



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: 26 January 2009

Original: English

IN TRIAL CHAMBER I

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

Acting Registrar: Mr. John Hocking

Decision of: 26 January 2009

PROSECUTOR

v.

MOMČILO PERIŠIĆ

PUBLIC

**DECISION ON EXPERT REPORTS OF RICHARD
HIGGS**

The Office of the Prosecutor

Mr. Mark Harmon
Mr. Daniel Saxon

Counsel for the Accused

Mr. Novak Lukić
Mr. Gregor Guy-Smith

TRIAL CHAMBER I (“Trial Chamber”) of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 (“Tribunal”) is seised of the Prosecution’s “Submission of Expert Reports by Richard Higgs with Annexes 1 Through 3” filed publicly on 7 January 2009 (“Motion”)¹ and hereby renders its Decision.

I. PROCEDURAL HISTORY AND SUBMISSIONS

1. In its Motion, the Prosecution moves the Trial Chamber to admit into evidence three expert reports authored by Richard Higgs:

- a) Report on Market Firing Incident Involving Mortars in the Sarajevo Area Dated 28 August 1995” (“First Report”);
- b) Addition to Expert Report on Firing Incident of 28 August 1995 As Included in Second Schedule to the Indictment Against Dragomir Milošević (“Second Report”); and
- c) Report on Firing Incidents Involving Mortars in the Sarajevo Area Dated 8 November 1994 and 18 June 1995 (“Third Report”).²

2. On 3 November 2006, the Prosecution disclosed to the Defence the First and Second Reports in English and on the 19 February 2007 disclosed their BCS versions. On 27 November 2006, the Defence filed its “Notice Pursuant to Rule 94 *bis* Concerning Prosecution Experts Grujić, Kovacs, Poje, Higgs, Philips, Tabeau, and Zečević” (“Notice”). The Defence did not object to the admission of the First and Second Reports.³

3. The Prosecution disclosed the Third Report to the Defence in English on 6 February 2007 and in BCS on 18 May 2007. The Defence has not filed a notice pursuant to Rule 94 *bis*(B) of the Rules of Procedure and Evidence (“Rules”) concerning the Third Report.⁴

¹ Signed on 6 June 2009.

² Motion, para. 1.

³ Notice, para. 4; Motion, para. 2.

⁴ Motion, para. 3.

II. APPLICABLE LAW

4. Rule 94 *bis* of the 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.

5. 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.⁵

6. The term “expert” has been defined by the jurisprudence of the Tribunal as “a person whom [*sic*] by virtue of some specialised knowledge, skill or training can assist the trier of fact to understand or determine an issue in dispute”⁶. 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

⁵ *Prosecutor v. Lukić and Lukić*, Case No. 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.

⁶ *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-T, Decision Concerning the Expert Witnesses Ewa Tabeau and Richard Philipps, 3 July 2002 (“*Galić* Decision Experts Tabeau and Philipps”), p. 2.

the witness's scholarly articles, other publications or any other pertinent information about the witness.⁷

7. The content of the statement or report must fall within the expert witness's area of expertise.⁸ This requirement ensures that the statements or reports of an expert witness will only be 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.⁹ 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.¹⁰

8. 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.¹¹

9. The evidence sought to be admitted into evidence pursuant to Rule 94 *bis* of the Rules must also fulfil the general requirements of admissibility. The proposed evidence must therefore be relevant and have probative value, and the probative value must not be substantially outweighed by the need to ensure a fair trial.¹²

III. DISCUSSION

A. Qualification of Mr. Higgs as an Expert Witness

10. An analysis of Mr. Higgs's CV shows that he is an ex Quartermaster Sergeant Instructor with the Small Arms School Corps serving with the Mortar Division, which is part of the British Army's Infantry Training Centre. In his post as Divisional Instructor he was responsible for subject matter expertise to the British Army in all matters relating to mortars.¹³

11. Mr. Higgs served in the British army for 22 years, spending the last 11 years of service specialising in mortars alone. In the course of his duties he conducted investigations into mortar

⁷ *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.

⁸ *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.

⁹ *Ibid.*, para. 12.

¹⁰ *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*, 18 March 2008, para. 12.

¹¹ *Martić* Decision Expert Avramov, para. 10.

¹² Rule 89(C) and (D) of the Rules.

¹³ First Report, p. 1.

incidents and instructed on “mortar related skills”¹⁴ to British and foreign armies. He has acted as a consultant to the UN in the past.¹⁵

12. Given Mr. Higgs’s past positions and professional experience, the Trial Chamber is satisfied that he has gained specialised knowledge as an expert in the field of mortar artillery. The Trial Chamber is therefore of the view that Mr. Higgs is qualified as an expert within the meaning of Rule 94 *bis* of the Rules.

B. Admissibility of the First Report

13. The first part of the First Report consists of general information on the deployment of mortars, a description of their component parts and the types of fuses available. Whilst the Trial Chamber considers this information relevant to the mortar attacks on Sarajevo, it finds particularly pertinent remarks made by Mr. Higgs in his opinions concerning the direction of fire, angle of descent and the probable firing positions of mortar attacks on Sarajevo on 28 August 1995.¹⁶ Considering that said mortar shelling on Sarajevo is referred to in the Indictment,¹⁷ the Trial Chamber finds that the First Report may assist it in its determination of important issues in this case.

14. Furthermore, Mr. Higgs’s comments regarding the characteristics of mortar attacks, such as their sound or the crater produced,¹⁸ is likely to assist the Trial Chamber in drawing conclusions about the mortar attacks on Sarajevo on 28 August 1995 from the evidence presented or to be presented in the case. The Trial Chamber is satisfied that the First Report clearly sets out the methodology used to verify the information presented.

15. The military information regarding mortars in general and the application of these principles to a mortar incident at Sarajevo market on the 28 August 1995 falls within Mr. Higgs’s expertise. However, the sub-sections entitled “Possible Intentions of the Attackers”¹⁹ and “The Other Four Rounds Fired”²⁰ discuss matters which could be viewed as falling outside Mr. Higgs’s expertise and which are reserved for the Trial Chamber’s decision at the end of the case, on the basis of the totality of the evidence. Rather than discarding the First Report on this basis, the Trial Chamber will accord appropriate weight to these portions of the First Report.

¹⁴ *Ibid.*, p. 1.

¹⁵ *Ibid.*, p. 2.

¹⁶ *Ibid.*, pp 8-14.

¹⁷ See para. 40 of the Indictment and para. 9 of Schedule A annexed thereto.

¹⁸ First Report, p. 5.

¹⁹ *Ibid.*, pp 9-10.

²⁰ *Ibid.*, p. 11.

16. Overall, the Trial Chamber finds the First Report relevant and of probative value. As a consequence, and given that the Defence has accepted Mr. Higgs's First Report pursuant to Rule 94 *bis*, the First Report is admitted into evidence.

C. Admissibility of the Second Report

17. The Second Report is an Addendum to the First Report focusing on the establishment of the range and specific angle of the mortar attack on 28 August 1995. The Trial Chamber finds it relevant, of probative value and falling within Mr. Higgs's field of expertise. As a consequence and given that the Defence has accepted the Second Report pursuant to Rule 94 *bis*, the Second Report is admitted into evidence.

D. Admissibility of the Third Report

18. The Third Report provides the same military information regarding mortars as the First Report but applies this information to mortar incidents taking place in Sarajevo on 8 November 1994 and 18 June 1995. The Trial Chamber notes that mortar shelling on Sarajevo on 18 June 1995 is referred to in the Indictment.²¹ The Trial Chamber therefore considers that information relating to this incident in the Third Report may assist it in its determination of important issues in this case. However, the Trial Chamber observes that mortar shelling on Sarajevo on 8 November 1994 is an unscheduled incident;²² as the Prosecution did not seek leave to lead such evidence,²³ the information relating to this incident shall be redacted.

19. Again the Trial Chamber is satisfied that the Third Report clearly sets out the methodology used to verify the information presented.²⁴

20. The Trial Chamber is satisfied that the military information contained in the Third Report falls within Mr. Higgs's expertise. At the same time, the Trial Chamber notes that the Third Report contains sub-sections entitled "Possible Intentions of the Attackers"²⁵, "The Military Objective, Intention and Steps Taken to Reduce Civilian Casualties"²⁶, "The Type of Fire and Use in this Case"²⁷ and "The Reasons for the Attack Deliberate or Otherwise"²⁸ where matters are discussed which could be viewed as falling outside Mr. Higgs's expertise and which are reserved for the Trial

²¹ See para. 40 of the Indictment and para. 7 of Schedule A annexed thereto.

²² See p. 72 of the 65 *ter* Rule Witness Summary and para. 15 of the Decision on Prosecution's Submission on Interpretation of the Trial Chamber's Decision of 15 May 2007 Regarding "Unscheduled Incidents", 31 October 2008.

²³ See Decision on Application of Rule 73 *bis* and Amendment of Indictment, 15 May 2007, para. 17.

²⁴ See Third Report, pp 5-7.

²⁵ *Ibid.*, p. 8 and p. 11.

²⁶ *Ibid.*, pp 8-9 and p. 12, in relation to the 18 June incident *see* p. 17.

²⁷ *Ibid.*, p. 9 and p. 12, in relation to the 18 June incident *see* p. 17.

²⁸ *Ibid.*, p. 18.

Chamber’s decision at the end of the case, on the basis of the totality of the evidence. Rather than discarding the Third Report on this basis, the Trial Chamber will accord appropriate weight to these portions of the Third Report.

21. The Trial Chamber finds that the Third Report shall be redacted insofar as it relates to the 8 November 1994 incident.²⁹ The Trial Chamber further finds the remaining sections relevant and of probative value. As a consequence, they are admitted into evidence".

IV. DISPOSITION

22. **FOR THE FOREGOING REASONS** and **PURSUANT TO** Rules 54, 89 and 94 *bis* of the Rules, the Trial Chamber hereby

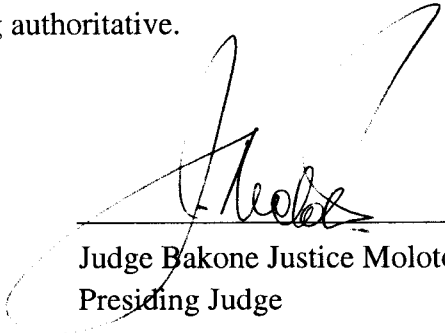
GRANTS the Motion in Part;

ADMITS into evidence the First and Second Report;

ADMITS into evidence the Third Report in its redacted form (pages one to six, pages fourteen to nineteen and picture two on page twenty only);

REQUESTS the Registry to assign the exhibit numbers to the First, Second and Third Reports.

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



Judge Bakone Justice Moloto
Presiding Judge

Dated this twenty-sixth day of January 2009
At The Hague
The Netherlands

[Seal of the Tribunal]

²⁹*Ibid.*, beginning at “Section 2” pp 6-13, picture 1 on p. 20 and p. 21.