

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: 21 May 2009
Original: English

IN TRIAL CHAMBER II

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

Registrar: Mr John Hocking, Registrar

Decision: 21 May 2009

PROSECUTOR

v.

VLASTIMIR ĐORĐEVIĆ

PUBLIC

**DECISION ON PROSECUTION'S MOTION TO ADD MILAN
ĐAKOVIĆ TO 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 24 April 2009, seeking to add Milan Đaković to its witness list filed on 1 September 2008 (“Motion”).¹ On 8 May 2009, Counsel for Vlastimir Đorđević (“Defence”) objected to the Motion in its entirety (“Response”).² On 15 May 2009, the Prosecution requested authorisation to file the reply as set forth in the filing (“Reply”).³ A summary of Milan Đaković’s anticipated evidence is annexed to the Reply.

I. SUBMISSIONS

2. The Prosecution submits that the evidence of Milan Đaković is relevant and has probative value and that his addition to the witness list is in the interests of justice.⁴ In particular, it is submitted that Milan Đaković will provide significant testimony on the Joint Command and will comment on a number of documents relating to that organ, including a notebook on meetings of the Joint Command.⁵ The Prosecution submits that Milan Đaković’s evidence on the Joint Command is particularly important in view of the Trial Chamber’s decision of 5 March 2009 disallowing prospective witness Philip Coo to testify as an expert witness.⁶ The Prosecution further submits that it has provided the Defence with all documents in its possession pertaining to this witness, noting that they have been disclosed to the Defence on 11 December 2007, 21 May 2008, and 5 September 2008, and that the proposed witness testified in the *Prosecutor v Milutinović et al* case.⁷ The Prosecution also submits that Milan Đaković’s testimony will not result in unreasonable delay in the proceedings, and that, provided that the Motion is granted, it will call the witness at a late stage in the trial so that the Defence would have adequate time to prepare for cross-examination.⁸ Finally, the Prosecution submits that the anticipated evidence of Milan Đaković will allow the Chamber to have a better understanding of the coordination between the police and army at the time relevant to the Indictment.⁹

¹ *Prosecutor v Vlastimir Đorđević*, Case No. IT-05-87/1-T, “Prosecution’s Motion to Add Milan Đaković to the Rule 65ter Witness List”, 24 April 2009.

² *Prosecutor v Vlastimir Đorđević*, Case No. IT-05-87/1-T, “Vlastimir Đorđević’s Response to Prosecution’s Motion to Add Milan Đaković to the Rule 65ter Witness List”, 8 May 2009.

³ *Prosecutor v Vlastimir Đorđević*, Case No. IT-05-87/1-T, “Prosecution’s Request for Leave to Reply Re Motion to Add Milan Đaković to the Rule 65ter Witness List”, 15 May 2009.

⁴ Motion, paras 3-8, 11.

⁵ Motion, para 8.

⁶ Motion, para 7.

⁷ Motion, paras 9-11.

⁸ Motion, paras 11-12.

⁹ Motion, para 8.

3. The Defence responds that the Prosecution has not shown good cause as to why the addition of Milan Đaković was not sought earlier and how he now appears necessary to replace the previously sought expert witness Philip Coo.¹⁰ The Defence further submits that granting the Motion would be contrary to the interests of justice.¹¹ More specifically, the Defence submits that the relevance of Milan Đaković's evidence is limited as it relates to the operation of the Joint Command in the period preceding the Indictment.¹² The Defence further submits that because the Defence filed an objection to the testimony of Philip Coo on 30 May 2008, the Prosecution was obliged to make provisions to tender any intended evidence through alternative witnesses.¹³ It is also submitted that Milan Đaković should not be considered as a replacement for Philip Coo's expert testimony since it was not anticipated that Coo would give evidence on the Joint Command.¹⁴ The Defence submits that the Motion is not filed at an early stage of the Prosecution case, and that at this stage significant time would be needed to prepare for this witness.¹⁵ The Defence further argues that the Prosecution should have applied to have Milan Đaković added earlier as it knew of his testimony in the *Milutinović* case since May 2008, and was in possession of documents relating to his proposed evidence prior to that date.¹⁶ The Defence also advances that as the Motion is the third submission sought by the Prosecution to amend its witness list since the commencement of trial, it appears that the Prosecution is "attempting to tailor the case to the evidence heard as it goes along".¹⁷

4. In its Reply the Prosecution submits that the allegation that it is "tailoring evidence" is unsubstantiated, and that the Defence has made inaccurate submissions regarding relevance of the proposed testimony.¹⁸ With respect to the Defence's submissions regarding the evidence of Philip Coo, it is submitted that both his Rule 65ter summary and his associated expert report indicated that his proposed testimony would address the Joint Command.¹⁹

II. LAW

5. 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)

¹⁰ Response, p. 2, paras 6 and 18.

¹¹ Response, p. 2, paras 6 and 18.

¹² Response, para 11.

¹³ Response, paras 12, 14-15.

¹⁴ Response, paras 16-17.

¹⁵ Response, paras 10 and 19.

¹⁶ Response, paras 7 and 12.

¹⁷ Response, para 10.

¹⁸ Reply, paras 5-8.

¹⁹ Reply, para 9.

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.²⁰ 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.²¹

6. 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.

III. DISCUSSION

7. The Prosecution submits that Milan Đaković's addition to its witness list is warranted in ~~light of the Trial Chamber's ruling that Philip Coo will not give evidence as an expert witness~~²²

The Prosecution submits that given that Philip Coo will testify as a witness of fact he will not give evidence on the Joint Command for Kosovo and will not be allowed to comment on a number of important associated documents in the Prosecution's exhibit list.²³ It is submitted that Milan Đaković, on the other hand, will, in light of his position, provide significant evidence on the Joint Command.²⁴

8. Milan Đaković was the Chief of the Department for Operations and Teaching in the command of the Priština corps from the end of 1997 until 20 January 1999. He then covered the same position for the 3rd Army, serving under the command of General Pavković. He was invited by General Pavković to attend meetings of the Joint Command for Kosovo and kept a detailed notebook recording the events and the attendance of Joint Command meetings from 22 July 1998 to 30 October 1998. His expected evidence relates to the Joint Command and its meetings which were

²⁰ *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.

²¹ *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.

²² Motion, paras 7-8; *See, Prosecutor v Vlastimir Đorđević*, Case No. IT-05-87/1-T, "Decision on Defence Notice under Rule 94bis", 5 March 2009.

²³ Motion, paras 7-8.

attended by the Accused Vlastimir Đorđević and other members of the joint criminal enterprise alleged in the Indictment. It is also submitted that he will give evidence on the coordination between the VJ and MUP during combat activities in Kosovo. The Chamber finds that the proposed evidence is relevant to the Accused's alleged responsibility pursuant to Article 7(1) and 7(3) of the Statute. At this stage, the Chamber has no reason to doubt the probative value of his proposed evidence.

9. Philip Coo, a Canadian military analyst formerly employed by the OTP, was listed as a prospective witness in the Prosecution's witness list of 1 September 2008. He was expected to give evidence on the "organization, operations and conduct of the forces of the FRY and Serbia" that were active in Kosovo during the relevant time period.²⁵ In his expert report disclosed by the Prosecution pursuant to Rule 94bis, Coo deals with the Joint Command for Kosovo in quite some detail.²⁶ In a decision dated 5 March 2009, this Chamber found that because of the extent of Coo's involvement in the preparation of the Prosecution case, he would not testify as an expert witness and his report would not be admitted into evidence.²⁷ The Chamber notes, that in light of this ruling, if the Prosecution were to call Philip Coo, he would testify as a witness of fact. Unlike Milan Đaković, Philip Coo does not have direct knowledge on the Joint Command for Kosovo. The Chamber, therefore, accepts that good cause existed for Milan Đaković to be added at this stage of the trial.

10. Although the Prosecution intends to call other witnesses in relation to the Joint Command,²⁸ Milan Đaković's evidence is not merely repetitive or cumulative of their evidence. His evidence would add significantly to the other contemplated testimony, particularly in view of the fact that he personally attended Joint Command meetings in 1998, and that he is expected to give evidence on a notebook recording the events and the attendance of Joint Command meetings from 22 July 1998 to 30 October 1998. While this is before the period alleged in the Indictment that does not preclude this evidence may be of relevance to the matters alleged in the Indictment. 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 in the Indictment,²⁹ and are the subject of the

²⁴ Motion, para 8.

²⁵ *Prosecutor v Vlastimir Đorđević*, Case No. IT-05-87/1-T, "Prosecution's Pre-Trial Brief, Confidential Annex II, Prosecution's Witness List", pp 107-108.

²⁶ "Forces of the FRY & Serbia in Kosovo", report by Philip Coo, part II, Section 5.

²⁷ *See, Prosecutor v Vlastimir Đorđević*, Case No. IT-05-87/1-T, "Decision on Defence Notice under Rule 94bis", 5 March 2009, para 20.

²⁸ For example, Ljubinko Cvetić, Zlatomir Pešić, and Aleksandar Vasiljević (*See, Prosecutor v Vlastimir Đorđević*, Case No. IT-05-87/1-T, "Public Redacted Version of the Prosecution's Pre-Trial Brief", paras 95-120; *Prosecutor v Vlastimir Đorđević*, "Prosecution's Pre-Trial Brief, Confidential Annex II, Prosecution's Witness List", pp 114-116, 228-229, 260-264).

²⁹ *See* paras 61 and 62 of the Indictment.

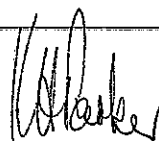
evidence of other witnesses,³⁰ so that it will not take the Defence into entirely new areas. Furthermore, Milan Đaković's statement to the OTP and the notebook recording the events and attendance of the Joint Command meetings together with his hand-written additions to the notebook, were disclosed to the Defence on 11 December 2007, 5 September 2008 and 21 May 2008 respectively, prior to the commencement of trial.

11. In view of the above considerations, the Chamber is persuaded that the addition of Milan Đaković is in the interests of justice.

12. For the foregoing reasons, pursuant to Rule 73bis(F) and 126bis of the Rules, the Chamber:

- (1) **GRANTS** leave to the Prosecution to file the Reply; and
- (2) **GRANTS** the Motion.

Dated this 21st day of May 2009
At The Hague
The Netherlands



Judge Kevin Parker
Presiding

[Seal of the Tribunal]

³⁰ See *supra* footnote 29.