



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: 30 October 2008  
Original: English

**IN TRIAL CHAMBER I**

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

**Registrar:** Mr. Hans Holthuis

**Decision of:** 30 October 2008

**PROSECUTOR**

v.

**MOMČILO PERIŠIĆ**

***PUBLIC***

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**DECISION ON DEFENCE MOTION TO EXCLUDE THE  
EXPERT REPORT OF MORTEN TORKILDSEN**

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**The Office of the Prosecutor**

Mr. Mark Harmon  
Mr. Daniel Saxon

**Counsel for the Accused**

Mr. Novak Lukić  
Mr. Gregor Guy-Smith

1. 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 Defence “Notice Pursuant to Rule 94 *bis* Concerning Prosecution Expert Morten Torkildsen and Motion to Exclude”, filed on 3 January 2007 (“Motion”) and hereby renders its Decision.

## I. PROCEDURAL HISTORY

2. On 14 June 2006, the pre-trial Judge ordered the Prosecution “to provide the reports of any expert witnesses to be called” and set the deadline of 20 October 2006 (“Order of 14 June 2006”).<sup>1</sup> The Prosecution provided an expert report of Morten Torkildsen of 18 November 2002 (“Report”)<sup>2</sup> to the Defence and on 3 January 2007, the Defence filed its Motion. On 17 January 2007, the “Prosecution’s Response to Defence Motion to Exclude Expert Reports of Donia, Theunens and Torkildsen” was filed (“Response”). On 2 February 2007, the Trial Chamber issued its “Order on Defence Submissions Regarding Various Experts’ Reports Disclosed by the Prosecution Pursuant to Rule 94*bis*” (“Order of 2 February 2007”), in which it deferred the decision on the merits of the Parties’ submissions to the Trial Chamber that would hear the case at trial.<sup>3</sup>

## II. SUBMISSIONS OF THE PARTIES

3. In its Motion, the Defence requests exclusion of the Report as evidence at trial.<sup>4</sup> It submits that “it does not accept the expert report of Mr. Torkildsen,<sup>5</sup> does wish to cross-examine him at trial, does challenge his qualifications and does challenge the relevancy of all of his report”.<sup>6</sup>

4. In support of its position, the Defence submits that:

<sup>1</sup> Status Conference, 14 June 2006, T. 50. On 5 October 2006, the Prosecution filed a “Motion to Vacate Order of 14 June 2006 Concerning Filing Time for Military Experts Reports with Confidential Annex A” (“Motion to Vacate”). The Motion to Vacate was denied on 11 October 2006. *See* Decision on Prosecution’s Motion to Vacate Order of 14 June 2006. *See also* Status Conference, 11 October 2006, T. 66.

<sup>2</sup> The Report was produced in the *Slobodan Milošević* case with citations made to the exhibit numbers in that case. In order to bring the Report in line with the present proceedings, through making reference to the exhibit numbers from the 65 *ter* list in the present case, on 14 October 2008, the Prosecution filed its “Submission of Expert Report by Morten Torkildsen”.

<sup>3</sup> Order of 2 February 2007, para. 10. *See also* Status Conference, 18 January 2008, T. 131. On 19 February 2007, the Prosecution filed its “Response to Trial Chamber’s Order on Defence Submissions Regarding Various Experts’ Reports Disclosed by the Prosecution Pursuant to Rule 94*bis*”, wherein the Prosecution notified the Trial Chamber that it complied with the Order of 2 February 2007 in relation to the matters decided by the Trial Chamber at the pre-trial stage.

<sup>4</sup> Motion, para. 23.

<sup>5</sup> *See* Submission of Expert Report by Morten Torkildsen filed partly confidentially by the Prosecution on 14 October 2008. On 20 October 2008, the Prosecution filed its Submission of Curriculum Vitae of Expert Morten Torkildsen.

<sup>6</sup> Motion, paras 5, 23.

- a) Parts of the Report describing financial assistance provided in 1991 and 1992 fall outside the temporal scope of the Indictment and therefore should be deemed irrelevant;<sup>7</sup>
  - b) Conclusions made in the Report are not sufficiently supported by the external sources;<sup>8</sup>
  - c) Parts of the Report refer to a book by Mladen Dinkić whom the Defence needs to cross-examine before these parts of the Report can be considered admissible;<sup>9</sup>
  - d) The summary of the documents referenced to in the Report made by Mr. Torkildsen is not reliable unless all such sources are in evidence. At the same time, when all such sources are in evidence, the summary becomes unnecessary;<sup>10</sup>
  - e) In the report Mr. Torkildsen selectively excerpts, interprets and gives opinions concerning various financial and military documents. His opinions and conclusions are mixed with factual summaries in a way that makes it impossible for the Defence to distinguish which parts of the Report refer to the opinion of an expert and which parts are factual conclusions;<sup>11</sup>
  - f) Mr. Torkildsen is not an “expert” for the purposes of Rule 94 *bis* of the Rules as his area of expertise “seems to be in reading materials and informing the court about what he has read. The actual import of the Torkildsen report is to provide the court with the [Prosecution’s] argument as to the meaning of the documents, which is not a proper subject of expert testimony”.<sup>12</sup>
  - g) Due to the fact that Mr. Torkildsen was an employee of the Office of the Prosecutor (“OTP”), he does not possess the necessary objectivity and independence required by an expert witness.<sup>13</sup>
5. In support of its objection to the Motion, the Prosecution submits that:
- a) Mr. Torkildsen is an expert as defined in the jurisprudence of the Tribunal;<sup>14</sup>

<sup>7</sup> Motion, paras 7, 9. The Defence refers to the whole Chapter III and parts of Chapter V of the Report.

<sup>8</sup> Motion, para. 8. The Defence refers e.g. to paragraph 13 of the Report.

<sup>9</sup> Motion, para. 10.

<sup>10</sup> Motion, paras 18-19.

<sup>11</sup> Motion, para. 11, 20.

<sup>12</sup> Motion, paras 20-22. The Defence further submits that process of summarizing facts which the Trial Chamber is obliged to consider does not require expertise beyond that which is within the capacity of any tribunal of fact, Motion, para. 21.

<sup>13</sup> Motion, paras 12-17, 19.

<sup>14</sup> Response, para. 11.

- b) The legal standard for accepting an expert report does not refer to the determination whether such report is selective but whether it is unfairly selective. The issue of selectivity and the evidentiary basis for the expert's conclusions are issues that can be most appropriately addressed by the Defence in the cross-examination of the expert or by calling its own witnesses;<sup>15</sup>
- c) In respect of the references made in the Report to the book of Mr. Dinkić, there is no general rule requiring the author of every document to be called for cross-examination. Rather, the preferable course of action in this case would be to call Mr. Torkildsen for cross-examination and subsequently decide whether to call Mr. Dinkić or to exclude the relevant part of the Report;<sup>16</sup>
- d) The fact that Mr. Torkildsen was an employee of the OTP at the time when he produced the Report goes to the weight to be attached to the Report rather than to its admissibility and this issue would most appropriately be addressed in the cross-examination;<sup>17</sup>
- e) Finally, the Prosecution does not object to the admission into evidence of the sources used by Mr. Torkildsen in the Report.<sup>18</sup>

### III. APPLICABLE LAW

6. Rule 94 *bis* of the Rules of Evidence and Procedure ("Rules") reads as follows:

**Rule 94 *bis***  
**Testimony of Expert Witnesses**

- (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.

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<sup>15</sup> Response, paras 12-16.

<sup>16</sup> Response, paras 34-39.

<sup>17</sup> Response, paras 18-27.

7. The jurisprudence of the Tribunal has established a number of requirements which must be met before an expert statement or report is admissible in evidence. They include:

- i) the proposed witness is classified as an expert;
- ii) the expert statements or reports meet the minimum standard of reliability;
- iii) the expert statements or reports are relevant and of probative value; and
- iv) the content of the expert statements or reports falls within the accepted expertise of the witness.<sup>19</sup>

8. The term “expert” has been defined by the jurisprudence of the Tribunal as “a person whom by virtue of some specialised knowledge, skill or training can assist the trier of fact to understand or determine an issue in dispute”<sup>20</sup>. In determining whether a particular witness meets these criteria, the Trial Chamber should take into account the witness’s former and present positions and professional experience through reference to the witness’s *curriculum vitae* (“CV”) as well as the witness’ scholarly articles, other publications or any other pertinent information about the witness.<sup>21</sup>

9. An expert is expected to make statements and draw conclusions independently and impartially. The fact that the witness has been involved in the investigation and preparation of the Prosecution or Defence case or is employed or paid by one party does not disqualify him or her as an expert witness or make the expert statement unreliable.<sup>22</sup> Concerns relating to the witness’s independence or impartiality do not necessarily affect the admissibility of the witness’ statement or report pursuant to Rule 94 *bis* of the Rules, but may affect the weight to be given to the witness’s evidence.<sup>23</sup>

10. The content of the statement or report must fall within the expert witness’s area of expertise.<sup>24</sup> This requirement ensures that the statements or reports of an expert witness will only be

<sup>18</sup> Response, paras 28-29.

<sup>19</sup> *Prosecutor v. Lukić and Lukić*, IT-98-32/1-T, Decision on Second Prosecution Motion for the Admission of Evidence Pursuant to Rule 92*bis* (Two Expert Witnesses), 23 July 2008, para. 15.

<sup>20</sup> *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-T, Decision Concerning the Expert Witnesses Ewa Tabeau and Richard Philipps, 3 July 2002, p. 2. (“*Galić* Decision Experts Tabeau and Philipps”).

<sup>21</sup> *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, Decision on Expert Status of Reynaud Theunens, 12 February 2008, para. 28, with further references; *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-T, Decision on Defence Expert Witnesses, 21 August 2007, para. 6, with further references.

<sup>22</sup> *Galić* Decision Experts Tabeau and Philipps pp 2-3.

<sup>23</sup> *Prosecutor v Slobodan Milošević*, Case No. IT-02-54-T, Decision on Admissibility of Expert Report of Kosta Čavoški, 1 March 2006 p. 2; *but see Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Oral Ruling of 13 July 2006.

<sup>24</sup> *Prosecutor v Milan Martić*, Case No. IT-95-11-T, Decision on Defence’s Submission of the Expert Report of Professor Smilja Avramov Pursuant to Rule 94*bis*, 9 November 2006, (“*Martić*, Decision Expert Avramov”) para. 12.

treated as expert evidence, insofar as they are based on the expert's specialised knowledge, skills or training. Statements that fall outside the area of expertise will be treated as personal opinions of the witness and will be weighted accordingly.<sup>25</sup> Generally, an expert witness should not offer his or her opinion on the criminal liability of the accused. This is a matter that falls within the competence of the Chamber.<sup>26</sup>

11. Experts may express their opinion within the confines of their expertise on the facts established in evidence if the opinion is relevant to the case.<sup>27</sup>

#### IV. DISCUSSION

12. An analysis of Mr. Torkildsen's CV shows that he holds a masters degree in the areas of trade and finance and that he possesses numerous years of work experience as a financial investigator both in his native Norway as well as on the international stage. The Trial Chamber is satisfied that in this position, he gained the required experience to be considered as an expert in the field of financial investigations.

13. The Trial Chamber dismisses the Defence submission that by virtue of his association with the Prosecution, Mr. Torkildsen does not possess the objectivity and independence required of an expert witness. The Trial Chamber recalls that concerns affecting the impartiality or credibility of an expert witness should not necessarily result in exclusion, but may affect the weight accorded to that evidence.<sup>28</sup>

14. The Trial Chamber notes that the Report consists of an analysis of financial aspects of military and other documents pertaining to the issue of assistance provided by the Socialist Federal Republic of Yugoslavia ("SFRY") and/or the Republic of Serbia to Serbian Autonomous District ("SAO") Krajina, SAO Western Slavonia, SAO Western Slavonia, Baranja and Western Srem (collectively referred to as the "RSK") as well as Republika Sprska ("RS"). It explains the forms of such assistance together with the detailed procedures used in its implementation. The Report also addresses the scale of the support and its impact on the economies of all these political entities. The Trial Chamber therefore finds that the content of the Report falls within Mr. Torkildsen's field of expertise.

<sup>25</sup> *Ibid.*, para. 12.

<sup>26</sup> *Prosecutor v. Jovica Stanišić and Franko 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*, para. 12.

<sup>27</sup> *Martić*, Decision Expert Avramov, para. 10.

<sup>28</sup> *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, Decision on Expert Status of Reynaud Theunens, 12 February 2008, para. 28, with further references also in respect of the *Milutinović et al* Decision cited by the Defence.

15. The Trial Chamber notes that the Report covers the period of 1991-1995; hence a significant part of it falls outside the temporal scope of the Indictment and as such is not *directly* relevant to charges in the present case. However, the Trial Chamber is of the view that the information concerning the events in 1991 and 1992 is of relevance to the Trial Chamber's understanding of a genesis of the process of financial support granted by the SFRY and/or the Republic of Serbia to the RSK and RS in the period relevant to the Indictment as well as any changes it underwent over time. As a consequence, the Trial Chamber is satisfied that the Report is relevant to the present case.

16. The Trial Chamber further finds that the concerns advanced by the Defence concerning inadequate referencing as well as the reliance on particular and/or selective sources, including the objection to the use of Mr. Dinkić's book, are matters of weight which can properly be addressed in cross-examination, before a decision on the admissibility of the Report is made by the Trial Chamber.

17. The Trial Chamber recalls that the standard of expert witness within the meaning of Rule 94 *bis* of the Rules is whether an expert can assist the trier of fact to understand or determine an issue in dispute, by virtue of his specialised knowledge. The Trial Chamber is satisfied that, as a financial expert, Mr. Torkildsen can assist the Trial Chamber in understanding the financial aspects of the assistance given to the RSK and RS in analysing the relevant documents in their financial context.

18. Finally, the Trial Chamber is of the view that it is not a requirement that *all* the sources used by an expert in the report are admitted into evidence as such an approach would unnecessarily burden the trial record. Rather, it is up to the Defence to challenge their use or confront an expert with them during cross-examination if the need arises. Such challenges shall be taken into account by the Trial Chamber in assessing the probative value of the report, including its reliability.

## V. DISPOSITION

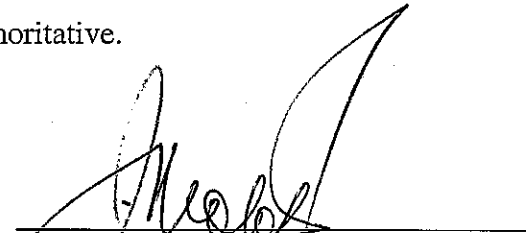
19. **FOR THE FOREGOING REASONS** and **PURSUANT TO** Rules 54 and 94 *bis* of the Rules, the Trial Chamber

**DENIES** the Motion;

**ORDERS** that Morten Torkildsen shall appear before the Chamber as an expert to be examined by the Parties and the Chamber; and

**DEFERS** the decision on the admissibility of the Report until the conclusion of Mr. Torkildsen's testimony.

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



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Judge Bakone Justice Moloto  
Presiding Judge

Dated this thirtieth day of October 2008

At The Hague

The Netherlands

[Seal of the Tribunal]