



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-03-69-PT

Date: 18 June 2008

Original: English

IN TRIAL CHAMBER III

Before: Judge Patrick Robinson, Presiding
Judge Pedro David
Judge Michèle Picard

Registrar: Mr. Hans Holthuis

Decision of: 18 June 2008

PROSECUTOR

v.

**JOVICA STANIŠIĆ
AND
FRANKO SIMATOVIĆ**

PUBLIC

**DECISION ON PROSECUTION MOTION TO
SUBSTITUTE TWO WITNESSES AND ON MOTION TO
ADD WITNESS RADIĆ**

The Office of the Prosecutor

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Counsel for the Accused

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1. **TRIAL CHAMBER III** (“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 Motion to Substitute Two Witnesses”, filed on 6 March 2008 (“Motion”) and of the “Prosecution Motion to Add Witness Radić”, filed on 2 May 2008 (“Additional Motion”). With the Motion the Prosecution seeks to replace witness Jasmin Odošević with Amor Masović and witness Ivan Gruić with Višnja Bilić respectively. With the Additional Motion, the Prosecution seeks to add witness Anna-Maria Radić as expert witness to complement the testimony of Višnja Bilić.
2. On 18 March 2008, the Defence for Franko Simatović (“Simatović Defence”) filed its “Defence Response to Prosecution Motion to Substitute Two Witnesses” (“Simatović Response”). On 20 March 2008, the Defence for Jovica Stanišić (“Stanišić Defence”) filed its “Defence Response to the Prosecution Motion to Substitute Two Witnesses” (“Stanišić Response”). On 25 March 2008, the Prosecution requested leave to reply and replied to both Defence responses (“Reply”).¹ The Trial Chamber grants the Prosecution’s request for leave to file the Reply.
3. On 16 May 2008, the Stanišić Defence filed its “Defence Response to the Prosecution Motion to Add Witness Radić” (“Stanišić Additional Response”). The Simatović Defence did not respond to the Additional Motion. On 22 May 2008, the Prosecution requested leave to reply and replied to the Stanišić Additional Response (“Additional Reply”).² The Trial Chamber grants the Prosecution’s request for leave to file the Additional Reply.
4. On 28 April 2008, the trial commenced and opening statements were heard on 28 and 29 April. Subsequently, on a number of occasions the trial was adjourned due to a change in the medical condition of the Accused Stanišić.
5. By its decision of 16 May 2008, the Appeals Chamber reversed the Trial Chamber’s Decision on the Future Course of the Proceedings and granted the Defence request “to adjourn the proceedings for a minimum of three months and to reassess the Accused’s state of health before determining when the trial should commence”.³ On 20 May 2008, the Trial Chamber adjourned the proceedings for a period of a minimum three months.⁴

¹ Prosecution Reply on the Motion to Substitute Two Witnesses (“Reply”), 25 March 2008.

² Prosecution Request for Leave to Reply and Reply on the Motion to Add Witness Radić (“Additional Reply”), 22 May 2008.

³ Decision on Defence Appeal on the Decision on Future Course of Proceedings, 16 May 2008, para. 22.

⁴ Hearing 20 May 2008, T. 1258.

Submissions of the Parties

(i) Replacement of Jasmin Odobašić with Amor Masović

6. With regard to the replacement of witness Jasmin Odobašić with Amor Masović, the Prosecution submits that both witnesses are able to testify on exhumations in Bosnia and Herzegovina (BiH), as they are both employed by the BiH State Commission for Tracing Missing Persons.⁵ The Prosecution argues that Amor Masović, as director of the aforementioned institution, would be in a position to provide “better evidence” than his deputy Jasmin Odobašić.⁶ Additionally, the Prosecution submits that Amor Masović was physically present at almost all the exhumations related to crime bases in the present case.⁷ Unlike Jasmin Odobašić who was scheduled to testify as a factual witness, the Prosecution intends to call Amor Masović as an expert witness and indicates that it will submit a written report pursuant to Rule 94 *bis*.⁸ Although the Prosecution notes that Amor Masović testified before this Tribunal in the *Krnojelac*, *Vasiljević* and *Prlić* cases,⁹ it does not indicate whether Amor Masović testified as an expert in these cases. Finally, the Prosecution submits that it will not call Amor Masović until the Defence has had sufficient time to prepare for his cross-examination.¹⁰

7. The Simatović Defence submits that principally, the mere statement that one witness is better than another does not justify an amendment to the Rule 65 *ter* witness list.¹¹ It argues that the Prosecution should have explored who the best witnesses were before filing its Rule 65 *ter* witness list and that, by filing that list, the process of exploration ended. Secondly, it points out that the Prosecution’s proposal should “not be treated as a witness replacement, but rather, as an addition of an expert witness, all without proper reasoning.”¹²

8. As a general remark, the Stanišić Defence submits that, given to the advanced stage of the proceedings at which the new witnesses are introduced, the proposed substitution of witnesses will violate the rights of the Accused to a fair and expeditious trial and to have adequate time and facilities for the preparation of his defence.¹³ It submits the Prosecution failed to show good cause

⁵ Motion, para. 6.

⁶ Motion, para. 7.

⁷ Motion, para. 8.

⁸ Motion, para. 10.

⁹ Motion, para. 9.

¹⁰ Motion, para. 19.

¹¹ Simatović Response, para. 5.

¹² Simatović Response, para. 7.

¹³ Stanišić Response, para. 3.

for the proposed substitution, and argues that the Defence will need to “examine a sizeable amount of material including new exhibits”.¹⁴

9. In relation to the replacement of Jasmin Odošić, the Stanišić Defence argues that the Prosecution had intended to replace this witness with Amor Masović since late 2007 and that, by that time, the Prosecution was already aware of the position occupied by Amor Masović.¹⁵ Thus, the Stanišić Defence submits that the proposed replacement is not in the interests of justice at this late stage of the proceedings.¹⁶ Rather, it argues the interests of justice would warrant a rejection of the Motion.

10. In its Reply the Prosecution submits that hearing the best available evidence is a sufficiently valid justification for the Motion, and that the requested substitution of witnesses is in the interest of justice.¹⁷ Moreover, it submits that it had not decided that the evidence of Amor Masović was “better, more comprehensive, and first-hand at the time of selecting Odošić [...] until filing the Motion.”¹⁸

(ii) Replacement of Ivan Grujić with Višnja Bilić and Anna-Maria Radić

11 With regard to the replacement of Ivan Grujić with Višnja Bilić, the Prosecution submits that both witnesses work for the Croatian Administration for Detained and Missing Persons and are able to testify on exhumations, grave sites, identified victims and data on missing and detained persons.¹⁹ Nevertheless, the Prosecution argues that Višnja Bilić would be a better and more suitable witness than Ivan Grujić since it “understands that there exist allegations of false testimony” against the latter “in the ‘*Glavas*’ trial in Croatia.”²⁰ Thus, the Prosecution submits that the proposed replacement would avoid “unnecessary (and time consuming) challenges or speculations about the credibility and reliability of the expert report.”²¹ The Prosecution submits that Višnja Bilić will also testify as an expert witness and that a written statement, “nearly the same” in nature as Grujić’s, will be submitted pursuant to Rule 94 *bis*.²² Also, the Prosecution indicates that it will not call Višnja Bilić until the Defence has had sufficient time to prepare for her cross-examination.²³ Finally, since Višnja Bilić is not qualified to testify about the issue of

¹⁴ Stanišić Response, para. 4.

¹⁵ Stanišić Response, paras 6 and 7.

¹⁶ Stanišić Response, para. 7.

¹⁷ Reply, para. 6.

¹⁸ Reply, para. 8.

¹⁹ Motion, para. 12.

²⁰ Motion, para. 16 (emphasis in original).

²¹ *Ibid.*

²² Motion, para. 15.

²³ Motion, para. 19.

displaced persons and refugees, the Prosecution stated its intention to call another expert witness on this topic as soon as the latter was identified by the Croatian authorities.²⁴

12 The Simatović Defence submits that it would not be in the interest of justice to amend the Rule 65 *ter* witness list “solely on account of doubt or allegations thereof in respect of a witness’ credibility.”²⁵ Moreover, it submits that since Višnja Bilić appears to be “a less qualified” expert than Ivan Grujić, the Prosecution intends to call another expert regarding the issue of displaced persons and refugees, causing an additional workload for the Defence.²⁶

13 The Stanišić Defence incorporates the general arguments made regarding the replacement of Jasmin Odobašić with Amor Masović.²⁷ Furthermore, it argues that the Prosecution already intended to replace Ivan Grujić at the time of filing the Rule 65 *ter* witness list, since in late 2007 the Prosecution sent requests to Croatia to find a witness to testify in conjunction with Višnja Bilić.²⁸ Thus, the Stanišić Defence argues that the Prosecution failed to “either notify the Defence in a timely manner or include the replacement in the Rule 65 *ter* witness list.”²⁹ It submits that the fact that the Prosecution was waiting for a response from Croatia cannot be considered as a justification for its failure to timely notify the Defence.³⁰

14 In its Reply, the Prosecution submits that the replacement of Ivan Grujić with Višnja Bilić will reduce the Defence workload because Višnja Bilić has never testified before this Tribunal and, thus, the amount of Rule 66 material to be examined by the Defence will be reduced.³¹ Moreover, the Prosecution argues that the parties have discretion to vary the witness list based on the review of a witness’ credibility.³²

15 With the Additional Motion the Prosecution moves to add Anna-Maria Radić as an expert witness to complement the proposed expert testimony of Višnja Bilić. On 18 March 2008, the Republic of Croatia identified and authorised Ms. Anna-Maria Radić to testify as a suitable expert witness on the issues of displaced persons and refugees.³³ The Prosecution submits that the addition of Anna-Maria Radić is in the interests of justice and that her evidence is *prima facie* relevant. In particular, the Prosecution argues that Radić’s testimony will assist the Trial Chamber in

²⁴ Motion, para. 18.

²⁵ Simatović Response, para. 8.

²⁶ Simatović Response, para. 9.

²⁷ See para. 8 of this decision.

²⁸ Stanišić Response, para. 8.

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ Reply, para. 12.

³² Reply, para. 13.

³³ Additional Motion, para. 2.

understanding the evidence related to the charges of deportation and forcible transfer.³⁴ Moreover, the Prosecution submits that the evidence Anna-Maria Radić is expected to provide is “comparable” to that of Ivan Grujić and that the evidence of Višnja Bilić and Anna-Maria Radić combined is “nearly the same” as that of Ivan Grujić.³⁵

16. With regard to the Additional Motion, the Stanišić Defence submits that the Prosecution should have investigated the possible replacement of Ivan Grujić at an earlier stage.³⁶ In particular, it argues that the addition of Anna-Maria Radić will cause prejudice to the Accused since the Defence will have to “reinvestigate a sizeable amount of material presumably including new exhibits” in relation to her testimony,³⁷ and the additional “investigation and research” will be substantial.³⁸ Moreover, it submits that apart from her *curriculum vitae*, no material has been provided in relation to Anna-Maria Radić which would enable the Defence to assess to what extent her evidence would “prejudice the Accused”.³⁹ Finally, it reasserts that the Prosecution had already intended the substitution of Ivan Grujić and the addition of another witness since late 2007 and, thus, acted too late in notifying the Defence of its intention to do so in March 2008 and providing the name of Anna-Maria Radić only on 2 May 2008.⁴⁰

17. In its Additional Reply the Prosecution submits that it acted with due diligence as to the time of the filing of the Additional Motion since the Republic of Croatia only identified and authorised Anna-Maria Radić to testify on 26 March 2008, and that the Prosecution received her *curriculum vitae* only on 28 April 2008.⁴¹ The Prosecution reiterates that since the evidence of Anna-Maria Radić will be “largely similar” to that of Ivan Grujić, the work of the Defence will not be increased and it will not require “re-investigation” on part of the Defence.⁴² Finally, since the trial has been postponed for a minimum of three months⁴³, the Prosecution submits that the Defence will have sufficient time to prepare for cross-examination.⁴⁴

Applicable law

18. The Trial Chamber recalls the applicable law on amendments to the witness list set out in its “Decision on Prosecution Motion to Amend Rule 65 *ter* Witness List”, dated 27 February 2008.

³⁴ Additional Motion, para. 6.

³⁵ Additional Motion, para. 8.

³⁶ Stanišić Additional Response, para. 2.

³⁷ Stanišić Additional Response, para. 6.

³⁸ Stanišić Additional Response, para. 7.

³⁹ *Ibid.*

⁴⁰ Stanišić Additional Response, paras 8 and 9; Stanišić Response, para. 8.

⁴¹ Additional Reply, para. 4.

⁴² Additional Reply, para. 6.

Discussion

(i) Replacement of Jasmin Odobašić with Amor Masović

19. The Trial Chamber is satisfied that the evidence of Amor Masović is *prima facie* relevant to the case. Nevertheless, the Chamber sees no clear reason why the Prosecution did not add Amor Masović to its Witness List at an earlier stage in the proceedings. The Prosecution knew, at the time it added Jasmin Odobašić to its witness list, that Amor Masović was in a position to provide better evidence than Jasmin Odobašić, as it knew that Amor Masović was the director of the BiH State Commission for Tracing missing persons. In particular, the Trial Chamber notes that Amor Masović previously testified before this Tribunal in three different cases. For these reasons, the Trial Chamber considers that the Prosecution failed to show good cause for its request to replace Jasmin Odobašić with Amor Masović. However, the Trial Chamber attaches some weight to the Prosecution's submission that, compared to Jasmin Odobašić's evidence, Amor Masović's evidence is "better, more comprehensive, and first-hand".⁴⁵ The evidence provided by Amor Masović may specifically be "better" due to the fact that, as the Prosecution submits, Amor Masović was physically present at almost all the exhumations related to the crime bases in this case. More importantly, provided that sufficient time is allocated to it to prepare for their cross-examination, the addition of Amor Masović to the witness list need not result in unfair prejudice to the Defence. For these reasons, the Trial Chamber considers the replacement in favour of Amor Masović to be in the interest of justice. The Chamber will ensure, in its management of the case, that the Defence is not prejudiced by the timing of the presentation of the evidence of Amor Masović.

20. As the Prosecution pointed out in its Reply, because Amor Masović already testified in three cases before the Tribunal, the Defence will need more time to prepare the cross-examination of Amor Masović as compared to that of Jasmin Odobašić.⁴⁶ Moreover, the Trial Chamber takes into account the fact that, while the Prosecution intended to call Jasmin Odobašić as a fact witness,⁴⁷ it intends to call Amor Masović as an expert witness. The Defence will therefore need additional time to examine the written statement of this witness. In this regard, the Trial Chamber stresses that the full statement of Amor Masović pursuant to Rule 94 *bis* as well as his previous testimony before this Tribunal will have to be filed before 18 August 2008.

⁴³ *Prosecution v. Stanišić and Simatović.*, IT-03-69-AR73.2, Decision on Defence Appeal of the Decision on Future Course of the Proceedings, filed on 16 May 2008, para. 22.

⁴⁴ Additional Reply, para. 7.

⁴⁵ Reply, para. 8.

⁴⁶ See Reply, para. 12.

⁴⁷ The Trial Chamber notices that witness Jasmin Odobašić was initially supposed to be called as an expert witness and that on June 18 2007, in contrast with its initial classification, the Prosecution notified its intention to call him as a factual witness, Prosecution's Notification of Intention to Call Witness B-200 and C-058 *Viva Voce* and Notification in Relation to Witness Odobašić, filed on 18 June 2007.

(ii) Replacement of Ivan Grujić in favour of Višnja Bilić and Anna Maria Radić

21 The Trial Chamber is also satisfied that the evidence of Višnja Bilić and Anna-Maria Radić is *prima facie* relevant. In evaluating whether the Prosecution has shown good cause for the substitution of these witnesses, the Trial Chamber takes into consideration that circumstances have arisen potentially influencing the credibility of this witness. Thus, it seems reasonable that the Prosecution investigated into finding a witness whose testimony is, *prima facie*, more reliable.

22 Whether it may or may not have been possible for the Prosecution to place the current request before the Trial Chamber at an earlier stage, provided that sufficient time is allocated to it to prepare for their cross-examination the Chamber considers that the addition of Višnja Bilić and Anna-Maria Radić to the witness list need not result in unfair prejudice to the Defence. The reports of Višnja Bilić and Anna-Maria Radić are expected to be similar to that of Ivan Grujić, and the Chamber considers that the proposed substitution would, *prima facie*, appear to produce more reliable evidence. In these circumstances, the Chamber concludes that it is in the interest of justice to allow the Prosecution to add Višnja Bilić and Anna-Maria Radić to its witness list. The Prosecution will disclose the full statement and/or report of Višnja Bilić and Anna-Maria Radić pursuant to Rule 94 *bis* before 18 August 2008. The Chamber will ensure, in its management of the case, that the Defence is not prejudiced by the timing of the presentation of the evidence of Višnja Bilić and Anna-Maria Radić.

Disposition

For the foregoing reasons, the Trial Chamber **GRANTS** leave to Reply to the Motion and the Additional Motion, **GRANTS** the Motion and the Additional Motion, and **ORDERS** the Prosecution to disclose the full statement and/or report of Amor Masović, Višnja Bilić and Anna-Maria Radić pursuant to Rule 94 *bis* before 18 August 2008.

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



Judge Patrick Robinson
Presiding

Dated this eighteenth day of June 2008
At The Hague
The Netherlands

[Seal of the Tribunal]