



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-09-92-T
Date: 17 September 2015
Original: English

IN TRIAL CHAMBER I

Before: Judge Alphons Orie, Presiding
Judge Bakone Justice Moloto
Judge Christoph Flügge

Registrar: Mr. John Hocking

Decision of: 17 September 2015

PROSECUTOR

v.

RATKO MLADIĆ

PUBLIC

**INTERIM DECISION REGARDING THE EXPERT REPORTS
OF MILE POPARIĆ AND ZORICA SUBOTIĆ**

Office of the Prosecutor
Mr Peter McCloskey
Mr Alan Tieger

Counsel for Ratko Mladić
Mr Branko Lukić
Mr Miodrag Stojanović

I. PROCEDURAL HISTORY

1. On 13 April 2015, the Defence filed a notice of disclosure of four expert reports, co-authored by Mile Poparić and Zorica Subotić (“Notice of disclosure”), pursuant to Rule 94*bis* of the Tribunal’s Rules of Procedure and Evidence (“Rules”).¹ The Prosecution filed its notice on 13 May (“Notice”), submitting that it does not challenge the expert status of Subotić and Poparić or the general relevance of the “Expert Report for the Defence Mortar Attacks on the Sarajevo Area – Incidents at the Markale Market 5 February 1994 and 28 August 1995” (“Markale Report”) or the majority of the “Expert Report for the Defence Mortar Attacks on the Sarajevo Area in 1992-1995” (“Shelling Report”), the “Expert Report for the Defence Small Arms Fire on the Sarajevo Area 1992-1995” (“Sniping Report”), and the “Defence Expert Analysis of The Use of Modified Aircraft Bombs in the Sarajevo Area in 1994-1995” (“Modified Aircraft Bombs Report”).² However, the Prosecution requested the exclusion of portions of the latter three reports due to a lack of relevance.³ On 2 July, the Chamber delivered its decision on the expertise of Poparić and Subotić, deferring its decision on admission of the four reports until the witnesses have given testimony.⁴ The Chamber also instructed the Defence to review the reports and respond to the Prosecution’s submissions that portions of the reports should be excluded.⁵ On 16 July, the Defence filed additional submissions (“Additional Submissions”).⁶ The Prosecution then filed a request for leave to reply to the Additional Submissions, with the proposed reply attached as an annex (“Request for leave to Reply” and “Reply”) on 23 July.⁷ On 13 August and 9 September, the Prosecution encouraged the Chamber to decide on the Prosecution’s request for exclusion as early as possible and prior to the appearance of the two witnesses.⁸ The Chamber will now address the parties’ arguments in relation to the Prosecution’s request to exclude portions of the three reports.

¹ Defence Notice of Disclosure of Expert Reports by Mile Poparić and Zorica Subotić Pursuant to Rule 94*bis*, 13 April 2015 (Public with Confidential Annexes), paras 1-2, 26.

² Prosecution Response to Defence Notice of Disclosure of Expert Reports by Mile Poparić and Zorica Subotić and Request to Exclude Portions of Poparić’s and Subotić’s Expert Reports, 13 May 2015, paras 3-4.

³ Notice, paras 2-4, 19.

⁴ T. 36692-36694.

⁵ T. 36693-36694.

⁶ Defence Additional Submissions on the Expert Reports of Mile Poparić and Zorica Subotić Pursuant to Rule 94*bis*, 16 July 2015.

⁷ Prosecution Request for Leave to Reply to the Defence’s Additional Submissions on the Expert Reports of Mile Poparić and Zorica Subotić Pursuant to Rule 94*bis*, 23 July 2015.

II. SUBMISSIONS OF THE PARTIES

2. The Prosecution requests the exclusion of portions of the three reports because they either (i) relate to unscheduled or dropped incidents, (ii) address areas outside the scope of the report, or (iii) challenge evidence of witnesses who did not provide evidence in this case.⁹

3. The Defence argues that the reports, including the portions dealing with dropped and unscheduled incidents, go to proof of an improper *modus operandi* on the part of the Bosnian investigative organs and the tendency to try to misrepresent ABiH fire and staged incidents as VRS attacks.¹⁰ The portions of the reports that challenge expert conclusions of Zečević should not be excluded because (i) the Presiding Judge of this Chamber has “expressed due deference and reliance on Zečević’s findings”, (ii) they attempt to rebut some of the adjudicated facts (a number of adjudicated facts are based on Zečević’s expert opinions), and (iii) they challenge the credibility and reliability of the Prosecution witnesses who have testified that they knew of Zečević’s work, or worked with him on investigations.¹¹

III. APPLICABLE LAW

4. The Chamber recalls and refers to the applicable law as set out in a previous decision.¹²

IV. DISCUSSION

5. The Chamber considers that it is assisted by further submissions from the Prosecution on the matters outlined in the Request for leave to Reply and will therefore grant such leave.

6. The Shelling Report contains a detailed analysis of scheduled incidents G.1, G.4, G.6, G.7, of an unscheduled incident on Livanjska Street on 8 November 1994, and of dropped incidents G.5, G.9, and G.16. The Accused is *inter alia* charged with participation in a Joint Criminal Enterprise to establish and carry out a campaign of sniping and shelling against the civilian population of Sarajevo, the primary purpose of which was to spread terror among the civilian population between 12 May 1992 and November 1995.¹³ According to the Indictment, the specific instances of the sniping and shelling attacks forming part of the campaign, by way of illustrative examples, *include*

⁸ T. 37798, 38925.

⁹ Notice, paras 2, 4, 19; Reply, para. 6

¹⁰ Additional Submissions, para. 17.

¹¹ Additional Submissions, paras 8, 10-13.

¹² Decision on Defence Request to Disqualify Richard Butler as an Expert and Bar the Prosecution from Presenting his Reports, 19 October 2012, paras 4-9.

¹³ Indictment, paras 76-81.

but are not limited to, the incidents set forth in Schedule F and G of the Indictment.¹⁴ Based on the foregoing, the Chamber finds that paragraphs 1-48, 63-91, and 132-158, relating to the abovementioned scheduled and unscheduled incidents, with the exception of paragraph 12, are *prima facie* relevant. In paragraph 12, the experts express doubts about the authenticity of a signature of Borislav Stankov on a report, however, since this report is not in evidence, this particular paragraph appears to be lacking relevance and the Defence is hereby informed that the Chamber is inclined to deny the admission of this paragraph. The Chamber will not exclude this paragraph *in limine*, as the reason for this portion's lack of *prima facie* relevance may still change prior to or during the experts' testimony.

7. With regard to the Prosecution's submission that paragraphs 49-62, 92-131, 159, and 162-163 dealing with dropped incidents in the Shelling Report should be excluded, the Chamber recalls its previous ruling that it "does not strictly prohibit the Prosecution from presenting evidence on incidents it has proposed to remove, if it considers this necessary to prove an element of a charged count".¹⁵ The Chamber notes in this respect that the Prosecution has, in fact, submitted evidence on some dropped incidents.¹⁶ The Chamber further considers that these paragraphs may also assist the Chamber in assessing the evidence presented by the Prosecution on incidents that are included in the Indictment, in particular with regard to the methodology used by the investigative organs and they therefore do not lack *prima facie* relevance.

8. The Sniping Report deals with Scheduled incidents F.1, F.3-F.5, F.9, F.11-F.13, F.15-F.16, dropped incidents F.2, F.6-F.8, F.10, F.14, and the unscheduled incidents of 24 October 1994, 22 November 1994, and 10 December 1994.¹⁷ With regard to the Prosecution's argument that paragraphs 7, 10, 12-14 and 154 should be excluded, the Chamber refers to its interpretation of the Indictment as set out above. Paragraphs 7 and 10 of the Sniping Report, however, contains a demographic analysis and the Chamber considers that this does not reflect Poparić's and Subotić's specialised knowledge, skills, and training and is therefore inclined to deny admission of these two paragraphs. The Chamber, however, will give the parties the opportunity to explore this further during the witnesses' testimony and not exclude these two paragraphs at this stage. With regard to a sentence in paragraph 154 containing Poparić's personal recollection of the time frame of a shopping mall construction, the Chamber considers that this may affect the weight to be given to the evidence but not its admissibility. Lastly, with respect to the Prosecution's arguments that

¹⁴ Indictment, para. 81.

¹⁵ Decision Pursuant to Rule 73 *bis* (D), 2 December 2011, para. 12.

¹⁶ For example: P889, paras 43-47; P2009, paras 24-27; P2043.

¹⁷ The incident listed as F.14 in the table of contents of the Sniping Report is Scheduled incident F.13 in the Indictment, F.15 is in fact dropped incident F.14, F.16 is F.15, and F.17 is F.16.

paragraphs 12-14 are irrelevant due to a different calibre used in those incidents, the Chamber considers that this matter too concerns the weight, if any, given to the evidence rather than its admissibility.

9. With regard to the Prosecution's arguments that a number of paragraphs of the Modified Aircraft Bombs Report deal with dropped and unscheduled incidents, the Chamber refers to its considerations above on evidence challenging dropped and unscheduled incidents. In addition, the Chamber finds that the fact that the Prosecution has presented minimal evidence on one particular incident,¹⁸ is no reason to bar the Defence from presenting evidence on it.

10. With regard to the Prosecution's submission that the paragraphs of the report that challenge Zečević's expert opinions should be excluded, the Chamber considers the following. The Chamber finds that the Defence's submission that the Presiding Judge expressed due deference to Zečević's expert opinions, lacks merit. The Chamber notes in this respect, that the Presiding Judge drew the attention of the parties to an earlier judgment in which the matter at stake had shown, to be properly understood, to require a high level of expertise. He referred in that context to Prosecution and Defence experts that are referred to in that judgment. Questions were put to the witness whether he had read expert reports by the then Prosecution expert Zečević and the then Defence expert Vilčić, in order to ascertain whether the witness, who was presented as a witness of fact and not as an expert, would at least have gained knowledge of the expertise that experts had provided to the Chamber in that case. With regard to the Defence's submission that a number of adjudicated facts are based on Zečević's expert opinions and that consequently the Defence's evidence goes to rebutting adjudicated facts, the Chamber considers that after an adjudicated fact has been judicially noticed, it is evaluated independently of its evidentiary basis. Accordingly, the Defence should, if it wants to rebut adjudicated facts, not challenge expert conclusions which are not in evidence in this case and which may or may not have been the basis for the adjudicated facts, but rather focus on presenting evidence that points in a different direction than the adjudicated facts. The Chamber further finds that the Defence's submission that challenging Zečević's evidence goes to challenging the credibility and reliability of Prosecution witnesses, is unspecified and vague. Moreover, the Chamber considers that the report could have addressed the credibility and reliability of these witnesses directly. Having reviewed the report, the Chamber notes that the paragraphs the Prosecution requested to be excluded do not only contain Zečević's evidence: in the selected paragraphs the experts set out (i) the conclusions of Bosnian investigations, which are in evidence, (ii) Zečević's expert opinions which sometimes differ from these conclusions, and (iii) their own analysis and conclusions. As Zečević's expert opinions are not in evidence, the Chamber, while it is

not inclined to rely on these portions of the paragraphs on their own, will give the parties the opportunity to explore this further during the witnesses' testimony.

V. DISPOSITION

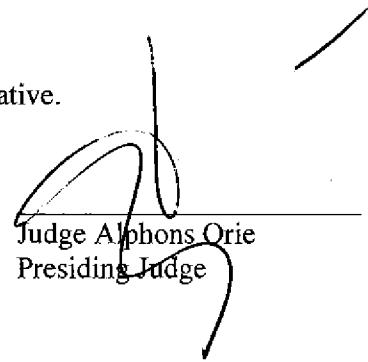
11. For the foregoing reasons, pursuant to 94 *bis* of the Rules, the Chamber

GRANTS the Prosecution leave to reply;

DENIES the Prosecution's request to exclude portions of the Shelling Report, the Sniping Report and the Modified Aircraft Bombs Report;

DEFERS its decision on admission into evidence of the three reports, either in part or in its entirety, until the time of witnesses Subotić and Poparić's testimony.

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



Judge Alphons Orie
Presiding Judge

Dated this seventeenth day of September 2015
At The Hague
The Netherlands

[Seal of the Tribunal]

¹⁸ The incident is referred to as 'Case 10' in the report.