IT-04-81-T
D16773-D16766
29 JANUARY 2009

16773

4.

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: 29 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: **29 January 2009**

PROSECUTOR

v.

MOMČILO PERIŠIĆ

PUBLIC

DECISION ON EXPERT REPORT OF P.J.J. VAN DER WEIJDEN

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 Defence's "Notice Pursuant to Rule 94 *bis* Concerning Prosecution Expert P.J.J. van der Weijden" filed publicly on 20 March 2007 ("Notice") and hereby renders its Decision.

I. PROCEDURAL HISTORY AND SUBMISSIONS

1. On 11 November 2007, the Prosecution disclosed to the Defence the expert report authored by P.J.J. van der Weijden entitled "Dragomir Milošević case – Sniping incidents in Sarajevo '94-'95" ("Report").[1] On 20 March 2007, the Defence filed its Notice. On 15 January 2009, the Prosecution filed its "Submission of Expert Report by P.J.J. van der Weijden" ("Submission"), requesting the Report to be admitted into evidence.[2]

II. SUBMISSIONS

2. In its Notice, the Defence makes objections to the admission of those parts of the report which focus on "non-artillery matters" and requests the opportunity to cross-examine the witness.[3] The Defence submits that although it accepts the expertise of Mr. van der Weijden as concerns artillery, it does not accept certain opinions given by Mr. van der Weijden in his Report as they fall outside his area of expertise.[4]

3. Further, the Defence also objects to the Report on the grounds that it is "based in part on the statements of unidentified witnesses for whom the defence has not had the opportunity to cross examine".[5] The Defence contends that if such witnesses are not tendered at trial, the Report should not be admitted based on the inability of the Defence to confront the witness.[6]

---

[1] Signed on 14 January 2009. The BCS version of the Report was disclosed on 11 November 2007.
[2] On 16 January 2009, the Prosecution filed an "Addendum to Submission of Expert Report by P.J.J. van der Weijden" with a confidential annex containing Mr. van der Weijden's curriculum vitae ("CV"). The Trial Chamber notes that this CV was previously included in the Report itself which was filed publicly, Report, pp 71-72. On 19 January 2009, the Prosecution filed a "Corrigendum to Submission of Expert Report by P.J.J. van der Weijden" amending the last sentence of paragraph 3 of the Report to refer to the case *Dragomir Milošević* (Case No. IT-98-29/1-T, Judgment, 12 December 2007) rather than *Stanislav Galić* (Case No. IT-98-29-T, Judgment, 5 December 2003).
[3] Notice, para. 3.
[4] *Ibid.*
[5] *Ibid.*
[6] In support of its position, the Defence refers to *Prosecutor v. Aleksovski,* Case No. IT-95-14/1-AR73, Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 February 1999 ("*Aleksovski* Decision") which, it contends, stated that the Trial Chamber must consider whether such a summary is "first-hand" hearsay and whether the absence of the opportunity to cross-examine those persons affects the reliability of their statements. The Defence also refers to *Prosecutor v. Milošević*, Case No. IT-02-54-AR73.2, Decision on Admissibility of Prosecution Investigator's Evidence, 30 September 2002 ("*Milošević* Decision"), para. 22.

4. In its Submission, the Prosecution contends that the Report is admissible in its entirety as it contains information concerning the training, tasks, deployment and equipment of professional snipers, including snipers operating in urban areas. It alleges that this information is relevant and probative to the widespread and systematic campaign of sniping which was allegedly carried out by Bosnian Serb forces during the relevant period of the Indictment.[7] The Prosecution further notes that the Report refers to specific sniping incidents which are mentioned in the Indictment.[8] Furthermore, the Prosecution relies on the fact that the Report has already been admitted into evidence in the trial of Dragomir Milošević.[9]

5. The Prosecution also notes that sniping does not constitute artillery warfare and therefore the Report only deals with "non-artillery matters". On this basis, the Prosecution argues that a decision to admit the Report only insofar as it relates to artillery matters, as suggested by the Defence, would be equivalent to the non-admission of the Report.[10]

III. APPLICABLE LAW

A. Admissibility of Expert Evidence

6. 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.

[7] Submission, para. 3.
[8] 3 May 1995 incident, referred to at Annex B 12 of the Indictment; 23 November 1994 incident, referred to at Annex B 8; 27 February 1995 incident, referred to at Annex B 10; 3 March 1994 incident, referred to at Annex B 11; 10 December 1994 incident, referred to at Annex B 9; 8 November 1994 incident, referred to at Annex B 7.
[9] Submission, para. 3.
[10] *Ibid.*, para. 4.

7. 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.[11]

8. 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".[12] 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 CV as well as the witness's scholarly articles, other publications or any other pertinent information about the witness.[13]

9. The content of the statement or report must fall within the expert witness's area of expertise.[14] 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.[15] 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.[16]

10. 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.[17]

---

[11] *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.
[12] *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.
[13] *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.
[14] *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.
[15] *Ibid.*, para. 12.
[16] *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.
[17] *Martić* Decision Expert Avramov, para. 10.

11. 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.[18]

B. Admissibility of Hearsay Evidence

12. The statements of unidentified witnesses which feature in the Report[19] constitute hearsay evidence. Under Rule 89(C), the Trial Chamber has a broad discretion to admit relevant hearsay, provided that it is satisfied that the evidence is reliable. For the purposes of assessing whether the evidence is reliable, the Trial Chamber "may consider both the content of the hearsay statement and the circumstances under which the evidence arose".[20]

IV. DISCUSSION

A. Qualification of Mr. van der Weijden as an Expert

13. An analysis of Mr. van der Weijden's CV shows that he was a member of a special operations unit within the Royal Netherlands Army, achieving the rank of 1st Lieutenant in 2003. He has been deployed to Bosnia on two occasions: between January and June 1995 and from August through December 1996.[21] Mr. van der Weijden has also completed numerous arms courses, in particular: a *Korps Commandotroepen* ("KCT")[22] sniper course, a KCT counter terrorism course and, most recently, a KCT sniper instructor course.[23]

14. Given Mr. van der Weijden's training and experience in the Royal Netherlands Army, the Trial Chamber is satisfied that he has gained specialised knowledge as an expert in the field of sniping. The Trial Chamber is therefore of the view that Mr. van der Weijden is qualified as an expert within the meaning of Rule 94 *bis* of the Rules.

---

[18] Rule 89(C) and (D) of the Rules.
[19] Report, pp 10, 12, 13, 15, 17, 21, 24, 25, 27, 28, 31,35, 36, 39, 42, 43, 44, 46, 47, 48, 50, 51, 52.
[20] *Aleksovski* Decision, para. 15 citing *Prosecutor v. Tadic,* Case No. IT-94-1-T, Decision on Defence Motion on Hearsay, 5 August 1996, paras 15-19.
[21] CV P.J.J.van der Weijden, "Career and deployments".
[22] Special Operations Unit of the Royal Netherlands Army.
[23] CV P.J.J.van der Weijden, "Selection military courses".

B. Admissibility of Expert Evidence

15. The Report is divided into five sections.[24] Section 1 of the Report provides background information relevant to sniping, such as the organisation of snipers and how they are trained. In particular, the paragraphs on "Urban Sniping" contain information which is germane to the sniper attacks in Sarajevo during the relevant period of the Indictment. Sections 3, 4 and 5 of the Report contain further information on the factors which influence the accuracy of shots, descriptions of the weapons and ammunition used by the Bosnian Serb Army and how snipers are able to identify targets.

16. Section 2 contains analysis of 12 sniping incidents in Sarajevo; six of which are scheduled incidents referred to in Annex B of the Indictment.[25] The remaining six incidents are not mentioned in the Indictment, however they are also not classified as unscheduled in the Prosecution *65 ter* witness summaries.[26] In the Trial Chamber's view, such incidents are merely pertinent to the alleged campaign of sniping in Sarajevo during the relevant period of the Indictment; it is in this context that the Trial Chamber will take into account these incidents.

17. The Trial Chamber is of the view that the Report falls within Mr. van der Weijden's area of expertise. The information contained in the Report is likely to assist the Trial Chamber in drawing conclusions about sniping attacks on Sarajevo during the relevant period of the Indictment. The Trial Chamber is also satisfied that the methodology used by Mr. van der Weijden is clearly set out in Sections 1, 3, 4 and 5, in general terms, and also, as it is applied to individual incidents in Section 2.

18. However, the conclusions made by Mr. van der Weijden at the end of each case study stating whether there was any reason for the sniper to identify the victim in the case as a combatant,[27] as well as the statement about the sniper's intention to deliberately kill civilians in case 3,[28] could be viewed as falling outside Mr. van der Weijden's expertise and constituting matters 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 Report on this basis, the Trial Chamber, if

[24] Namely: "An introduction to sniping" ("Section 1"), "Incident files" ("Section 2"), "Ballistics and shooting" ("Section 3"), "Weapons and ammunition of the VRS (appendix A)" ("Section 4") and "Spotting and identification (appendix B)" ("Section 5").
[25] Namely: Case 18 which is scheduled incident B12, Case 8 which is scheduled incident B8, Case 13 which is scheduled incident B10, Case 14 which is scheduled incident B11, Case 10 which is scheduled incident B9 and Case 3 which is scheduled incident B7.
[26] *See* Decision on Prosecution's Submission on Interpretation of the Trial Chamber's Decision of 15 May 2007 Regarding "Unscheduled Incidents", 31 October 2008, paras 13 and 15; Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts Concerning Sarajevo, 26 June 2008; Decision on Second Motion for Judicial Notice of Facts Relevant to the Sarajevo Crime Base, 17 September 2008.
[27] Report, pp 12, 15, 20, 23, 26, 29, 33, 37, 42, 46, 48, 53.

ultimately deciding to admit the Report into evidence, will accord appropriate weight to these portions of the Report.

19. The Trial Chamber further notes that expert opinions of Mr. van der Weijden contained in the Report are based on certain information about the particular incidents as provided to him. As a consequence, the weight to be given to the Report will necessarily depend on the accuracy of such information.

20. Finally, considering the submissions made by the Defence and objections raised therein, the Trial Chamber finds it appropriate to call Mr. van der Weijden for cross-examination and therefore defers its decision on admission of the Report until the end of Mr. van der Weijden's testimony.

V. DISPOSITION

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

GRANTS the Motion in Part; and

ORDERS that P.J.J. van der Weijden shall appear before the Chamber as an expert to be examined by the Parties and the Chamber;

DEFERS the decision on the admissibility of the Report until the conclusion of Mr. van der Weijden's testimony.

[28] *Ibid.*, p. 52.

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

Judge Bakone Justice Moloto
Presiding Judge

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

[Seal of the Tribunal]