



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-02-54-T

Date: 27 March 2003

Original: ENGLISH

IN THE TRIAL CHAMBER

Before: Judge Richard May, Presiding
Judge Patrick Robinson
Judge O-Gon Kwon

Registrar: Mr. Hans Holthuis

Decision of: 27 March 2003

PROSECUTOR

v.

SLOBODAN MILOŠEVIĆ

DECISION ON ADMISSIBILITY OF MORTEN TORKILDSEN'S EVIDENCE

Office of the Prosecutor:

Ms. Carla Del Ponte
Mr. Geoffrey Nice, QC

Amici Curiae:

Mr. Steven Kay, QC
Mr. Branislav Tapušковиć
Mr. Timothy McCormack

The Accused:

Mr. Slobodan Milošević

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 (“International Tribunal”),

BEING SEISED of two applications¹ made by the Office of the Prosecutor (“Prosecution”) to admit as expert evidence two reports prepared by Mr. Morten Torkildsen, a “Financial Investigator” with the Prosecution, under the provisions of Rule 94*bis* of the Rules of Procedure and Evidence of the International Tribunal (“Rules”),

NOTING the hearings held on 25 February and 3 March 2003, during which the Trial Chamber heard further oral submissions on the applications by the Prosecution, the *Amici Curiae* and the Accused,

NOTING that, in support of its applications, the Prosecution submits, *inter alia*, that:

¹ The procedural background to these applications is as follows. On 29 May 2002, the Prosecution filed a “Prosecution’s notice of filing of expert report of Morten Torkildsen” - the report mainly relates to the Kosovo portion of the trial (“Kosovo Report”) -, followed by the “Prosecution’s Submission of Attachments to Expert Report of Morten Torkildsen” filed on 30 May 2002 (“Attachments to the Kosovo Report”). On 7 June 2002, the Prosecution filed a “Prosecution’s Submission of Amended Expert Report of Morten Torkildsen” and indicated that it wished to replace the earlier Kosovo Report (“Amended Kosovo Report” or “First Report”). A “Prosecution’s Corrigendum of Amended Expert Report of Morten Torkildsen” was filed on 10 June 2002. On 1 July 2002, the Prosecution filed a “Prosecution’s Notice of Confidential Designation of Attachments to Expert Report of Morten Torkildsen” thereby notifying all parties that, although initially filed publicly, the Attachments to Torkildsen Report were to be designated “Confidential”. On 12 June 2002, the *Amici Curiae* filed their written “Observations by the *Amici Curiae* on the Amended Expert Report of Morten Torkildsen filed 29th May 2002” (“*Amici Curiae* Observations”). The “Prosecution’s Response to Observations by the *Amici Curiae* on the Amended Expert Report of Morten Torkildsen filed 29th May 2002” was filed on 21 June 2002 (“Prosecution’s Response”). On 18 November 2002, the Prosecution filed a “Partly Confidential Prosecution’s Submission of Morten Torkildsen’s Second Expert Report” (“Croatia/Bosnia Report” or “Second Report”). A “Prosecution’s Corrigendum of the Second Expert Report of Morten Torkildsen” was filed on 10 December 2002. On 16 December 2002, the *Amici Curiae* filed the “*Amici Curiae*’s Schedule of Objections to the Amended Expert Report of Morten Torkildsen filed 7 June 2002 and Morten Torkildsen’s Second Expert Report filed 18 November 2002” (“*Amici Curiae* Schedule of Objections”). On 16 January 2003, the Prosecution filed the “Prosecution’s Response to *Amici Curiae*’s Schedule of Objections filed on 16 December 2002 and Submission of Additional Attachments to Amended Expert Report of Morten Torkildsen” (“Prosecution’s Second Response” and “Additional Attachments to the Amended Kosovo Report”). On 14 February 2003, the Prosecution filed a “Corrigendum to “Prosecution’s Response to *Amici Curiae*’s Schedule of Objections filed on 16 December 2002 and Submission of Additional Attachment to Amended Expert Report of Morten Torkildsen”.

- (i) by virtue of his specialised training and experience, Mr. Torkildsen is an expert, who is “qualified to testify as an expert witness about the material that he has reviewed, forensically analysed and reconstructed”,²
- (ii) the subject matter of Mr. Torkildsen’s evidence is properly a subject of expert testimony, that the issues discussed in the Reports demand specialised knowledge and expertise that will assist the trier of fact,³
- (iii) any concerns relating to Mr. Torkildsen’s level of independence and impartiality are matters of weight, not admissibility, and may be addressed on cross-examination,
- (iv) the reports are relevant to the case as they show the existence of large, complex financial structures, ultimately controlled by the accused, and used to finance the wars in Croatia, Bosnia and Kosovo,⁴
- (v) all documents and attachments are interrelated and must be considered as whole, the documents are available in full when required,⁵ and
- (vi) identified personalities in the reports can be called, if necessary, “to call all the evidence live would be an unacceptable task”,⁶

NOTING the *Amici Curiae*’s objections to the reports submitting, *inter alia*, that

- (i) the materials sought to be produced through Mr. Torkildsen are not properly a subject that requires expert evidence,⁷ that Mr. Torkildsen could be accurately described as an “OTP investigator summarising witnesses”,⁸
- (ii) the accused should be able to fully challenge the evidence if he chooses to do so,⁹
- (iii) the reliability and authenticity of statements, interview notes and other documents attached to the reports are questionable. In addition, the reports lack proper referencing and footnoting,¹⁰

² The Prosecution has claimed support from the *Čelebići* case in which the Trial Chamber noted that “an expert witness is one specially skilled in the field of knowledge about which he is required to testify.” *Prosecutor v Delalić et al. (“Čelebići”)*, Decision on the Motion by the Prosecution to Allow the Investigators to Follow the Trial During the Testimonies of the Witnesses, Case No. IT-96-21-T, 20 March 1997, para. 10, and *Kovačević, Prosecutor v Kovačević* Case No. IT-97-24, 6 July 1998, Transcript (“T.”), pp. 59-61.

³ Prosecution’s Response, para 17.

⁴ Prosecution Second Response, para. 1.

⁵ T., p. 17225.

⁶ *Ibid*, pp. 17224-17225.

⁷ *Amici Curiae* Observations, paras 14-16, T., p. 17206.

⁸ *Ibid*, para. 22, T., pp. 17210, 17214.

⁹ T., pp. 17214-17215.

¹⁰ *Amici Curiae* Schedule of Objections, and T., pp. 17210, 17213.

- (iv) the conclusions which Mr. Torkildsen has expressed are for the Trial Chamber to determine itself,¹¹
- (v) the relevance of the evidence is unclear.¹²

NOTING that the Accused challenges the relevance of the evidence arguing, *inter alia*, that no single document in the evidence submitted indicates that the resources were allocated “in the function of perpetrating a crime of any kind”,¹³ and he agrees with the *Amici*’s objections in relation to the statements which, he says, “cannot be (...) admitted until all those individuals are subjected to cross-examination”,¹⁴ and ultimately, “Mr. Torkildsen himself will have to take the chair”,¹⁵

NOTING FURTHER that the Prosecution has sought the admission of three written statements under Rule 92*bis* without cross-examination,¹⁶ arguing, *inter alia*, that the three written statements are offered into evidence for the purpose of corroborating the facts and conclusions contained in the Amended Kosovo Report and the attachments to it; that the *Amici* do not object to the Application provided that the witnesses appear for cross-examination,¹⁷

CONSIDERING that the evidence sought to be admitted concerns banking transactions and the movement of funds, a topic which, contrary to the *Amici*’s submission, the witness has, by means of study and practice, the necessary expertise to give the evidence about, and which is appropriate for expert evidence,

CONSIDERING that Part A of the First Report consists of what is in effect a summary of a series of interviews with third parties and of statements made by them, and, as pointed out by *Amici*, the role of the witness is a summariser of this evidence; analysis of the remaining statements and documentation is another summary,

¹¹ *Amici Curiae* Observations, para. 13, and, generally, *Amici Curiae* Schedule of Objections.

¹² *Amici Curiae* Observations, para. 24.

¹³ T., p. 17221.

¹⁴ *Ibid*, p. 17220.

¹⁵ *Ibid*, p. 17221.

¹⁶ Prosecution’s Submission of Three Written Statements provided pursuant to Rule 92*bis*, Case No. IT-02-54-T, 21 June 2002.

¹⁷ Observations by the *Amici Curiae* on the Prosecution’s Request to Adduce the Evidence of Mr. George Georgiou, Mr. Andreas Iacovou and Mr. Yiannakis Tsiartis pursuant to Rule 92*bis* Without cross-examination by the Accused, Case No. It-02-54-T, 17 July 2002; *see also* Prosecution Motion for Admission of Written Statements of George Georgiou, Mr. Andreas Iacovou and Mr. Yiannakis Tsiartis pursuant to Rule 92*bis* and Response to Observations of *Amici Curiae* concerning Adducement of their Evidence without cross-examination, Case No. It-02-54-T, 29 July 2002.

CONSIDERING that Part B of the First Report is also based on interviews and consists of a review of banking documents relating to them,

CONSIDERING that the Trial Chamber in rulings on the evidence of Kevin Curtis¹⁸ and Barney Kelly,¹⁹ has rejected this type of evidence, in the latter case in a ruling upheld by the Appeals Chamber,²⁰

CONSIDERING FURTHER that the report covers only a small part of the transactions involved in what may have been a massive fraud, and, as the conclusions makes it clear, the witness cannot say what happened to a lot of the money, and as such his evidence can only be a partial account of what may be a distraction from the central issues in this part of the case, requiring the defendant to make a considerable effort to meet and for the Trial Chamber to determine,

CONSIDERING however that the statements by the accused to the investigating judge in Belgrade,²¹ and his statement opposing continued detention²² are admissible as public documents containing statements by the accused, and the Trial Chamber notes that their admission has not been opposed by the *Amici*,

CONSIDERING, therefore, that the First Report is not admissible, save in respect of the statements by the accused,

CONSIDERING that it is unnecessary for Trial Chamber to further consider the Prosecution's application to admit into evidence the written statements in corroboration of facts contained in the First Report, pursuant to Rule 92*bis* of the Rules,

CONSIDERING that, contrary to the *Amici's* submission, the Second Report consists of an analysis of financial aspects of military and other official documents, a great number of which have already been admitted in this case,

¹⁸ T., pp. 672-673.

¹⁹ *Ibid.*, pp. 5941-5944.

²⁰ *Prosecutor v. Milošević*, Decision on Admissibility of Prosecution Investigator's Evidence, Case No. IT-02-54-AR73.2, 30 Sept. 2002.

²¹ Attachments to the Kosovo Report, Attachment R4(b) Statement provided by Slobodan Milošević in domestic criminal proceeding, 1 April 2001.

CONSIDERING that the evidence goes to show the financial support given by the leadership of the Republic of Serbia to Republika Srpska and the Serb Republic of Krajina, a topic about which evidence has been given and which is relevant to the issues in this case,

CONSIDERING that the *Amici* object to the production of a book²³ through this witness on the grounds that the Accused should be given an opportunity to cross-examine the author as to its contents; a submission which the Trial Chamber accepts finding that the book is not admissible, nor the portions of the Second Report based upon the book,

CONSIDERING that, in the Chamber's view, the conclusions expressed in the Second Report,²⁴ and objected to by the *Amici*, are opinions on facts that the witness has analysed, based on his professional knowledge and experience, and which – as an expert - he is entitled to give,

CONSIDERING that complaints of inadequate referencing and footnoting are matters of weight which can properly be addressed in cross-examination,

CONSIDERING all the other arguments of the parties as set out in the pleadings,

HEREBY ORDERS AS FOLLOWS:

- (1) The First Report and Exhibits shall not be admitted save in respect of Attachments R4(a), R4(b) and R4(c),
- (2) The Prosecution's Motion for Admission of the Written Statements of George Georgiou, Mr. Andreas Iacovou and Mr. Yiannakis Tsiartis pursuant to Rule 92*bis* is denied,
- (3) The Second Report and Exhibits shall be admitted, pursuant to Rule 94*bis* of the Rules, save for paragraphs 23, 79 to 83 and Exhibit C4832, and

²³ Second Report, Attachment C4832, Mladan Dinkić, *The Economics of Destruction*, 1995.

²⁴ *Ibid*, para. 30, p. 11; para. 37, p. 13; para. 51, p. 19, para. 98, p. 35, paras 122-124, p. 44.

(4) The witness shall be required to attend for cross-examination.

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



Richard May
Presiding

Dated this twenty-seventh day of March 2003
At The Hague
The Netherland

[Seal of the Tribunal]