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UNITED
NATIONS



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: 10 March 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: 10 March 2009

PROSECUTOR

v.

MOMČILO PERIŠIĆ

PUBLIC

**DECISION ON EXPERT REPORT BY RICHARD
PHILIPPS**

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 Report by Richard Philipps with Annexes A and B” filed publicly on 17 February 2009 (“Submission”) and hereby renders its Decision.

I. PROCEDURAL HISTORY AND SUBMISSIONS

1. In its Submission, the Prosecution moves the Trial Chamber to admit into evidence a report authored by Richard Philipps, entitled: “Expert Report Richard Philipps – Galić Report” (“Report”) dated 17 March 2002.¹ The Prosecution submits that the Report is relevant and of probative value to the allegation that many of the officers serving in the top levels of the Army of the Republika Srpska (“VRS”) were in fact Yugoslav Army (“VJ”) officers subordinated to Momčilo Perišić as set out in Schedule E of the Indictment.²

2. On 7 November 2006, the Prosecution provided the Report to the Defence. On 27 November 2006, the Defence filed its “Notice Pursuant to Rule 94 *bis* Concerning Prosecution Experts Grujić, Kovacs, Poje, Higgs, Philips [*sic*], Tabeau, and Zecević” (“Notice”). In its Notice the Defence contended that, as it had not received the curriculum vitae (“CV”) of Mr. Philipps, it could not assess his qualifications as an expert. In addition, the Defence noted that it had not yet received the “source documents” referenced in the Report. Consequently, the Defence objected to the “acceptance” of the Report and expressed its wish to cross-examine Mr. Philipps on his qualifications and the content of the Report.³

3. On 19 February 2007, the Prosecution disclosed the source documents referenced in the Report. On 16 January 2009, the Prosecution disclosed Mr. Philipps’s CV to the Defence.⁴

4. On 3 March 2009, the Defence filed its “Reaffirmation of Notice Pursuant to Rule 94*bis* on Expert Report of Prosecution Witness Richard Phillips [*sic*” (“Reaffirmation of Notice”), whereby the Defence stated that after reviewing the source documents and Mr. Philipps’s CV, it confirmed its non acceptance of the Report and repeated its wish to cross-examine him.⁵

¹ Submission, para. 1. *See* Submission, Annex 1.

² Submission, para. 5.

³ Notice, para. 5.

⁴ Submission, paras 3-4.

⁵ Reaffirmation of Notice, paras 7-8.

II. APPLICABLE LAW

5. 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.

6. 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.⁶

7. 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”⁷. 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

⁶ *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.

⁷ *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”).

experience through reference to the witness's CV as well as the witness's scholarly articles, other publications or any other pertinent information about the witness.⁸

8. The content of the statement or report must fall within the expert witness's area of expertise.⁹ 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.¹⁰ 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.¹¹

9. 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.¹²

10. 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.¹³

III. DISCUSSION

A. Qualification of Mr. Philipps as an Expert Witness

11. An analysis of Mr. Philipps's CV shows that at the time when he prepared the Report he was working as a Military Analyst for the Office of the Prosecutor ("OTP"). Mr. Philipps has also held a number of part-time military posts and has completed numerous military analysis courses, in particular: training in the use of Link Analysis Software and a strategic analysis course.¹⁴

12. Given Mr. Philipps's military training and his experience working as a military analyst, the Trial Chamber is satisfied that he has gained specialised knowledge as an expert in the field of

⁸ *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.

⁹ *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 on Expert Avramov") para. 12.

¹⁰ *Ibid.*, para. 12.

¹¹ *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.

¹² *Martić* Decision on Expert Avramov, para. 10.

¹³ Rule 89(C) and (D) of the Rules.

¹⁴ Annex B of the Report, CV of Richard Duncan Philipps.

military analysis. The Trial Chamber is therefore satisfied that Mr. Philipps is qualified as an expert within the meaning of Rule 94 *bis* of the Rules.

B. Admissibility of the Report

13. Mr. Philipps's report consists of six charts and an introduction, which sets out the methodology used to compile the charts, describes their contents and, in relation to the first chart, provides an explanation for symbols contained therein.

14. The first chart depicts the structure of the Sarajevo Romanija Corps ("SRK") for the period May 1992 to December 1995.¹⁵ The chart identifies personnel and the dates, where known, on which personnel changes were made in the SRK. The Trial Chamber considers this information relevant to the chains of command within the VRS. In particular, the Trial Chamber finds this information relevant to assessing the Prosecution's allegation that many of the officers serving in the top levels of the VRS, including in the SRK, were in fact VJ officers subordinated to Momčilo Perišić.¹⁶

15. The remaining five charts¹⁷ outline the structure of the SRK, and, generically, of the battalions and brigades within the Corps. The Trial Chamber finds that these charts are also relevant to understanding the chains of command within the SRK.

16. The Trial Chamber therefore finds that the Report falls within Mr. Philipps's field of expertise and may assist it in its determination of important issues in this case.

17. As regards the Defence's argument in its Notice in relation to the degree of transparency in the sources and methods used to compile the Report,¹⁸ the Trial Chamber finds such concerns have been met by the Prosecution disclosure of the source documents.¹⁹ Any further concerns the Defence may have with regard to Mr. Philipps's qualifications and his Report may properly be addressed in cross-examination.

18. In general, the Trial Chamber is satisfied that the Report clearly sets out the methodology used to verify the information presented. Nonetheless, it has some concerns regarding Mr. Philipps's reliance on documents signed by staff of the OTP. Mr. Philipps places certain units and

¹⁵ Annex A of the Report. The SRK is alleged to have conducted a campaign of shelling and sniping upon Sarajevo. *See* Indictment, paras 41-42.

¹⁶ *See* Indictment, para. 43; Annex E of the Indictment, pp 5-6.

¹⁷ "Sarajevo Romanija Corps –Corps Troops", "Sarajevo Romanija Corps – September 1992", "Sarajevo Romanija Corps – September 1993", "Sarajevo Romanija Corps – Generic Brigade Overview" and "Sarajevo Romanija Corps – Generic Battalion Overview".

¹⁸ Notice, para. 5. *See also* Reaffirmation of Notice, para. 7.

¹⁹ Submission, para. 3.

personnel within the command structure of the SRK based, among other documents, on letters signed by OTP staff.²⁰ These concerns, however, do not affect the admissibility of the Report but may affect the weight to be given to Mr. Philipps's evidence.

19. Overall, the Trial Chamber is satisfied that the Report contains information of relevance and probative value to this case.

IV. DISPOSITION

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

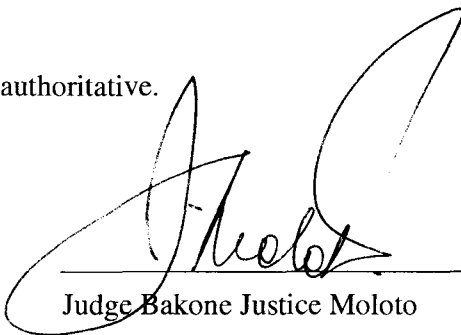
GRANTS the Prosecution Submission and **ADMITS INTO EVIDENCE** the Report;

ORDERS that Mr. Richard Philipps shall appear before the Trial Chamber as an expert to be examined by the Parties and the Trial Chamber;

DISMISSES the Defence Notice in all other respects; and

REQUESTS the Registry to assign an exhibit number to the Report.

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



Judge Bakone Justice Moloto
Presiding Judge

Dated this tenth day of March 2009

At The Hague

The Netherlands

[Seal of the Tribunal]

²⁰ *E.g.* Annex A of the Report, "1st Infantry Battalion (2)", p. 1; "1st Sarajevo Mechanised (Motorised) Brigade, p. 2; "4th Infantry Battalion", p. 3.