



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-95-11-T

Date: 13 November 2006

Original: English

IN TRIAL CHAMBER I

Before: Judge Bakone Justice Moloto, Presiding
Judge Janet Nosworthy
Judge Frank Höpfel

Registrar: Mr. Hans Holthuis

Decision of: 13 November 2006

PROSECUTOR

v.

MILAN MARTIĆ

**DECISION ON DEFENCE'S SUBMISSION OF THE
EXPERT REPORT OF MILISAV SEKULIĆ PURSUANT
TO RULE 94 *BIS*, AND ON PROSECUTION'S MOTION
TO EXCLUDE CERTAIN SECTIONS OF THE
MILITARY EXPERT REPORT OF MILISAV SEKULIĆ,
AND ON PROSECUTION MOTION TO RECONSIDER
ORDER OF 7 NOVEMBER 2006**

The Office of the Prosecutor:

Mr. Alex Whiting
Ms. Anna Richterova
Mr. Colin Black
Ms. Nisha Valabhji

Counsel for the Accused:

Mr. Predrag Milovančević
Mr. Nikola Perović

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");

BEING SEISED of the "Defence's Submission of the Expert Report of Milisav Sekulić pursuant to Rule 94 *bis*" ("Submission" and "Report" respectively) filed on 10 October 2006, in which the Defence informs the Trial Chamber that while Milisav Sekulić will be available for cross-examination, they do not intend to call him in person should the Prosecution accept his expert Report; **AND BEING SEISED** of the "Prosecution Motion to Exclude Certain Sections of the Military Expert Report of Milisav Sekulić", filed on 2 November 2006 ("Motion"), in which the Prosecution requests that the Report be excluded from evidence excepting pages 8-28 and informs that they do not seek to have Milisav Sekulić present for cross-examination if only these pages are admitted;¹

NOTING that the Prosecution proposes that the Defence be permitted to tender any relevant document from the relevant time-period, which is cited in the Report's sources "along with Mr. Sekulić's *specific* analysis of that document" ("Prosecution's Proposal");²

NOTING that the Prosecution further requests that the Defence be ordered to file an expedited response to this Motion by 6 November 2006 and that this request was granted in-part, by oral order of 3 November 2006, by which the Defence was ordered to file their response within one week from the date of the Prosecution Motion, that is, by 9 November 2006;³

NOTING that on 7 November 2006, the Trial Chamber issued its "Order for Provision of Further Information Concerning Report of Milisav Sekulić" ("Order of 7 November 2006"), ordering the Defence to file the *curriculum vitae* of Milisav Sekulić, as well as "complete footnote references for the Report, that is, footnote references that link the body of text and the sources which are listed from pages 190 to 200 of the Report", by 10 November 2006;⁴

BEING ALSO SEISED of the "Prosecution Motion to Reconsider Order of 7 November 2006 for Provision of Further Information Concerning Report of Milisav Sekulić" filed on 8 November 2006 ("Motion to Reconsider") in which the Prosecution requests the Trial Chamber to reconsider its Order of 7 November 2006 on the basis, *inter alia*, of perceived unfairness to the Prosecution;

¹ Motion, para. 1.

² Motion, para. 2 [emphasis in original].

³ Hearing, 3 November 2006, T. 10639-10640.

⁴ Order for Provision of Further Information Concerning Report of Milisav Sekulić, 7 November 2006.

NOTING that on 9 November 2006, the Defence filed "Defence's Response to Two Prosecution's Motions Concerning Report of Milisav Sekulic" ("Response"), in which the Defence argues that both the Motion and the Motion to Reconsider should be dismissed as, *inter alia*, in the view of the Defence, the Report is properly sourced within the meaning of the jurisprudence;⁵

NOTING that on 10 November 2006, just prior to the expiration of the deadline set by the Trial Chamber in its Order of 7 November 2006, the Defence filed "Defence's Submission Regarding the Trial Chamber's Order of 7 November 2006" by which the Defence provides the *curriculum vitae* of Milisav Sekulić and requests that the Trial Chamber enlarge the time given to the Defence by the Order of 7 November 2006 for the provision of references for the Report of Milisav Sekulić;

NOTING that on 10 November 2006, the Prosecution filed "Prosecution's Response to Defence's Submission Regarding the Trial Chamber's Order of 7 November 2006" by which the Prosecution objects to any extension of time for the Defence, *inter alia*, for reasons of unfairness to the Prosecution;

RECALLING the Trial Chamber's Oral Decision of 10 November 2006 ("Oral Decision"), by which it dismissed the Defence's Submission Regarding the Trial Chamber's Order of 7 November 2006, finding that in failing to meet the set deadline the Defence "forfeited the opportunity granted to it by the Trial Chamber to provide adequate references" for the Report;

NOTING Rule 94 *bis* of the Rules of Procedure and Evidence ("Rules");

CONSIDERING that according to the jurisprudence of the Tribunal an expert witness is "[a] person whom by virtue of some specialized knowledge, skill or training can assist the trier of fact to understand or determine an issue in dispute",⁶ that is, an issue or dispute upon which the Trial Chamber must make a determination or finding;⁷

NOTING that the Trial Chamber, in its "Decision on Defence's Submission of the Expert Report of Professor Smilja Avramov Pursuant to Rule 94 *bis*" of 9 November 2006 ("Decision of 9 November 2006"), held that the Trial Chamber must examine several factors in its assessment of a submission

⁵ Response, para. 5.

⁶ *Prosecutor v. Stanislav Galić*, Decision Concerning the Expert Witnesses Ewa Tabeau and Richard Philipps, 3 July 2002. See also *Prosecutor v. Blagojević and Jokić*, Decision on Prosecution's Motions for Admission of Expert Statements, 7 November 2003, para. 19. The Trial Chamber in *Čelebići* held that "[e]xpert opinion is only necessary and required where the expert can furnish the Trial Chamber with scientific, technical or such knowledge or information that is ordinarily outside the experience and knowledge of the judges of facts" *Prosecutor v. Zejnil Delalić, Zdravko Mucić, a.k.a. "Pavo", Hazim Delić and Esad Landžo, a.k.a. "Zenga"*, Decision on the Motion by the Prosecution to Allow the Investigators to Follow the Trial During the Testimonies of the Witnesses, 20 March 1997, para. 10.

⁷ *Prosecutor v. Blagojević and Jokić*, Decision on Prosecution's Motions for Admission of Expert Statements, 7 November 2003, para. 19.

for the admission of an expert report, including whether: (1) the witness is an “expert” within the meaning of the jurisprudence of this Tribunal; (2) the report is reliable; (3) the report is relevant and of probative value; and, (4) the subject matter of the report falls within the accepted expertise of the witness;⁸

NOTING that the Prosecution accepts that Milisav Sekulić may be considered a military expert for the purposes of this trial;⁹

NOTING that the Prosecution objects to the admission of this Report, excepting the portion from pages 8 to 28, on a number of grounds:

1. That the majority of the Report deals with legal, political, and historical matters for which the witness has no expertise,¹⁰
2. Much of the Report addresses material which is cumulative and “of little or no relevance to this case”,¹¹
3. The Report repeatedly comments on the criminal responsibility of the Accused and other ultimate issues which are not appropriate for an expert report,¹²
4. The Report fails to refer to the sources and bases for the various assertions made;

CONSIDERING with reference in particular to the *curriculum vitae* of Milisav Sekulić, which the Defence provided on 10 November 2006, that Milisav Sekulić, being a retired Colonel of the JNA and VJ and Major General of the SVK, may be considered as a military expert on the JNA, VJ and SVK for the purposes of this case, and **RECALLING** in this regard, its Oral Decision of 10 November 2006;¹³

RECALLING FURTHER the law in relation to expert reports, as set out in the Trial Chamber’s Decision of 9 November 2006, and in particular that Rule 89 (C) is applicable to the admissibility of expert evidence under Rule 94 *bis*;¹⁴

⁸ Decision on Defence’s Submission of the Expert Report of Professor Smilja Avramov Pursuant to Rule 94 *bis*, 9 November 2006.

⁹ Motion, para. 7.

¹⁰ Motion, paras 4, 8-10.

¹¹ Motion, paras 4, 11-13.

¹² Motion, paras 4, 14-16.

¹³ Hearing, 10 November 2006, T. 10897-10899.

¹⁴ Decision on Defence’s Submission of the Expert Report of Professor Smilja Avramov Pursuant to Rule 94 *bis*, 9 November 2006, para. 11

CONSIDERING that an expert report must meet a minimum degree of reliability,¹⁵ and that the Trial Chamber has held that this would require that:

(1) the facts and statements upon which the expert bases his or her opinion include references to the sources of such facts or statements; (2) the underlying sources must *prima facie* show indicia of reliability or the Trial Chamber must be able to test the reliability of such sources;¹⁶

CONSIDERING that an expert witness may not pronounce on the “ultimate issue” before the Trial Chamber, and that “an expert witness may not be authorised to offer his opinion on the criminal liability of the accused, a matter which falls within the sole jurisdiction of the Chamber at the close of the Trial”;¹⁷

CONSIDERING that the Report is poorly cited throughout, and that for large portions of the Report there are no references at all, and that such a lack of references makes it difficult to assess the probative value of the contents of this Report as the statements contained therein are virtually impossible to verify;

REITERATING the conclusion of the Trial Chamber that in the absence of references to each fact or statement made in an expert report “the Trial Chamber will treat such information as the opinion of the witness, and weigh the evidence accordingly”;¹⁸

CONSIDERING that large portions of this Report are inadmissible on the following grounds:

1. Lack of relevance to the issues before this Trial Chamber and the charges in the Indictment,
2. The subject matter falls outside of the scope of the expertise of Milisav Sekulić,
3. The Report attempts to pronounce on the “ultimate issue” which is before this Trial Chamber,
4. The Report contains wholly inappropriate, inflammatory and argumentative statements which lack impartiality and objectivity, and reflect the obvious bias of the author;

¹⁵ *Prosecutor v. Stanislav Galić*, Decision on the Prosecution Motion for Reconsideration of the Admission of the Expert Report of Prof. Radinovij, 21 February 2003, para. 9.

¹⁶ Decision on Defence’s Submission of the Expert Report of Professor Smilja Avramov Pursuant to Rule 94 bis, 9 November 2006.

¹⁷ *Prosecutor v. Hadzihasanović and Kabura*, Decision on Report of Prosecution Expert Klaus Reinhardt, 11 February 2004, p. 4. See also the Trial Chamber in *Milošević*, which held that “what this witness effectively is doing is to provide evidence or provide opinion, more accurately, upon the very matters upon which this Trial Chamber is going to have to rule, and that, as they correctly point out, invades the right, power, and duty of the Trial Chamber to rule upon the issue. [...] 89(C) says we may admit any relevant material which it deems to have probative value. Because it’s dealing with the matters which we have to deal with ultimately, drawing the conclusions and inferences which we have to draw, we think that it does not assist and is, therefore, not of probative value”, *Prosecutor v. Milošević*, Hearing, 28 Jan 2000, T. 13305-07.

RECALLING that the Trial Chamber has informed the Defence on which topics it does not need to hear further evidence;¹⁹

CONSIDERING furthermore that this Report amounts, in large parts, to a “reverse indictment”,²⁰ and that large parts of this Report could only be of relevance if *tu quoque* were a defence open to the Accused;

FINDING THEREFORE that only limited parts of the Report meet the standard of Rule 94 *bis*;

CONSIDERING that as the Report was submitted to the Prosecution on 10 October 2006 and bearing in mind that it has been reduced significantly by the Oral Decision of 10 November 2006, and furthermore, as this witness is not due to be heard before 15 November 2006, the Prosecution will have had sufficient time to prepare for cross-examination;

CONSIDERING THEREFORE that the Order of 7 November 2006 has not caused an injustice to the Prosecution;²¹

¹⁸ Decision on Defence’s Submission of the Expert Report of Professor Smilja Avramov Pursuant to Rule 94 *bis*, 9 November 2006.

¹⁹ Hearing, 1 November 2006, T. 10472.

²⁰ *Prosecutor v. Slobodan Milošević*, Decision on Admissibility of Expert Report of Vasilije Krestic, 7 December 2005, p. 4. The Trial Chamber in *Kunarac* rejected the admission of portions of an expert report on the grounds that “[t]he historical background of the conflict is not relevant to the charges against the three accused, as the innocence or guilt of the three accused does not turn on any historical reasons for the armed conflict”, *Prosecutor v. Kunarac, Kovač and Vuković*, Decision on Prosecutor’s Motion for Exclusion of Evidence and Limitation of Testimony, 3 July 2000, para. 6.

²¹ *Prosecutor v. Galić*, Decision on Application by Prosecution for Leave to Appeal, 14 December 2001, para. 13.

FOR THE FOREGOING REASONS

PURSUANT TO Rules 89 (C) and 94 *bis* of the Rules,

REITERATES its Oral Decision of 10 November 2006, by which the Trial Chamber:

ACCEPTED IN PART the Defence Submission of the Expert Report of Milisav Sekulić, and admitted the Report in redacted form as Exhibit 1012,


GRANTED IN PART the Prosecution Motion,

DISMISSED the Defence's Submission Regarding the Trial Chamber's Order of 7 November 2006, wherefore the Prosecution Motion to Reconsider becomes moot,

ORDERED the Defence to present Milisav Sekulić before the Trial Chamber for cross-examination, and

FURTHER ORDERS that should the Defence wish to file documents in line with the Prosecution's Proposal, it may do so.

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



Judge Bakone Justice Moloto
Presiding

Dated this thirteenth day of November 2006

At The Hague

The Netherlands

[Seal of the Tribunal]