



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-05-88-T

Date: 6 March 2007

Original: English

IN TRIAL CHAMBER II

Before: Judge Carmel Agius, Presiding
Judge O-Gon Kwon
Judge Kimberly Prost
Judge Ole Bjørn Støle – Reserve Judge

Registrar: Mr. Hans Holthuis

Decision of: 6 March 2007

PROSECUTOR

v.

**VUJADIN POPOVIĆ
LJUBIŠA BEARA
DRAGO NIKOLIĆ
LJUBOMIR BOROVČANIN
RADIVOJE MILETIĆ
MILAN GVERO
VINKO PANDUREVIĆ**

DECISION REGARDING PROSECUTION'S RULE 94 *bis* NOTICE

Office of the Prosecutor

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Mr. Aleksandar Lazarević and Mr. Miodrag Stojanović for Ljubomir Borovčanin
Ms. Natacha Fauveau Ivanović and Mr. Nenad Petrušić for Radivoje Miletić
Mr. Dragan Krgović and Mr. David Josse for Milan Gvero
Mr. Peter Haynes and Mr. Đorđe Sarapa for Vinko Pandurević

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 Notice of Disclosure of Expert Witness Statements Under Rule 94 *bis*”, filed confidentially on 31 October 2006 (“Rule 94 *bis* Notice”).

I. PROCEDURAL BACKGROUND

1. A joint Defence response to the Rule 94 *bis* Notice was filed on 14 November 2006 (“Defence Response”).¹ On 21 November 2006, the Prosecution sought leave to file a reply (“Reply”).² Also related to the Rule 94 *bis* Notice, on 30 November 2006, Pandurević and Nikolić filed a confidential “Notice on Behalf of Vinko Pandurević and Drago Nikolić Pursuant to Rule 94 *bis*(B)” (“Pandurević / Nikolić Notice”), which Popović joined on 1 December 2006.³

2. The Rule 94 *bis* Notice lists ten expert witnesses that the Prosecution intends to call for testimony at trial,⁴ and the expert reports of nine additional witnesses whom the Prosecution does not intend to call.⁵ Each of these 19 experts was identified as such in the “Prosecution’s Notice of Filing Provisional Witness List”, filed confidentially on 16 December 2005 (“Provisional Witness List”). Additionally, each of the 19 experts appears in the “Prosecution’s Filing of Pre-Trial Brief Pursuant to Rule 65 *ter* and List of Exhibits Pursuant to Rule 65 *ter*(E)(v)”, filed under seal on 28 April 2006 (“Prosecution’s Pre-Trial Brief”).⁶

II. SUBMISSIONS OF THE PARTIES

A. The Rule 94 *bis* Notice

3. The Prosecution notes that “the majority of the reports in question were disclosed to the Defence many months ago” and that, except for certain responses concerning Witness No. 8,⁷ the

¹ [Confidential] Joint Defence Response to the Prosecution Notice of Disclosure of Expert Witness Statements Under Rule 94 *bis*, 14 November 2006.

² Confidential Prosecution’s Reply to “Joint Defence Response to the Prosecution’s Notice of Disclosure of Expert Witness Statements Under Rule 94 *bis*”, 21 November 2006.

³ Notice on Behalf of Vujadin Popović Joining “Notice on Behalf of Vinko Pandurević and Drago Nikolić Pursuant to Rule 94 *bis*(B)”, 1 December 2006 (“Popović Joinder”).

⁴ Rule 94 *bis* Notice, para. 1.

⁵ *Ibid.*, para. 2.

⁶ Prosecution’s Pre-Trial Brief, Annex A, pp. 1, 6, Annex B, pp. 4–10, 116–119.

⁷ All witness numbers in this Decision are those used in the Prosecution’s Pre-Trial Brief.

Defence has failed to respond as to whether it accepts the evidence and whether it wishes to cross-examine any of the witnesses.⁸

B. The Defence Response

4. The Defence Response does not contest the Prosecution's assertion that many of the reports were previously disclosed.⁹ However, it claims, the Prosecution never provided the Defence "with a comprehensive notice of expert reports that it wishes to introduce into evidence"¹⁰ and "[expert] reports were provided to the Defence together with other material, without any clear indication that this material [was] being disclosed pursuant to Rule 94 *bis*."¹¹ Because the Prosecution filed no formal notice under Rule 94 *bis* until 31 October 2006, the Defence argues that its 14 November 2006 response to the Rule 94 *bis* Notice is timely under Rule 94 *bis*(B).¹² Additionally, the Defence states it "wishes to cross-examine all expert witnesses named in the Prosecution Notice".¹³

C. The Prosecution's Reply

5. The Prosecution asserts in its Reply that the 30-day response time limit of Rule 94 *bis*(B) is triggered by disclosure and that nothing in Rule 94 *bis* requires a party proffering expert evidence to file any formal notice.¹⁴ Additionally, the Prosecution asserts that the challenges raised in the Defence Response are moot with regard to the first ten listed experts, as each of them will be available at trial for cross-examination.¹⁵ With respect to the remaining experts, the Prosecution asserts that the Defence Response "fails to show cause explaining [its] failure timely to file Rule 94 *bis* Notices seeking to cross-examine those witnesses."¹⁶

⁸ Rule 94 *bis* Notice, para. 4.

⁹ Defence Response, para. 5.

¹⁰ *Ibid.* The Defence concedes that the Prosecution filed a specific notice regarding (Prosecution's Pre-Trial Brief) Witness No. 8. *Ibid.* The Defence also acknowledges that five of the ten expert witnesses the Prosecution lists in the Rule 94 *bis* Notice were included in the Prosecution's 92 *bis* motion. *Ibid.*, paras. 5, 8.

¹¹ *Ibid.*, para. 6.

¹² *Ibid.*, para. 10.

¹³ *Ibid.*

¹⁴ Reply, para. 7.

¹⁵ *Ibid.*, para. 5; Rule 94 *bis* Notice, para. 1.

¹⁶ Reply, para. 10.

III. DISCUSSION

A. The Defence Response Is Partially Moot

6. The Prosecution is correct that the challenges raised in the Defence Response are moot with regard to the first ten listed experts. Each of the ten experts is proposed either for full *viva voce* testimony,¹⁸ or has already been accepted for admission under Rule 92 *bis*(D) with cross-examination.¹⁹ Accordingly, the only relief sought by the Defence under Rule 94 *bis*—cross-examination—will be available to each Accused, and it is unnecessary for the Trial Chamber to further address these ten experts.²⁰

7. Additionally, the Prosecution replies that it is no longer planning to introduce one of the remaining nine expert reports.²¹ Thus, the only issues remaining pertain to the reports of eight experts whom the Prosecution states it does not intend to produce at trial.²² As the Prosecution has never explained how it proposes to introduce these reports without the authors appearing at trial, the Trial Chamber can only presume the Prosecution proposes to introduce these reports by the operation of Rule 94 *bis*(C).

B. The Defence Response Is Not Timely Under Rule 94 *bis*(B)

8. The threshold question for the Trial Chamber is whether the Defence Response is timely pursuant to Rule 94 *bis*. If the Defence Response is timely no further analysis is necessary, there existing no question as to whether the Defence must be permitted to cross-examine the experts at trial pursuant to Rule 94 *bis*(B)(ii).

9. If the Defence Response is not timely, however, a fundamental question presents itself, one which does not appear to have been directly answered in the jurisprudence of this Tribunal: where

¹⁸ Prosecution's Pre-Trial Brief, Witness Nos. 8, 9, 15, 16 and 17.

¹⁹ Decision on Prosecution's Confidential Motion for Admission of Written Evidence in Lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis*, 12 September 2006 ("12 September 2006 Rule 92 *bis* Decision"), Disposition, paras. 3, 4 (Prosecution's Pre-Trial Brief Witness Nos. 10, 11, 12 and 13); Order on Prosecution Submission Pursuant to Rule 92 *bis* Decision Issued 12 September 2006, 13 December 2006, p. 5 (Prosecution's Pre-Trial Brief Witness No. 14).

²⁰ Indeed, four of these ten experts—Witness Nos. 10, 12, 13 and 15—have already appeared at trial. In the Defence Response, the Accused seek only cross-examination. No challenge to qualifications has been stated. Defence Response, para. 10. In the Pandurević / Nikolić Notice, however, two of the Accused assert that the Prosecution has never provided CVs for two of these ten listed experts—Prosecution's Pre-Trial Brief Witness Nos. 16 and 17. Accordingly, these two Accused wish to challenge the qualifications of these two experts pursuant to Rule 94 *bis*(B)(iii). Pandurević / Nikolić Notice, paras. 39–41. The Prosecution has not replied to this assertion.

²¹ Reply, n. 3.

²² The Pandurević / Nikolić Notice addresses only the ten experts listed at paragraph 1 of the Rule 94 *bis* Notice, ignoring the eight reports remaining at issue. Accordingly, neither the Pandurević / Nikolić Notice nor the Popović Joinder will be further considered by the Trial Chamber with regard to these eight reports.

an opposing party fails to timely respond to the disclosure of expert witness reports as mandated by Rule 94 *bis*(B), are the disclosed reports inadmissible without cross-examination because the opposing party has failed to formally accept them pursuant to Rule 94 *bis*(B)(i) and (C), or does the failure to respond constitute a waiver of the opposing party's right to cross-examine the expert at trial?

10. The terms of Rule 94 *bis* are clear regarding which act triggers an opposing party's response time. "Within thirty days of *disclosure* of the statement and/or report of the expert witness [...] the opposing party shall file a notice".²³ Disclosure is the key.

11. The Defence acknowledges the duty under Rule 94 *bis*(B) to file a responding notice within 30 days of disclosure.²⁴ However, the Defence claims, mere disclosure of a report without any formal notice under Rule 94 *bis* is insufficient to trigger the 30 day response period of Rule 94 *bis*(B).²⁵ Therefore, the Defence asserts that the appropriate 30-day period for it to respond in this case began only with the filing of the Prosecution's Notice on 31 October 2006.

12. The Prosecution flatly contests that it has a duty to file any formal notice under Rule 94 *bis*, arguing in its Reply:

The Rule is clear; there is no implied requirement that expert witnesses' statements or reports should be identified as being disclosed under Rule 94 *bis*(A) in order to trigger the deadline for the opposing party to respond pursuant to Rule 94 *bis*(B). The Defence therefore had 30 days from the date of disclosure of the respective experts' statements or reports to file a notice pursuant to Rule 94 *bis*(B).²⁶

13. The Prosecution is correct. Although it seems to have been common practice, there is no express or implied requirement in Rule 94 *bis* for a party proffering expert evidence to file any notice. Indeed, the only duty imposed by Rule 94 *bis*(A) is that a party must disclose full statements and reports within prescribed time limits. And the only *notification* duty in Rule 94 *bis* is found in subsection (B); a duty that rests squarely upon the opposing party.

14. As to the disclosure in this case, the Prosecution maintains that reports for six of the remaining eight experts were disclosed in April 2005.³⁰ The remaining two reports were disclosed

²³ Rule 94 *bis*(B) (emphasis added).

²⁴ Defence Response, para. 7.

²⁵ *Ibid.*

²⁶ Reply, para. 7.

³⁰ Reply, para. 6, *see also* Annex A.

on 28 April 2006 and 21 July 2006, respectively.³¹ The Defence Response does not contest these assertions. It is clear that the Defence Response was filed long after the expiration of the 30-day deadline triggered by the disclosure of any of these reports. Accordingly, the Defence Response is not timely.³² Nor has the Defence requested the Trial Chamber to recognise its response as timely filed pursuant to Rule 127.

15. The Defence argues that without a formal Rule 94 *bis* “notice” from the Prosecution in this case, there existed no possibility for the Defence to identify the expert material which the Prosecution disclosed pursuant to Rule 94 *bis*.³³ This argument is without merit. The disclosed reports are readily identifiable as expert materials. Moreover, even if the disclosed documents had been difficult to identify as expert reports, the Prosecution would still have had no duty to file any formal notice under the terms of Rule 94 *bis*(A). As the Prosecution recently argued, such a notice might constitute “a preferred practice” but it is not required.³⁴ Additionally, two of these reports were disclosed after the Prosecution filed a provisional witness list including each of the experts now at issue.³⁵ Having been put on notice as to the identity of proposed experts, the Defence cannot reasonably maintain that it could not identify reports by those individuals as expert materials.

C. The Defence Failure Does Not Waive the Right to Cross-Examination

16. Having found the Defence Response untimely, the Chamber must decide what consequence, if any, such failure under Rule 94 *bis* has on the cross-examination rights of the Accused. In the Reply, the Prosecution states “the Defence fails to show cause explaining their failure timely to file Rule 94 *bis* Notices seeking to cross-examine those witnesses.”³⁶ Although not articulated as such, this implies the Prosecution believes the Defence failure operates as a waiver of the Defence right to cross-examine these experts under Rule 94 *bis*.

17. The question squarely presented in this case does not appear to have been directly answered in the jurisprudence of this Tribunal. A Trial Chamber decision of the International Criminal

³¹ *Ibid.*

³² The Defence also notes that in response to the Prosecution’s Provisional Witness List, on 16 January 2006, Popović filed a formal notice informing the Chamber that he wished to cross-examine the expert witnesses on that list; the same experts now listed in the Rule 94 *bis* Notice. The Notice of the Defence of Vujadin Popović Pursuant to Rule 94 *bis*, 16 January 2006 (“Popović Notice of January 2006”). However, the Popović Notice of January 2006 was not timely filed as regards the reports disclosed in April 2005, and the Popović Notice of January 2006 was filed before the reports disclosed in April and July 2006.

³³ Defence Response, para. 6 (“the Prosecution disclosed several thousands of witness statements, reports, books and other documents” and the Defence “had no possibility to identify the material that the Prosecution considers to have been disclosed pursuant to Rule 94 *bis*”).

³⁴ T. 6081 (19 January 2007).

³⁵ Reply, para. 8.

³⁶ *Ibid.*, para. 10.

Tribunal for Rwanda, however, is directly on point. In *Prosecutor v. Zigiranyirazo*, the Defence response challenging expert reports was not timely filed under Rule 94 *bis*(B) of the Rules of Evidence and Procedure of that Tribunal, a provision remarkably similar to this Tribunal's Rule 94 *bis*(B).³⁷ The *Zigiranyirazo* Trial Chamber said:

[I]n light of the vital importance of cross-examination to the fairness of the proceedings, the Chamber is not prepared to consider the Defence failure to file a timely Notice as a waiver of the Accused's rights to cross-examine the expert witness on her qualifications and report. Both parties have had sufficient time to prepare for the examination-in-chief and the cross-examination, respectively, of the expert witness [...] and no prejudice has been caused to either party by the late filing.³⁸

18. The *Zigiranyirazo* Trial Chamber undertook no textual analysis of Rule 94 *bis*. A textual analysis of Rule 94 *bis*, however, supports the same result. Although Rule 94 *bis*(B) clearly imposes a duty upon the opposing party to file a response stating whether it accepts the statement or wishes to cross-examine the expert, nothing in Rule 94 *bis* specifies any express consequence for failure to do so.³⁹

19. Neither does the text of Rule 94 *bis* imply a waiver of cross-examination rights for failing to file a responding notice. Indeed, subparagraph (C)—which provides for the possible admission of expert reports without cross-examination—seems to require specific action by the opposing party before admission without cross-examination is appropriate.⁴⁰ The plain wording of Rule 94 *bis*(C) suggests that the only manner in which reports can be admitted under that rule without calling the witness to testify in person is through explicit acceptance by the opposing party.⁴¹

20. Therefore, the Trial Chamber is of the view that failure to respond under Rule 94 *bis* does not result in a waiver of the right to cross-examination. At the same time, Rule 94 *bis* is not the source of the Accused's right to cross-examine expert witnesses. Rather, the Accused's "right to examine [...] the witnesses against him" is enshrined directly in Article 21 of the Statute. If the

³⁷ *Prosecutor v. Zigiranyirazo*, Case No. ICTR-2001-73-T, Decision on the Prosecution Motion for Dismissal of the Defence Notice due to Failure to Meet the Time Limit: Rule 94 *bis*(B) of the Rules of Procedure and Evidence, 24 February 2006, para. 4. The only significant difference between the two rules is in the prescribed time limit within which an opposing party must file a notice. Rather than 30 days, the Rwanda Tribunal requires a responding notice within 14 days. The Rwanda Tribunal's Rule 94 *bis*(C) is operatively identical to Rule 94 *bis*(C).

³⁸ *Ibid.*, para. 5.

³⁹ Rule 94 *bis*(B) ("the opposing party *shall* file a notice indicating ...") (emphasis supplied).

⁴⁰ Rule 94 *bis*(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") (emphasis supplied).

⁴¹ Rule 92 *bis*(B)(i).

⁴⁴ *Cf. Prosecutor v. Galic*, Case No. IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92 *bis*(C), 7 June 2002, para. 40.

purpose of Rule 94 *bis* is to permit a waiver of the statutory right to cross-examination in certain narrowly defined instances, the rule should clearly say so. It does not. Accordingly, despite the Prosecution's invitation, the Trial Chamber is unwilling to construe the Defence failure to comply with Rule 94 *bis*(B) as a waiver of the Accused's right to cross-examine expert witnesses in this case.

21. The Defence did not file the required notice in response to disclosure within the prescribed time limit of Rule 94 *bis*(B) and did not seek to invoke Rule 127. One result of non-compliance with this specific procedure might well be that this *lex specialis* rule no longer applies to these particular expert reports. Accordingly, the evidence at issue could be introduced in accordance with the general regime applicable under the Statute and any relevant rules, including Rule 92 *bis*.⁴⁴ The disposition of this Decision, however, does not require the Trial Chamber to decide this issue.

IV. DISPOSITION

22. For these reasons, pursuant to Rules 54, 94 *bis*, and 126 *bis* of the Rules, the Trial Chamber hereby **ORDERS** as follows:

- (a) The Prosecution is granted leave to file a reply.
- (b) The reports of the remaining eight experts identified in paragraph 2 of the Rule 94 *bis* Notice will not be admitted in evidence pursuant to Rule 94 *bis*(C).

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



Carmel Agius
Presiding

Dated this sixth day of March 2007
At The Hague
The Netherlands

[Seal of the Tribunal]