



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-04-81-PT
Date: 2 February 2007
Original: English

IN THE TRIAL CHAMBER

Before: Judge Patrick Robinson, Pre-Trial Judge
Judge Krister Thelin
Judge Frank Höpfel

Registrar: Mr. Hans Holthuis

Order of: 2 February 2007

PROSECUTOR

v.

MOMČILO PERIŠIĆ

**ORDER ON DEFENCE SUBMISSIONS REGARDING
VARIOUS EXPERTS' REPORTS DISCLOSED BY THE
PROSECUTION PURSUANT TO RULE 94bis**

The Office of the Prosecutor:

Mr. Mark B. Harmon
Ms. Susan L. Somers

Counsel for the Accused:

Mr. James Castle

I. INTRODUCTION

1. 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 in receipt of several notices from the Defence, seeking the exclusion of the expert witness reports of witnesses Degeratu, Donia, Theunens, Treanor and Torkildsen.¹ The Trial Chamber is also in receipt of several notices concerning the reports of other expert witnesses disclosed by the Prosecution pursuant to Rule 94*bis*, raising various issues but not seeking their exclusion.² The Prosecution has filed responses to the Defence’s notices that seek the exclusion of the Degeratu report³; the Treanor report⁴; and the Donia, Theunens and Torkildsen reports.⁵ The Prosecution has not filed responses to the notices relating to any other expert witness reports.

II. APPLICABLE LAW

2. Rule 94*bis* concerns the testimony of expert witnesses, and 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

¹ On 28 November 2006, the Defence filed its Notice pursuant to Rule 94*bis* concerning Prosecution Expert Constantin Degeratu and Motion to strike report. On 6 December 2006, the Defence filed its Notice pursuant to Rule 94*bis* concerning Prosecution Expert Patrick Treanor and motion to exclude. On 3 January 2006, the Defence filed its Notice pursuant to Rule 94*bis* concerning Prosecution Expert Robert Donia and Motion to Exclude, its Notice pursuant to Rule 94*bis* concerning Prosecution Expert Morten Torkildsen and Motion to Exclude, and its Notice pursuant to Rule 94*bis* concerning Prosecution Expert Reynaud Theunens and Motion to Exclude.

² On 13 November 2006, the Defence raised its objections to Mr. Richard Butler as an expert witness in its separate Notice pursuant to Rule 94*bis* concerning Prosecution Expert Richard Butler. In a submission of the same date, the Defence filed its inaptly entitled Notice pursuant to Rule 94*bis* concerning Prosecution Expert Richard Butler (Partly Confidential) (with Confidential Annex A), which raises specific objections to the following proposed expert witness reports (not Richard Butler): John Clark; Martin Ols; Richard Wright; P C A M De Bruyn; Freddie Pecereilli; José Pablo Baraybar; Kathryn Barr; Anthony Brown; Helge Brunborg; Jurrien Bijhold; Johan De Koeijer; William Haglund; M J Hedley; A J Kloosterman; Christopher Lawrence; S E Maljaars; and Michael Malony and Michael Brown. (The Defence subsequently filed a clarification on 15 November 2006, correcting the title of this filing as (Partly Confidential) (with Confidential Annex A) Notice pursuant to Rule 94*bis* concerning Prosecution Expert Disclosures.) On 27 November 2006, the Defence filed its Notice pursuant to Rule 94*bis* concerning Prosecution Experts [Ivan] Grujić, [Vilmos] Kovacs, [Jozef] Poje, [Richard] Higgs, [Richard] Phillips, [Ewa] Tabeau and [Berko] Zečević. The Defence accepts the majority of expert witness reports, but where it does so, it is subject to its understanding of the expert’s supposed area of expertise, where it avers this is not clear from the information received to date.

³ Prosecution’s Response to Defence Motion to strike Degeratu report, 12 December 2006.

⁴ Prosecution’s Response to Defence Motion to strike Treanor report, 20 December 2006.

⁵ Prosecution’s Response to Defence Motions to exclude expert reports of Donia, Theunens and Torkildsen, 17 January 2007.

(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.

3. Previous decisions concerning Rule 94*bis* have discussed the application of that Rule, and have explained its intended effect on the length of the trial proceedings:

Rule 94*bis* ... is intended to avoid unnecessary prolongation of proceedings so that if the opposing party accepts the written statement of an expert witness, it can be admitted into evidence by the Trial Chamber without calling the witness to testify in person. Again the evidence in question could be the only evidence on the facts in question and therefore the right to cross-examine, if needed, is preserved.⁶

Rule 94*bis* performs two separate functions. ... Rule 94*bis* provides a separate timetable for the disclosure of the statements of expert witnesses whichever party is calling that expert. Once the statement of an expert witness has been disclosed, Rule 94*bis* requires the other party to react to that statement within a further time limit and, depending upon whether the other party wishes to cross-examine the expert, provides for the admission of that statement without calling the expert witness to testify.⁷

4. Rule 94*bis* serves, therefore, to identify those expert witness reports that may be admitted without calling the expert witness to testify at trial, and those expert witnesses who will be subject to cross-examination. To this end, it places an obligation on the party submitting the expert report to provide sufficient information to the opposing party, such that the opposing party can determine, pursuant to Rule 94*bis*, whether or not it accepts the tendered report and, where the opposing party does not accept the tendered report, whether it wishes to cross-examine the expert witness and whether it challenges the qualifications of the witness as an expert, or the relevance of all or parts of the report.

⁶ *Prosecutor v. Dario Kordić & Mario Čerkez*, Case No: IT-95-14/2-AR73.6, Decision on Appeal Regarding the Admission into Evidence of Seven Affidavits and one Formal Statement, 18 September 2000, fn. 56. The Trial Chamber notes that, while the version of the Rule then in force (Rev. 19) has been subsequently amended, this citation nevertheless remains an accurate description of the Rule's function.

⁷ *Prosecutor v. Stanislav Galić*, Case No: IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92*bis*(C), 7 June 2002, para. 39. The Trial Chamber notes that, while the version of the Rule then in force (Rev. 22) has been subsequently amended, this citation also remains an accurate description of the Rule's function.

III. DISCUSSION

A. Matters before the Pre-Trial Chamber

1. B/C/S Translations of reports

5. In respect of several expert witness reports (Brunborg, De Bruyn, De Koeijer, Hedley, Higgs, Ols, Pecereilli, Wright, and Zečević), the Defence has indicated that B/C/S translations of the proposed reports or parts thereof remain outstanding. Pursuant to Rule 66(A)(ii), the Prosecution is required to make available to the Defence, in a language which the accused understands, copies of the statements of all witnesses whom the Prosecution intends to call to testify at trial, and copies of all transcripts and written statements taken in accordance with Rule 92bis; Rule 92ter, and Rule 92quarter. Rule 66(A)(ii) empowers the Trial Chamber or the pre-trial Judge to set the time limit within which such material must be provided. Pursuant to that authority, the Chamber hereby orders the Prosecution to make available to the Defence the B/C/S translations of the proposed reports or parts thereof that remain outstanding.

2. Curricula vitae and areas of expertise of expert witnesses

6. In respect of several expert witnesses (Kloosterman, Maljaars, Maloney & M Brown, Ols, Pecereilli and Philips), no *curricula vitae* have been provided to the Defence by the Prosecution. Although Rule 94bis is silent on the question,⁸ the provision of the *curricula vitae* of all proposed expert witnesses to the Defence is necessary to enable the Defence to determine whether or not it accepts the qualifications of the expert, and the expert witness's report(s), pursuant to Rule 94bis (B)(iii). The Prosecution must therefore provide the outstanding *curricula vitae* to the Defence.

7. In respect of most expert witnesses whose reports have been proposed by the Prosecution, the Prosecution has not provided the Defence with a description of the witnesses' area of expertise, which the Defence submits the Prosecution should be required to do.⁹ As a result, the Defence submits that it "has been left to guess, from the text of the reports or from a review of the curriculum vitae of the experts [where one has been provided], the specific area of expertise

⁸ Rule 94bis requires only that "[t]he full statement and/or report of any expert witness to be called by a party shall be disclosed ...". The rule is silent regarding the specific need to disclose the *curriculum vitae* of the author of the statement and/or report, or whether "[t]he full statement and/or report" includes the *curriculum vitae* of the author. However, the rule also requires an opposing party to file a notice within thirty days of disclosure of the statement and/or report of the expert witness indicating *inter alia* whether it challenges the qualifications of an expert witness.

⁹ Constantin Degeratu is described as a "military expert" and his area of expertise was apparently stated (Notice pursuant to Rule 94bis concerning Prosecution Expert Constantin Degeratu and Motion to strike report, para. 3). Morten Torkildsen is identified as a "financial expert" (Notice pursuant to Rule 94bis concerning Prosecution Expert Morten Torkildsen and Motion to Exclude, 3 January 2007, para. 6).

pertaining to each expert witness” and has filed its notices based on those assumptions, reserving the right to make further objections should those assumptions prove to be incorrect.¹⁰ In those instances where the Prosecution has filed a response, it has asserted that the area of an expert’s expertise is usually ascertainable from a review of the relevant report and *curriculum vitae*.¹¹

8. As discussed above, Rule 94*bis* serves to identify those expert witness reports that may be accepted. It would be difficult for an opposing party to accept the report of an expert witness without knowing that witness’s area of expertise. Conversely, the party disclosing clearly must be aware of the witness’s area of expertise – without it the witness’s usefulness to the disclosing party would be in serious doubt. It is therefore appropriate that the party disclosing an expert witness report identifies the area of that expert’s expertise. In the circumstances of this case, the Prosecution states that it has now disclosed all of the expert witness reports it intends to disclose. The Chamber will therefore order that the Prosecution disclose the areas of expertise of all expert witnesses.

3. Other issues outstanding

9. In the cases of several proposed expert witnesses, certain other information is yet to be disclosed by the Prosecution, namely:

- The Defence submits that it is unclear whether the Prosecution still intends to call Kathryn Barr as a witness;¹²
- In respect of Helga Brunborg, the English version of one report is yet to be disclosed by the Prosecution;¹³
- In respect of Constantin Degeratu, his report is labelled “provisional” and contains no references.¹⁴

¹⁰ Notice pursuant to Rule 94*bis* concerning Prosecution Expert Richard Butler, 13 November 2006, para. 3; Notice pursuant to Rule 94*bis* concerning Prosecution Expert Richard Butler (Partly Confidential) (with Confidential Annex A), 13 November 2006, para. 4; Notice pursuant to Rule 94*bis* concerning Prosecution Experts Grujić, Kovacs, Poje, Higgs, Phillips, Tabeau and Zečević, 27 November 2006, para. 3; Notice pursuant to Rule 94*bis* concerning Prosecution Expert Patrick Treanor and motion to exclude, 6 December 2006, para. 3; Notice pursuant to Rule 94*bis* concerning Prosecution Expert Robert Donia and Motion to Exclude, 3 January 2006, para. 5; Notice pursuant to Rule 94*bis* concerning Prosecution Expert Reynaud Theunens and Motion to Exclude, 3 January 2006, para. 5.

¹¹ Prosecution’s Response to Defence Motion to strike Treanor report, 20 December 2006, paras 6 – 10; Prosecution’s Response to Defence Motions to exclude expert reports of Donia, Theunens and Torkildsen, 17 January 2007, paras 5 – 9 (in respect of Donia and Theunens).

¹² The Defence refers to a letter it received from the Prosecution, dated 25 October 2006, in which Kathryn Barr’s name was apparently deleted from the list of witnesses for trial (Notice pursuant to Rule 94*bis* concerning Prosecution Expert Richard Butler (Partly Confidential) (with Confidential Annex A), para. 7).

¹³ Notice pursuant to Rule 94*bis* concerning Prosecution Expert Richard Butler (Partly Confidential) (with Confidential Annex A), 13 November 2006, para. 9.

These are issues which, unless they have been resolved *inter partes* in the interim, can and must be dealt with by the Prosecution forthwith.

B. Remaining matters

10. The Trial Chamber notes that the Defence has raised numerous other objections to various expert witness reports disclosed by the Prosecution. The Defence challenges *inter alia* the alleged partiality of several expert witnesses,¹⁵ the scope of expertise of several witnesses,¹⁶ the relevance of several expert witness reports,¹⁷ and the absence of referencing and/or source documentation.¹⁸ At this stage of the proceedings, it is for the Defence to accept or reject the proposed expert witness reports, with any disputes falling to be adjudicated by the Trial Chamber at trial. These are matters which are better dealt with before the Trial Chamber.

C. Disposition

The Trial Chamber therefore **RECOGNISES** as accepted¹⁹ the expert witness reports of:

José Pablo Baraybar; Anthony Brown, John Clark, P C A M De Bruyn (with the B/C/S/ translation of the report to be provided to the Defence), William Haglund, Christopher Lawrence;

AND, to the extent that the Prosecution has not already discharged its obligations:

ORDERS the Prosecution, within 14 days of the date of this Order, to make available to the Defence the B/C/S translations of the proposed reports or parts thereof that remain outstanding;

ORDERS the Prosecution, within 14 days of the date of this Order, to provide the outstanding *curricula vitae* to the Defence;

¹⁴ The Prosecution responded that the disclosure of provisional reports had been agreed between the parties. *See* Prosecution's Response to Defence Motion to strike Degeratu report, 12 December 2006, paras 2 – 5, 10 – 12; referring to the 11 October 2006 Decision on Prosecution's motion to vacate order of 14 June 2006, which denied the Prosecution an extension of time in which to file its expert witness reports and noted that the production of provisional reports would not prejudice the Defence.

¹⁵ Expert witnesses Butler, Donia, Torkildsen, Treanor, and Zečević.

¹⁶ Expert witnesses Brunborg, Donia, Hedley, Higgs, Kovacs, Poje, Theunens, and Treanor.

¹⁷ Expert witnesses Barr, Bijhold, De Koeijer, Grujić, Higgs, Poje, Tabeau, and Theunens.

¹⁸ Expert witnesses Degeratu, Phillips, Torkildsen, and Zečević. For example, "[t]he Degeratu report has only one reference in the entire report" and "... the Defence the Chamber to strike the report of Mr. Degeratu as it contains no referencing at all by which ", Notice pursuant to Rule 94*bis* concerning Prosecution Expert Constantin Degeratu and Motion to strike report, pp. 5, 6.

¹⁹ Subject to the Defence's uncertainty regarding the relevant witness's area of expertise being correct, failing which, the Defence shall have leave to revisit its acceptance.

ORDERS the Prosecution, within 14 days of the date of this Order, to communicate to the Defence in writing the areas of expertise of all expert witnesses;

ORDERS the Prosecution, within seven days of the date of this Order, to inform the Defence in writing whether or not the Prosecution still intends to call Kathryn Barr as a witness, and if so, to confirm that the single report of Ms. Barr provided to the Defence is the only one the Prosecution intends to tender;

ORDERS the Prosecution, within 14 days of the date of this Order, to provide the Defence with the English version of the one report of Helga Brunborg which the Prosecution has disclosed solely in B/C/S;

ORDERS the Prosecution, within 14 days of the date of this Order, to provide to the Defence a final version of the Degeratu report;

ORDERS the Prosecution, within 15 days of the date of this Order, to file with the Registry a "Response" to this Order confirming that all dispositive clauses of this Order have been complied with; and

DECLINES to determine the Defence's motions to strike or exclude the expert witness reports of witnesses Degeratu, Donia, Theunens, Treanor and Torkildsen, on the basis that these matters are better left to the Trial Chamber to determine, without prejudice to the Defence's leave to raise such objections, as it sees fit, before the Trial Chamber during the trial phase of the case.

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



Judge Patrick Robinson
Presiding

Dated this 2nd day of February 2007
At The Hague
The Netherlands

[Seal of the Tribunal]