



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: 19 May 2009

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. John Hocking

Decision of: 19 May 2009

PROSECUTOR

v.

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

PUBLIC

**DECISION ON JOINT DEFENCE MOTION SEEKING ADMISSION OF
THE EXPERT REPORT OF PROFESSOR LJUBOMIR GOGIĆ**

Office of the Prosecutor

Mr. Peter McCloskey

Counsel for the Accused

Mr. Zoran Živanović and Ms. Mira Tapušковиć for Vujadin Popović
Mr. John Ostojić and Mr. Predrag Nikolić for Ljubiša Beara
Ms. Jelena Nikolić and Mr. Stéphane Bourgon for Drago Nikolić
Mr. Aleksandar Lazarević and Mr. Christopher Gosnell 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”) is seised of the “Joint Defence Motion Seeking Admission of the Expert Report Prepared by Professor Ljubomir Gogić” filed jointly by Popović, Beara, Nikolić and Miletić (“Joint Defence”) on 8 May 2009 (“Motion”), and hereby renders its decision thereon.

I. PROCEDURAL BACKGROUND

1. On 28 April 2006, the Prosecution confidentially filed its 65 *ter* list, which included Momir Nikolić on the list of Prosecution witnesses.¹ On 2 November 2007, the Prosecution withdrew Momir Nikolić as a prosecution witness, stating that Nikolić had “become adverse to the Prosecution’s case” and “made statements at [a] proofing session that we don’t believe are credible”.²

2. On 10 March 2009, the Trial Chamber issued an order to summon Momir Nikolić as a Chamber witness,³ and Momir Nikolić subsequently gave evidence between 21 and 28 April 2009.⁴ In the course of his testimony, on 24 April 2009, Momir Nikolić denied that he made the handwritten annotations which appear in Exhibit 1D00382, a 2 July 1995 Krivaja-95 order issued by the Drina Corps (“2 July Order”).⁵

3. The Joint Defence seeks admission of an expert report authored by Professor Ljubomir Gogić (“Gogić Report”).⁶ The Gogić Report contradicts Momir Nikolić’s testimony by concluding that the handwritten notes in the 2 July Order were written by Momir Nikolić.⁷

II. SUBMISSIONS OF THE PARTIES

A. Motion

4. In the Motion, the Joint Defence submits that the Gogić Report should be admitted pursuant to Rules 89 (C) and 94 *bis* of the Rules of Procedure and Evidence of the Tribunal (“Rules”).⁸

¹ Prosecution’s Filing of Pre-trial Brief Pursuant to Rule 65*ter* and List of Exhibits Pursuant to 65*ter* (E)(v), confidential, 28 April 2006, Annex A, p. 4.

² T. 17398 (2 November 2007).

³ Order to Summon Momir Nikolić, 10 March 2009.

⁴ T. 32894 (21 April 2009) – T. 33364 (28 April 2009).

⁵ T. 33199–33200 (24 April 2009). Ex. 1D00382 was admitted into evidence on 13 September 2007. See T. 15387 (13 September 2007); Ex. 1D00382, “Order Krivaja 95 from Command of the Drina Corps signed by Major General Milenko Živanović, dated 2 July 1995”.

⁶ Motion, para. 25.

⁷ Motion, Annex A, p. 5.

Through the Gogić Report, the Joint Defence “seeks to contradict the new evidence provided by Momir Nikolić [...] and to impeach the credibility of Momir Nikolić”.⁹

5. The Joint Defence submits that the Trial Chamber may use its discretion under Rule 89 (C) to admit the Gogić Report.¹⁰ According to the Joint Defence, an exercise of this discretion is appropriate at this late stage of the proceedings because the Gogić Report only became relevant during the testimony of Momir Nikolić, *i.e.* after the close of all parties cases-in-chief.¹¹ The Joint Defence also notes that the handwritten annotations in question were raised at least twice by the parties prior to the testimony of Momir Nikolić.¹²

6. In support of the Motion, the Joint Defence argues (i) the Trial Chamber called Momir Nikolić in the course of its “search for the truth”, and such a search would be incomplete without the Gogić Report; (ii) the interests of justice are served by admission of the Gogić Report; and (iii) admission of the Gogić Report will not prejudice any of the parties to the proceedings.¹³

7. The Joint Defence also submits that the application of Rule 94 *bis mutatis mutandis* to the Gogić Report would be an appropriate course of action.¹⁴ In the opinion of the Joint Defence, Professor Gogić does not need to be called to testify in person.¹⁵

B. Prosecution Response

8. On 13 May 2009, the Prosecution filed its “Response to Joint Defence Motion Seeking Admission of the Expert Report Prepared by Professor Ljubomir Gogić” (“Prosecution Response”), in which the Prosecution indicated that it does not object to the admission of the Gogić Report without cross examination.¹⁶

C. Borovčanin Notice and Pandurević Response

9. On 14 May 2009, Borovčanin filed the “Borovčanin Notice Supporting Admission of the Expert Report Prepared by Professor Ljubomir Gogić” (“Borovčanin Notice”) and Pandurević filed the “Response on Behalf of Vinko Pandurević to the Joint Defence Motion Seeking Admission of

⁸ Motion, para. 5.

⁹ Motion, para. 2.

¹⁰ Motion, para. 6.

¹¹ Motion, paras. 2, 7.

¹² Motion, paras. 9–10, citing the testimony of Richard Butler on 21 January 2008 and Petar Vugar on 7 July 2008.

¹³ Motion, paras. 15–19.

¹⁴ Motion, para. 20.

¹⁵ Motion, para. 24. Rule 94 *bis* (C) provides that if the opposing party accepts the statement of the expert witness, the statement may be admitted into evidence by the Trial Chamber without calling the witness to testify in person.

¹⁶ Prosecution Response, p. 1.

Ljubomir Gogić's Report" ("Pandurević Response"), neither of which object to the admission of the Gogić Report.¹⁷

III. APPLICABLE LAW

10. Pursuant to Rule 89(C) "A Chamber may admit any relevant evidence which it deems to have probative value." Rule 89(D) provides that "A Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial".

11. In the context of an expert witness, Rule 89(C) has also been interpreted to allow the Trial Chamber to determine "whether the witness has sufficient expertise in a relevant subject area such that the Trial Chamber may benefit from hearing his or her opinion".¹⁸

12. Furthermore, though Rule 94 *bis* is the general rule dealing with expert witnesses,¹⁹ it does not provide specific guidelines on criteria for the admission of expert reports.²⁰ Tribunal jurisprudence has considered the following requirements for the admissibility of expert statements or reports: "(1) the proposed witness is classified as an expert; (2) the expert statements or reports meet the minimum standards of reliability; (3) the expert statements or reports are relevant and of probative value; and (4) the contents of the expert statements or reports fall within the accepted expertise of the expert witness."²¹

IV. DISCUSSION

13. The Trial Chamber notes that the Joint Defence seeks to challenge the recent testimony of Chamber witness Momir Nikolić through the admission of the Gogić Report. Because of this, and in light of the significance of the 2 July Order to this case, the Trial Chamber considers the Gogić Report relevant and of probative value. The Trial Chamber also considers that the admission of the

¹⁷ Borovčanin Notice, para. 2; Pandurević Response, para. 2.

¹⁸ Decision on Defence Rule 94 *bis* Notice Regarding Prosecution Expert Witness Richard Butler, 19 September 2007, para. 26.

¹⁹ Rule 94 *bis* provides that: "(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, [...] 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."

²⁰ *Prosecutor v. Popović et al*, Case No. IT-05-88-AR73.2, Decision on Joint Defence Interlocutory Appeal Concerning the Status of Richard Butler as an Expert Witness, 30 January 2008 ("*Popović* Appeal Decision"), para. 21; Decision on Defence Rule 94 *bis* Notice Regarding Prosecution Expert Witness Richard Butler, 19 September 2007, para. 29; *Prosecutor v. Bošković 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.

²¹ *Popović* Appeal Decision, para. 21.

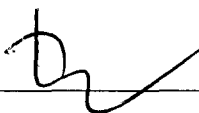
Gogić Report is in the interests of justice and will assist it in its search for the truth. For these reasons, admission of the Gogić Report at this late stage of the proceedings is warranted.

14. In terms of Gogić's expertise and the reliability of the Gogić Report, the Trial Chamber accepts the assertions made in the Gogić Report as to Gogić's expertise,²² and notes the Prosecution's non-objection to its admission without cross-examination.²³

V. DISPOSITION

15. For these reasons, pursuant to Rules 85, 89, and 94 *bis* of the Rules, the Trial Chamber hereby **GRANTS** the Motion, and admits the Gogić Report into evidence without cross-examination.

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



O-Gon Kwon
Judge

Dated this nineteenth day of May 2009
At The Hague
The Netherlands

[Seal of the Tribunal]

²² See Motion, Annex A, p. 1.

²³ See Prosecution Response, p. 1. In the Borovčanin Notice and the Pandurević Response, both parties state their non-objection to admission of the Gogić Report, but are silent on the issue of Cross Examination. See Borovčanin Notice, paras. 1–2; Pandurević Response, paras. 1–2.