

IT-98-29-T
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21 FEBRUARY 2003

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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 the
Former Yugoslavia since 1991

Case: IT-98-29-T

Date: 21 February 2003

Original: English

IN TRIAL CHAMBER I

Before: Judge Alphons Orie, Presiding
Judge Amin El Mahdi
Judge Rafael Nieto-Navia

Registrar: Mr. Hans Holthuis

Decision of: 21 February 2003

THE PROSECUTOR

v.

STANISLAV GALIĆ

**DECISION ON THE PROSECUTION MOTION FOR RECONSIDERATION OF
THE ADMISSION OF THE EXPERT REPORT OF PROF. RADINOVIĆ**

The Office of the Prosecutor:

Mr. Mark Ierace

Defence Counsel:

**Ms. Mara Pilipović
Mr. Stéphane Piletta-Zanin**

1. Pending before Trial Chamber I, Section B (“the 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 (“the International Tribunal”) is the “Motion for Reconsideration of the Admission of the Expert Report of Prof. Radinović” (“the Motion”) filed confidentially by the Prosecution on 6 February 2003.

2. The Motion follows a letter addressed by the Defence to the Prosecution on 4 February 2003. The Trial Chamber heard the oral submissions of the parties on 3 and 7 February 2003.

THE TRIAL CHAMBER, HAVING CONSIDERED the written and oral submissions of the parties,

HEREBY ISSUES ITS DECISION.

1. Procedural background and arguments of the parties

3. The Defence filed the military expert report of Prof. Radinović (“the Report”) on 20 November 2002. Prof. Radinović indicates in his Report that one of the sources he relied upon in reaching his conclusions are interviews he conducted with a number of “outstanding superior officers of the SRK”. On 17 December 2002, the Prosecution filed its “Submissions Concerning the Expert Statements Filed by the Defence” (“the Prosecution Submission”), whereby it did not object to the admission of the Report but requested the Trial Chamber to order the immediate disclosure of notes or statements of those “outstanding superior officers of the SRK” before Prof. Radinović comes to testify.

4. On 27 January 2003, the Trial Chamber rendered its “Decision on the Expert Witness Statements Submitted by the Defence” (“the Decision”) whereby, among other things, it admitted the Report but requested the Defence to “make available to the Prosecution those sources referred to in the statement that it would ask for, including the

notes referred to in Prof. Radinović's statement, at least ten (10) days before the expert witnesses comes to testify".

5. On 3 February, the Prosecution filed a "Submission Concerning Decision on the Defence Expert Witness Statement" where it specified the documents it sought access to, pursuant to the Decision of the Trial Chamber. It requested, among other things, "translations of notes taken by the expert during these interviews, any video or audio tape recordings of such interviews, as well as the specific details of each individual interviewed by the expert".¹

6. The Defence indicated, in a letter addressed to the Prosecution on 4 February 2003, that no video or audio recordings of the interviews were made and invoked Rule 70 (A) to claim that the expert witness is under no obligation to disclose the notes he has taken during his work. The Defence concluded that "the Trial Chamber's Order for the Defence to provide notes made by Professor Radinović is against the limitation of authorities of the Trial Chamber pursuant with Rules 98, from the Rule 70(C)".²

7. However, on 3 February 2003, the Prosecution informed the Trial Chamber in court that it had received part of the notes, but complained that some of them were illegible or incomplete and that the persons interviewed were not always clearly identified.³ On 7 February 2003, the Prosecution requested a typed version of the notes due to the illegibility of the expert witness' handwriting.⁴ The Defence indicated that it would contact the witness and keep the Prosecution and the Trial Chamber informed.⁵ The Trial Chamber invited the Prosecution to indicate with greater specificity what was illegible in the notes disclosed.⁶

8. The Prosecution seeks reconsideration of the Decision on several grounds. It first argues that Rule 70 may not be used as a shield to protect from disclosure information, necessary to demonstrate the transparency required of expert statements filed pursuant to Rule 94 *bis*. Second, it notes that the expert witness does not specifically cite any of these

¹ para. 2 c).

² Letter transmitted to Chambers by fax.

³ T. 18861.

⁴ T. 19242.

⁵ T. 19242.

⁶ T. 19243.

interviews in the course of his report, thereby rendering it impossible to know how the information derived from the interviews is incorporated in the report. As a result, the Prosecution claims that the expert witness is being called to provide summarising evidence, when the Appeals Chamber has held that it is proper for a Trial Chamber to exclude summarising evidence under Rule 89(C). Finally, the Prosecution deems that the notes constitute inherently unreliable hearsay evidence, as they were not taken under oath nor were they tested in cross-examination. The Prosecution also points that some of the individuals interviewed testified at trial or were originally on the Defence Rule 65ter witness list and contends that the proper course would have been to provide the transcripts of the in-court testimony of the relevant witnesses to the expert Radinović for his consideration in his report.⁷

2. Discussion

9. The Trial Chamber reiterates that an expert witness is expected to give his or her expert opinion in full transparency of the established or assumed facts he or she relies upon,⁸ which supposes that the sources used in support of any expert witness statement be clearly indicated and easily accessible. A minimum degree of reliability is also required at the stage of admission with respect to the sources used, and opportunity should be given, whenever possible, to the other party to test or challenge the factual basis on which the expert witness reached his/her conclusions. The Trial Chamber points that it rejected admission of some witness statements submitted through an expert witness,⁹ on the ground that these statements had not been previously tendered into evidence and the Defence had had no opportunity to cross-examine the witnesses concerned. The Trial Chamber however does not consider that the Report should be regarded as a whole as summarising evidence.

10. In a letter addressed to the Prosecution, the Defence also seems to contest the Decision on the ground that the notes fall within the ambit of Rule 70 (A) and that the Trial Chamber cannot, under Rule 70 (C), order their disclosure. Although this argument has not been properly raised before it, the Trial Chamber points that Rule 70 (A) excludes from the

⁷ Motion, para. 9; T. 18861-18862.

⁸ Decision Concerning the Expert Witnesses Ewa Tabeau and Richard Philipps, 3 July 2003, p. 2; Transcript, 8 July 2003, T. 11413-11414; Decision on the Expert Witness Statements Submitted by the Defence, 27 January 2003, p. 3.

⁹ Expert Witness Higgs.

general disclosure obligation any reports, memoranda or other internal documents prepared by a party, its assistants or representatives. The expert witness does not qualify as a party, or an assistant or representative thereof. The interviews conducted by the expert witness during the preparation of his Report hence cannot be covered by Rule 70 (A). The Trial Chamber also understands that Rule 70 (C) directly relates to Rule 70 (B), as opposed to Rule 70 (A). The Trial Chamber concludes that the Defence would err in invoking Rule 70 in the situation at hand. The argument presented by the Defence to the Prosecution in order to justify its non-compliance with the Decision is thus without merit.

11. The Trial Chamber however finds that, while a minimum degree of transparency and reliability in sources is required at the stage of admission, it mostly plays a role when the Trial Chamber appreciates the weight to be given to the expert report at the end of trial, and in light of all the evidence adduced.

12. The notes which have not been disclosed by the Defence constitute a limited portion of the sources relied upon by the expert witness and the Trial Chamber finds that the Defence's partial compliance with the Decision does not justify that the Report be rejected in its entirety. Under these circumstances, however, the Defence should expect the Trial Chamber to give limited weight, if any, to those parts of the Report and testimony for which the sources relied upon are unclear or where the Prosecution had no opportunity to test or challenge the witnesses who provided the information.

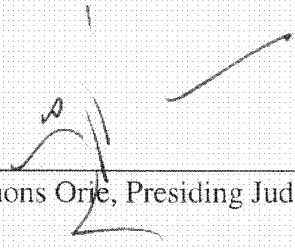
3. Disposition

FOR THE FOREGOING REASONS

PURSUANT TO Articles 20 and 21 of the Statute and Rules 89, 70 and 94*bis* of the Rules of Procedure and Evidence,

REJECTS the Motion.

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



Alphons Orie, Presiding Judge

Dated this twenty-first of February 2003
At The Hague
The Netherlands

[Seal of the Tribunal]