



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-04-81-T
Date: 30 October 2009
Original: English

IN TRIAL CHAMBER I

Before: Judge Bakone Justice Moloto, Presiding
Judge Pedro David
Judge Michèle Picard

Registrar: Mr. John Hocking

Decision of: 30 October 2009

PROSECUTOR

v.

MOMČILO PERIŠIĆ

AMENDED PUBLIC REDACTED VERSION

**DECISION ON PROSECUTION'S MOTION TO
SUBSTITUTE EXPERT WITNESS**

The Office of the Prosecutor

Mr. Mark Harmon
Mr. Daniel Saxon

Counsel for the Accused

Mr. Novak Lukić
Mr. Gregor Guy-Smith

TRIAL CHAMBER I (“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 Expert Witness with Annexes A and B”, filed confidentially on 19 August 2009 (“Initial Motion”),¹ and the “Prosecution’s Addendum to Motion to Substitute Expert Witness with Annexes A and B”, filed confidentially on 7 September 2009 (“Addendum”)² (collectively, the “Motion”), and hereby renders its Decision.

1. In its Motion, the Prosecution seeks leave to amend its Rule 65*ter* witness list by replacing expert witness General Constantin Degeratu. In the Initial Motion, the Prosecution sought to replace General Degeratu with General Sir Richard Dannatt.³ However, nine days after the Initial Motion was filed, General Dannatt recommended to the Prosecution that Major General Mungo Melvin would be a better qualified expert witness to address the questions submitted by the Prosecution.⁴ Consequently, in the Addendum, the Prosecution now wishes to substitute General Degeratu with Major General Melvin.⁵

I. SUBMISSIONS

A. Prosecution

2. The Prosecution submits that both General Degeratu and Major General Melvin are able to testify as expert witnesses on the co-operation and coordination between the Yugoslav Army (“VJ”), the Army of Republika Srpska (“VRS”) and the Army of Serbian Krajina (“SVK”).⁶ The Prosecution argues this evidence was relevant to prove allegations in the Indictment regarding the position and authority of the Accused, the exercise of that authority to provide VJ officers to the VRS and the SVK and the superior responsibility that the Accused retained in relation to those officers.⁷

3. The Prosecution argues it has good cause to make an expert witness substitution, as General Degeratu has failed to produce his final report by their agreed February 2009 due date despite repeated Prosecution efforts.⁸ General Degeratu indicated in a 16 July 2009 meeting that he is now in a position to finalise the report, but the Prosecution asserts a lack of confidence in this

¹ Signed on 18 August 2009.

² Signed on 4 September 2009.

³ Initial Motion, paras 1 and 14.

⁴ Addendum, para. 4.

⁵ Addendum paras 1-2.

⁶ Initial Motion, para. 2; Addendum, para. 2.

⁷ Addendum, para. 2, referring to Indictment paras 2-23, 29, 34-37.

statement.⁹ The Prosecution submits that Major General Melvin has confirmed his availability to produce a brief report (“Melvin Report”) containing responses to four of the seven questions originally put to General Degeratu.¹⁰ The Prosecution expects the report to be available for disclosure by 18 September 2009.¹¹

B. Defence

4. In its “Response to Prosecution’s Addendum to Motion to Substitute Expert Witness” filed on 11 September 2009 (“Response”), the Defence alleges that the Prosecution has not shown good cause to make a substitution and asserts that the substitution prejudices the Defence. The Defence alleges that the Melvin Report would be delivered well beyond the early 2007 deadline the pre-trial Chamber initially imposed for General Degeratu’s final report¹² and states that this Trial Chamber has already indicated that violation of such a deadline is reason enough to strike a report.¹³ The Defence also asserts that the Prosecution gives no justification as to why the difficulties it faced in obtaining General Degeratu’s report were not disclosed to the Trial Chamber or the Defence earlier.¹⁴

5. The Defence also argues that significant prejudice is present in that the submission of a “brand” new expert report a year into the trial is “unconscionable.”¹⁵ Though both experts are reporting on the same subject matter, the Defence asserts that this observation assumes a “uniformity of approach by both the witnesses [...] which is certainly not the case.”¹⁶ They also call to the Chamber’s attention that General Degeratu’s provisional report did not contain any references.¹⁷

II. APPLICABLE LAW

6. Pursuant to Rule 73bis(F) of the Rules of Procedure and Evidence (“Rules”), a Trial Chamber may grant a motion requesting an amendment of the witness list if it is satisfied that doing

⁸ Addendum, para. 3, referring to Initial Motion, para. 8; Annex A.

⁹ Addendum, para. 3, referring to Initial Motion, para. 9.

¹⁰ Addendum, para. 5. The questions to be asked are included in Annex A of the Addendum.

¹¹ Addendum, para. 6.

¹² Response, para. 2. *See also* Order on Defence Submissions Regarding Various Experts’ Reports Disclosed by the Prosecution Pursuant to Rule 94 bis, 2 February 2007 (giving the Prosecution fourteen days from the decision to issue a final version of General Degeratu’s report).

¹³ Response, para. 17. *See also* Decisions on Defence Motion to Exclude Reports of Mr. Patrick J. Treanor, 27 October 2008 (“Treanor Expert Report Decision”), para. 16.

¹⁴ Response, para. 19.

¹⁵ Response, para. 27.

¹⁶ Response, para. 24.

¹⁷ Response, para. 11.

so is in the interests of justice.¹⁸ 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 to have adequate time and facilities to prepare a defence.¹⁹ In making its determination, the Trial Chamber may also take into consideration several factors,²⁰ including whether the proposed evidence is *prima facie* relevant and of probative value in accordance with Rule 89(C) of the Rules and whether the probative value is outweighed by the need to ensure a fair trial.²¹ The Trial Chamber may further consider the actual stage of the trial and other circumstances specific to the case, as well as whether good cause has been shown for the amendment of the witness list and whether any prejudice is caused to the defence by the addition of the witness²²

III. DISCUSSION

7. The Trial Chamber notes that Major General Melvin's anticipated evidence relates to the interrelationship between the VJ, VRS and SVK and the Accused's authority over members of these armies, key issues in the present case. The Trial Chamber is satisfied that this evidence is *prima facie* relevant and of probative value.

8. The Trial Chamber is mindful of the advanced stage of the proceedings and the imminent end of the Prosecution's case. However, the Trial Chamber is satisfied that this substitution at the current stage of the proceedings does not cause prejudice to the Defence. The Trial Chamber notes that Major General Melvin's expected evidence is identical in subject matter to that of General Degeratu and that the substitution is not expected to materially change the anticipated report or corresponding testimony. The Trial Chamber recalls the Prosecution's assertions that Major General Melvin's report will be "brief" and only answer four of the seven questions originally posed to General Degeratu. Moreover, the Defence has been in possession of General's Degeratu's provisional expert report, and has therefore been aware of his proposed evidence, since 7 November

¹⁸ Rule 73bis(F) of the Rules; *Prosecutor v. Haradinaj et al.*, Case No. IT-05-88-T, Confidential Decision on Prosecution's Request to Add Two Witnesses to Its Witness List And to Substitute One Witness for Another, 1 November 2007, ("*Haradinaj Decision*") para. 3; *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, Decision on Prosecution Second Renewed Motion for Leave to Amend Its Rule 65ter List to Add Michael Phillips and Shaun Byrnes, 12 March 2007, ("*Milutinović Decision*") para. 18; *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-T, Decision on Prosecution's Motions for Leave to Amend Rule 65ter Witness List and Rule 65ter Exhibit List, 6 December 2006 ("*Popović Decision*"), p. 6, with further references.

¹⁹ Articles 20(1) and 21(4)(b) of the Statute of the Tribunal ("*Statute*"). *Popović Decision*, p. 6, with further references. See also Decision on Prosecution's Motion for Leave to Amend its Rule 65 ter Witness List With Annexes A and B and *ex Parte Annex C*, 26 May 2008, para. 7.

²⁰ See *Haradinaj Decision* para. 4; *Milutinović Decision*, para. 18; *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Decision on Prosecution's Request to Call Witness C-063, 18 February 2004, p. 2.

²¹ Rules 89(C) and 89(D) of the Rules.

²² *Haradinaj Decision*, para. 4; *Milutinović Decision*, para. 18; *Popović Decision*, pp 6-7, with further references.

2006.²³ The Trial Chamber is therefore satisfied that the substitution of the expert witness does not violate the Accused's right to a fair trial or the principle of equality of arms.

9. Furthermore, the Trial Chamber notes that Rule 94 *bis* gives the Defence 30 days from the disclosure of the expert report by the Prosecution to form its opinion about the expert and his report. In the present case, this timeframe should be adequate for the Defence to prepare a defence.

10. The Prosecution presented evidence of well over a dozen attempts to contact General Degeratu by telephone and email [REDACTED]. When balanced against his consistent unreliability, the Trial Chamber finds that the Prosecution's lack of confidence that General Degeratu can finish the report in a timely fashion is reasonable. The Trial Chamber is therefore satisfied that the Prosecution has shown good cause for seeking the substitution of General Degeratu.

11. Finally, the Trial Chamber notes that the Defence's argument regarding this Trial Chamber's earlier Treanor Expert Report Decision incorrectly states the law. Said decision explained that violating a deadline is "a reason" among others to strike a late report,²⁴ and *not* that it is "reason enough" to do so. There were other reasons for striking the Treanor report²⁵ that are not present on the facts before the Chamber now.

²³ Defence Notice Pursuant to Rule 94 *bis* Concerning Expert Constantin Degeratu and Motion to Strike Report, 28 November 2006, para. 1.

²⁴ Treanor Expert Report Decision, para. 16.

²⁵ Other reasons given for striking one of Mr. Treanor's two reports included concerns over methodology, Mr. Treanor's specialised knowledge on the topic, and the report's probative value. *See Ibid.*, paras 25-29.

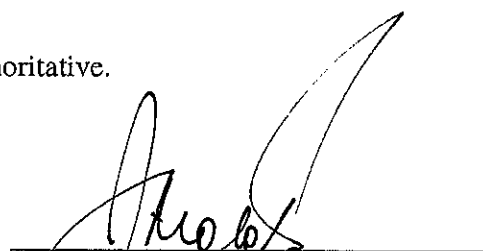
IV. DISPOSITION

12. **FOR THE FOREGOING REASONS** and **PURSUANT TO** Rule 73bis(F) of the Rules, the Trial Chamber hereby

GRANTS the Motion, and

GRANTS the Prosecution leave to amend its 65^{ter} witness list by substituting General Constantin Degeratu with Major General Mungo Melvin.

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



Judge Bakone Justice Moloto
Presiding Judge

Dated this thirtieth day of October 2009

At The Hague

The Netherlands

[Seal of the Tribunal]