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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: 21 April 2009
Original: English

IN TRIAL CHAMBER I

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

Acting Registrar: Mr. John Hocking

Decision of: 21 April 2009

PROSECUTOR

v.

MOMČILO PERIŠIĆ

PUBLIC

**DECISION ON DEFENCE MOTION *IN LIMINE* FOR
PROSECUTION WITNESS MIODRAG STARČEVIĆ**

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 “Motion *in Limine* for Prosecution Witness Miodrag Starčević”, filed publicly on 14 April 2009 (“Motion”) and hereby renders its Decision.

A. Introduction

1. On 23 February 2007, the Prosecution filed its initial list of witnesses, witness summaries, and exhibits pursuant to Rule 65 *ter*(E) of the Rules of Procedure and Evidence of the Tribunal (“Rules”).¹ On 1 March 2007, the Prosecution filed summaries of the facts on which each witness will testify, pursuant to Rule 65 *ter*(E)(ii)(b).²

2. According to the summary of the expected evidence of Miodrag Starčević, the witness will testify about the structure of the Federal Secretariat of National Defence (“SSNO”)—a body which the Prosecution submits was the predecessor of the Ministry of Defence of the Federal Republic of Yugoslavia—and its relationship with the Ministry of Defence and the General Staff of the Yugoslav Army (“VJ”).³ Starčević is also expected to authenticate and examine various documents, including records pertaining to the 30th Personnel Centre of the VJ.⁴ In this context, Starčević “will also opine that under [Article] 331 of the Law of the Army of Yugoslavia, an officer serving abroad is only entitled to receive a salary if he is part of a diplomatic or consular mission belonging to the former Yugoslavia in another country.”⁵ The Prosecution further submitted that Starčević’s “legal opinions will be based upon the laws in effect during the relevant time periods alleged in the indictment.”⁶

B. Submissions of the Parties

1. Defence Motion

3. In the present Motion, the Defence requests that the Trial Chamber issue an order prohibiting Starčević from giving opinion evidence. Alternatively, the Defence requests that in the event that Starčević is permitted to give opinion evidence, the Trial Chamber should foreclose him from giving opinions or conclusions on the ultimate issue before the Trial Chamber in this case.

¹ Prosecution’s Rule 65 *ter* Submission, 23 February 2007 (confidential).

² Prosecution’s Application to Replace Witness List and Summaries Filed Pursuant to Rule 65 *ter*(E) and Corrigenda, 1 March 2007 (“Rule 65 *ter* summary”).

³ Rule 65 *ter* Summary, p. 174.

⁴ *Ibid.*

⁵ *Ibid.*

⁶ Rule 65 *ter* Summary, p. 175.

4. With regard to the expected testimony of Starčević, the Defence submits that he is not an expert, and thus, cannot give any opinion evidence for the purposes of this case.⁷ Although brought before the witness has taken the stand, the Defence argues that the Motion is neither premature nor speculative. It submits that the Rule 65 *ter* summary indicates that the witness will give opinion evidence and testify on the ultimate issue on this case.⁸

5. In support of its arguments, the Defence contends that the jurisprudence of the Tribunal clearly distinguishes between expert witnesses and lay or fact witnesses and that certain rules and procedures must be followed for a witness to obtain the status of an expert.⁹ The Defence argues that one of the main distinctions between expert and other witnesses is the ability of the expert due to his or her qualifications to give an opinion and draw conclusions and present them to the Trial Chamber. The Defence further submits that “thus, by inference, all witnesses who are not expert witnesses are not permitted to present opinions or draw conclusions before the court.”¹⁰ According to the Defence, the Prosecution has not called Starčević as an expert witness and thus cannot ask the witness to give opinion evidence and testify on the ultimate issue in this case.¹¹

6. The Defence submits that allowing Starčević to give opinion evidence as an expert would be an obvious violation of the Rules and prejudice the right of the Accused to know, in a timely manner, the status of the witness being brought against him.¹² Finally the Defence contends that Starčević should not be permitted to take over the role of the Trial Chamber by giving opinion evidence on the ultimate issue in this case, namely the criminal liability of the Accused.¹³

2. Prosecution Response

7. On 16 April 2009, the Prosecution confidentially filed the “Response to Defence Motion *In Limine* For Prosecution Witness Miodrag Starčević” (“Response”), in which it contends that while Starčević is not being called as an expert, his evidence relates to matters falling within his own knowledge, understanding and experience.¹⁴ Moreover, the Prosecution contends that the Defence has long been on notice about Starčević’s anticipated evidence, as outlined in his Rule 65 *ter* summary and thus no prejudice can result thereof.¹⁵ The Prosecution submits that Starčević’s evidence is not expert in nature. It argues that contrary to ordinary cases, in which the expert

⁷ Motion, para. 3.

⁸ Motion, paras 4- 5.

⁹ Motion, paras 6-7.

¹⁰ Motion, para. 12.

¹¹ Motion, para. 5.

¹² Motion, para. 14.

¹³ Motion, para. 15.

¹⁴ Response, para. 2 (confidential).

¹⁵ Response, paras 3, 7 (confidential).

witness lacks personal familiarity with the particular case, but instead offers a view based on his or her specialised knowledge regarding a technical, scientific, or otherwise discrete set of ideas or concepts that is expected to lie outside the lay person's knowledge, Starčević has an intimate familiarity with the laws applicable to the VJ during the indictment period and an in-depth knowledge and understanding of the meaning and scope of their provisions and the legal effect thereof.¹⁶

8. Furthermore, Prosecution submits that the Defence mischaracterises Starčević's Rule 65 *ter* summary, which states that the witness would testify as to various provisions in the laws relating to the VJ and FRY national defence.¹⁷

9. Addressing the Defence objection to opinions or conclusions on the ultimate issue before the Trial Chamber, the Prosecution contends that nothing in Starčević's Rule 65 *ter* summary suggests that he will give such opinion evidence.¹⁸ Finally, the Prosecution submits that Starčević's evidence could assist the Trial Chamber in its determination of the existence of certain indicators of effective control relevant to the allegations of superior responsibility.¹⁹

3. Defence Reply

10. In its "Request for Leave to File a Reply and Reply to the Prosecution's Response to Defence Motion *In Limine* for Prosecution Witness Miodrag Starčević" filed publicly on 20 April 2009 ("Reply"), the Defence seeks leave to file a reply and maintains its earlier arguments.²⁰ It submits that Starčević's intimate familiarity with the laws in place at the time relevant to this case is an entirely different issue from his views regarding the actual application or actual legal effect, then or now, of the laws in question. Therefore, as Starčević is not being called as an expert witness, his personal views as to the interpretation or application of the law at issue are irrelevant and "cannot properly be allowed in evidence".²¹

C. Discussion

11. The Trial Chamber concurs with the Defence that Starčević is not called to testify as an expert witness but as a "linkage" fact witness and thus should not in principle be permitted to present his opinions or draw conclusions on the ultimate issue in this case.²² However, the Trial

¹⁶ Response, paras 4-5 (confidential).

¹⁷ Response, paras 8, 9 (confidential).

¹⁸ Response, para. 12 (confidential).

¹⁹ Response, para. 13 (confidential).

²⁰ Reply, para. 12.

²¹ Reply, para. 11.

²² Motion, para. 8.

Chamber points out – as clearly stated in the *Karamera* case – that “[f]actual witnesses can also express opinions, so long as they emanate from personal experience”.²³

12. Further, the Trial Chamber is not of the opinion that allowing Starčević’s testimony would prejudice any of the rights of the Accused “to know, in a timely manner, the status of the witness being brought against him”²⁴ recalling that the Defence had been on notice of Starčević’s position and the nature of his anticipated testimony since his Rule 65 *ter* summary was filed on 1 March 2007.

13. The Trial Chamber notes that according to his Rule 65 *ter* summary, Starčević was the head of the Legal Department of the SSNO and in this capacity was responsible for, among other things, drafting legislation relating to the military and national defence. As such Starčević is in a position to provide the Trial Chamber with vital information as to the structure of the military of the Federal Republic of Yugoslavia in 1992. The Trial Chamber deems it appropriate *in casu* that the witness, due to the position he held within the SSNO, be permitted to provide the Trial Chamber with meaningful and informed assessment of the law, based on his own experience. The Trial Chamber thus declines from explicitly prohibiting Starčević from sharing his opinion with the Chamber. Rather, the Defence is free to interject an objection when it feels that the witness is giving inappropriate opinion evidence such as amounting to speculation.

14. The Trial Chamber points out that although the information provided by both fact and expert witnesses assists the Chamber in making decisions as to the criminal liability of the Accused, the Chamber will at the end of the trial, in light of the entire record, decide what weight, if any, to accord to each piece of evidence.

²³ *Prosecutor v. Karamera et al.*, Case No. ICTR-98-44-T, 6 August 2008, para. 4.

²⁴ Motion, para. 14

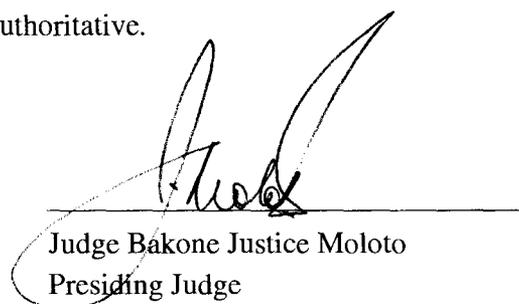
D. Disposition

FOR THE FOREGOING REASONS, and pursuant to Rules 54 and 89 of the Rules, the Trial Chamber

GRANTS leave to file the Reply and

DENIES the Motion.

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



Judge Bakone Justice Moloto
Presiding Judge

Dated this twenty-first day of April 2009

At The Hague

The Netherlands

[Seal of the Tribunal]