

**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: 9 May 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: 9 May 2013

PROSECUTOR

v.

GORAN HADŽIĆ

PUBLIC

**DECISION ON PROSECUTION MOTION
FOR ADMISSION OF EXHIBITS CITED IN EXPERT REPORT
OF CHRISTIAN NIELSEN**

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 Exhibits Cited in the Expert Report of Christian Nielsen”, filed on 12 February 2013 (“Motion”). The Defence filed its “Response to Prosecution Motion for the Admission of Exhibits Cited in the Expert Report of Christian Nielsen” on 19 February 2013 (“Response”). The Prosecution filed its “Prosecution Request for Leave to Reply and Reply to the Defence Response to the Prosecution Motion for the Admission of Exhibits Cited in the Expert Report of Christian Nielsen” on 26 February 2013 (“Reply”). The Prosecution filed a “Corrigendum to Prosecution Motion for the Admission of Exhibits Cited in the Expert Report of Christian Nielsen” on 15 April 2013 (“Corrigendum”).

2. The Prosecution filed its “Prosecution Motion for Admission of One Exhibit Used with Expert Witness Christian Nielsen” on 13 February 2013 (“Second Motion”). On 27 February 2013, the Defence responded.¹

A. Background

3. On 13 December 2012, the Prosecution provided the Trial Chamber and the Defence with a list of exhibits it would likely seek to tender for admission during Dr. Christian Nielsen’s testimony.²

4. On 8 January 2013, the Defence notified the Prosecution and the Trial Chamber that it would object to the admission of the documents cited in the expert report with the following Rule 65 *ter* numbers: 01939, 02578, 04981, 02528, 02231, 03018, 03024, 03033, 02400, 02130, 02262, and 05274. The Defence noted that this list was non-exhaustive. The Defence further noted that it would likely not object to contemporaneously created documents.³

5. Dr. Nielsen testified on 10 January, 11 January, and 6 February 2013.

6. On 11 January 2013, the Prosecution sought to admit Dr. Nielsen’s report and an errata sheet at the conclusion of its examination-in-chief. The Defence requested that the Trial Chamber postpone its decision on the admissibility of Dr. Nielsen’s report until the conclusion of cross-

¹ Defence Email to Trial Chamber and Prosecution, 27 February 2013.

² Prosecution Email to Trial Chamber and Defence, 13 December 2012.

³ Defence Email to Trial Chamber and Prosecution, 8 January 2013.

examination.⁴ This request was granted.⁵ In relation to the documents cited in Dr. Nielsen's report, the Prosecution was ordered to make submissions in a written filing by 12 February 2013.⁶

B. Submissions

7. In the Motion, the Prosecution requests the admission of documents cited in the report of Dr. Nielsen, filed in accordance to Rule 65 *ter* (E) (iii) of the Tribunal's Rules and Procedure and Evidence ("Rules"), with the exception of 61 documents cited in Dr. Nielsen's report that have previously been admitted into evidence.⁷ The Prosecution withdraws its application to admit Rule 65 *ter* numbers 03025 and 02528.⁸

8. The Prosecution argues, in relation to the documents footnoted in Dr. Nielsen's report, including the documents specifically objected to by the Defence, that the evidence is relevant and probative and will assist the Trial Chamber in assessing the accuracy, reliability, and weight of Dr. Nielsen's report.⁹ The Prosecution argues that these documents are integral to understanding the analysis and conclusions presented by Dr. Nielsen.¹⁰

9. Further, the Prosecution submits that one document, Rule 65 *ter* number 06386, which is included in footnote 2 of Dr. Nielsen's report, was inadvertently left out of its Rule 65 *ter* exhibit list ("Exhibit List"). According to the Prosecution, the document sets out the election results in Croatia in 1990 and provides historical background described in Dr. Nielsen's report. The Prosecution requests leave to add this document to its Exhibit List and requests that the document be admitted into evidence.¹¹

10. In response, the Defence objects to the admission of 13 documents cited in Dr. Nielsen's report on the basis that the documents do not meet the threshold of reliability required under Rule 89(C).¹² The Defence submits that Dr. Nielsen's recitation in his report of the contents of the

⁴ Christian Nielsen, 11 January 2013, T. 2517-2519.

⁵ Christian Nielsen, 11 January 2013, T. 2519.

⁶ Trial Chamber Email to the Prosecution and the Defence, 6 February 2013.

⁷ Motion, para. 7, referring to Rule 65 *ter* numbers: 00051, 00073, 00102, 00115, 00141, 00157, 00186, 00324, 00261, 04803, 00312, 05041, 00322, 00323, 00330, 00356, 05045, 00370, 00380, 00384, 00390, 00419, 00441, 00445, 00450, 00451, 00455, 00485, 00497, 00626, 00684, 00727, 00754, 00770, 00809, 00814, 00819, 05135, 00926, 00936, 05142, 00942, 00946, 00950, 00951, 00961, 00990, 00991, 00998, 01064, 01135, 01195, 01363, 05306, 01433, 01484, 01496, 01499, 01613, 01663, and 01710.

⁸ Motion, para. 7.

⁹ Motion, para. 1.

¹⁰ Motion, para. 8.

¹¹ Motion, para. 12.

¹² Response, para. 1, referring to Rule 65 *ter* numbers: 01939, 02578, 04981, 02231, 03018, 03024, 03033, 02400, 02130, 02262, 05274, 02117, and 02188.

footnoted documents, without any corroboration, further explanation, or indication that Dr. Nielsen agrees with the information provided in the documents does not establish their reliability.¹³

11. The Prosecution replies that Dr. Nielsen weighed the relevance, reliability, and accuracy of the documents before citing them in his report and only selected those that were highly relevant for the Trial Chamber's consideration.¹⁴ The Prosecution further states that the Defence's focus on reliability is misplaced because at this stage of the proceedings nothing more than "sufficient indicia to make out a *prima facie* case of reliability" is required.¹⁵

C. Applicable Law

12. 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.

13. 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."¹⁶ In determining whether a particular witness meets these criteria, 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.¹⁷ The

¹³ Response, paras 3, 4.

¹⁴ Reply, para. 2.

¹⁵ Reply, para. 4.

¹⁶ *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; *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.

¹⁷ *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.

content of the expert witness's statement or report must fall within his or her accepted area of expertise.¹⁸

14. 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.¹⁹ 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.²⁰ 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.²¹ Nevertheless, *prima facie* proof of reliability on the basis of sufficient indicia should be demonstrated at the admissibility stage.²²

15. 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.²³

D. Discussion

16. At the outset, the Trial Chamber will address the issue of Dr. Nielsen's qualifications as an expert witness. Pursuant to Rule 94 *bis* (B)(iii) and the 16 December 2011 pre-trial work plan, the Defence had until 9 August 2012 to file a notice indicating whether it challenged Dr. Nielsen's qualifications.²⁴ In the 8 August 2012 Defence notice, Dr. Nielsen's qualifications are not challenged.²⁵ On 8 and 11 January 2013, the Defence attempted to "reserve" its position in relation to this issue.²⁶ Nevertheless, the Defence made it clear it was more concerned with the admissibility of certain documents cited in Dr. Nielsen's report "than the characterisation of Dr. Nielsen as an

¹⁸ *Dordević* 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 *Dordević* Decision, para. 6.

¹⁹ *Dordević* 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.

²⁰ *Dordević* 2010 Decision, para. 7; *Stanišić* Decision, para. 9; *Galić* Decision, para. 9.

²¹ *Dordević* 2010 Decision, para. 7; *Stanišić* Decision, para. 9; *Martić* Decision, para. 9.

²² *Dordević* 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.

²³ *Dordević* 2010 Decision, para. 8.

²⁴ Order on Pre-trial Work Plan, 16 December 2011, annex.

²⁵ Notice on Expert Witness Pursuant to Rule 94 *bis* (B), 8 August 2012.

²⁶ Defence Email to the Trial Chamber and Prosecution, 8 January 2013; Christian Nielsen, 11 January 2013, T. 2517.

expert or not an expert.”²⁷ The Trial Chamber further notes that the Defence does not dispute the status of Dr. Nielsen as an expert in its Response. At issue in the written filings of the parties is the admission of documents cited in Dr. Nielsen’s report.²⁸ Based on the foregoing, the Trial Chamber does not consider itself seised of a challenge to the qualifications of Dr. Nielsen.

17. The Trial Chamber notes that a decision on the admission of Dr. Nielsen’s report²⁹ and accompanying errata sheet³⁰ is pending.³¹ The Trial Chamber finds that the report and errata sheet are relevant to the issues at trial and meet the minimum standards of reliability under Rules 89 (C) and (D) and therefore will be admitted.

18. In addition to the 61 documents listed by the Prosecution in the Motion,³² the Trial Chamber notes that a number of other documents cited in Dr. Nielsen’s report have already been admitted into evidence or marked for identification.³³

1. Relevance and reliability of footnoted documents to which there is no specific objection

19. The proposed footnoted documents in Dr. Nielsen’s report include: (a) laws, orders, and decisions; (b) government letters, minutes, and reports; (c) police and ministry of interior documents; (d) military documents; (e) intercepted conversations;³⁴ (f) material issued by political parties; (g) media material; and (h) monographs.

20. The Trial Chamber notes that the Defence has not objected to a number of these documents.³⁵

²⁷ Christian Nielsen, 11 January 2013, T. 2517.

²⁸ Motion, para. 7; Response, para. 1.

²⁹ Rule 65 *ter* number 02837. Motion, para. 5, fn. 3. Dr. Nielsen explained the methodology in preparing his report. His report focused on two main areas: (a) the historical and political developments in the former Yugoslavia and Croatia between 1990 and 1993 and (b) the MUP structures in Croatia during 1991 to 1993. Dr. Nielsen referenced both primary and secondary sources. He defined primary sources as documents produced by government institutions, political parties, and those who participated in the historical events. He defined secondary sources as scholarly works or publicists’ works that provide second-hand summaries or accounts of these events. Generally, Dr. Nielsen relied on primary sources, but incorporated the use of secondary sources when any relevant areas were not sufficiently addressed by the primary sources. The primary sources used by Dr. Nielsen included documents provided by the Office of the Prosecutor, as well as documents resulting from his own investigation. Dr. Nielsen also incorporated the use of what he referred to as “open sources”, including newspaper articles and interviews. Dr. Nielsen cross-referenced a source’s accounts (specific meetings, dates, and events) with other documentation. Dr. Nielsen stated that he used Serb sources to avoid the potential for bias. Christian Nielsen, 10 January 2013, T. 2406-2412.

³⁰ Rule 65 *ter* number 06378. Corrigendum, para. 1.

³¹ Christian Nielsen, 11 January 2013, T. 2517-2519.

³² Motion, para. 7.

³³ Rule 65 *ter* numbers: 00038, 00039, 00049, 00059, 00089, 00090, 00091, 00092, 00111, 00120, 00122, 00125, 00138, 00140, 00150, 00158, 00160, 00161, 00162, 00164, 00168, 00170, 00171, 00172, 00193, 00204, 00222, 00223, 00224, 00228, 00229, 00231, 00237, 00279, 00280, 00287, 00507, 00737, 00744, 00812, 00925, 02915, 03215, 00811.

³⁴ Rule 65 *ter* number 00284.

³⁵ Response, para. 1.

21. The Trial Chamber finds that those documents cited in Dr. Nielsen's report, but not specifically objected to by the Defence, are probative, have a sufficient degree of reliability, meet the requirements of Rules 89 (C) and (D), and will assist the Trial Chamber in assessing the basis on which Dr. Nielsen reached his conclusions. Rule 65 *ter* number 00284 however is a transcript of an intercepted conversation that requires authentication and shall therefore be marked for identification until such time as it is authenticated by another witness. The Trial Chamber will admit into evidence the remaining documents referenced in Dr. Nielsen's report, which are not specifically objected to by the Defence.³⁶

2. Document to which there is a specific objection

(a) Rule 65 *ter* numbers 02130 and 02262: Interviews with Hadžić

22. The Prosecution submits that these documents are reliable and accurate given that Rule 65 *ter* numbers 02130 and 02262 are corroborated by other evidence already admitted in this case. Further, the Prosecution submits that the Defence had an opportunity to cross-examine Dr. Nielsen regarding the reliability of these documents and did not.³⁷

23. The Defence submits that these exhibits should not be admitted because: (a) the *Borovo* magazine article (Rule 65 *ter* number 02262) does not meet the minimum threshold of reliability under Rule 89(C) as the accuracy of Hadžić's words cannot be verified and therefore the potential for prejudice vastly outweighs any probative value; (b) admission would be a violation of the best evidence rule as there is no indication that the journalists having authored the articles are not available to testify; (c) the *Intervju* magazine article (Rule 65 *ter* number 02130) is generally unreliable due to its "sensationalist" tone; (d) the exhibits have limited relevance because the statements were made 14 and 28 months after the Indictment period; and (e) this evidence is more properly considered Rule 92 *bis*, Rule 92 *ter*, Rule 92 *quater*, or oral evidence.³⁸

³⁶ Rule 65 *ter* numbers: 00006, 00012, 00031, 00046, 00050, 00052, 00053, 00066, 00067, 00077, 00079, 04804, 00093, 00097, 00098, 00105, 00109, 00112, 00116, 00118, 00121, 00123, 00128, 00129, 00130, 00133, 00137, 00148, 00156, 00165, 00176, 00143, 00177, 00178, 00180, 00196, 00207, 00215, 00216, 00218, 00220, 00241, 00243, 00244, 00258, 00260, 04726, 00286, 00292, 00303, 00326, 00334, 00337, 00338, 00394, 00409, 00547, 00565, 04802, 00673, 00734, 00738, 00765, 00788, 00815, 00818, 00835, 00854, 00863, 00896, 00899, 00900, 00901, 00934, 05855, 05856, 00945, 00952, 00966, 00967, 00968, 00975, 00981, 00987, 00989, 00996, 01008, 01009, 01016, 01019, 01024, 01028, 01039, 01041, 01043, 01045, 01046, 01047, 01048, 01049, 01050, 01051, 01053, 01055, 01056, 01062, 01068, 01070, 01082, 01107, 01108, 01131, 01136, 01150, 01156, 01157, 01159, 01160, 01163, 01174, 01177, 01190, 01202, 01214, 01215, 01218, 01221, 01223, 01235, 01240, 01247, 01249, 01250, 01251, 01259, 01268, 01293, 01295, 01312, 01334, 01345, 01380, 01401, 01434, 01435, 01436, 01437, 01438, 01439, 01454, 01480, 01501, 01518, 01530, 01537, 01541, 01545, 01596, 01599, 01611, 01620, 01629, 01634, 01648, 01673, 01674, 01678, 01734, 00278, 00294, 01785, 01803, 01807, 01845, 01851, 01886, 05481, 01924, 01933, 01943, 01957, 02019, 02041, 02051, 02100, 02123, 02134, 02183, 02203, 02204, 02230, 02542, 02881, 02883, 02889, 03023, 03039, and 06386.

³⁷ Motion, para. 23.

³⁸ Response, para. 5.

24. The Prosecution replies that the Tribunal's jurisprudence provides that a document need not be admitted through its author.³⁹ Further, the Prosecution argues that the Defence has provided no examples of the purported "sensationalist tone" of the documents and argues that, in any event, this issue goes to the weight and not the reliability of the documents. In terms of the time period in which the documents were created, the Prosecution states that the Defence's arguments are "disingenuous" given that the Defence has also tendered documents created outside the Indictment period.⁴⁰

25. The Trial Chamber recalls that there is no rule prohibiting the admission into evidence of documents merely because their alleged source was not called to testify.⁴¹ The Trial Chamber notes that Dr. Nielsen testified that he has a familiarity with the journalists working for *Intervju* magazine and the type of persons interviewed by the magazine. Dr. Nielsen testified that the magazine published a large quantity of interviews with important actors in Serb-controlled areas of the former Yugoslavia in the mid-1990s. Dr. Nielsen further testified that the substance of the magazine's interviews often corresponded closely with other reports of statements made by the same individuals.⁴² The Trial Chamber notes that the arguments of the Prosecution and the Defence largely go to the weight that should be attributed to the documents. The Trial Chamber will keep these arguments in mind when assessing the weight to be assigned to Rule 65 *ter* numbers 02130 and 02262. In terms of admissibility, the Trial Chamber finds that sufficient indicia of reliability have been demonstrated and that the requirements of Rules 89 (C) and (D) have been met for Rule 65 *ter* numbers 02130 and 02262. These documents will be admitted into evidence.

(b) Rule 65 *ter* numbers 01939 and 02231: Excerpts of books by Petrović and Očić

26. The Prosecution submits that the excerpts of books by Petrović and Očić,⁴³ which are cited in Dr. Nielsen's report, are reliable because the author was a direct participant in the events described and because, while the authors have their own subjective points of view, the contents of the excerpts comport with other documents and accounts relating to the same events.⁴⁴ The Prosecution asserts that the Defence is inconsistent in their argument against tendered documents, such as Rule 65 *ter* numbers 01939 and 02231, which are created by insiders after the events relevant to the Indictment period, as the Defence also relied on Rule 65 *ter* number 01939 during its

³⁹ Reply, para. 5.

⁴⁰ Reply, para. 6.

⁴¹ Order on Guidelines for Procedure for Conduct of Trial, 4 October 2012, para. 5.

⁴² Christian Nielsen, 10 January 2013, T. 2415-2416.

⁴³ The excerpts of Rule 65 *ter* number 01939 are: 0184-6260 to 6261, 0184-6264 to 6266, 0184-6284 to 6285, 0184-6292 to 6293, 0184-6296 to 6297, 0184-6309, 0184-6326, 0184-6336, 0184-6338, 0184-6340, 0184-6344 to 6345, 0184-6360, 0184-6374, 0184-6376, 0184-6392. Motion, para. 16, fn. 16. The excerpts of Rule 65 *ter* number 02231 are: 0683-6134, 0683-6136 to 6137, 0683-6139 to 6141, 0683-6147 to 6149. Motion, para. 19, fn. 25.

⁴⁴ Motion, paras 14, 19.

cross-examination of Dr. Nielsen and has relied on similar books, such as exhibit D5, during the cross-examination of other witnesses.⁴⁵

27. The Defence submits that these excerpts should not be admitted because the books do not meet the minimum threshold of reliability required under Rule 89(C) given Dr. Nielsen's "tepid" views on the reliability of these books and the fact that the relevant excerpts are "cited numerous times for specific facts that are not corroborated elsewhere."⁴⁶

28. The Prosecution replies that Dr. Nielsen was not "tepid" in his views on the reliability of these books: Dr. Nielsen concluded that the books were reliable, primary source material because the authors were participants in the events detailed and because these events were corroborated by other material.⁴⁷

29. The Trial Chamber notes that the Prosecution is tendering only relevant excerpts from the books. Dr. Nielsen testified that he selected books written by authors who experienced events first-hand.⁴⁸ The Trial Chamber does not consider that Dr. Nielsen was "tepid" in his views towards the excerpts. Documents do not require corroboration before they are admitted into evidence. The Trial Chamber finds that sufficient indicia of reliability have been demonstrated for Rule 65 *ter* number 01939 and that the requirements of Rules 89 (C) and (D) have been met. The tendered excerpts of Rule 65 *ter* number 01939 will be admitted into evidence.

30. In relation to Rule 65 *ter* number 02231, the Trial Chamber notes that excerpted pages with ERN numbers 0683-6136 to 6137, 0683-6147, and 0683-6149 have not been translated. The Trial Chamber is consequently unable to determine whether the requirements of Rules 89 (C) and (D) have been met for these pages. The Trial Chamber will therefore not admit ERN numbers 0683-6136 to 6137, 0683-6147, and 0683-6149 into evidence. The Trial Chamber finds that sufficient indicia of reliability have been demonstrated for the remaining excerpts (ERN numbers 0683-6134, 0683-6139 to 6141, and 0683-6148) and the requirements of Rules 89 (C) and (D) have been met. These excerpts will be admitted into evidence.

(c) Rule 65 *ter* number 02578: Book by Barić

31. The Prosecution submits that the six excerpts from a book by Barić and the accompanying summary in English should be admitted, given that (a) the Prosecution has now provided translations of the excerpts on eCourt, (b) Dr. Nielsen used this book to establish a chronology of

⁴⁵ Motion, paras 15, 19.

⁴⁶ Response, paras 7, 11.

⁴⁷ Reply, para. 7.

⁴⁸ Christian Nielsen, 10 January 2013, T. 2408-2412.

events in his report, and (c) the book has been well received throughout the former Yugoslavia, including Serbia.⁴⁹

32. The Defence objects to the admission of the book in its entirety. The Defence does not however object to the admission of the specific passages referenced in Dr. Nielsen's report.⁵⁰ The Defence does object to the "summary" not referred to in Dr. Nielsen's report. The Defence submits that the summary adds nothing to the report because it is full of tendentious accusations, including, *inter alia*, references to "Serb rebels"; to the RSK being "an illegitimate and illegal state of Serb rebels"; and disparaging references to the Serb media. According to the Defence, inserting such information into the case record serves no useful purpose and actually contradicts Dr. Nielsen's concern that his report not be used as a vehicle for introducing bias under the guise of scholarship.⁵¹

33. The Prosecution replies that the Defence's objections regarding Rule 65 *ter* number 02578 only pertain to the summary used during the Prosecution's examination-in-chief.⁵² In respect of the summary, the Prosecution notes that it has limited the tendered summary to the portion that Dr. Nielsen discussed during his testimony.⁵³

34. The Trial Chamber notes that the Defence does not object to the admission of portions of the book cited in Dr. Nielsen's report. The Trial Chamber finds that sufficient indicia of reliability have been demonstrated for these relevant portions of Rule 65 *ter* number 02578⁵⁴ and that the requirements of Rules 89 (C) and (D) have been met. The Trial Chamber will admit these relevant portions into evidence.

35. The summary is not cited in Dr. Nielsen's report and therefore does not aid the Trial Chamber in testing the basis on which Dr. Nielsen reached his conclusions. On direct examination, the Prosecution only referred to two sentences of the eight-page summary to elicit Dr. Nielsen's opinion on the fears harboured by Serbs regarding displays of Croatian nationalist symbols and the alleged exploitation by Serbian politicians of President Tudman's rhetoric to mobilise Serbs around the Serbian Democratic Party.⁵⁵ The Trial Chamber does not find the summary necessary to the understanding of Dr. Nielsen's testimony or report. The Trial Chamber will therefore order the Prosecution to remove the summary from Rule 65 *ter* number 02578 before its admission into evidence.

⁴⁹ Motion, para. 17.

⁵⁰ Response, para. 8.

⁵¹ Response, para. 9.

⁵² Reply, para. 9.

⁵³ Reply, para. 9; Christian Nielsen, 10 January 2013, T. 2421-2423.

⁵⁴ Rule 65 *ter* number 02578, pp. 0624-6513, 0624-6571, 0624-6551, 0624-6559, 0624-6568, and 0624-6570.

⁵⁵ Christian Nielsen, 10 January 2013, T. 2421-2423.

(d) Rule 65 ter number 04981: Video of interview with Milan Martić

36. The Prosecution submits that the 29-minute video of a BBC interview with Milan Martić, Rule 65 ter number 04981, is relevant and should be admitted because (a) the timing of the 1994 interview does not render the video inadmissible and (b) Martić was a direct participant in the events relevant to the current proceedings.⁵⁶

37. The Defence submits that the video should not be admitted because the admission of a testimonial account of events three to four years prior to an interview is improper. The Defence also argues that admission of all 29 minutes of the video is not proper given that Dr. Nielsen only referenced 11 words from that video.⁵⁷ The Defence states it is willing to stipulate to the fact that Martić did utter the 11 words referenced in footnote six of Dr. Nielsen's report.⁵⁸

38. The Prosecution replies that Dr. Nielsen refers to the video twice in his report and testified regarding to the contents of the video while on the stand.⁵⁹ According to the Prosecution, the entirety of the video should be admitted to give context to the words referred to in Dr. Nielsen's report and testimony.⁶⁰

39. The Trial Chamber finds that sufficient indicia of reliability have been demonstrated for Rule 65 ter number 04981 and that the requirements of Rules 89 (C) and (D) have been met. The Trial Chamber finds that the entirety of the 29-minute video and its transcription are necessary to give context to the portion of the interview referenced in Dr. Nielsen's report and testimony. The Trial Chamber notes however that ERN number 0219-5509, which is referenced in footnote 11 of Dr. Nielsen's report, as well as a number of other pages of the transcription found on eCourt, are not part of the 29-minute video provided to the Trial Chamber by the Prosecution. Accordingly, the Trial Chamber will order the Prosecution to remove ERN number 0219-5508 (starting with the words "Mid August 1990") to ERN number 0219-5518 from Rule 65 ter number 04981.

(e) Rule 65 ter numbers 03018 and 03024: Biography of and statement by Žarković

40. The Prosecution submits that a biography of and statement by Žarković should be admitted because (a) Dr. Nielsen establishes that the documents were obtained through the Croatian State Archives in October 2004 as a result of the Prosecution's efforts to obtain information regarding Serb entities in Croatia and (b) the documents were used to show the creation of police stations in

⁵⁶ Motion, para. 18.

⁵⁷ Response, para. 10.

⁵⁸ Response, para. 10, *referring to* Christian Nielsen, 10 January 2013, T. 2424-2525.

⁵⁹ Reply, para. 10; Christian Nielsen, 10 January 2013, T. 2424-2425; Rule 65 ter number 02837, paras 6, 8, fns 6, 11.

⁶⁰ Reply, para. 10.

Western Slavonia in 1992 and that RSK police forces were deployed to Bosnia and Herzegovina for the Pasovina Corridor operation.⁶¹

41. The Defence submits that that this document does not meet the minimum threshold of *prima facie* reliability required by Rule 89(C) because there is no indication of the source or purpose of the documents.⁶²

42. The Prosecution replies that the Defence had an opportunity to question Dr. Nielsen regarding the source of the information for these documents and did not.⁶³

43. The Trial Chamber notes that the autobiographies indicate who the author of the documents are and discuss the author's own involvement in events. The Trial Chamber finds that sufficient indicia of reliability have been demonstrated for Rule 65 *ter* numbers 03018 and 03024 and that the requirements of Rules 89 (C) and (D) have been met. The Trial Chamber will admit these documents into evidence.

(f) Rule 65 *ter* number 03033: Cryptographic chart

44. The Prosecution submits that the cryptographic chart was obtained from the Republika Srpska Security Services Centre (CSB). The Prosecution argues that, since the Security Services Centre Banja Luka is one of the three entities depicted in the chart and the chart is written in the Cyrillic, "it is logical to conclude that this chart was created by one of the Serb police entities."⁶⁴

45. The Defence submits that this document fails to meet the minimum threshold required by Rule 89(C) because there is no indication of the authorship, timing, or to whom the document has been distributed.⁶⁵

46. The Prosecution replies that the Defence had an opportunity to question Dr. Nielsen regarding the document's source.⁶⁶

47. The Trial Chamber finds the Rule 65 *ter* number 03033 provides no indication of the authorship or entity that distributed or created the chart. The Trial Chamber finds that insufficient indicia of reliability have been demonstrated for Rule 65 *ter* number 03033 and will not admit this document into evidence.

⁶¹ Motion, para. 20.

⁶² Response, para. 12.

⁶³ Reply, para. 3.

⁶⁴ Motion, para. 21.

⁶⁵ Response, para. 16.

⁶⁶ Reply, para. 3.

(g) Rule 65 ter numbers 02117 (under seal) and 02188: Alleged association of Hadžić, Ulemek, and Arkan in 1995

48. The Prosecution tenders Rule 65 ter numbers 02117 and 02188 as they are integral to understanding the analysis and conclusions in Dr. Nielsen's report.⁶⁷

49. The Defence submits that these documents should not be admitted because they are not probative of any allegation in the Indictment as they concern events in 1995. The Defence argues that any minimal relevance or probative value is outweighed by its prejudicial effect.⁶⁸

50. The Prosecution replies that Dr. Nielsen was not given an opportunity to provide an explanation to the Defence's objection, as the Defence did not question him on the issue during cross-examination.⁶⁹

51. The Trial Chamber notes that Rule 65 ter number 02117 is cited in Dr. Nielsen's report and used to assert that Mihaljo Ulemek and Hadžić were acquaintances.⁷⁰ The Trial Chamber finds that sufficient indicia of reliability have been demonstrated for Rule 65 ter number 02117 and that the requirements of Rules 89 (C) and (D) have been met. The Trial Chamber will admit this document into evidence.

52. Rule 65 ter number 02188 is used to support Dr. Nielsen's assertion that Hadžić's association with Arkan persisted after Hadžić was no longer President of the RSK.⁷¹ The Trial Chamber finds that sufficient indicia of reliability have been demonstrated for Rule 65 ter number 02188 and that the requirements of Rules 89 (C) and (D) have been met. The Trial Chamber will admit this document into evidence.

(h) Rule 65 ter number 02400 (under seal): Statement of a member of the Serbian MUP

53. The Prosecution submits that the document is a statement that was given in March 2000 and is meant to be a retrospective. The document explains the functions and deployments of a member of the Serbian MUP and was obtained from the Ministry of Foreign affairs of the Republic of Serbia in May 2007.⁷²

54. The Defence submits that a statement of a member of the Serbian MUP, which is tendered by the Prosecution, does not have the minimum indicia of reliability to be admitted pursuant to Rule

⁶⁷ Motion, paras 7-8.

⁶⁸ Response, para. 17.

⁶⁹ Reply, para. 3.

⁷⁰ Rule 65 ter number 02837, para. 189, fn. 304.

⁷¹ Rule 65 ter number 02837, para. 211, fn. 344.

89(C) because (a) the document is not highly detailed; (b) the statement was taken by police, rather than judicial officers; and (c) the affiant of the statement will not be present in court to be examined on the conditions in which the statement was taken.⁷³

55. The Prosecution replies that Dr. Nielsen was not given an opportunity to provide an explanation to the Defence's objection because the Defence did not question him on the issue during cross-examination.⁷⁴

56. The Trial Chambers finds that Rule 65 *ter* number 02400, bearing the signature of its author and indicating the time and place in which the statement was taken, has sufficient indicia of reliability and that the requirements of Rules 89 (C) and (D) have been met. The Trial Chamber will admit this document into evidence.

(i) Rule 65 *ter* number 05274 (under seal): Police report

57. The Prosecution submits that Rule 65 *ter* number 05274 should be admitted because (a) Dr. Nielsen cited the document in his report to demonstrate the relationship between Hadžić and Arkan and to discuss political developments in Western Slovenia and (b) the document meets the threshold requirements for relevance and reliability. The Prosecution submits that this document should not be excluded because the possible source of the document, GH-007, testified previously in this case.⁷⁵

58. The Defence submits that Rule 65 *ter* number 05274 should have been tendered through the source of the document, who testified previously in the present proceedings. The Defence further argues that the document "does not, given the circumstances, meet the minimum threshold of reliability under Rule 89(C)." According to the Defence, Dr. Nielsen acknowledged that the source of the document may have had a motive to exaggerate some aspects of his statement. The Defence further submits that, despite Dr. Nielsen's claim that the information contained in Rule 65 *ter* number 05274 is corroborated by other evidence, there is a lack of corroboration in relation to key aspects of the document.⁷⁶

⁷² Motion, para. 22.

⁷³ Response, para. 13.

⁷⁴ Reply, para. 3.

⁷⁵ Motion, para. 24.

⁷⁶ Response, paras 14-15.

59. The Prosecution replies that Dr. Nielsen was not given an opportunity to provide an explanation to the Defence's objection because the Defence did not question him on the issue during cross-examination.⁷⁷

60. The Trial Chamber recalls that there is no requirement that a document must be tendered through its source.⁷⁸ The Trial Chamber finds that sufficient indicia of reliability have been demonstrated for Rule 65 *ter* number 05274 and that the requirements of Rules 89 (C) and (D) have been met. The Trial Chamber will admit this document into evidence.

3. Document subject to Second Motion

61. In the Second Motion, the Prosecution requests the admission of Rule 65 *ter* number 06059.⁷⁹ The Prosecution submits that the Defence's tendering of a letter sent by Hadžić to the Ilok town command on 23 December 1991 during cross-examination of Dr. Nielsen⁸⁰ triggered Dr. Nielsen's mention of Rule 65 *ter* number 06059, a response letter written by the Ilok town command to Hadžić dated 25 December 1991. The Prosecution showed Rule 65 *ter* number 06059 to Dr. Nielsen during re-examination, but inadvertently omitted to tender the document. The Prosecution requests that Rule 65 *ter* number 06059 should be admitted in the interests of justice, as the document is relevant and probative of the views held by the army during the Indictment period.⁸¹

62. The Defence has indicated that it does not oppose the Second Motion.⁸²

63. The Trial Chamber notes that the letter is relevant to the relationships between the army, SAO SBWS, and Hadžić. Further, the Trial Chamber notes that both the date and author of the letter are indicated on the document. The Trial Chamber therefore finds that sufficient indicia of reliability have been demonstrated for Rule 65 *ter* number 06059 and that the requirements of Rules 89 (C) and (D) have been met. The Trial Chamber will admit this document into evidence.

E. Disposition

64. Accordingly, the Trial Chamber, pursuant to Rules 54, 65 *ter*, 89, and 94 *bis* of the Rules, hereby

(a) **GRANTS** the Prosecution leave to file the Reply;

⁷⁷ Reply, para. 3.

⁷⁸ Order on Guidelines for Procedure for Conduct of Trial, 4 October 2012, para. 5.

⁷⁹ Second Motion, paras 1, 4.

⁸⁰ This document was admitted as D30.

- (b) **GRANTS** the Prosecution leave to add the document designated by Rule 65 *ter* number 06386 to the Exhibit List;
- (c) **ORDERS** that the report of Dr. Nielsen with Rule 65 *ter* number 02837 and the errata sheet with Rule 65 *ter* number 06378 shall be admitted into evidence;
- (d) **ORDERS** that the documents cited in Dr. Nielsen's report with the following Rule 65 *ter* numbers shall be admitted into evidence: 00006, 00012, 00031, 00046, 00050, 00052, 00053, 00066, 00067, 00077, 00079, 04804, 00093 (under seal), 00097, 00098, 00105, 00109, 00112, 00116, 00118, 00121, 00123, 00128, 00129, 00130, 00133 (under seal), 00137, 00148, 00156, 00165, 00176, 00143, 00177, 00178, 00180, 00196, 00207, 00215, 00216, 00218, 00220, 00241, 00243, 00244 (under seal), 00258, 00260 (under seal), 04726, 00286, 00292, 00303, 00326, 00334, 00337, 00338, 00394, 00409, 00547, 00565, 04802, 00673, 00734, 00738, 00765 (under seal), 00788, 00815, 00818, 00835, 00854, 00863, 00896, 00899, 00900, 00901, 00934, 05855, 05856, 00945, 00952, 00966, 00967, 00968, 00975 (under seal), 00981, 00987, 00989, 00996, 01008 (under seal), 01009, 01016, 01019, 01024, 01028, 01039, 01041, 01043, 01045, 01046, 01047, 01048, 01049, 01050, 01051, 01053, 01055, 01056, 01062 (under seal), 01068, 01070, 01082, 01107, 01108, 01131 (under seal), 01136, 01150, 01156, 01157, 01159, 01160, 01163 (under seal), 01174, 01177, 01190, 01202, 01214, 01215, 01218 (under seal), 01221, 01223, 01235, 01240, 01247 (under seal), 01249, 01250, 01251, 01259, 01268, 01293, 01295, 05274 (under seal), 01312, 01334, 01345, 01380, 01401, 01434, 01435, 01436, 01437, 01438, 01439, 01454, 01480 (under seal), 01501 (under seal), 01518 (under seal), 01530, 01537, 01541 (under seal), 01545 (under seal), 01596, 01599, 01611, 01620, 01629, 01634, 01648, 01673, 01674, 01678, 01734 (under seal), 00278, 00294, 01785, 01803, 01807, 01845, 01851, 01886 (under seal), 05481, 01924 (under seal), 01933 (under seal), 01943, 01957, 02019, 02041, 02051 (under seal), 02100 (under seal), 02117 (under seal), 02123 (under seal), 02130, 02134 (under seal), 02183, 02188, 02203 (under seal), 02204 (under seal), 02230, 02262, 02400 (under seal), 02542, 02881, 02883, 02889 (under seal), 03018, 03023, 03024, 03039, and 06386;
- (e) **ORDERS** that the intercepted conversation with Rule 65 *ter* number 00284 shall be marked for identification until such time as it is authenticated and until further order of the Trial Chamber;

⁸¹ Second Motion, paras 2, 3.

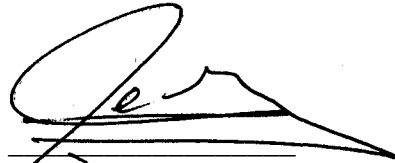
⁸² Defence Email to Trial Chamber and Prosecution, 27 February 2013.

- (f) **ORDERS** that Rule 65 *ter* number 03033 shall not be admitted into evidence;
- (g) **GRANTS** the Prosecution request in the Second Motion to admit Rule 65 *ter* number 06059 into evidence;
- (h) **ORDERS** the Prosecution—by 16 May 2013—(a) to replace the existing version of Rule 65 *ter* number 01939 on eCourt with a new version consisting of the relevant excerpts (ERN numbers 0184-6260 to 6261, 0184-6264 to 6266, 0184-6284 to 6285, 0184-6292 to 6293, 0184-6296 to 6297, 0184-6309, 0184-6326, 0184-6336, 0184-6338, 0184-6340, 0184-6344 to 6345, 0184-6360, 0184-6374, 0184-6376, 0184-6392) and (b) to notify, via a written filing, the Trial Chamber, Defence, and Registry that this has been completed, after which the document shall be deemed admitted into evidence;
- (i) **ORDERS** that the excerpts of Rule 65 *ter* number 02231 with ERN numbers 0683-6136 to 6137, 0683-6147, and 0683-6149 shall not be admitted into evidence and **ORDERS** the Prosecution—by 16 May 2013—(a) to replace the existing version of Rule 65 *ter* number 02231 on eCourt with a new version consisting of the relevant excerpts (ERN numbers 0683-6134, 0683-6139 to 6141, 0683-6148) and (b) to notify, via a written filing, the Trial Chamber, Defence, and Registry that this has been completed, after which the document shall be deemed admitted into evidence;
- (j) **ORDERS** the Prosecution—by 16 May 2013—(a) to replace the existing version of Rule 65 *ter* number 02578 on eCourt with a new version consisting of the six relevant excerpts (ERN numbers 0624-6513, 0624-6551, 0624-6559, 0624-6568, 0624-6570, and 0624-6571) *and excluding the summary* and (b) to notify, via a written filing, the Trial Chamber, Defence, and Registry that this has been completed, after which the document shall be admitted into evidence;
- (k) **ORDERS** the Prosecution—by 16 May 2013—(a) to replace the existing version of Rule 65 *ter* number 04981 on eCourt with a new version consisting of only the specified relevant portions (ERN numbers 0219-5504 to 0219-5508, excluding the portion of 0219-5508 starting with the words “Mid August 1990”) and (b) to notify, via a written filing, the Trial Chamber, Defence and Registry that this has been completed, after which the document shall be admitted; and

- (1) **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 ninth day of May 2013,
At The Hague,
The Netherlands



Judge Guy Delvoie
Presiding

[Seal of the Tribunal]