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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-04-81-T
Date: 1 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: 01 October 2009

PROSECUTOR

v.

MOMČILO PERIŠIĆ

CONFIDENTIAL

**DECISION ON MOTION FOR RECONSIDERATION OF
TRIAL CHAMBER DECISION REGARDING
SUBSTITUTION OF PROSECUTION 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 Defence “Motion for Reconsideration of Trial Chamber Decision Regarding Substitution of Prosecution Expert Witness”, filed confidentially on 25 September 2009 (“Motion”)¹ and hereby renders its Decision.

I. PROCEDURAL BACKGROUND

1. On 19 August 2009,² the Prosecution filed its confidential “Prosecution Motion to Substitute Expert Witness with Annexes A and B” (“Initial Motion”) followed on 7 September 2009 by the confidential “Prosecution’s Addendum to Motion to Substitute Expert Witness with Annexes A and B” (“Addendum”)³ (collectively, the “Original Motion”), whereby the Prosecution sought to amend its 65 *ter* list by substituting expert witness General Constantin Degeratu with Major General Mungo Melvin.⁴

2. On 17 September 2009, this Trial Chamber rendered its confidential “Decision on Prosecution’s Motion to Substitute Expert Witness” (“Impugned Decision”), in which it granted the Original Motion, allowing the Prosecution to amend its 65 *ter* witness list by substituting expert witness Major General Melvin.⁵

II. SUBMISSIONS

A. Defence

3. In its Motion, the Defence seeks reconsideration of the Impugned Decision on grounds that the Trial Chamber erred in law “in allowing the Prosecution to disregard orders of the court and substitute General Degeratu with Major General Melvin without demonstrating good cause.”⁶ According to the Defence, the Trial Chamber failed to address the “crux” of the Defence’s argument in its “Response to Prosecution’s Addendum to Motion to Substitute Expert Witness” filed on 11 September 2009 (“Original Response”),⁷ that the Prosecution disregarded two orders of the Pre-Trial Judge to submit to the Defence the final report of General Degeratu.⁸

¹ Signed on 25 September 2009.

² Signed on 18 August 2009.

³ Signed on 4 September 2009.

⁴ Original Motion, para. 14; Addendum, para. 7.

⁵ Impugned Decision, para. 12.

⁶ Motion, paras 5-10.

⁷ Original Response, para. 17.

⁸ Motion, para. 8; *see also* Original Response, paras 3-12.

4. The Defence further challenges the Chamber's finding that good cause existed for the witness substitution and alleges that the Prosecution bears the burden of demonstrating good cause for both the untimely filing of the report and the substitution itself.⁹ The Defence finally reasserts its arguments that the untimeliness of a report is reason enough to reject the filing of the report.¹⁰

B. Prosecution

5. On 29 September 2009, the Prosecution filed its confidential "Prosecution's Response to Defence 'Motion for Reconsideration of Trial Chamber Decision Regarding Substitution of Prosecution Expert Witness'" ("Response"), wherein it argues that the Trial Chamber correctly focused on the core issue in the Original Motion; whether the witness substitution would prejudice the Defence's right to a fair trial.¹¹ The Prosecution also indicates that the Defence's arguments in relation to the two Pre-Trial Judge orders ignores the submissions made during the Status Conference of 2 September 2008¹² and other comments by the Pre-Trial Chamber¹³ indicating that no fixed deadline existed for producing General Degeratu's final expert report.¹⁴

III. DISCUSSION

6. The Trial Chamber recalls that according to the jurisprudence of the Tribunal, the Trial Chamber has inherent discretionary power to reconsider a previous decision if there has been a clear error of reasoning or if particular circumstances exist that justify reconsideration in order to prevent an injustice¹⁵ and that the requesting party is under "an obligation to satisfy the Chamber of the existence of such error in reasoning, or of the existence of particular circumstances justifying reconsideration in order to prevent an injustice."¹⁶ Such circumstances may include new facts or arguments that have arisen since the issuance of a decision.¹⁷

⁹ Motion, para. 11.

¹⁰ Motion, para. 14.

¹¹ Response, para. 6.

¹² Rule 65ter Status Conference, 2 September 2008, T. 272.

¹³ Rule 65ter Status Conference, 6 February 2007, T. 77-79.

¹⁴ Response, Para. 6.

¹⁵ See *Prosecutor v. Milan Martić*, Case No. IT-95-11-A, Decision on Motion for Reconsideration of Oral Decision Issued on 29 February 2008, 10 March 2008 para. 5; *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR108bis.3, Confidential Decision on Request of Serbia and Montenegro for Review of the Trial Chamber's Decision of 6 December 2005, 6 April 2006, para. 25, fn. 40; *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Decision on Prosecution Motion for Reconsideration of Oral Decision Dated 24 April 2007 Regarding Evidence of Zoran Lilić, 27 April 2007, para. 4.

¹⁶ *Prosecutor v. Šainović et al.*, Case No. IT-05-87-A, Decision on Sreten Lukić's Motion to Reconsider Decision on Defence Motions for Extension of Word Limit, 14 September 2009, pp 1-2.

¹⁷ See *Prosecutor v. Rasim Delić*, Case No. IT-04-83-T, Decision on the Prosecution's Motion for Reconsideration of the Chamber's Decision on Admission of Documentary Evidence, 13 February 2008 ("Delić Decision"), para. 9; *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, Second Decision on the Admission of Documentary Evidence submitted by the Prosecution (Dretelj and Gabela), 18 January 2008 (signed 12 December 2007), p. 4 fn. 4 with further references.

7. As to the existence of a clear error of reasoning, the Trial Chamber deems it important to clarify that the subject matter of the Impugned Decision concerns the amendment of the Rule 65 *ter* List pursuant to Rule 73 *bis*(F) of the Rules of Procedure and Evidence (“Rules”),¹⁸ and not the admission into evidence of an expert report or of a notice pursuant to Rule 94 *bis*. Accordingly, the Trial Chamber notes that the Impugned Decision clearly sets out the applicable law governing the amendment of the Rule 65 *ter* List pursuant to Rule 73 *bis*(F)¹⁹ and, in exercising its discretion, took into consideration several factors specific to this case, including the *prima facie* relevance and probative value of the proposed evidence in accordance with Rule 89(C), whether the Prosecution had shown good cause for the substitution and whether the Defence would have sufficient time to prepare a defence.²⁰ At that stage, the Trial Chamber was *not* considering the admission of the substituted witness’ expert report into evidence, which will be governed by Rules 89 and 94 *bis* and is a separate enquiry from whether to substitute a witness under Rule 73 *bis*(F).²¹ The Trial Chamber considered the similarities of the content of the expert reports as well as their length, in order to “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”²² and did not make any admissibility determination.

8. The Trial Chamber also did not err in its reasoning when finding that “reason enough” and “a reason” are distinguishable.²³ The former is in and of itself sufficient to establish a proposition, whereas the latter may be considered concurrently among others. This Trial Chamber’s previous decision referred to in the Impugned Decision unmistakably indicates that a missed deadline is “a reason” to strike a report.²⁴

9. In conclusion, the Trial Chamber finds that the Impugned Decision responded to all relevant Defence arguments relating to the Rule 73 *bis*(F) witness substitution and finds that, in the present Motion, the Defence has failed to demonstrate that an error of reasoning occurred or that particular circumstances exist that justify reconsideration in order to prevent an injustice.

¹⁸ Rule 73 *bis* (F) of the Rules

¹⁹ Impugned Decision, para. 6.

²⁰ Impugned Decision, paras 7-9.

²¹ See Impugned Decision, para. 9.

²² Impugned Decision, paras 6, 8.

²³ Impugned Decision, para. 11.

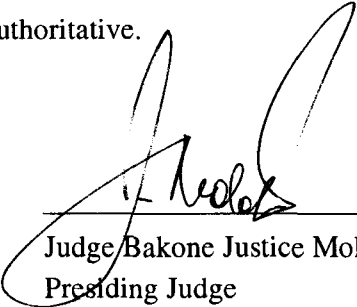
²⁴ Decision on Defence Motion to Exclude the Expert Reports of Mr. Patrick J. Treanor, 27 October 2008 (“Treanor Expert Report Decision”), para. 16. The Defence argues in its Motion that para. 16 of the Treanor Expert Report Decision “mentions no other reasons for striking the report” other than the missed deadline; however, the Impugned Decision correctly cites to paragraphs 25-29 to show that there were other reasons for striking the Treanor report. See Motion, para. 14; Impugned Decision, para. 11. This point needs to be emphasised because, were the missed deadlines “reason enough” to deny an expert report, then it would be a futile gesture to grant the Original Motion since the substituted witness’ report could never be admissible evidence.

IV. DISPOSITION

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

DENIES the Defence Motion for Reconsideration.

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



Judge Bakone Justice Moloto
Presiding Judge

Dated this first day of October 2009

At The Hague

The Netherlands

[Seal of the Tribunal]