



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: 14 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: 14 March 2007

PROSECUTOR

v.

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

**DECISION ON DEFENCE MOTION FOR EXTENSION OF TIME
TO FILE A RULE 94 *BIS* NOTICE**

Office of the Prosecutor

Mr. Peter McCloskey

Counsel for the Accused

Mr. Zoran Živanović and Ms. Julie Condon for Vujadin Popović
Mr. John Ostojić and Mr. Christopher Meek for Ljubiša Beara
Ms. Jelena Nikolić and Mr. Stéphane Bourgon for Drago Nikolić
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”);

BEING SEISED OF the “Defence Motion Pursuant to Rule 127(A) for Extension of Time to File the Rule 94 *bis* Notice Regarding Prosecution Expert Witness Richard Butler”, filed by Vujadin Popović (“Popović”) on 2 October 2006, with Annexes A and B (“Popović Motion”), in which Popović requests the Trial Chamber to recognise as validly filed the notice pursuant to Rule 94 *bis* of the Rules of Procedure and Evidence (“Rules”) opposing the acceptance of the report prepared by Richard Butler (“Butler”) and challenging the status of Butler as an expert witness (“Popović Rule 94 *bis* Notice”), which is attached in Annex A;¹

NOTING that the scope of this decision is limited to the request for variation of time-limits to file the Popović Rule 94 *bis* Notice, and that therefore only submissions of the parties relevant to this decision will be mentioned and considered below;²

NOTING Rule 94 *bis* and Rule 127(A) of the Rules;

NOTING that on 9 June 2006, following an oral order issued by the pre-trial Judge,³ the Prosecution filed the “Prosecution’s Notice of Filing Military Report of Richard Butler” attaching as Annex A the “VRS Main Staff Command Responsibility Report” (“Butler Report”);

NOTING that Popović submits, *inter alia*, that:

- i. the Butler Report was disclosed for the purposes of Rule 94 *bis* on 8 August 2006, when the BCS version was provided to the accused Vujadin Popović, Ljubiša Beara, Drago Nikolić, Ljubomir Borovčanin, Radivoje Miletić, Milan Gvero and Vinko Pandurević (“Accused”);⁴
- ii. the *curriculum vitae* of Butler provided by the Prosecution fails to disclose “the full extent of Butler’s role in the investigation” of the current case, as there is no clear reference that Butler was present or participated in interviews of numerous witnesses in this case;⁵

¹ Popović Motion, paras. 1–2, Annex A, Annex B. On 16 January 2007 Popović filed the “Addendum to Popović Defence Rule 94 *bis* Notice Regarding Prosecution Expert Witness Richard Butler” with Annex A (“Addendum to the Popović Motion”), in which he raises additional submissions with respect to his objection to Butler Report and the qualification of Butler as an expert witness. Addendum to the Popović Motion, pp. 2–3, Annex A.

² In this respect, see also, Decision Regarding Prosecution’s Rule 94 *bis* Notice, filed on 6 March 2007.

³ Status Conference, 4 April 2006, T. 126.

⁴ Popović Motion, para. 4.

⁵ *Ibid.*, para. 6.

- iii. the Accused are entitled to rely on the *curriculum vitae* of Butler “as a comprehensive description of his professional qualifications and experience” and are not required to conduct their own investigations as to whether this *curriculum vitae* is an accurate reflection of Butler’s role in the Prosecution’s investigation of this case;⁶
- iv. only on 25 September 2006, in the course of the testimony of Colonel Boering, did Popović become aware that Butler had taken a statement from that witness, and subsequently, through his own investigations, he became aware that Butler “had played an extensive role in a number of interviews of key Prosecution witnesses”;⁷ and
- v. in light of the above, the Trial Chamber “should exercise its discretion and accept the late Rule 94 *bis* filing and find that good cause has been shown”;⁸

BEING ALSO SEISED OF the “Motion on Behalf of Drago Nikolić Joining ‘Defence Motion Pursuant to Rule 127(A) for Extension of Time to File the Rule 94 *bis* Notice Regarding Prosecution Expert Witness Richard Butler’”, filed by Drago Nikolić (“Nikolić”) on 11 October 2006 (“Nikolić Motion”), and the “Motion on Behalf of Vinko Pandurević and Ljubiša Beara Joining ‘Defence Motion Pursuant to Rule 127(A) for Extension of Time to File the Rule 94 *bis* Notice Regarding Prosecution Expert Witness Richard Butler’”, filed by Vinko Pandurević and Ljubiša Beara (“Pandurević” and “Beara”, respectively) on 17 October 2006 (“Pandurević and Beara Motion”), in which Nikolić, Pandurević and Beara support the Popović Motion and submit additional arguments in support of the Popović Rule 94 *bis* Notice;⁹

NOTING that on 16 October 2006, the day before the filing of the Pandurević and Beara Motion, the Prosecution filed the “Prosecution’s Response to ‘Defence Motion Pursuant to Rule 127(A) for Extension of Time to File the Rule 94 *bis* Notice Regarding Prosecution Expert Witness Richard Butler’” (“Response”), whereby it submits that the Butler Report was disclosed for the purposes of Rule 94 *bis* on 9 June 2006, when the original English version of the Butler Report was filed,¹⁰ and that it does not object to Popović’s request for an extension of time;¹¹ but that, should leave to file

⁶ *Ibid.*, para. 7.

⁷ *Ibid.*, para. 8.

⁸ *Ibid.*, paras. 5, 9.

⁹ Nikolić Motion, para. 2; Pandurević and Beara Motion, para. 1.

¹⁰ Response, para. 3 n. 1. The Prosecution submits that the information regarding Butler’s participation in interviews of witnesses to be called in this case was available to the Accused before the Butler Report was filed, since it was mentioned in several statements of Prosecution’s witnesses which were disclosed to the Accused prior to April 2006, as well as during the testimony of Butler in the case of *Prosecutor v. Blagojević and Jokić*. *Ibid.*, paras. 4–7.

¹¹ *Ibid.*, para. 2.

the Popović Rule 94 *bis* Notice be granted, the Prosecution requests leave to file a consolidated response to the Popović and Nikolić Motions;¹²

NOTING that, following the “Prosecution’s Notice of Disclosure of Expert Witness Statements under Rule 94 *bis*”, filed confidentially on 31 October 2006, the issue of the “disclosure” of expert reports, including Butler Report, within the meaning of Rule 94 *bis* has been raised and discussed in subsequent submissions of the parties;¹³

CONSIDERING that the Prosecution’s intention to call Butler as an expert witness was made clear to the Accused on 16 December 2005, when the Prosecution filed the Provisional Witness List,¹⁴ and again on 28 April 2006 when the Prosecution filed under seal its Pre-Trial Brief and List of Exhibits Pursuant to Rule 65 *ter*(E)(v), which had Butler listed as a Tribunal expert;¹⁵

CONSIDERING that Rule 94 *bis*(A) merely requires the full statement of any expert witness to be called by a party to be “disclosed” without requiring that party to give any formal notice to the opposing party;

CONSIDERING that, in the present case, the original English version of the Butler Report was filed, attached to a Prosecution’s notice, on 9 June 2006, and that the Accused received the BCS version on 8 August 2006;

CONSIDERING that the Popović Motion, dated 2 October 2006, was in any case untimely filed;

CONSIDERING that the Prosecution does not oppose the request for an extension of the time period allowed for filing the Popović Rule 94 *bis* Notice;

¹² *Ibid.*, para. 8.

¹³ On 9 November 2006, Popović filed the “Popović Response to Prosecution’s Notice of Disclosure of Expert Witness Statements under Rule 94 *bis*” (“Popović Response”), whereby he submits, among other things, that following the Prosecution’s Rule 94 *bis* Notice of 31 October 2006, he is no longer required to show “good cause” pursuant to Rule 127(A), as the 30-day period prescribed by Rule 94 *bis*(B) had not expired prior to the filing of the Popović Motion; and therefore requests that the Trial Chamber accept the Popović Rule 94 *bis* Notice as validly filed. (*Ibid.*, para. 5). On 14 November 2006, the Accused filed a confidential “Joint Defence Response to the Prosecution Notice of Disclosure of Expert Witness Statements under Rule 94 *bis*”, whereby they submit, *inter alia*, that the proper disclosure of all expert reports, including Butler Report, is the one on 31 October 2006, as until that date the Accused were not provided “the comprehensive report”, but instead with several reports of Butler, and they “could not conclude which reports or which parts of these reports the Prosecution intends to tender into evidence” (*Ibid.*, para. 9). On 16 November 2006, the Prosecution filed the “Prosecutions Reply to ‘Popović Response to Prosecution’s Notice of Disclosure of Expert Witness Statements under Rule 94 *bis*’” (“Reply to the Popović Response”). The Trial Chamber has considered the arguments set forth in this Reply and grants leave to file it as indicated in the disposition to this Decision. On 21 November 2006, the Prosecution filed a confidential “Prosecution’s Reply to ‘Joint Defence Response to the Prosecution’s Notice of Disclosure of Expert Witness Statements under Rule 94 *bis*’”. 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)”, and on 1 December 2006 Popović filed a “Notice on Behalf of Vujadin Popović Joining ‘Notice on Behalf of Vinko Pandurević and Drago Nikolić Pursuant to Rule 94 *bis*(B)’”.

¹⁴ Confidential Prosecution’s Notice of Filing Provisional Witness List, 16 December 2005, Annex A, page 1.

CONSIDERING that the extent of Butler's involvement in the Prosecution's investigations of the alleged crimes charged in this case was not clear from the *curriculum vitae* provided by the Prosecution, and that it is upon the Prosecution to provide sufficient information to the Accused in order to enable the latter to determine whether or not they accept the tendered report, whether they wish to cross-examine the expert witness and whether they challenge the qualifications of the witness as an expert;

CONSIDERING that the Trial Chamber is satisfied that Popović, joined by Nikolić, Pandurević and Beara, have shown good cause for a variation of the time-limit prescribed by Rule 94 *bis*(B);

PURSUANT TO Rule 127(A) of the Rules,

HEREBY GRANTS the Popović Motion, the Nikolić Motion and the Pandurević and Beara Motion, and **ORDERS** as follows:

1. the Prosecution is granted leave to file the Reply to the Popović Response.¹⁶
2. the Popović Rule 94 *bis* Notice, joined by Nikolić, Pandurević and Beara, is recognised as validly filed.
3. the Prosecution may file a response to the Popović Rule 94 *bis* Notice, as well as to the arguments submitted by Nikolić, Pandurević and Beara in their respective Motions, no later than 14 days after the filing of this decision.

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



Carmel Agius
Presiding

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

[Seal of the Tribunal]

¹⁵ Prosecution's Filing of Pre-Trial Brief Pursuant to Rule 65 *ter* and List of Exhibits Pursuant to Rule 65 *ter*(E)(v), 28 April 2006, Annex A, page 1.

¹⁶ See *supra*, n. 13.