

IT-09-92-T
Dubuka - Dubuka
01 November 2012

Dubuka
9/3.



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-09-92-T
Date: 1 November 2012
Original: English

IN TRIAL CHAMBER I

Before: Judge Alphons Orie, Presiding
Judge Bakone Justice Moloto
Judge Christoph Flügge

Registrar: Mr John Hocking

Decision of: 1 November 2012

PROSECUTOR

v.

RATKO MLADIĆ

PUBLIC

**DECISION ON DEFENCE MOTION TO DISQUALIFY
RICHARD PHILIPPS AS AN EXPERT AND BAR THE
PROSECUTION FROM PRESENTING HIS REPORT**

Office of the Prosecutor

Mr Dermot Groome
Mr Peter McCloskey

Counsel for Ratko Mladić

Mr Branko Lukić
Mr Miodrag Stojanović

I. PROCEDURAL HISTORY

1. At a Status Conference held on 19 January 2012, the Prosecution indicated that it would file the report of proposed expert witness Richard Philipps which had already been disclosed to the Defence.¹ The Chamber noted that the 30-day notice period under Rule 94 *bis* (B) of the Tribunal's Rules of Procedure and Evidence ("Rules") would run from that day, 19 January 2012.² At a 65 *ter* meeting held on 20 February 2012, the Chamber observed that the Prosecution had not yet filed the Philipps Report, and the Prosecution replied that this was due to an oversight and the report would be filed within the week.³ The Chamber also informed the Defence that the 30-day notice period would run from the date of the report's filing.⁴ On 20 February 2012, the Defence filed a notice of objection and sought to bar the testimony of witness Philipps ("Defence Notice").⁵ On 24 February 2012, the Prosecution filed a revised version of the Philipps Report ("Philipps Report").⁶ On 6 March 2012 and 26 March 2012, the Defence filed a first supplement to the Defence Notice ("Supplement") and a second supplement ("Second Supplement") respectively, addressing issues arising from the Philipps Report as filed but not in the version originally disclosed.⁷

2. During a Rule 65 *ter* meeting held on 26 March 2012, the Chamber enquired as to the possibility of the parties agreeing on any of the contents of the Philipps Report independently of the determination of witness Philipps's status as an expert.⁸ At a Status Conference held on 29 March 2012, the Chamber directed the parties to indicate any possible agreement on the contents of the Philipps Report in their Sixth Joint Submission on Progress of Agreed Facts Negotiations ("Joint Submission") due on 27 April 2012.⁹ On 10 April 2012, the Prosecution filed its consolidated Reply to the Notice and two Supplements ("Response").¹⁰ On 27 April 2012 and 6 July 2012, the parties filed their Sixth and Seventh Joint Submission indicating that they had not reached any agreement on the Philipps Report.¹¹

¹ T. 173.

² T. 173.

³ Rule 65 *ter* meeting (20 February 2012), T. 238.

⁴ *Ibid.*

⁵ Defence Rule 94 *bis* Notice, Objection and Motion to Bar Relative to Proposed Prosecution Witness Richard Philipps, 20 February 2012.

⁶ Prosecution's Notice of Disclosure of Expert Report of Richard Philipps Pursuant to Rule 94 *bis* with Annex A ("Prosecution Notice"), 24 February 2012.

⁷ Defence Supplement to Original Rule 94 *bis* Notice, Objection and Motion to Bar Relative to Proposed Prosecution Witness Richard Philipps, 6 March 2012; Second Defence Supplement to Original Rule 94 *bis* Notice, Objection and Motion to Bar Relative to Proposed Prosecution Witness Richard Philipps, 26 March 2012.

⁸ Rule 65 *ter* meeting (26 March 2012), T. 332-335.

⁹ T. 269-270.

¹⁰ Prosecution Reply to Defence Motions in Respect of Proposed Prosecution Expert Richard Philipps, 10 April 2012.

¹¹ Sixth Joint Submission on Progress of Agreed Facts Negotiations, 27 April 2012, para. 6; Seventh Joint Submission on Progress of Agreed Facts Negotiations, 6 July 2012, paras 3-4.

II. SUBMISSIONS OF THE PARTIES

3. The Philipps Report consists of the following: (1) Philipps's *curriculum vitae* ("CV"); (2) Organizational Chart of the Sarajevo Romanija Corps ("SRK"), VRS, 1992-1994; (3) "Notes on the SRK, VRS", 8 April 2009; (4) "Alphanumerical List of Units and Formations with Evidence Reference Numbers [SRK] Order of Battle 1992-1995", 6 February 2009; (5) "Alphabetical List of Personnel with Evidence Reference Numbers [SRK] Order of Battle 1992-1995"; and (6) Explanation of the Organizational Charts of the SRK, 6 February 2009.¹² The Prosecution requests leave to supplement its Rule 65 *ter* exhibit list by adding an additional SRK organizational chart which covers the years 1994 to 1995, which was disclosed to the Defence on 3 October 2011, and completes the Philipps Report.¹³

4. The Defence submits firstly that Philipps's CV and publications do not demonstrate expertise or specific technical knowledge of the structure and operation of VRS units.¹⁴ Prior to working for the Prosecution, witness Philipps's sole experience relating to Bosnia-Herzegovina consisted of ten months as a Senior Staff Officer in the Intelligence Operations of the Stabilisation Force in Sarajevo in 2000.¹⁵ Furthermore, witness Philipps had not followed any courses related to the operation or structure of the VRS in the period from 1992 to 1995.¹⁶ Moreover, the Defence submits that a Prosecution military analyst who has merely reviewed and summarized numerous documents cannot be deemed an expert.¹⁷ Secondly, the Defence argues that witness Philipps cannot be accepted as an expert as his knowledge on the VRS was obtained in the course of his employment with the Prosecution and considerable parts of the Philipps Report are based on a letter written by a former Prosecution senior trial attorney which demonstrates witness Philipps's close links with the Prosecution.¹⁸ Although the references in the Philipps Report to the aforementioned letter have been omitted from the filed version, the conclusions drawn from that letter still form part thereof.¹⁹ In addition, witness Philipps's substantial reliance on material authored by the Prosecution as well as his lack of neutrality in selecting the documents analysed in the Philipps Report suggest that the latter cannot be accepted as expert evidence.²⁰

¹² Prosecution Notice, para. 2, Annex A.

¹³ Prosecution Notice, para. 4. The Chamber notes that the additional chart has been included as a second page to the chart bearing Rule 65 *ter* no. 10572.

¹⁴ Defence Notice, para. 8; Second Supplement, paras 7-10.

¹⁵ Defence Notice, paras 8-9; Document bearing Rule 65 *ter* no. 11344 (*Curriculum Vitae* of Richard Duncan Philipps).

¹⁶ Defence Notice, paras 8-9, 13.

¹⁷ Defence Notice, paras 21-24; Second Supplement, para. 22.

¹⁸ Defence Notice, para. 17; Supplement, paras 8-9; Second Supplement, para. 16.

¹⁹ Second Supplement, para. 16.

²⁰ Defence Notice, para. 17; Second Supplement, paras 12, 16.

5. Thirdly, the Defence argues that the Philipps Report incorporates witness Philipps's interpretation and evaluation of various documents such as witness statements, diaries and contemporaneous notes, intelligence and situation reports, and publications, and thereby improperly interferes with the Chamber's discretion to ascertain the evidentiary value of such material.²¹ Fourthly, the Defence submits that the Philipps Report does not meet the minimum standards of reliability as the Prosecution seeks to introduce into evidence through it hearsay statements in contravention of the requirements of Rules 89(C) and 92 *bis* of the Rules;²² witness Philipps's conclusions appear to be based on sources which are, at times, insufficiently identified, have not been disclosed and are of questionable provenance;²³ and substantial parts of witness Philipps's conclusions are based on a single source document.²⁴ The Defence also argues that the Prosecution failed to file a portion of witness Philipps's report filed in the *Galić* case, which, in its view, demonstrates his flawed methodology and requests the Chamber to consider this portion when evaluating the Defence Notice.²⁵ Fifthly, the Defence seeks to strike from the record portions of the Philipps Report not previously disclosed to the Defence on 6 January 2012.²⁶ Lastly, the Defence requests an opportunity to cross-examine witness Philipps if he is called to testify.²⁷

6. In response, the Prosecution submits that witness Philipps has 25 years' experience in military intelligence and analysis, first with the British Armed Forces, and subsequently with the Office of the Prosecutor.²⁸ The SRK's structure or operation is not a recognized field of study, and expertise thereon could not be obtained other than from personal experience, for instance through serving in the SRK, or through analysing military documents, as in the case of witness Philipps.²⁹ In fact, witness Philipps has been recognized as an expert in the *Galić* and *Karadžić* cases, and his revised charts were admitted into evidence in the *Karadžić* case.³⁰ The Prosecution adds that witness Philipps revised his charts in 2009 on the basis of voluminous materials obtained directly from the SRK archives in 2007, and the revised charts no longer rely on published reference materials, witness statements or the contested letter of a former Prosecution senior trial attorney.³¹ It submits therefore that a number of the objections raised by the Defence to witness Philipps's

²¹ Defence Notice, paras 14-15; Second Supplement, paras 12-14.

²² Defence Notice, para. 15; Second Supplement, paras 13-14, 21.

²³ Defence Notice, paras 17-19; Second Supplement, paras 12-13, 15, 18, 20-21.

²⁴ Second Supplement, paras 18, 20-21.

²⁵ Supplement, para. 9.

²⁶ Supplement, paras 9-10, p. 6, Confidential Exhibit A. The Chamber notes that while the Defence interchangeably refers to the date of the letter from the Prosecution as 6 January 2012 and 9 January 2012, the date of the letter is 6 January 2012.

²⁷ Defence Notice, para. 3, p. 8; Second Supplement, para. 5

²⁸ Response, para. 15.

²⁹ Response, para. 18.

³⁰ Response, paras 6, 19.

³¹ Response, paras 4, 8.

evidence concerned the previous version of witness Philipps's report.³² As to witness Philipps's choice of documents to be included in the Philipps Report, the Prosecution states that this was intended so as to provide the best available evidence.³³ The objections as to witness Philipps's methodology are issues to be taken into consideration when assessing the weight to be attributed to the Philipps Report and not its admissibility.³⁴

III. APPLICABLE LAW

7. The Chamber refers to the applicable law concerning Rule 94 *bis* of the Rules and expert evidence as set out in a previous decision.³⁵

8. The Chamber also refers to the applicable law governing amendments to the Rule 65 *ter* exhibit list as previously set out in a decision.³⁶

IV. DISCUSSION

9. At the outset, in relation to the Prosecution request for leave to supplement its Rule 65 *ter* exhibit list by adding an additional SRK organizational chart, the Chamber considers that the chart is *prima facie* relevant and of probative value, it is of limited length, has been disclosed to the Defence approximately a year ago and completes the Philipps Report. The Chamber considers that the amendment sought does not create a great burden for the Defence which had the opportunity to consider and contest it in its Second Supplement,³⁷ and finds that it is in the interests of justice to grant this Prosecution request.

10. As to the Defence first objection concerning witness Philipps's expertise, the Chamber notes that an examination of his CV demonstrates that he has at least twenty years' relevant experience in military and intelligence analysis. He has, *inter alia*, served with the British Armed Forces as Staff Officer of the Defence Intelligence Staff and the Military Intelligence Brigade and Commanding Officer of a Military Intelligence Company. He has also worked for approximately 6 years with the Office of the Prosecutor as an intelligence analyst, and since then has been an independent defence analyst/consultant. Although witness Philipps does not have direct work experience with the VRS or SRK and has not followed any specific training courses on these entities, the Chamber reiterates

³² Response, para. 8.

³³ Response, para. 9 (C).

³⁴ Response, para. 11.

³⁵ Decision on Defence Request to Disqualify Richard Butler as an Expert and Bar the Prosecution from Presenting his Reports, 19 October 2012 ("Decision on Richard Butler"), paras 4-9.

³⁶ Decision on Prosecution Second Motion to Amend Rule 65 *ter* Exhibit List, 27 June 2012, paras 5-6.

³⁷ Second Supplement, para. 3 (ii).

the remarks made in a previous decision that expert opinion need not be based upon firsthand knowledge or experience and that expert witnesses often lack personal familiarity with the circumstances of a case, and are required to give their professional opinion by applying their specialized knowledge and skills to facts as observed and reported by others.³⁸ The Chamber is not convinced by the Defence submission that the Philipps Report, including the command structure charts, constitutes a mere summary of various documents requiring as such the application of no expertise. To the contrary, the Chamber considers that in the Philipps Report's preparation, witness Philipps applied his skills as a military analyst in identifying, reviewing and extracting information from multiple sources, and organizing a considerable amount of material into a comprehensive structure chart. Consequently, the Chamber finds that witness Philipps can be considered an expert in military analysis and can testify accordingly on the command structure and organization of the VRS and SRK.

11. Turning to the Defence objection to witness Philipps's evidence on account of his alleged close relationship with the Prosecution, the Chamber reiterates that his previous employment with the Office of the Prosecutor is not, on its own, a sufficient reason to bar him from testifying.³⁹ The Defence has not sufficiently established witness Philipps's alleged lack of neutrality in selecting the material analysed in the Philipps Report or the alleged inappropriate reliance on the contested letter written by a former member of the Prosecution. In any event, the Chamber notes that this letter is no longer referred to in the Philipps Report. In addition, the Chamber notes that witness Philipps's alleged close links with the Prosecution as well as his selection of material analysed in the Philipps Report may be explored in the course of cross-examination or tested by submission of contradicting factual or expert evidence.

12. As to the Defence third objection, the Chamber notes that witness Philipps's conclusions by no means provide a final answer to issues relevant to the Indictment. However, they can assist the Chamber in understanding the evidence presented by the parties and making the necessary determinations in the context of the totality of evidence.

13. With regard to the Defence fourth objection concerning the Philipps Report's reliability, and, in particular, the alleged reliance of the Philipps Report on hearsay evidence such as witness statements, and diaries and contemporary notes of journalists, the Chamber notes witness Philipps's statement that the Philipps Report (as filed on 24 February 2012) "excludes witness statements and does not rely on potentially subjective information such as journalism or published reference

³⁸ Decision on Richard Butler, para. 12.

³⁹ Decision on Richard Butler, para 16.

material.”⁴⁰ In any event, the Chamber will defer deciding upon the Philipps Report’s admission until the Defence has had the opportunity to challenge witness Philipps’s sources and applied methodology during cross-examination. If the Defence wishes the Chamber to consider the relevant part of Philipps’s report filed in the *Galić* case, it may seek to tender it in evidence in the course of witness Philipps’s testimony.

14. In relation to the Defence request to strike out portions of the Philipps Report, the Chamber notes that in early January and February of this year, there was a discussion between the parties regarding the expert reports, and underlying materials thereof, to be presented as Prosecution evidence. The Chamber considers that whatever discussion may have taken place at that time, it is the Report filed on 24 February 2012 under Rule 94 *bis* which is to be addressed by the Defence in its Rule 94 *bis* (B) Notice. If any discussion prior to the filing of the Philipps Report led to some confusion on the part of the Defence, the Chamber considers that the appropriate remedy would have been to give the Defence sufficient time to prepare its Notice under Rule 94 *bis* (B). The Defence in fact sought a period of 30 days from the filing of the Report on 24 February 2012 within which to file its Notice under Rule 94 *bis* (B) as an alternative remedy to striking out contested portions of the Report.⁴¹ The Chamber considers that an appropriate remedy has already been afforded to the Defence, and it was in fact allowed to supplement its Defence Notice twice. The Chamber therefore denies the Defence request to strike out portions of the Report.

15. Lastly, with regard to the Defence request to cross-examine witness Philipps, the Chamber notes that the Prosecution intends to call him to give evidence in court and, as such, he will be available for cross-examination.

V. DISPOSITION

16. For the foregoing reasons, the Chamber

- 1) **GRANTS** the Prosecution request to supplement its Rule 65 *ter* exhibit list with an additional organizational chart covering the years 1994 to 1995;
- 2) **DENIES** the Defence request to strike out portions of the Philipps Report;

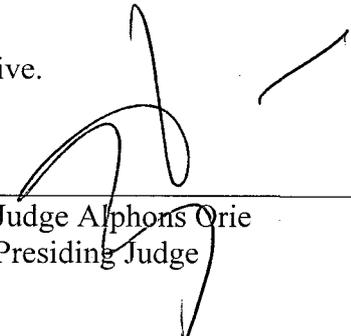
⁴⁰ Document bearing Rule 65 *ter* no. 11343 (Notes on the SRK, VRS, 8 April 2009), p. 27; See also Response, para. 4.

⁴¹ Supplement, para. 11, p. 6.

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- 3) **DENIES** the Defence Motion to Bar the Prosecution from presenting the Philipps Report as expert evidence at trial and **ALLOWS** Richard Philipps to testify as an expert witness; and
- 4) **DEFERS** its decision on the admission of the Philipps Report until the time of Philipps's testimony.

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



Judge Alphons Orie
Presiding Judge

Dated this first day of November 2012
At The Hague
The Netherlands

[Seal of the Tribunal]