



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-05-88-T

Date: 11 October 2007

Original: English

IN TRIAL CHAMBER II

Before: Judge Carmel Agius, Presiding
Judge O-Gon Kwon
Judge Kimberly Prost
Judge Ole Bjørn Støle – Reserve Judge

Registrar: Mr. Hans Holthuis

Decision of: 11 October 2007

PROSECUTOR

v.

**VUJADIN POPOVIĆ
LJUBIŠA BEARA
DRAGO NIKOLIĆ
LJUBOMIR BOROVIČANIN
RADIVOJE MILETIĆ
MILAN GVERO
VINKO PANDUREVIĆ**

PUBLIC

**SECOND DECISION REGARDING THE EVIDENCE OF GENERAL
RUPERT SMITH**

Office of the Prosecutor

Mr. Peter McCloskey

Counsel for the Accused

Mr. Zoran Živanović and Ms. Julie Condon for Vujadin Popović
Mr. John Ostojić and Mr. Christopher Meek for Ljubiša Beara
Ms. Jelena Nikolić and Mr. Stéphane Bourgon for Drago Nikolić
Mr. Aleksandar Lazarević and Mr. Miodrag Stojanović for Ljubomir Borovčanin
Ms. Natacha Fauveau Ivanović and Mr. Nenad Petrušić for Radivoje Miletić
Mr. Dragan Krgović and Mr. David Josse for Milan Gvero
Mr. Peter Haynes and Mr. Đorđe Sarapa for Vinko Pandurević

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”);

BEING SEISED OF the “Submission on Behalf of General Milan Gvero Pursuant to Rule 94 *bis* Relating to the Proposed Expert Evidence of General Sir Rupert Smith”, filed on 20 April 2007 (“Gvero Motion”), and the “Submissions of General Miletić in Respect of the Testimony of General Sir Rupert Smith”, filed in the original French on 20 April 2007 (“Miletić Motion”),¹ which submissions were generated by the Prosecution’s declared intent to adduce expert evidence from General Smith in relation to military matters generally and with respect to the VRS;

NOTING the “Prosecution’s Consolidated Response to ‘Submission on Behalf of General Milan Gvero Pursuant to Rule 94 *bis* Relating to the Proposed Expert Evidence of General Sir Rupert Smith’ and ‘Submissions of General Miletić in Respect of the Testimony of General Sir Rupert Smith’”, filed on 4 May 2007 (“Response”), and the “Joint Defence Request for Leave to Reply and Reply to Prosecution Consolidated Response to Defence Submissions Pursuant to Rule 94 *bis* Related to the Evidence of General Sir Rupert Smith”, filed on 11 May 2007 (“Joint Reply”);

NOTING earlier submissions regarding the proposed expert evidence of General Smith,² and the “Decision Regarding Evidence of General Rupert Smith and the Calculation of Time Limits Under Rule 126 *bis*”, filed on 30 March 2007, in which the Trial Chamber disposed of certain arguments relating to Rule 94 *bis* and ordered Miletić and Gvero to file further written submissions detailing all their objections to General Smith testifying as an expert in this case;

NOTING the “Prosecution’s Filing of Expert Statement of General Sir Rupert Smith”, filed on 2 October 2007, to which the “Expert Statement of General Sir Rupert Smith” was attached as Appendix A (“General Smith’s statement”);

¹ 1 May 2007 (English translation).

² [Confidential] Motion and Notice Pursuant to Rule 94 *bis* Relating to the Evidence of General Sir Rupert Smith, 15 December 2006; [Confidential] General Miletić’s Motion Regarding the Testimony of General Sir Rupert Smith, 10 January 2007 (English translation), 27 December 2006 (French original); [Confidential] Prosecution’s Consolidated Response to Accused Gvero’s “Defence Motion and Notice Pursuant to Rule 94 *bis* Relating to the Evidence of General Sir Rupert Smith” and Accused Miletić’s “Requête du Général Miletić Relative au Témoignage du Général Sir Rupert Smith”, 2 January 2007; [Confidential] Request for Leave to Reply and Reply of General Miletić to the Prosecution’s Response Relating to the Evidence of General Sir Rupert Smith, 30 January 2007 (English translation), 4 January 2007 (French original); General Gvero’s Motion to Strike Prosecution Response as Untimely or for Leave to Reply: Motion Relating to Evidence of General Sir Rupert Smith, 8 January 2007; Prosecution’s Response to General Gvero’s Motion to Strike Prosecution Response as Untimely, 9 January 2007. On 19 January 2007, the parties made additional oral submissions.

NOTING that the Prosecution proposes to call General Smith as an expert to assist the Trial Chamber in three related areas, namely:

- a. the history, function and importance of a Main Staff in general;
- b. the function and operation of the VRS Main Staff; and
- c. the command doctrine of the VRS;³

NOTING that the Prosecution has never requested the admission of General Smith's statement as an expert statement or report pursuant to Rule 94 *bis*(C);

NOTING that Miletić and Gvero (collectively "Defence") advance four main challenges to the competence of General Smith to testify as an expert in this case, namely that:

- a. General Smith does not have the necessary "specialised knowledge" about the VRS and its Main Staff;⁴
- b. General Smith's statement does not reference the sources relied upon, uses questionable methodology, and improperly opines upon the Accuseds' *mens rea* and responsibility;⁵
- c. General Smith is neither impartial nor disinterested;⁶
- d. General Smith's proposed expert testimony in this case is redundant as Prosecution Witness Richard Butler's report of 9 June 2006 deals with identical subject matter;⁷

NOTING that the Prosecution opposes each of the Defence challenges specifically and asserts that none of the challenges affects the admissibility of the proposed expert testimony, but go rather to the ultimate weight to be accorded the testimony, properly assessed following cross-examination;⁸

NOTING that in response to the Defence challenge that General Smith lacks specialised knowledge about the VRS and its Main Staff, the Prosecution makes several assertions regarding General Smith's direct contact with the VRS and its Main Staff supported by citations to documents

³ Response, para. 2.

⁴ Gvero Motion, para. 2; Miletić Motion, para. 11. In addition, Miletić argues that the Prosecution never provided a CV for General Smith and, thus, Miletić is unable to determine whether General Smith possesses the requisite expertise. This argument appears to have been mooted, as the Joint Reply notes that the Prosecution provided an extremely brief CV on 1 May 2007, which is attached to the Joint Reply as an annex. Joint Reply, para. 9.

⁵ Gvero Motion, para. 2; Miletić Motion, paras. 12, 14.

⁶ Gvero Motion, para. 2; Miletić Motion, para. 17.

⁷ Miletić Motion, para. 24.

⁸ Response, paras. 3–4.

which—although apparently disclosed to the Defence—have not been provided to the Trial Chamber;⁹

CONSIDERING that the Trial Chamber should grant leave to the Defence to file the Joint Reply;

CONSIDERING that an expert appearing before the Tribunal is “a person whom by virtue of some specialised knowledge, skills, or training can assist the trier of fact to understand or determine an issue in dispute”;¹⁰

CONSIDERING that the Defence does not dispute that General Smith may testify as a fact witness and concedes that his testimony “might assist the Trial Chamber in explaining certain relevant events”;¹¹

CONSIDERING that Gvero also concedes General Smith “is an expert on military matters relating *inter alia* to the British Army, NATO, and to general military issues and strategies in this regard”,¹² and Miletić concedes that General Smith could “assist the Tribunal with general questions relating to command during a military operation”;¹³

CONSIDERING that the Trial Chamber will be assisted in this case if General Smith is permitted to testify as an expert witness regarding the history, function and importance of a Main Staff in general, and that General Smith is competent to testify as an expert on this issue and, therefore, that the relevant question arising from the Defence submissions is not *whether* General Smith is competent to testify as an expert but, rather, the scope of that expert testimony;

CONSIDERING that it is incumbent upon the party proffering expert witness evidence to satisfy the Trial Chamber that the proposed expert possesses the specialised knowledge, skills, or training to assist the Trial Chamber in understanding or determining an issue in dispute;

CONSIDERING that, based upon the material provided to the Trial Chamber, it is not satisfied that the Prosecution has established that General Smith possesses the specialised knowledge

⁹ *Ibid.*, para. 11–12. The Prosecution cites to an OTP Witness Statement dated 14 August 1996, and an Information Report of 1 and 7 November 2002.

¹⁰ *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-T, Decision on Prosecution’s Submission of Statement of Expert Witness Ewan Brown (“*Brđanin* Trial Decision”), 3 June 2003, p. 4 (citing *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-T, Decision Concerning the Expert Witnesses Ewa Tabeau and Richard Philipps, 3 July 2002, and *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-T, Decision on the Expert Witness Statements Submitted by the Defence, 27 January 2003). See also Decision on Defence Rule 94 *bis* Notice Regarding Prosecution Expert Witness Richard Butler, 19 September 2007 (“*Butler* Decision”), para. 23 (noting that an expert witness is one that possesses “the special knowledge, experience, or skills needed to potentially assist the Trial Chamber in its understanding or determination of issues in dispute”).

¹¹ Joint Reply, para. 20.

¹² Gvero Motion, para. 3.

necessary to testify as an expert with regard to the function and operation of the VRS Main Staff or the command doctrine of the VRS at the relevant time;

CONSIDERING, however, that General Smith will not be precluded from testifying as to his personal experience with the VRS Main Staff, or his direct observations of the functioning of the VRS Main Staff and its officers, nor will he be precluded from testifying to reasonable inferences he drew from those direct experiences;

CONSIDERING that the jurisprudence of this Tribunal supports the Prosecution's argument that objectivity is not a necessary component of an expert witness's competence to testify,¹⁴ and that, as the Trial Chamber has previously stated, "questions of objectivity, impartiality and independence become relevant to assess the weight to be accorded to [expert] opinion evidence";¹⁵

CONSIDERING that—in the context of the Defence challenges to the methodology and substance of General Smith's statement—the mere fact that General Smith is accepted as an expert and called to give evidence does not mean that his statement is automatically to be admitted before the Trial Chamber as evidence,¹⁶ and that in the course of direct examination it will be incumbent upon the Prosecution to demonstrate that General Smith's statement meets the criteria of Rule 89(C) as interpreted by the jurisprudence of the Tribunal, and that the Defence may challenge the statement's

¹³ Miletić Motion, para. 9.

¹⁴ Butler Decision, para. 26. Faced with a very similar Defence challenge to the proposed expert testimony of a Prosecution witness, the *Brdanin* Trial Chamber considered that "any concerns relating to the Witness's independence and impartiality, the accuracy of his evidence, or the extent to which his evidence will be helpful to this Trial Chamber are matters of weight, not admissibility, and can be properly addressed during cross-examination." *Brdanin* Trial Decision, 3 June 2003, p. 4. Similarly, the *Slobodan Milošević* Trial Chamber stated that an allegation of bias "is not a matter of admissibility but one which affects the weight to be granted to the witness's evidence." *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Decision on Admissibility of Expert Report of Kosta Čavoški ("*Slobodan Milošević Trial Decision*"), 1 March 2006, p. 2. Other Chambers have reached similar conclusions. See *Prosecutor v. Pavle 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. 4; *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-T, Decision on Admission of Expert Report of Robert Donia, 15 February 2007, para. 9; *Prosecutor v. Boškoski and Tarčulovski*, Case No. IT-04-82-T, Decision on Motion to Exclude the Prosecution's Proposed Evidence of Expert Bezruchenko and His Report, 17 May 2007, para. 8.

¹⁵ Butler Decision, para. 26. The Defence rely heavily upon an oral decision of the *Milutinović* Trial Chamber. *Prosecutor v. Milutinović, Šainović, Ojdanić, Pavković, Lazarević and Lukić*, Case No. IT-08-87-T, T. 840–844 (13 July 2006) (*Milutinović et al.*). In *Milutinović*, the witness had, *inter alia*, "provided advice to the OTP on how to shape the case and other advice on how to conduct the interviews of some of the accused and other military personnel." *Milutinović et al.*, Decision on Prosecution Request for Certification of Interlocutory Appeal of Decision on Admission of Witness Philip Coo's Expert Report, 30 August 2006, para. 10. Additionally, the witness's report contained his opinions regarding how the evidence related to the individual criminal responsibility of the accused. *Ibid.* The Trial Chamber is not persuaded by the Defence assertion that General Smith is in the same category. General Smith's involvement in the facts of this case is of a fundamentally different character.

¹⁶ See Butler Decision, para. 31; *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-T, Decision on the Expert Witness Statements Submitted by the Defence, 27 January 2003, p. 4 (noting that "the mere fact that an expert witness appears in court does not mean that the whole expert witness statement will necessarily be admitted").

admissibility through cross-examination, and that only then will the Trial Chamber be in a position to properly assess which—if any—portions of General Smith's statement should be admitted;¹⁷

CONSIDERING that even if the Trial Chamber were to assume for the sake of argument that portions of General Smith's evidence are redundant because some of the factual information appearing in General Smith's statement is duplicated in the 9 June 2006 report of Prosecution witness Richard Butler, this is not a basis upon which the evidence must be precluded;

PURSUANT TO Rules 54, 89 and 126 *bis*,

HEREBY GRANTS IN PART the relief sought and **ORDERS** as follows:

1. Leave to file the Joint Reply is granted.
2. General Smith is allowed to testify as an expert with regard to the history, function and importance of a Main Staff in general, but not as an expert with regard to the function and operation of the VRS Main Staff, nor with regard to the command doctrine of the VRS.

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



Carmel Agius
Presiding

Dated this eleventh day of October 2007
At The Hague
The Netherlands

[Seal of the Tribunal]

¹⁷ See Butler Decision, para. 31.