

**UNITED
NATIONS**



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-95-11-T
Date: 28 November 2006
Original: English

IN TRIAL CHAMBER I

Before: Judge Bakone Justice Moloto, Presiding
Judge Janet Nosworthy
Judge Frank Höpfel

Registrar: Mr. Hans Holthuis

Decision of: 28 November 2006

PROSECUTOR

v.

MILAN MARTIĆ

**DECISION ON DEFENCE'S MOTION TO EXCLUDE
THE EVIDENCE OF REYNAUD THEUNENS AND TO
CALL AN INDEPENDENT MILITARY EXPERT WITH
CONFIDENTIAL ANNEXES A, B, C, D AND E**

The Office of the Prosecutor:

Mr. Alex Whiting
Ms. Anna Richterova
Mr. Colin Black
Ms. Nisha Valabhji

Counsel for the Accused:

Mr. Predrag Milovančević
Mr. Nikola Perović

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”);

BEING SEISED of the “Defence’s Motion to Exclude the Evidence of Reynaud Theunens and to Call an Independent Military Expert With Confidential Annexes A, B, C, D and E” filed on 20 November 2006 (“Motion”) wherein the Defence requests the Trial Chamber to exclude the evidence of Military Expert Reynaud Theunens, and for the Trial Chamber to call an independent military expert witness, *inter alia* on the grounds that:

1. two recent Decisions by the Trial Chamber in *Milutinović et al.* have “firmly established that proximity to the Prosecution team [...] is a disqualifying factor for a witness to give evidence as an expert”,¹
2. Reynaud Theunens is employed by the Office of the Prosecutor (“OTP”); he participated in the collection of documents for the OTP; he acted as an OTP investigator in a number of interviews with witnesses; he was “acquainted with the OTP’s strategy in this trial and other evidence unrelated to his ‘expertise’”; he has been engaged as the OTP expert in other trials before the Tribunal; and he took for granted certain basic allegations of the OTP;²

NOTING the “Prosecution’s Response to Defence’s Motion to Exclude the Evidence of Reynaud Theunens and to call an Independent Military Expert” filed on 22 November 2006 (“Response”), in which the Prosecution opposes the Motion, *inter alia*, on the grounds that:

1. the filing of a Motion of this type is too late,³
2. the only change in circumstance which has taken place is the handing down of the *Milutinović* Decisions which are decisions of another Trial Chamber and therefore not binding,⁴
3. there is nothing in the Motion which should lead the Trial Chamber to change its view on Reynaud Theunens’ impartiality,⁵

¹ Motion, para. 5, citing *Prosecutor v. Milutinović et al.* Oral Decision at T. 840-844, 13 July 2006 and “Decision on Prosecution Request for Certification of Interlocutory Appeal of Decision on Admission of Witness Philip Coo’s Expert Report” of 30 August 2006 (“*Milutinović* Decisions”).

² Motion, paras 8-11.

³ Response, para. 2.

⁴ Response, para. 3.

⁵ Response, para. 6.

4. the Defence “attack” on Reynaud Theunens’ alleged bias must go to weight not admissibility;⁶

NOTING that the Military Expert Report of Reynaud Theunens was admitted into evidence pursuant to the Trial Chamber’s “Decision on Prosecution’s Motions for Admission of Transcripts Pursuant to Rule 92 *bis* (D) and of Expert Reports Pursuant to Rule 94 *bis*” handed down on 13 January 2006 (“Decision of 13 January 2006”), and that Reynaud Theunens testified before this Trial Chamber from 26 January to 3 February 2006;

NOTING that in the Decision of 13 January 2006 the Trial Chamber considered the objections raised by the Defence regarding the status of Reynaud Theunens as an expert and the admission of his Expert Report on the basis of his alleged partiality in light of his position in the OTP, and dismissed those objections;⁷

CONSIDERING that in the absence of information as to the Rules or jurisprudence upon which the Defence bases its Motion, the Trial Chamber understands the Motion to be either a motion for reconsideration of the Trial Chamber’s Decision of 13 January 2006, or a motion for the exclusion of evidence under Rule 95 of the Rules of Procedure and Evidence (“Rules”);

NOTING that the established standard for a Trial Chamber to reconsider its own decision was set by the Appeals Chamber in *Galić*, which held that:

[a] Trial Chamber may [...] always reconsider a decision it has previously made, not only because of a change of circumstances but also where it is realised that the previous decision was erroneous or that it has caused an injustice;⁸

NOTING that Rule 95 provides that:

No evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings;

CONSIDERING that the Trial Chamber fails to understand the argument of the Defence that a decision taken in another case at trial before this Tribunal should result in this Trial Chamber reconsidering a Decision it has made in the present case;

⁶ Response, para. 7-8.

⁷ Decision of 13 January 2006, paras 37-39.

⁸ *Prosecutor v. Galić*, Case No. IT-98-29-AR73, Decision on Application by Prosecution for Leave to Appeal, 14 December 2001, para. 13.

CONSIDERING that the Motion does not show a change of circumstances which would cause the Trial Chamber to reconsider its Decision of 13 January 2006, nor does it demonstrate any cause for the Trial Chamber to consider that Decision erroneous or to have caused an injustice;

CONSIDERING that nothing in the Motion casts “substantial doubt” on the reliability of the Expert Report of Reynaud Theunens, nor does the Trial Chamber find its admission to be adverse to or cause serious damage to the integrity of the proceedings;

CONSIDERING that the appropriate time for the Defence to object to Reynaud Theunens was subsequent to the Prosecution’s submission of the Expert Report of Reynaud Theunens, in line with Rule 94 *bis*, or during cross-examination, and that even if it were the case that the information cited in the Defence objections as regards Reynaud Theunens’ impartiality only became available to the Defence subsequent to the Decision of 13 January 2006 and his testimony, the most appropriate manner for the Defence to counter his contentions would have been either to bring this information to the attention of the Trial Chamber at the moment this information became available to it or to call a military expert witness of its own, or to otherwise challenge the assertions of Reynaud Theunens through testimony and evidence during the Defence case;

NOTING that the Defence *did* in fact bring a military expert, Milisav Sekulić, before this Trial Chamber, that the Trial Chamber accepted Milisav Sekulić as a military expert, and that the Trial Chamber admitted the parts of his Expert Report which it deemed relevant and of probative value, thereby excluding those parts of the Report which the Trial Chamber considered lacked relevance to the issues before the Trial Chamber, the subject-matter of which fell outside the scope of Milisav Sekulić’s expertise, which pronounced upon the “ultimate issue”, and which contained “wholly inappropriate, inflammatory and argumentative statements which lack impartiality and objectivity, and reflect the obvious bias of the author”;⁹

NOTING that the Defence chose to withdraw the military Expert Report of Milisav Sekulić and to withdraw him from the witness list;¹⁰

CONSIDERING that this unilateral exercise of tactical discretion on the part of the Defence cannot now be viewed as having denied the Defence the opportunity to counterbalance the contentions of Reynaud Theunens, and **RECALLING** that the Defence had the opportunity to thoroughly cross-examine Reynaud Theunens at the time of his testimony;

⁹ Decision on Defence’s Submission of the Expert Report of Milisav Sekulić Pursuant to Rule 94 *bis*, and on Prosecution’s Motion to Exclude Certain Sections of the Military Expert Report of Milisav Sekulić, and on Prosecution Motion to Reconsider Order of 7 November 2006, of 13 November 2006.

¹⁰ Hearing, 15 November 2006, T. 11138-11141.

BEING FULLY AWARE of the status of Reynaud Theunens as an employee of the Office of the Prosecutor, as well as of his involvement in the present case, and **NOTING** that the Trial Chamber will take Reynaud Theunens' position into consideration when assessing the weight to be attached to his evidence;

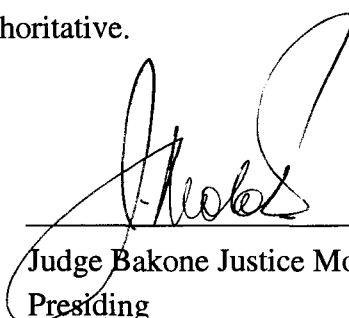
CONSIDERING therefore, that the Trial Chamber does not find there to be any reason to admit the annexes to the Motion;

FINDING that the Defence has failed to meet the standard required for reconsideration of the Trial Chamber's Decision, that the Defence has not given any reasons why Reynaud Theunens' Expert Report should be excluded pursuant to Rule 95, and, therefore, that there is no need for the Trial Chamber to examine the Defence submission concerning Rule 98;

PURSUANT to Rule 54 and Rule 95,

DENIES the Motion.

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



Judge Bakone Justice Moloto
Presiding

Dated this twenty-eighth day of November 2006

At The Hague

The Netherlands

[Seal of the Tribunal]