*, Case No. ICTR-99-52-T, “Decision on Prosecutor’s Oral Motion for Leave to Amend the List of Selected Witnesses”, 26 June 2001, para 20; *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, “Confidential Decision on Prosecution’s Motions for Leave to Amend Rule 65ter Witness List and Rule 65ter Exhibit List”, 6 December 2006, p 8.

⁹ *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, “Decision on Prosecution’s Fourth Omnibus Motion for Leave to Amend the Witness List and Request for Protective Measures”, 21 November 2003, p 4.

of bodies onto a truck. He is expected to testify further about an order given to police officers to stop the killing and instead tell the remaining ethnic Albanians to leave in half an hour, and that this order must have come from a higher level.

7. Velibor Veljković's anticipated evidence, therefore, is relevant to the allegations of murder and deportation in the Indictment. It also contains information regarding the conduct of alleged subordinates of the Accused which is relevant to the Accused's alleged responsibility pursuant to Article 7(1) and 7(3) of the Statute of the Tribunal ("Statute"). At this stage, the Chamber has no reason to doubt the probative value of his proposed evidence.

8. The Prosecution submits that Velibor Veljković was interviewed by the Prosecution on 19 January 2006 in relation to the *Milutinović et al* trial proceedings which were scheduled to start in July 2006. At the time of Veljković's interview, the Accused, who was still at large, was being investigated together with the other accused in the *Milutinović et al* case.¹⁰ The Prosecution, therefore, knew of Velibor Veljković and his proposed evidence since 19 January 2006. Veljković was not called as a witness in the *Milutinović* trial. In the absence of an explanation from the Prosecution for its failure to include Velibor Veljković in its witness list for this case, the Chamber can only proceed on the assumption that there was a failure to give due attention to this witness. It is said, however, that on 11 December 2008, 1 January 2009, and 4 February 2009 there were discussions with Veljković, the outcome of which was that he would only give evidence if ordered by the Tribunal to attend. It is apparent from this that the proposed witness has not been cooperative with the Prosecution and is reluctant to become involved. The Chamber has had some evidence about the killing of Kosovo Albanians in Suva Reka/Suharekë from K83 and of killings at the pizzeria in the town and elsewhere from Shyrete Berisha. However, the proposed evidence of Veljković is from the perspective of a serving police member and adds material dimension to the other evidence especially in a trial in which the Accused is charged with superior responsibility. The record of his interview in Belgrade District Court on 5 March 2004 was disclosed to the Defence on 10 December 2008, and his statement of 18 January 2006 was disclosed on 4 February 2009, just after the commencement of this trial. Thus, while the addition of this witness can be expected to require additional preparation by the Defence, his proposed evidence concerns allegations that are expressly raised by the Indictment and are the subject of the evidence of other witnesses, so that it will not take the Defence into entirely new areas. The application is made at a very early stage in the trial so that some time interval can be anticipated before the witness is called, and if there is a particular time difficulty for the Defence that can be raised at the appropriate time.

¹⁰ As Vlastimir Đorđević was still at large, on 17 May 2006, the case against Vlastimir Đorđević was severed from the *Milutinović et al* case in order to allow the trial against the other accused to commence as scheduled.

9. Having regard to all these factors, and despite the failure of the Prosecution to give timely attention to this evidence, the Chamber is persuaded that the addition of Velibor Veljković is in the interests of justice.

Živko Trajković

10. Živko Trajković was the commander of a special anti-terrorist unit (“SAJ”) of the Ministry of Internal Affairs of the Republic of Serbia (“MUP”) in 1999. It is anticipated that he will give evidence about the command structure of the police, and the role of the Accused in police operations in Kosovo at the relevant time, and about killings of Kosovo Albanian women and children in the village of Podujevo/Podujeve carried out by a reserve police unit –Skorpioni- that had been transferred there on specific orders of the Accused.¹¹ It is also suggested that he will depose that the Accused told Živko Trajković, during a meeting with Serb authorities, that the Accused had been charged with “sanitizing the battlefields” in Kosovo.¹² Živko Trajković’s proffered evidence is clearly relevant to the case. In particular, it is relevant to the Accused’s alleged responsibility pursuant to Article 7(1) and 7(3) and of the Statute, and is also relevant to Counts 2 and 3 (murder) of the Indictment. At this stage, the Chamber has no reason to doubt the probative value of his proposed evidence.

11. The Prosecution submits that it conducted a suspect interview with Živko Trajković on 26 and 27 January 2004 and on 19 March 2004 and that on 1 December 2008 it sent a request to the Republic of Serbia to have Trajković interviewed before an investigating judge there.¹³ Hence, on 22 January 2009 Trajković appeared before the Belgrade District Court where he stated that because he had agreed to testify for the Defence in this trial he would only agree to be interviewed by the Prosecution if Defence counsel were present.¹⁴ Following this court appearance, Trajković declined to be interviewed.¹⁵ The Defence has raised concerns it has in respect of the Prosecution’s conduct towards this prospective witness. It is submitted that although the Prosecution has acknowledged that Trajković has agreed to testify in these proceedings as a witness for the Defence,¹⁶ it has tried to interview him without contacting Defence counsel.¹⁷

¹¹ Motion, para 15 and footnote 3.

¹² Motion, para 16.

¹³ Motion, para 18.

¹⁴ Motion, para 18.

¹⁵ Motion, para 18.

¹⁶ Motion, para 18.

¹⁷ Response, paras 12, 14-17.

12. The Prosecution can request interviews with prospective defence witnesses and may seek assistance from state authorities to facilitate this contact.¹⁸ As stated by the Appeals Chambers in *Mrkšić et al*, however, the freedom to contact witnesses of the opposing party is not without limitation - particular caution is needed where the Prosecution is seeking to interview a witness who has declined to be interviewed by the Prosecution.¹⁹ The Prosecution's request to the Republic of Serbia in this case is in accordance with the Rules and the response of the witness has been to refuse to be interviewed in the absence of Defence counsel. These events do not preclude the Prosecution from calling Trajković as a witness, and, to that extent, from including his name in its list of witnesses. The Prosecution is on notice, however, that Trajković wishes Defence counsel to be present if he is to be interviewed before giving evidence.

13. In relation to the *Milutinović et al* proceedings, the Prosecution interviewed Živko Trajković twice in 2004 as a suspect.²⁰ He was not indicted nor was he called as a witness in that trial. It was not until November 2008 that the Prosecution sought to contact Trajković with a view to his giving evidence in this trial. Once again, in the absence of specific explanation by the Prosecution, the Chamber can only proceed on the basis that the failure of the Prosecution to include Trajković on its witness list occurred because due attention was not given to this witness. It is clear that since November 2008, the Prosecution has been pursuing efforts to interview Trajković as a prospective witnesses, but, as indicated, without success. The 2004 interviews were disclosed to the Defence on 19 January 2009. However, it is apparent that as it is contemplated that he be called as a Defence witness, the Defence is fully apprised of the evidence this person can give. The inclusion of Trajković in the Prosecution witness list will not, therefore, involve additional preparation by the Defence. Three witnesses for the Prosecution are listed to give evidence in respect of this incident – two survivors, and a member of the reserve police unit called “Skorpions” that was allegedly responsible for the killings that occurred there (Goran Stoparić).²¹ The proposed evidence of Trajković relevant to this incident is not, however, merely repetitive or cumulative on their evidence. It would add significantly to the other contemplated testimony.

14. In view of the above considerations, and despite an apparent lack of due attention by the Prosecution, the Chamber is persuaded that the addition of Živko Trajković would on balance be in the interests of justice.

Slobodan Borisavljević

¹⁸ *Prosecutor v Mrkšić et al*, Case No. IT-95-13/1-AR73, “Decision on Defence Interlocutory Appeal on Communication with Potential Witnesses of the Opposing Party”, 30 July 2003 (“*Mrkšić Appeals Decision*”), para 14.

¹⁹ *Mrkšić Appeals Decision*, paras 13 and 16.

²⁰ Motion, para 18.

²¹ Prosecution's Pre-Trial Brief, Annex II, para 291.

15. Slobodan Borisavljević was the Accused's Chief of Cabinet at the MUP in 1999. His proposed evidence relates to the structure and role of the MUP in Serbia and the deployment of MUP forces in Kosovo at the relevant time. He is expected to give evidence on the reporting system between the MUP forces operating in the field in Kosovo and Belgrade during the relevant time. It is also submitted that he will give evidence on the Accused's role on "sanitizing the battlefields" in Kosovo (*i.e.* removing corpses of Kosovo Albanians), and, particularly, on how Borisavljević processed the paperwork for the payment of expenses for the disposal of a refrigerator lorry containing corpses that had been found in the Danube river in the Tekija region in Serbia. The Chamber is satisfied that the proposed evidence is primarily relevant to the Accused's individual criminal responsibility pursuant to Article 7(1) and 7(3) of the Tribunal's Statute. At this stage, the Chamber sees no appearance of any significant limitation to the probative value of the proposed evidence.

16. Slobodan Borisavljević was interviewed by the Prosecution in 2002 and in 2003, but he refused to sign his statement[s].²² Borisavljević was not called as a witness in the *Milutinović et al* case. On 23 October 2008 and 5 December 2008, the Prosecution unsuccessfully tried summoning Borisavljević for interviews at the Tribunal's Liaison Office in Belgrade, Serbia, with a view to calling him as a witness in this trial.²³ On 15 January 2009 the Prosecution received a full waiver by the Serbian Government and is currently trying yet again to summon Borisavljević for an interview.²⁴ Having interviewed Borisavljević in relation to other proceedings, the Prosecution must have been cognisant of Borisavljević's proximity to the Accused and of the relevance of his proposed evidence since 2002. In the absence of any specific explanation for its failure to include Slobodan Borisavljević in its witness list for this case, the Chamber can only proceed in the assumption that there was a failure to give due attention to this witness until October 2008 when the Prosecution sought to contact him for this trial. It is clear that since then, the Prosecution has been pursuing efforts to interview Borisavljević as a prospective witness without success. Borisavljević's statements of 2002 and 2003 were disclosed to the Defence in December 2008, prior to the commencement of trial. The Chamber accepts that the Defence would be required to conduct additional, although not lengthy, preparations in respect of the proposed testimony. However, the application is made at a very early stage of the proceedings and quite some time is expected before the proposed witness will be called to testify. Should the Defence require more time to conduct investigations in respect of this witness, it should raise the issue at the relevant time.

²² Motion, para 24.

²³ Motion, para 24.

²⁴ Motion, para 24.

17. For the above reasons, the Chamber is persuaded that the addition of Slobodan Borisavljević is in the interest of justice.

Đorđe Kerić

18. Đorđe Kerić was the acting Chief of the Secretariat of the Interior in Užice, Serbia, in 1999. His anticipated evidence concerns conversations that he had in April 1999 with the Accused about the then recent discovery of bodies floating in Perućac Lake in Serbia. It is submitted that during one of these conversations the Accused allegedly ordered Kerić to arrange that MUP officers “clean-up” the bodies found without warning the relevant judicial authorities. The proposed evidence is relevant to the Accused’s individual criminal responsibility pursuant to Article 7(1) and 7(3) of the Tribunal’s Statute. At this stage, the Chamber has no reason to doubt the probative value of his proposed evidence.

19. The Prosecution submits that it has not had any contact with Đorđe Kerić and that it is currently trying to obtain his contact details from the Government of the Republic of Serbia.²⁵ Đorđe Kerić’s statement to the Serbian Ministry of Interior of 27 July 2001 was disclosed to the Defence on 10 December 2008. Despite the absence of any explanation for the Prosecution’s failure to include Đorđe Kerić in its witness list earlier, the Chamber is of the view that no material prejudice will arise as a result of the late addition of this witness to the Prosecution’s witness list. His anticipated evidence does not present factual issues which cannot be investigated at this early stage of the proceedings by the Defence. If there is a particular time difficulty for the Defence in preparing for this witness, that can be raised at the appropriate time. In these circumstances, the Chamber is persuaded that the addition of Đorđe Kerić is in the interest of justice.

Fuad Haxhibeqiri and Florije Gjota

20. The Prosecution also seeking leave to remove Florije Gjota who is not now available to give evidence from its list of witnesses, and to replace this witness with Fuad Haxhibeqir.²⁶ Fuad Haxhibeqir was Chairman of the Council for the Defence of Human Rights and Freedoms in Đakovica/Gjakovë at the relevant time. He is expected to give evidence on the killings and forced expulsion of Kosovo Albanians in Đakovica/Gjakovë. It is submitted that he will also give evidence on the destruction of the old town and the Hadum mosque in the town of Đakovica/Gjakovë. His evidence is, therefore, relevant to all counts (deportation, forcible transfer, murder and persecutions) of the Indictment. It is apparently credible. Florije Gjota, who was listed as a prospective witness in the Prosecution’s witness list of 1 September 2008 had been expected to

²⁵ Motion, para 29.

give an eye-witness account of the forced expulsion of Kosovo Albanians in Đakovica/Gjakovë.²⁷ Unlike Gjota, however, Haxhibeqir is also to give evidence on the damage or destruction of cultural monuments.

21. Fuad Haxhibeqir had given statements to the Prosecution as early as 28 August 2001 and, also, testified as a Prosecution witness in the *Milutinović et al* case.²⁸ The Prosecution, therefore, knew of Fuad Haxhibeqir and his proposed evidence since 2001. The circumstances indicate that the proposal to include Fuad Haxhibeqir in its witness list at this stage is a consequence of the unavailability of Florije Gjota.

22. Although the Prosecution intends to call other witnesses in relation to the killings and forced expulsion of Kosovo Albanians in Đakovica/Gjakovë,²⁹ and a witness regarding the damage and destruction of the Hadum mosque and the old historic quarter in Đakovica/Gjakovë,³⁰ the proposed evidence of Haxhibeqir is not merely repetitive or cumulative of their evidence. His evidence would add significantly to the other contemplated testimony. Furthermore, while the addition of this witness can require some additional preparation on the part of the Defence, his proposed evidence is the subject of the evidence of other witnesses, so that it will not take the Defence into entirely new areas. The Defence has been cognisant of his proposed evidence since 6 July 2007, when the Prosecution disclosed Haxhibeqir's statement and transcripts of his testimony in the *Milutinović et al* case.³¹

23. The Chamber is of the view that the above reasons speak in favour of the requested amendments to the Prosecution's witness list.

24. For the foregoing reasons, the Chamber **GRANTS** the Motion.

Dated this twelfth day of March 2009
At The Hague
The Netherlands



Judge Kevin Parker
Presiding

[Seal of the Tribunal]

²⁶ Motion, para 2.

²⁷ Prosecution's Pre-Trial Brief, Annex II, pp 132-133.

²⁸ Response, para 26; Motion, para 33.

²⁹ For example, Dreni Caka, Merita Deda or Dedaj, Shyhrete Dula, Hani Hoxha, K72, K90, and Malaj Lizane.

³⁰ Shyhrete Dula. See Prosecution's Pre-Trial Brief, Annex II, pp 123-125.

³¹ See Motion, para 33.