

**UNITED
NATIONS**

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: 31 January 2013

IN TRIAL CHAMBER III

Before:

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

Registrar:

Mr John Hocking

THE PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**PROSECUTION'S RESPONSE TO DISCLOSURE OF
REPORTS OF EXPERT WITNESS MILE POPARIĆ AND
REQUEST TO EXCLUDE PORTIONS OF POPARIĆ'S
REPORTS**

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The Accused:

Mr Radovan Karadžić

Standby Counsel:

Mr Richard Harvey

**THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA**

Case No. IT-95-5/18-T

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EXPERT WITNESS MILE POPARIĆ AND REQUEST TO EXCLUDE
PORTIONS OF POPARIĆ'S REPORTS**

Introduction

1. The Prosecution hereby responds to the disclosure of the following reports authored or co-authored by the witness Mile Poparić and proposed to be tendered through him: 1) "Small Arms Fire on the Sarajevo Area 1994-1995" ("Small Arms Report");¹ 2) Supplement to the Expert Report for the Defence Small Arms Fire on the Sarajevo Area, 1992-1995 ("Supplementary Report");² and 3) Inconsistencies of Experts Berko Zečević and Richard Higgs in Cases of the Shelling of Sarajevo ("Higgs-Zečević Report").³ For the reasons set forth below, the Prosecution requests the exclusion of the Small Arms Report, the Supplementary Report, and portions of the Higgs-Zečević Report. To the extent Mr Poparić's reports are admitted, the Prosecution does not accept the reports and wishes to cross-examine Mr Poparić on them.

¹ Disclosure of Report of Expert Witness Mile Poparić, 24 August 2012. Translation disclosed by email on 27 January 2013. All references herein are to Case No. IT-95-5/18-T unless otherwise specified.

² Disclosure of Supplemental Report of Expert Witness Mile Poparić, 24 January 2013.

Request to Exclude the Small Arms Report

2. The Prosecution requests the exclusion of the Small Arms Report on the basis that Mr Poparić does not have the requisite expertise in small arms to assist the Trial Chamber. Alternatively, if Mr Poparić is found to have the necessary expertise in small arms, paragraphs 6, and 9-11 of the report should nevertheless be excluded because they consist of analysis outside of Mr Poparić's expertise.
3. The Prosecution maintains its earlier challenge to the qualifications of Mile Poparić in relation to small arms.⁴ On 10 December 2012, the Defence submitted a revised *curriculum vitae* for Mr Poparić⁵ containing new information about Mr Poparić's exposure to small arms. However, this new information does not establish any specialized knowledge, experience, or skills in the area of small arms which could assist the Chamber in its understanding or determination of the issues in dispute in this case.⁶
4. According to the revised *curriculum vitae*, Mr Poparić's exposure to small arms stems from (1) practical training in small weapons ammunition production and testing that he received in 1976 (before he received his qualifications as a mechanical engineer); (2) some training in "handling and maintenance" of small weapons he received in 1980-1981; and (3) yearly training and target practice in certain small weapons at the Technical Testing Centre where he was previously employed. So, while Mr Poparić has some basic knowledge and experience with the handling of certain small weapons, it is not the kind of specialized knowledge or experience that would assist the Chamber in assessing Sarajevo sniping incidents. His work as a mechanical

³ Notice of Disclosure of Translation of Report of Expert Witnesses Mile Poparić and Mirjana Andelković-Lukić, 7 November 2012.

⁴ Prosecution's Response to Disclosure of Report of Expert Witness: Mile Poparić, 30 August 2012, para.5.

⁵ Revised CV of Expert Witness Mile Poparić, 10 December 2012, Annex A (65ter 1D06819).

⁶ *Dragomir Milošević*, Decision on Admission of Expert Report of Robert Donia, Case No. IT-98-29/1-T, T. Ch., 15 February 2007 ("D. Milošević Decision"), para. 7 (citing *Galić*, Decision on the Expert Witness Statements Submitted by the Defence, Case No. IT-98-29-T, T. Ch., 27 January 2003, p. 3); *Popović et al.*, Case No. IT-05-88-T, Second Decision Regarding the Evidence of General Rupert Smith, 11 October 2007, p.3; *Milutinović et al.*, Case No. IT-05-87-T, Decision on Evidence Tendered through Dr. Eric Baccard, 16 March 2007, para.13.

engineer did not involved small arms or small arms ballistics and his limited practical experience with small arms – which involves no experience in the use of small arms in a conflict situation – reflects a basic familiarity with such weapons, not specialized knowledge or experience.

5. Even if the Chamber finds that Mr Poparić has the requisite expertise in small arms, portions of the report should nevertheless be excluded as they do not draw upon any small arms, ballistics or weapons expertise.⁷ In particular, paragraph 6 (opining that the overall political strategy of the BH Army was to “provoke a military intervention”), paragraph 9 (analyzing and opining on demographic matters), and paragraphs 10-11 (concluding that “there is evidence that” the BH Army targeted UNPROFOR members and the Holiday Inn based on an analysis of documents involving no weapons or ballistics expertise).
6. In addition, the Prosecution notes that throughout his analysis of scheduled incidents, Mr Poparić draws conclusions on matters unrelated to small arms, weapons or ballistics and strays into areas of expertise in which he is clearly unqualified to make expert opinions. For example, he reaches conclusions in relation to the authenticity of medical⁸ and police⁹ records, BH Army duty schedule patterns,¹⁰ the location of a spring,¹¹ hospital visiting hours,¹² the “authenticity” of a scar on the body of a sniping victim,¹³ and the credibility and reliability of fact witnesses on matters that have nothing to do with small arms or ballistics.¹⁴ Thus, if the Chamber decides to admit the Small Arms Report, the nature and frequency of conclusions that are unrelated to any expertise possessed by Mr Poparić is a factor going to the weight that should be given to the Small Arms Report and its conclusions on the scheduled sniping incidents.

⁷ The admissibility of an expert report requires, *inter alia*, that “the contents of the statement/report fall within the accepted expertise of the witness”. D. Milošević Decision, para. 6.

⁸ Small Arms Report, para.40.

⁹ Small Arms Report, para.151.

¹⁰ Small Arms Report, para.46.

¹¹ Small Arms Report, para.73.

¹² Small Arms Report, para.80

¹³ Small Arms Report, para.169.

¹⁴ Small Arms Report, paras.65, 70, 75, 132.

Request to Exclude the Supplementary Report

7. The Prosecution requests the exclusion of the Supplementary Report. Contrary to its title, the Supplementary Report does not supplement the Small Arms Report. It does not update, clarify, or augment any of the conclusions reached in the Small Arms Report in relation to the scheduled sniping incidents. Instead, it analyzes ten unscheduled shelling and sniping incidents none of which were addressed in the Small Arms Report.¹⁵
8. Furthermore, the Accused has provided no explanation for his violation of the deadline for disclosure of expert reports,¹⁶ and has not even attempted to establish that it would be in the interests of justice to permit him to tender the Supplementary Report long after that deadline expired and at the conclusion of the Sarajevo component of the Defence case.¹⁷
9. It would not be in the interests of justice to allow the late disclosure of the Supplementary Report. The Chamber has emphasized that expert evidence “should be focused as much as possible on matters that are directly relevant to the indictment”¹⁸ and that “detailed evidence going to specific incidents which are not listed in the indictment or its schedules is unhelpful.”¹⁹ Thus, the detailed analysis of unscheduled incidents in the Supplementary Report has limited probative value and is of little assistance to the Chamber. This is both an independent basis upon which the Supplementary Report should be excluded, and a factor weighing against permitting the late disclosure of the Supplementary Report.²⁰

¹⁵ The Supplementary Report addresses one scheduled incident, F-9 (identified as Incident 11), but includes no actual analysis. It simply cross-references the conclusions in the Small Arms Report.

¹⁶ Scheduling Order on Close of Prosecution’s Case, Rule 98*bis* Submissions, and Start of the Defence Case, 26 April 2012, para.24.

¹⁷ See, *Gotovina et al.*, Case No. IT-06-90-T, Decision on Expert Report and Addendum of Harry Konings, 18 December 2008 (“Gotovina Decision”), paras.11-15 (holding that the Chamber will consider whether it is in the interests of justice to allow the late submission of an expert report, and that relevant factors include whether good cause has been shown, whether it is properly characterized as an addendum to an existing report, the length and complexity of the report, the number of underlying documents addressed, the amount of preparation time afforded to the opposing party, and the extent to which the report will assist the Chamber in reaching sound conclusions).

¹⁸ T.21487-21496 (excluding portions of Mr Brown’s expert report).

¹⁹ T.5480.

²⁰ Gotovina Decision, para.15.

10. In addition, for the reasons set forth above in relation to the Small Arms Report, Mr Poparić does not have the relevant expertise in small arms to provide opinions on the sniping incidents addressed in the Supplementary Report (Incidents 1, 3-5, and 7-11).

11. In the event the Chamber finds that Mr Poparić does have the requisite expertise in small arms and that the Supplementary Report is generally admissible, the discussion of Incidents 4, 5, 7, 10 and 11 should nevertheless be excluded as they do not draw upon any ballistics or weapons expertise.²¹ The purported analysis of Incidents 4, 5, and 7 is not an analysis at all. Mr Poparić merely recites findings of the *Galić* Trial Chamber. For Incident 10, Mr Poparić only points to an apparent inconsistency between various sources regarding the precise location where a boy was killed. He applies no ballistics or weapons expertise, nor is this a matter upon which the Trial Chamber requires the assistance of “specialized knowledge, skills or training” to understand and assess.²² For Incident 11, Mr Poparić just cross-references findings in the Small Arms Report for Scheduled Incident F9. The reference is superfluous and irrelevant.

Request to Exclude parts of the Higgs-Zečević Report²³

12. The Prosecution seeks the exclusion of Sections A1, A2, A4, and B1 of the Higgs-Zečević Report. Sections A2, A4, and B1 of the report attempt to rebut expert analyses that are not in evidence in this case, relating to unscheduled shelling incidents and are therefore irrelevant. Section A1 analyzes Dr Zečević’s credibility on general factual matters. This is outside the scope of

²¹ The admissibility of an expert report requires, *inter alia*, that “the contents of the statement/report fall within the accepted expertise of the witness”. D. Milošević Decision, para. 6.

²² D. Milošević Decision, para. 7.

²³ Although an English translation of the Higgs-Zečević Report was disclosed more than 30 days ago, it appears that the 30-day response deadline under Rule 94 *bis*(B) – which is triggered by disclosure of the “full” statement and/or report of any expert witness to be called by a party pursuant to Rule 94 *bis*(A) – does not commence until disclosure of all reports to be tendered through a particular expert has been completed. In any event, the ICTR Appeals Chamber has ruled that there is nothing in Rule 94 *bis* that implies that, absent a timely motion from the party opposing an expert, a Trial Chamber is obligated to admit expert testimony or to accept a witness’s qualification as an expert and that Rule 94 *bis* only sets forth a procedure by which an expert’s report can be accepted into evidence without that expert testifying. *See, Gacumbitsi*, Judgment, Case No. ICTR-01-64-A, App. Ch., 7 July 2006, para. 31 (citing *Rutaganda*, Judgment, Case No. ICTR-96-3-A, App. Ch., 26 May 2003, para. 164). Consistent with that jurisprudence, the Chamber previously granted the Accused’s motion

the witness's expertise, not the proper subject of an expert report, and of no assistance to the Chamber.

a. Section A1 (pp.42-47): "Analysis of documents in which Berko Zečević presented his life and career to the International Tribunal"

13. This section consists of an analysis of prior statements of Dr Zečević, regarding factual matters relating to his background and career, and the background to the conflict. Although Mr Poparić draws repeated conclusions about the credibility of Dr Zečević's statements, nothing in this section draws upon Mr Poparić's stated expertise in weapons and ballistics. The Trial Chamber already determined that Dr Zečević's 2008 statement, was of a "factual nature concerning matters which Dr Zečević observed and experienced during his prior employment" and was therefore not appropriately characterized as an expert report.²⁴ An analysis of such factual matters is also not appropriate subject matter for expert evidence, as the Chamber does not require the assistance of any "specialized knowledge, skill or training" to understand and assess these factual matters.²⁵ They fall within the Chamber's ordinary experience and knowledge.

14. Furthermore, this section of the Higgs-Zečević Report addresses statements made by Dr Zečević in three prior statements, none of which are in evidence in this case.²⁶ Thus, the analysis is not only improper subject-matter for an expert report, it also has limited, if any, probative value.

b. Section A2 (pp.47-65): "Analysis of the document entitled "Report on the Effects of Strikes against Urban Areas of Sarajevo by Rockets of Great Destructive Power"

to exclude portions of Mr. Brown's expert report brought at the time of Mr. Brown's testimony, long after the expiration of the 30-day time period in Rule 94bis(B). *See*, T.21487-21496.

²⁴ T.12145-12146.

²⁵ D. Milošević Decision, para. 7.

²⁶ 0229-9709-0229-9755 (also 65ter 10114); (an 18 February 2003 statement; 0303-4993-0303-4999 (also 65ter 1D03272) (a 26 March 1996 statement) and 0422-9945-0422-2321 (a 21 June 2001 statement). None of these statements are in evidence or were tendered for admission.

15. This section is a detailed technical attack on an expert report co-authored by Dr Zečević analyzing five incidents, none of which are scheduled incidents in this case. This report is also not in evidence in this case nor were its conclusions addressed by Dr Zečević in his oral evidence. As such, the only possible relevance of this section of the Higgs-Zečević Report would be to assist the Chamber in evaluating Dr Zečević's expertise. However, the Chamber lacks an evidentiary foundation from which to assess Mr Poparić's analysis of Dr Zečević's conclusions. The Chamber has not received Dr Zečević's underlying report into evidence, has not received any detailed evidence on the incidents the underlying report addresses, and has not heard evidence from Dr Zečević explaining the conclusions reached in the report.²⁷ Thus, Mr Poparić's analysis is of little, if any assistance, to the Chamber in assessing Dr Zečević's expertise, and therefore has little if any probative value. It would also be unfair to the Prosecution and Dr Zečević to allow a Defence expert to attack Mr Zečević's report on unscheduled incidents that has never been tendered in this case, an attack to which Dr Zečević has never been given an opportunity to respond.

16. Moreover, as noted above, the Chamber has emphasized that expert evidence "should be focused as much as possible on matters that are directly relevant to the indictment"²⁸ and that "detailed evidence going to specific incidents which are not listed in the indictment or its schedules is unhelpful."²⁹ An analysis of an expert report not admitted in this case dealing with unscheduled incidents violates both of these directions.

c. Section A4 (pp.79-108): "Analysis of the shelling of Tuzla Kapija on 25 May 1995"

17. This section of the Higgs-Zečević Report analyzes a report authored by Dr Zečević on a shelling incident in Tuzla. This shelling incident has virtually no connection to the Indictment. Mr Poparić's analysis of Dr Zečević's report – which is not in evidence – on this incident is only tangentially connected to

²⁷ In cross-examination of Dr Zečević, the Accused only touched upon this report (1D03282) in relation to two discrete issues (*see*, T.12210-12213 and T.12236-12238). He did not question Dr Zečević on the report's conclusions relating to the incidents it addressed, or tender the report.

²⁸ T.21487-21496 (excluding portions of Mr Brown's expert report).

this incident and is thus even further removed from the Indictment. Moreover, as the Chamber has not received any detailed evidence on this incident, and virtually no evidence from Dr Zečević that would assist in explaining the conclusions he reached in relation to that incident³⁰ the Chamber has no proper evidentiary context from which to evaluate Mr Poparić's analysis. This further reduces the relevance and probative value of this portion of the Higgs-Zečević Report.

d. Section B1 (pp.109-111): "Incident in Livanjska Street of 8 November 1994"

18. This is an analysis of a supplemental report by Mr Higgs³¹ that is not in evidence in this case relating to an unscheduled incident that was never discussed with Mr Higgs in his admitted expert report³² or his testimony. This section of the Higgs-Zečević Report is also not focused on matters directly relevant to the Indictment. Nor has the Chamber received the supplemental report into evidence, or heard evidence from Mr Higgs explaining his conclusions. The Chamber therefore lacks an evidentiary context from which to evaluate this section of the Higgs-Zečević Report, further reducing its relevance and probative value. It would also be unfair to the Prosecution and Mr Higgs to allow a Defence expert to attack an analysis by Mr Higgs that has never been tendered in this case, and to which Mr Higgs has never been given an opportunity to respond.

Conclusion

19. For the foregoing reasons, the Prosecution requests the exclusion of:

- (i) The Small Arms Report, or, alternatively, paragraphs 6, and 9-11 of that report;

²⁹ T.5480.

³⁰ The Accused engaged in limited questioning of Mr Zečević on this incident, but his questions were mainly focused on the reasons for Mr Zečević's engagement in the trial. Few questions dealt with technical matters. *See*, T.12362-12372.

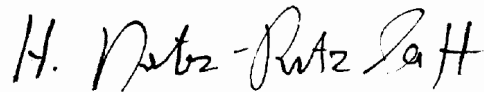
³¹ 65ter 10253.

³² Exh.P01437.

- (ii) The Supplementary Report, or, alternatively the discussion of Incidents 1, 3, 4, 5, 7, 8, 9, 10, and 11 in that report; and
- (iii) Sections A1, A2, A4, and B1 of the Higgs-Zečević Report.

20. For those portions of Mr Poparić's reports that are not excluded, the Prosecution challenges Mr Poparić's qualifications as an expert in small arms and small arms ballistics, does not accept the Small Arms Report, Supplementary Report or the Higgs-Zečević Report, and wishes to cross-examine Mr Poparić.

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