



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-95-5/18-T

Date: 15 July 2013

Original: English

IN THE TRIAL CHAMBER

Before: Judge O-Gon Kwon, Presiding Judge
Judge Howard Morrison
Judge Melville Baird
Judge Flavia Lattanzi, Reserve Judge

Registrar: Mr. John Hocking

Decision of: 15 July 2013

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON PROSECUTION REQUEST TO EXCLUDE PORTIONS OF
THE REPORT OF EXPERT WITNESS RADOVAN RADINOVIĆ**

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused

Mr. Radovan Karadžić

Standby Counsel

Mr. Richard Harvey

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 “Prosecution’s Response to Disclosure of Report of Expert Witness Radovan Radinović and Request to Exclude Portions of This Report”, filed on 8 April 2013 (“Request”), and hereby issues its decision thereon.

I. Background and Submissions

1. On 26 April 2012, the Accused was instructed by the Chamber to file the list of expert witnesses he intended to call during his case and to serve upon the Chamber and the Office of the Prosecutor (“Prosecution”) copies of the *curriculum vitae* and reports of these expert witnesses by no later than 27 August 2012.¹ On 17 August 2012, he requested that the deadline for the submission of the expert report of witness Radovan Radinović (“Witness”) be extended until 27 September 2012.² On 23 August 2012, the Chamber granted this request and ordered that the Witness’s expert report be filed no later than 27 September 2012.³

2. On 27 September 2012, the Accused filed a notice (“Notice”) disclosing the *curriculum vitae* of the Witness and the BCS version of his expert report, entitled “The Control Authority of Dr. Radovan Karadžić in the Strategic Command System of the VRS” (“Report”).⁴ In the Notice, the Accused maintains that the Witness is a military expert and has been accepted as such in the *Prosecutor v. Krstić*, *Prosecutor v. Galić*, and *Prosecutor v. Milutinović et al.* cases.⁵ The Accused also states that he directed the Witness to study the reports of military experts called to testify by the Prosecution, namely Richard Butler and Reynaud Theunens, about portions of their expert witness reports which he considered to be incorrect.⁶ The reports of Butler and Theunens (together, “Butler and Theunens Reports”)—entitled “Radovan KARADŽIĆ and the ‘SRBiH’ TO–VRS (1992–1995)”,⁷ “VRS Corps Command Responsibility Report”,⁸ “Srebrenica Military Narrative (Revised) Operation ‘Krivaja 95’”,⁹ “VRS Brigade Command Responsibility Report”,¹⁰ and “VRS

¹ Scheduling Order on Close of the Prosecution Case, Rule 98 *bis* Submissions, and Start of the Defence Case, 26 April 2012, para. 24.

² Motion for Extension of Time: Expert Report for General Radovan Radinović, 17 August 2012, paras. 1, 8.

³ Decision on Accused’s Motions for Extension of Time for Filing of Expert Reports, 23 August 2012, para. 6.

⁴ Disclosure of Report of Expert Witness: General Radovan Radinović, 27 September 2012.

⁵ Notice, para. 2, referring to *Prosecutor v. Krstić*, Case No. IT-98-33, *Prosecutor v. Galić*, Case No. IT-98-29, *Prosecutor v. Milutinović et al.*, Case No. IT-05-87.

⁶ Notice, para. 3.

⁷ P3033 (Reynaud Theunens’s expert report entitled “Radovan Karadžić and the SRBiH TO-VRS (1992-1995)”).

⁸ P4913 (Richard Butler’s expert report entitled “VRS Corps Command Responsibility Report”, 5 April 2000).

⁹ P4914 (Richard Butler’s expert report entitled “Srebrenica Military Narrative (Revised): Operation ‘Krivaja 95’”, 1 November 2002).

Main Staff Command Responsibility Report”¹¹—focus on a wide variety of military-related matters, including the structure and activities of the Socialist Federal Republic of Yugoslavia armed forces,¹² the development and implementation of the Strategic Goals of the Serbian People in Bosnia and Herzegovina (“Strategic Goals”),¹³ the authority of the Accused as Supreme Commander of the Army of Republika Srpska (“VRS”),¹⁴ the structure and responsibilities of brigades within the VRS,¹⁵ and a narrative of events transpiring during Operation Krivaja 95.¹⁶

3. On 16 October 2012, in the “Prosecution Response to Disclosure of Report of Expert Witness: General Radovan Radinović” (“Response”), the Prosecution reserves its right to make submissions pursuant to Rule 94 *bis* (B) of the Tribunal’s Rules of Procedure and Evidence (“Rules”) within 30 days from the disclosure of the English translation of the Report.¹⁷ The Prosecution also states that it does not challenge the qualifications of the Witness.¹⁸ The Accused disclosed the English version of the Report on 7 March 2013, *via* e-mail.¹⁹

4. In the Request, the Prosecution seeks the exclusion of portions of the Report because they consist of analysis beyond the confines of the Witness’s expertise, are outside of the scope of the Report, and/or are irrelevant to the charges in the Third Amended Indictment (“Indictment”).²⁰ More specifically, the Prosecution first requests exclusion of portions of the Report which are “unrelated to military expertise” and in which the Witness “comments or opines on historical, political and legal matters”.²¹ Second, the Prosecution notes that portions of the Report, while acknowledging that the topics of (i) proportionality and legitimacy of shelling in and around Sarajevo and (ii) crimes following the Krivaja 95 operation are beyond the scope of the Report,

¹⁰ P4915 (Richard Butler’s expert report entitled “VRS Brigade Command Responsibility Report”, 31 October 2002).

¹¹ P4917 (Richard Butler’s expert report entitled “VRS Main Staff Command Responsibility Report”, 9 June 2006).

¹² P3033 (Reynaud Theunens’s expert report entitled “Radovan Karadžić and the SRBiH TO-VRS (1992-1995)”, pp. 45–121).

¹³ P3033 (Reynaud Theunens’s expert report entitled “Radovan Karadžić and the SRBiH TO-VRS (1992-1995)”, pp. 283–286).

¹⁴ P3033 (Reynaud Theunens’s expert report entitled “Radovan Karadžić and the SRBiH TO-VRS (1992-1995)”, pp. 500–582).

¹⁵ *See generally* P4915 (Richard Butler’s expert report entitled “VRS Brigade Command Responsibility Report”, 31 October 2002).

¹⁶ *See generally* P4914 (Richard Butler’s expert report entitled “Srebrenica Military Narrative (Revised): Operation ‘Krivaja 95’”, 1 November 2002).

¹⁷ Response, para. 2.

¹⁸ Response, para. 3.

¹⁹ Request, para. 1, footnote 1.

²⁰ Request, para. 3, referring to Report, paras. 11, 13, 18–19, part of para. 24, 25, 32–33, part of para. 34, part of para. 36, 39–46, 91–93, 140–142, 144, 146–152, 154, 159–162, part of para. 163, 164–173, 175, 177–183, 201–204, part of para. 267, 268, 277–286, 290, 300–303, part of para. 315, part of para. 317, part of para. 340, 354–370, 386–398, 417–418, part of para. 419, part of para. 420, part of para. 427, 428–429.

²¹ Request, para. 5.

then nevertheless include analysis of the same, should therefore be excluded.²² Third, the Prosecution argues that parts of the Report relate to regions not in the Indictment and thus should be excluded from the Report.²³ Fourth, the Prosecution notes that the Witness makes legal conclusions and “often bases his analysis on unsourced and unsubstantiated factual allegations”.²⁴ The Prosecution thus argues that only the parts of the Report based on the Witness’s specialised knowledge, skills, or training should be treated as expert evidence, and that the Chamber should attribute appropriate weight to the Report given the frequency and nature of conclusions unrelated to the Witness’s expertise and unsupported by the evidence.²⁵ Finally, the Prosecution does not dispute that the Witness is a military expert.²⁶

5. The Accused did not reply to the Request.

II. Applicable Law

6. Rule 94 *bis*, which is a general rule concerning expert witnesses, provides as follows:

- (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. The general standards of admissibility which are set forth in Rule 89 apply to expert reports.²⁷ Rule 89(C) provides that a Chamber may admit any relevant evidence which it deems to

²² Request, paras. 6–7.

²³ Request, paras. 5(g)–5(h).

²⁴ Request, para. 8.

²⁵ Request, para. 8.

²⁶ Request, para. 4.

²⁷ Decision on Prosecution’s Motion for Admission of Evidence of Eight Experts Pursuant to Rules 92 *bis* and 94 *bis*, 9 November 2009 (“Decision of 9 November 2009”), para. 14; *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. 22; *Prosecutor v. Tolimir*, Case No. IT-05-88/2-T, Decision on Admission of Expert Report of Ratko Škrbić with Separate Opinion of Judge Mindua and Dissenting Opinion of Judge Nyambe, 22 March 2012 (“*Tolimir* Decision”), para. 12.

have probative value. A minimum degree of transparency in the sources and methods used in an expert report is required at the stage of admission into evidence in order for the Chamber to determine the report's probative value.²⁸ Furthermore, pursuant to Rule 89(D), such probative value must not be substantially outweighed by the need to ensure a fair trial.²⁹

III. Discussion

8. As a preliminary matter, the Prosecution does not challenge the Witness's qualifications as an expert under Rule 94 *bis*.³⁰ On the basis of the information contained in his CV,³¹ the Chamber is satisfied that the Witness is qualified as a military expert within the meaning of Rule 94 *bis* and thus can be called to testify as such.

9. Furthermore, the Chamber recalls the Accused's submission that he requested the Witness to address portions of the Butler and Theunens Reports "which he believes to be incorrect".³² Accordingly, the scope of the Report is related to and governed by the scope and the content of the Butler and Theunens Reports. As stated above,³³ the Butler and Theunens Reports, as well as the evidence adduced during their testimony, deal with issues such as: (i) the events occurring during and after the Krivaja 95 operation, including discussions of both military and civilian activity;³⁴ (ii) the development and implementation of the Strategic Goals as a basis for VRS military activity;³⁵ and (iii) descriptions of Army of Bosnia and Herzegovina ("ABiH"), NATO, and United Nations Protection Force activities.³⁶ The Chamber thus considers that the Report is generally relevant to the Indictment. The Chamber also considers that the Butler and Theunens Reports lack determinations of the legality or illegality of the activities of the VRS. In fact, on multiple occasions on cross-examination both witnesses declined to engage in legal analysis.³⁷

²⁸ *Prosecutor v. Gotovina et al.*, Case No. IT-06-90-T, Decision on Admission of Expert Report of Geoffrey Corn, 22 September 2009, para. 5.

²⁹ Decision of 9 November 2009, para. 14.

³⁰ Response, para. 3; Request, para. 4.

³¹ See 65 *ter* 1D21046.

³² Notice, para. 3.

³³ See *supra* para. 2.

³⁴ See generally P4914 (Richard Butler's expert report entitled "Srebrenica Military Narrative (Revised): Operation 'Krivaja 95'", 1 November 2002).

³⁵ See, e.g., P3033 (Reynaud Theunens's expert report entitled "Radovan Karadžić and the SRBiH TO-VRS (1992-1995)"), pp. 283-286, 347-467; Reynaud Theunens, T. 17022 (20 July 2011); T. 17067, T.17132-17133 (21 July 2011).

³⁶ See, e.g., P4914 (Richard Butler's expert report entitled "Srebrenica Military Narrative (Revised): Operation 'Krivaja 95'", 1 November 2002), pp. 35-38.

³⁷ See, e.g., Reynaud Theunens, T. 16980 (20 July 2011); T. 17124, 17136 (21 July 2011); Richard Butler, T. 27687, 27712-27713 (19 April 2012); T. 27789-27790 (20 April 2012).

A. Subject-matter outside of the expertise of the Witness and/or outside the proper scope of the Report

10. With respect to the Prosecution's request that certain sections of the Report be redacted, the Chamber recalls that an expert witness is intended to provide specialised knowledge that can assist the Chamber to understand or determine an issue in dispute.³⁸ Regarding paragraph 5 of the Request, where the Prosecution alleges that certain portions of the Report should be excluded on the basis that the Witness analyses and draws conclusions on matters unrelated to his military expertise, including historical, political, and legal matters,³⁹ the Chamber agrees that some of those should be excluded because they are outside of the proper scope of the Report and/or are outside of the Witness's expertise. The Chamber has therefore decided to exclude the following portions of the Report on that basis:

- a. Paragraphs 18–19, 175, and 277, which relate to the demographics and history of Sarajevo or other municipalities;
- b. Paragraphs 39–46, which relate to the Witness's views about trials at the Tribunal and perceptions of Serbian responsibility in the conflict;
- c. Paragraph 159, starting from “In a geo-political sense,” until “East, West, and the Islamic world”, which relate to historical background; and
- d. Paragraph 268, which refers to the political reasons behind the Bosnian Serb campaign in Sarajevo.

Additionally, while in paragraph 5 of the Request the Prosecution also moves for the exclusion of portions of the Report which relate to the Strategic Goals, the Chamber recalls that a core argument in Theunens's evidence was that the Strategic Goals were the “basis for the Bosnian Serb military operations during the 1992 to 1995 period” and that the VRS Operational Directives converted the political Strategic Goals into instructions for combat operations.⁴⁰ Accordingly, the Accused is

³⁸ Decision on Prosecution Motion to Exclude the Expert Report of Kosta Čavoški, 5 April 2013 (“Čavoški Decision”), para. 17; *Popović* Appeal Decision, para 27; *Tolimir* Decision, para. 35; *Prosecutor v. Galić*, Case No. IT-98-29-T, Decision Concerning the Expert Witnesses Ewa Tabeau and Richard Philipps, 3 July 2002 (“*Galić* Decision”), p. 2; *Prosecutor v. 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.

³⁹ Report, paras. 11, 13, 18–19, part of para. 24, 25, 32–33, part of para. 34, part of para. 36, 39–46, 91–93, 140–142, 144, 146–152, 154, 159–162, 175, 177–178, 180–183, 201–204, part of para. 267, 268, 277–286, 290, 300–303, part of para. 315, part of para. 317, part of para. 340, 354–370, 386–398, 417–418, part of para. 419, part of para. 420, part of para. 427, 428–429. The Chamber notes that paragraph 179 is missing in the Report.

⁴⁰ P3033 (Reynaud Theunens's expert report entitled “Radovan Karadžić and the SRBiH TO-VRS (1992-1995)”), pp. 283–286, 347–467; Reynaud Theunens, T. 17022 (20 July 2011); T.17067, T.17132–17133 (21 July 2011).

entitled to an opportunity to respond to this component of the Prosecution's case. Furthermore, the Chamber considers that the Witness is a military expert of comparable expertise to that of Butler and Theunens.⁴¹ For that reason, most of the portions of the Report dealing with the Strategic Goals are neither outside of the scope of the Report nor outside of the Witness's expertise.⁴²

11. The Chamber considers, however, that paragraphs 146–151 and 154 of the Report—which relate to the purely historical and political reasons behind the adoption of the Strategic Goals, including the political activity of Bosnian Muslims and Bosnian Croats—are outside of the Witness's expertise and thus should be excluded from the Report.

12. With regard to portions of the Report relating to the proportionality and legitimacy of shelling in and around Sarajevo, the Chamber considers that the following portions of the Report should be excluded because they relate to legal, as opposed to military, matters and are thus outside of the Witness's expertise:

- a. Paragraph 302, which relates to legal analysis of the military operations within Sarajevo; and
- b. Paragraph 315, starting from “If we know that according to the establishment” until the end of the paragraph, which makes legal determinations about sniper fire.

13. With regard to the remaining Sarajevo-related portions of the Report for which the Prosecution moves for exclusion,⁴³ the Chamber notes that Sarajevo is not addressed in any detail in the Butler and Theunens Reports. The Chamber further considers that the issue of shelling and sniping of Sarajevo is not explicitly contemplated in the Notice, wherein the scope of the Report is described as encompassing topics raised in the Butler and Theunens Reports. However, the Chamber notes that such portions of the Report fall broadly within the Witness's expertise as a military expert. Furthermore, they relate to the broader purpose of the Report, namely, demonstrating the legitimacy of VRS military strategy. Accordingly, the Chamber is of the view that these paragraphs should not be excluded.

⁴¹ Compare 65 *ter* 1D21046 with P3031 (Reynaud Theunens' 2005 *curriculum vitae*) and P4912 (Richard Butler's *curriculum vitae*).

⁴² Report, paras. 11, 144, 152, and 177–178, 180–183. The Chamber also considers that paras. 13, 91–93, 140–142, the remainder of para. 159 not excluded in para. 10(c) above, and 201–204, which do not relate explicitly to the Strategic Goals, are neither outside of the scope of the Report nor outside of the Witness's expertise.

⁴³ Report, para. 24, starting from “Under such circumstances,” until ““Proposal of Selected Targets for Destruction””; 25; 267, starting from “After the establishment of demarcation lines” until the end of the paragraph; 278–286; 290; 300–301; 303.

14. With regard to portions of the Report relating to events following Krivaja 95,⁴⁴ the Chamber recalls the Prosecution's argument that portions of the Report should be excluded because they do not relate to military matters and/or more closely resemble the evidence of an eye witness, thus being outside of the Witness's expertise. However, Butler's report, entitled "Srebrenica Military Narrative (Revised): Operation 'Krivaja 95'", contains a great deal of evidence relating not only to VRS activities, but also to the timeline of events on the ground, including the movement of the civilian population.⁴⁵ As stated earlier,⁴⁶ the Accused must have an opportunity to respond to this part of the Prosecution's case particularly when the scope of the Report is such that it is meant to address the Butler and Theunens Reports and when the Witness's expertise is comparable to that of Theunens and Butler. Finally, in light of the preceding factors, the Chamber does not consider the Witness's passing reference in the Report that more analysis is necessary to assess "the entirety of elements of crimes that may have been committed" to be a sufficient basis for exclusion of those portions.⁴⁷ The Chamber thus considers that the portions of the Report relating to events following Krivaja 95 are neither outside of the scope of the Report nor outside of the Witness's expertise.

B. Issues not relevant to the Indictment

15. The Chamber recalls that commentary on subject matters outside the temporal or geographical jurisdiction of the Indictment does not relate to the charges contained therein and thus are irrelevant.⁴⁸ As such the Chamber considers that the following paragraphs should be excluded from the Report:

- a. Paragraphs 165–173, which relate to Bosanska Krupa, a municipality that has been removed from the Indictment pursuant to Rule 73 *bis* of the Rules.⁴⁹

⁴⁴ Report, paras. 32–33; 34, starting from "There is a direct link" until "and every battle and capture of prisoners", as well as from "The so-called 'opportunistic killings'" until the end of the paragraph; 36, starting from "This author subscribes to the view that" until "but also of those who could have but failed to prevent it", as well as from "Apart from blind revenge," until the end of the paragraph; 317, starting from "It is thus pointless to discuss" until the end of the paragraph; 340, starting from "Nor was it able to foresee" until "and the capture of large numbers of these men"; 419, point (3) beginning "the evacuation of the population from Potočari" and point (8) beginning "with the exception of the incident in Kravica"; 354–357; 358–370; 386–398; 417–418; 420, starting from "In this respect" until "foreign military intervention", as well as from "This study did not ascertain" until the end of the paragraph; 427, starting from "(2) Dr. KARADŽIĆ did not know that" until the end of the paragraph; 428–429.

⁴⁵ See, e.g., P4914 (Richard Butler's expert report entitled "Srebrenica Military Narrative (Revised): Operation 'Krivaja 95'", 1 November 2002), pp. 40–46.

⁴⁶ See *supra* para. 10.

⁴⁷ Report, para. 26. See also Report, para. 20.

⁴⁸ Čavoški Decision, para. 17.

⁴⁹ The Chamber also considers that para. 163, starting with "The first CUTILHEIRO map" until the end of the paragraph, and para. 164 relate generally to the Strategic Goals and are thus neither outside of the scope of the Report nor outside of the Witness's expertise.

C. Lack of sources

16. Finally, the Chamber recalls that to satisfy the minimum standard of reliability, an expert witness is expected to provide sufficient information as to the sources used in support of the conclusions in his report. These sources must be clearly indicated and accessible to allow the opposing party to challenge the basis upon which the expert reached those conclusions.⁵⁰ The Chamber notes that the Witness provides limited references for many of the views and opinions in the Report.⁵¹ However, such limited references will go to the weight the Chamber will ultimately ascribe to this material according to the nature of the Witness's expertise and in light of the totality of the evidence.

⁵⁰ Čavoški Decision, para. 22; Decision on Evidence of Robert Donia, 19 February 2010, para. 5. *See also Prosecutor v. Galić*, Case No. IT-98-29-T, Decision on the Prosecution Motion for Reconsideration of the Admission of the Expert Report of Prof. Radinović, 21 February 2003, para. 9; *Galić* Decision, p. 2.

⁵¹ *See, e.g.*, Report, paras. 67–72, 185–194, 215–226, 255–264, 399–403.

IV. Disposition

17. Accordingly, the Chamber, pursuant to Rules 54, 89, and 94 *bis* of the Rules, hereby:
- a) **GRANTS** the Request in part;
 - b) **ORDERS** the following redactions, as outlined in paragraphs 10 to 15 above:
 - i) Paragraphs 18–19, 39–46, 146–151, 154, 165–173, 175, 268, 277, 302;
 - ii) Paragraph 159, starting from “In a geo-political sense,” until “East, West, and the Islamic world”;
 - iii) Paragraph 315, starting from “If we know that according to the establishment” until the end of the paragraph; and
 - c) **DENIES** the Request in all other respects.

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



Judge O-Gon Kwon
Presiding

Dated this fifteenth day of July 2013
At The Hague
The Netherlands

[Seal of the Tribunal]