

**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-04-75-T
Date: 16 April 2013
Original: English

IN THE TRIAL CHAMBER

Before: Judge Guy Delvoie, Presiding
Judge Burton Hall
Judge Antoine Kesia-Mbe Mindua

Registrar: Mr. John Hocking

Decision: 16 April 2013

PROSECUTOR

v.

GORAN HADŽIĆ

PUBLIC

**DECISION ON PROSECUTION MOTION FOR RECONSIDERATION OF
DECISION ON PROSECUTION MOTION TO SUBSTITUTE EXPERT REPORT
OF EXPERT WITNESS (REYNAUD THEUNENS)**

The Office of the Prosecutor:

Mr. Douglas Stringer

Counsel for Goran Hadžić:

Mr. Zoran Živanović

Mr. Christopher Gosnell

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 (“Tribunal”) is seised of the “Prosecution Motion for Reconsideration of the Decision on Prosecution Motion to Substitute Expert Report of Expert Witness (Reynaud Theunens)”, filed on 11 March 2013 (“Motion”). The Defence filed its “Response to Prosecution Motion for Reconsideration of the Decision on Prosecution Motion to Substitute Expert Report of Expert Witness (Reynaud Theunens)” on 22 March 2013 (“Response”). The Prosecution filed its “Prosecution Request for Leave to Reply and Reply to Response to Prosecution Motion for Reconsideration of the Decision on Prosecution Motion to Substitute Expert Report of Expert Witness (Reynaud Theunens)” on 28 March 2013 (“Reply”).

2. In the Motion, the Prosecution seeks reconsideration of the Trial Chamber’s “Decision on Prosecution Motion to Substitute Expert Report of Expert Witness (Reynaud Theunens)”, issued on 7 November 2012 (“7 November Decision”) in order to allow the Prosecution to tender as evidence expert witness Reynaud Theunens’ case-specific report, rather than the operative, amalgamated report. The Prosecution argues that it is in the interests of justice to admit into evidence an expert report on military issues that is tailored to this case in light of the additional time made available to the Defence to prepare for this witness’s evidence by virtue of the revised trial calendar for February through April 2013.¹ The Prosecution explains that it was unable to deliver a case-specific military expert report by the 10 July 2012 deadline “because of competing demands” upon Theunens “from his current employment with UNIFIL and the need to finalise his report in the *Prosecutor v. Mladić* case.”² The Prosecution submits that the recent adjournments in the trial have provided additional time for the Defence to review the case-specific report and that the benefits of a case-specific report outweigh any inconvenience or possible prejudice that would result from substituting it for the amalgamated report.³

3. In the Response, the Defence opposes the Motion, arguing that no additional information or arguments have been provided by the Prosecution to justify reconsideration of the 7 November Decision. The Defence also argues that allowing the Prosecution to substantially modify the military expert’s report now, well into the Prosecution’s case, after having heard the testimony of Dr. Nielsen and many other salient witnesses, would be even more prejudicial than when the previous motions regarding this matter were denied.⁴

¹ Motion, paras 1, 5-7.

² Motion, para. 3, note 3.

³ Motion, para. 5.

⁴ Response, paras 1-2, 13-14, 16-17.

4. In the Reply, the Prosecution submits that the Defence, in its Response, fails to dispel the Prosecution's argument that the change in trial schedule mitigates any prejudice arising from the use of the "revised report". According to the Prosecution, the Defence's claims of prejudice from lack of notice lack substance.⁵

5. A Chamber has the discretion to reconsider a previous interlocutory decision in exceptional cases if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent an injustice. Particular circumstances justifying reconsideration include new facts or new arguments.⁶

6. In accordance with Rule 94 *bis*, the Pre-Trial Judge ordered that the disclosure of expert reports in this case be made by 10 July 2012.⁷ On 4 July 2012, the Prosecution requested an extension of time for the disclosure of Theunens' expert report; this request was denied by the Pre-Trial Judge.⁸ In the 7 November Decision, the Chamber found that it would not be appropriate to allow the Prosecution to substitute the expert report of Reynaud Theunens with a new report.⁹

7. The Trial Chamber considers that, due to the recent adjournments in the trial, the amount of time that the new report has been in the possession of the Defence has increased. However, this new fact has no bearing on the Trial Chamber's previous rulings that the Prosecution had had sufficient time to fulfil its disclosure obligation and that it was not appropriate to allow the Prosecution to substitute the amalgamated report with the new report. During the pre-trial phase of the proceedings in this case, the Prosecution chose to engage a single expert to prepare expert reports for both the *Mladić* and the *Hadžić* cases, and the *Mladić* report was prioritised over the *Hadžić* report.¹⁰ The recent adjournments in the trial have no relevance to the Trial Chamber's previous rulings that the Prosecution had not demonstrated good cause for an extension of the deadline for disclosure of Theunens' expert report. The Prosecution has therefore not fulfilled the standard for reconsideration of the 7 November Decision.

8. Based upon the foregoing, it is unnecessary to address the Prosecution's submissions regarding lack of prejudice to the Defence.

⁵ Reply, para. 4.

⁶ *Prosecutor v. Prlić et al.*, Case No. IT-04-74-AR73.16, Decision on Jadranko Prlić's Interlocutory Appeal against the Decision on Prlić Defence Motion for Reconsideration of the Decision on Admission of Documentary Evidence, 3 November 2009, paras 6, 18; see *Kajelijeli v. Prosecutor*, Case No. ICTR-98-44A-A, Judgement, 23 May 2005, paras 203-204; *Prosecutor v. S. Milošević*, Case No. IT-02-54-AR108bis.3, Decision on Request of Serbia and Montenegro for Review of the Trial Chamber's Decision of 6 December 2005 (confidential), 6 April 2006, para. 25, note 40.

⁷ Order on Pre-Trial Work Plan, 16 December 2011, Annex, p. 1.

⁸ Decision on Prosecution Motion for Extension of Time for Disclosure of Expert Report of Reynaud Theunens, 10 July 2012, paras 5-6.

⁹ 7 November Decision, para. 4.

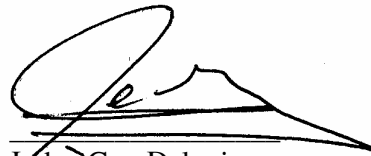
¹⁰ See Motion, para. 3, note 3.

9. For the foregoing reasons, the Trial Chamber, pursuant to Rules 54, 94 *bis*, and 126 *bis* of the Rules, hereby

- (a) **GRANTS** the Prosecution leave to file the Reply; and
- (b) **DENIES** the Motion.

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

Done this sixteenth day of April 2012,
At The Hague,
The Netherlands.



Judge Guy Delvoic
Presiding

[Seal of the Tribunal]