

**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: 15 July 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: 15 July 2013

PROSECUTOR

v.

GORAN HADŽIĆ

PUBLIC

**DECISION ON PROSECUTION MOTION FOR ADMISSION OF MORTEN
TORKILDSEN'S EXPERT REPORT AND ITS ASSOCIATED EXHIBITS**

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 the Admission of Morten Torkildsen’s Expert Report and its Associated Exhibits” filed on 17 June 2013 (“Motion”). The Defence filed its “Response to Prosecution Motion for the Admission of Morten Torkildsen’s Expert Report and its Associated Exhibits” on 1 July 2013 (“Response”).

A. Background

2. Torkildsen testified before the Chamber on 28 May 2013 as an expert witness specialising in financial investigation. His status as an expert witness was not challenged by the Defence. On 28 May 2013 the Prosecution sought to admit Torkildsen’s Expert Report (“Report”) and the 34 documents referenced therein (“Associated Exhibits”) at the conclusion of its examination-in-chief.¹ The Chamber instructed the Prosecution to submit a written motion for the admission of the Report and its Associated Exhibits.²

B. Submissions

3. In the Motion, the Prosecution requests the admission of the Report and its Associated Exhibits.³ The Prosecution does not seek to rely on paragraphs 16 (from line 4 through the end of the paragraph), 23, or 79 through 83 of the Report.⁴

4. The Prosecution argues that the Report is relevant and probative of key issues related, *inter alia*, to: (a) the alleged means by which the SFRY or the Republic of Serbia provided financial and material support to the RSK and RS; (b) the alleged means by which the alleged JCE provided financial, material, and logistical assistance to Serb forces; (c) the way that Hadžić allegedly organised financial and logistical support from Belgrade for Serb forces on the ground; (d) the alleged source of funding for the JNA, the Serbian Army of Krajina, and the Army of RS; (e) the alleged relationship between the National Bank of Yugoslavia and the armies of the RSK and RS; and (f) the alleged role of the Republic of Serbia’s Ministry of Defence in coordinating assistance to Serb-controlled districts in Croatia.⁵

¹ Morten Torkildsen, 28 May 2013, T. 5034.

² Morten Torkildsen, 28 May 2013, T. 5034.

³ Motion, para. 1.

⁴ Motion, para. 2.

⁵ Motion, paras 6-10.

5. The Prosecution further submits that the Associated Exhibits listed in appended Annex A of the Motion are integral to understanding the analyses and conclusions presented in the Report.⁶ According to the Prosecution, the Associated Exhibits pertain to relevant issues in the case, including: (a) the implementation of the alleged JCE; (b) the alleged financing of the JNA by the SFRY between 1991 and 1992; (c) the alleged monetary integration between the SFRY, RSK, and RS; and (d) financial assistance allegedly provided by Serbia to the RSK.⁷

6. In its Response, the Defence objects to the admission of one of the tendered documents on the basis that the document does not meet the threshold of reliability required under Rule 89(C) of the Rules of Procedure and Evidence (“Rules”).⁸ The document consists of an alleged statement by Slobodan Milošević in which he seeks to appeal an order for his detainment and which is addressed to the investigative judge of the District Court in Belgrade. The Defence submits that the statement was not given under oath and that Torkildsen has no direct knowledge of the statement that would enhance its reliability.⁹

C. Applicable Law

7. Rule 94 *bis* of the Rules provides as follows:

- (A) The full statement and/or report of any expert witness to be called by a party shall be disclosed within the time-limit prescribed by the Trial Chamber or by the pre-trial Judge.
- (B) Within thirty days of disclosure of the statement and/or report of the expert witness, or such other time prescribed by the Trial Chamber or pre-trial Judge, the opposing party shall file a notice indicating whether:
 - i. it accepts the expert witness statement and/or report; or
 - ii. it wishes to cross-examine the expert witness; and
 - iii. it challenges the qualifications of the witness as an expert or the relevance of all or parts of the statement and/or report and, if so, which parts.
- (C) If the opposing party accepts the statement and/or report of the expert witness, the statement and/or report may be admitted into evidence by the Trial Chamber without calling the witness to testify in person.

8. It is established by the jurisprudence of the Tribunal that an expert witness is a person who “by virtue of some specialised knowledge, skill or training can assist the trier of fact to understand or determine an issue in dispute.”¹⁰ In determining whether a particular witness meets these criteria,

⁶ Motion, para. 11.

⁷ Motion, paras 11-13.

⁸ Response, para. 1, *referring to* Rule 65 *ter* number 02443.

⁹ Response, para. 1.

¹⁰ *Prosecutor v. Đorđević*, Case No. IT-05-87/1-T, Decision on Prosecution’s Notice re Defence Expert Witness Radomir Milašinović, Aleksandar Pavić, and Zoran Stanković, 24 March 2010 (“*Đorđević* 2010 Decision”), para. 6;

the Trial Chamber may take into account the witness's former and present positions and professional experience through reference to the witness's *curriculum vitae*, as well as the witness's scholarly articles, other publications, or any other pertinent information about the witness.¹¹ The content of the expert witness's statement or report must fall within his or her accepted area of expertise.¹²

9. Like any evidence, expert evidence is subject to the provisions contained in Rules 89 (C) and (D). The expert statement or report must, therefore, be relevant to the issues at trial and meet the minimum standards of reliability.¹³ An item of evidence may be so lacking in terms of indicia of reliability that it is not probative and, therefore, inadmissible. In establishing reliability, there must be sufficient information as to the sources used in support of statements, and these must be clearly indicated in order to allow the other party or the Trial Chamber to test the basis on which the expert witness reached his or her conclusions.¹⁴ Even where a report is admitted into evidence, in the absence of clear references, the Trial Chamber will treat such statements as the personal opinion of the witness and weigh the evidence accordingly.¹⁵ Nevertheless, *prima facie* proof of reliability on the basis of sufficient indicia should be demonstrated at the admissibility stage.¹⁶

10. The admissibility of an expert report should be clearly distinguished from the weight that it will be given by the Trial Chamber during its final deliberations.¹⁷

Prosecutor v. Galić, Case No. IT-98-29-T, Decision Concerning the Expert Witnesses Ewa Tabeau and Richard Philipps, 3 July 2002 (“*Galić Decision*”), p. 2. *See also Prosecutor v. Đorđević*, Case No. IT-05-87/1-T, Decision on Defence Notice under Rule 94 *bis*, 5 March 2009 (“*Đorđević Decision*”), para. 6.

¹¹ *Đorđević* 2010 Decision, para. 6; *Đorđević Decision*, para. 6; *Prosecutor v. Šešelj*, Case No. IT-03-67-T, Decision on Expert Status of Reynaud Theunens, 12 February 2008 (“*Šešelj Decision*”), para. 28.

¹² *Đorđević* 2010 Decision, para. 6; *Prosecutor v. Martić*, Case No. IT-95-11-T, Decision on Defence's Submission of the Expert Report of Professor Silja Avramov Pursuant to Rule 94 *bis*, 9 November 2006 (“*Martić Decision*”), para. 12. *See also Đorđević Decision*, para. 6.

¹³ *Đorđević* 2010 Decision, para. 7; *Prosecutor v. J. Stanišić and Simatović*, Case No. IT-03-69-PT, Decision on Prosecution's Submission of the Expert Report of Nena Tromp and Christian Nielsen Pursuant to Rule 94 *bis*, 18 March 2008 (“*Stanišić Decision*”), para. 9; *Prosecutor v. Strugar*, Case No. IT-01-42-PT, Decision on the Defence Motions to Oppose Admission of Prosecution Expert Reports pursuant to Rule 94 *bis*, 1 April 2004, p. 5; *Prosecutor v. Brdanin*, Case No. IT-99-36-T, Decision on Prosecution's Submission of Statement of Expert Witness Ewan Brown, 3 June 2003, p. 4.

¹⁴ *Đorđević* 2010 Decision, para. 7; *Stanišić Decision*, para. 9; *Galić Decision*, para. 9.

¹⁵ *Đorđević* 2010 Decision, para. 7; *Stanišić Decision*, para. 9; *Martić Decision*, para. 9.

¹⁶ *Đorđević* 2010 Decision, para. 7; *Prosecutor v. Popović et al.*, Case No. IT-05-88-AR73.2, Decision on Joint Defence Interlocutory Appeal Concerning the Status of Richard Butler as an Expert Witness, 30 January 2008 (“*Popović Decision*”), para. 22.

¹⁷ *Đorđević* 2010 Decision, para. 8.

D. Discussion

1. Expert Report

11. The Trial Chamber finds that the Report is relevant to the issues at trial and meets the minimum standards of reliability under Rules 89 (C) and (D). The Chamber further notes that the Defence does not object to the admission of the Report. It will therefore be admitted.

2. Relevance and reliability of the Associated Exhibits to which there is no specific objection

12. The proposed Associated Exhibits in the Report include: (a) orders and decisions; (b) government letters, notes, minutes, transcripts, and reports; (c) police and ministry of defence documents; (d) military documents, letters, requests, reports, and memoranda; (e) material issued and received by national banks; (f) analyses of combat readiness; (g) media materials; and (h) statements made by Slobodan Milošević¹⁸.

13. The Trial Chamber notes that the Defence has objected to the admission of one of these Associated Exhibits.¹⁹

14. The Trial Chamber finds that those exhibits listed in Annex A of the Motion, but not specifically objected to by the Defence, meet the requirements of Rules 89 (C) and (D) and will assist the Trial Chamber in assessing the basis on which Torkildsen reached his conclusions. The Trial Chamber will admit into evidence those Associated Exhibits listed in Annex A that are not specifically objected to by the Defence.²⁰

3. Associated Exhibit to which there is a specific objection

(a) Rule 65 *ter* number 02443: Statement by Slobodan Milošević

15. The Prosecution submits that this statement is integral to understanding the analyses and conclusions presented in the Report and that it is therefore necessary to review it in conjunction with the Report.²¹

16. The Defence submits that the statement was not given under oath, that there is no affirmation of the statement's truth, that Torkildsen has no direct knowledge of the statement that

¹⁸ Rule 65 *ter* number 02443.

¹⁹ Response, para. 1; Rule 65 *ter* number 02443.

²⁰ All Rule 65 *ter* numbers listed in Annex A of the Motion, excepting only Rule 65 *ter* 02443.

²¹ Motion, para. 11.

would enhance its reliability, and that it would therefore be inappropriate to admit the statement at this time.²²

17. The Trial Chamber notes that the statement is relevant to the alleged financial assistance of the RS and RSK armies by the Republic of Serbia. Further, the Chamber notes that Rule 65 *ter* number 02443 bears the date and the signature of its author. The Chamber finds that the statement has sufficient indicia of reliability and that the requirements of Rules 89 (C) and (D) have been met. The Chamber will thus admit this document into evidence.

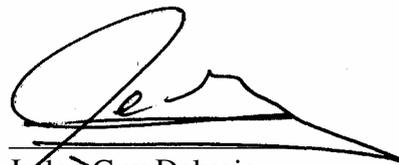
E. Disposition

18. Accordingly, the Trial Chamber, pursuant to Rules 54, 89, and 94 *bis* of the Rules, hereby

- (a) **ORDERS** that—by no later than 22 July 2013—the Prosecution shall (i) prepare and upload to eCourt a version of Torkildsen’s Report (Rule 65 *ter* number 02477) with paragraphs 16 (from line 4 through the end of the paragraph), 23, and 79 through 83 redacted and (ii) file a written notice of compliance on the official record of the proceedings when it has done so, at which time the redacted version of the Report shall be deemed admitted into evidence;
- (b) **ORDERS** that the Associated Exhibits listed in Annex A to the Motion shall be admitted into evidence; and
- (c) **INSTRUCTS** the Registry to take all necessary and appropriate measures to implement this decision.

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

Done this fifteenth day of July 2013,
At The Hague,
The Netherlands



Judge Guy Delvoie
Presiding

[Seal of the Tribunal]

²² Response, para. 1.