



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: 30 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: 30 March 2007

PROSECUTOR

v.

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

**DECISION REGARDING EVIDENCE OF GENERAL RUPERT SMITH
AND THE CALCULATION OF TIME LIMITS UNDER RULE 126 *BIS***

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 “Motion and Notice Pursuant to Rule 94 *bis* Relating to the Evidence of General Sir Rupert Smith”, filed confidentially by Milan Gvero on 15 December 2006 (“Motion”), and “General Miletić’s Motion Regarding the Testimony of General Sir Rupert Smith”, filed confidentially in the original French on 27 December 2006 (“Miletić Motion”);¹

NOTING the “Prosecution’s Consolidated Response to the [Motion] and [the Miletić Motion]”, filed confidentially on 2 January 2007 (“Prosecution’s 2 January 2007 Response”), and the “Request for Leave to Reply and Reply of General Miletić to the Evidence of General Sir Rupert Smith”, filed confidentially in the original French on 4 January 2007 (“Miletić Reply”);²

NOTING “General Gvero’s Motion to Strike Prosecution Response as Untimely or for Leave to Reply: Motion Relating to Evidence of General Sir Rupert Smith” (“Gvero Motion to Strike / Reply”), filed confidentially on 8 January 2007, and the “Prosecution’s Response to General Gvero’s Motion to Strike Prosecution Response as Untimely” (“Prosecution’s Response to Gvero Motion to Strike”), filed confidentially on 9 January 2007;

NOTING that Gvero requests the Trial Chamber to strike the Prosecution’s 2 January 2007 Response because it was filed five days late, arguing that the response “was due fourteen days after the [15 December 2006] filing that being Thursday, 28 December 2006”;³

NOTING that the Prosecution opposes the Gvero Motion to Strike / Reply, arguing that Gvero’s construction of Rule 126 *bis* is incorrect and the Prosecution’s 2 January 2007 Response was timely filed;⁴

NOTING that on 19 January 2007, the parties made additional oral submissions on the issues relevant to the instant written submissions;⁵

NOTING that Gvero requests the Trial Chamber to:

- a. order the Prosecution to set out in full the qualifications of General Sir Rupert Smith (“Witness”) to testify as a witness in this case,⁶

¹ 10 January 2007 (English translation).

² 30 January 2007 (English translation).

³ Gvero Motion to Strike / Reply, para. 3.

⁴ Prosecution’s Response to Gvero Motion to Strike, paras. 5-7.

⁵ T. 6068–6083 (19 January 2007).

- b. order the Prosecution to serve a formal Rule 94 *bis* “Notice” on the Defence,⁷
- c. alternatively, to disallow the expert testimony of the Witness but permit him to testify as a fact witness;⁸

NOTING that Miletic argues he is “not able to determine the nature of [the Witness’s] testimony”⁹ and requests the Trial Chamber:

- a. to establish a deadline for the Prosecution to specify the status of the Witness;¹⁰ or
- b. alternatively, to establish a deadline for disclosure of the entire statement of the Witness, including translation into BCS, and to establish the deadline before which the Defence must respond pursuant to Rule 94 *bis*(B);¹¹

NOTING that both Gvero and Miletic state they wish to cross-examine the Witness;¹²

NOTING that the Prosecution argues it has provided sufficient notice of its intention to call the Witness as an expert witness, and further argues “the contents of [the Witness’s] Expert Statement, along with his prior statements previously provided to the Defence, set forth his experience and qualifications, the subject matter of his expert opinion and the bases thereof”;¹³

NOTING that the Prosecution disclosed the Witness’s statement on 24 November 2006,¹⁴ and that Counsel for Gvero orally informed the Trial Chamber that a BCS translation of the statement was disclosed on 18 January 2007;¹⁵

NOTING that the Prosecution has no objection to Defence requests for “additional time in order more fully to respond pursuant to Rule 94 *bis*(B)”;¹⁶

NOTING Rules 94 *bis*, 126, and 126 *bis*;

CONSIDERING that Rule 126 *bis* provides that a response to a motion must be filed “within fourteen days of the filing of the motion”, and that a natural construction of this language excludes the day the original motion is filed from the calculation of the 14-day time limit within which a

⁶ Motion, para. 8(a).

⁷ *Ibid.*, para. 8(b).

⁸ *Ibid.*, para. 8(c).

⁹ Miletic Motion, para. 3.

¹⁰ *Ibid.*, para. 12.

¹¹ *Ibid.*, para. 13.

¹² Motion, para. 9(b); Miletic Motion, para. 11.

¹³ Prosecution’s 2 January 2007 Response, para. 6.

¹⁴ *Ibid.*, para. 5.

¹⁵ T. 6077 (19 January 2007).

¹⁶ Prosecution’s 2 January 2007 Response, para. 6.

response must be filed,¹⁷ and that this construction is consistent with the practice before the Tribunal;¹⁸

CONSIDERING, therefore, that pursuant to Rule 126 *bis* the Prosecution's response to the Motion filed 15 December 2006 was due no later than 29 December 2006;

CONSIDERING that 29 December 2006 was an official UN holiday and, thus, a day "when the Registry of the Tribunal [did] not accept documents for filing", and that 2 January 2007 was "the first day thereafter when the Registry [did] accept documents for filing";¹⁹

CONSIDERING, therefore, that the Prosecution's 2 January 2007 Response was timely filed pursuant to Rules 126(B) and 126 *bis*;

CONSIDERING the "Decision Regarding Prosecution's Rule 94 *bis* Notice", filed on 6 March 2007, in which the Trial Chamber held that "there is no express or implied requirement in Rule 94 *bis* for a party proffering expert evidence to file any notice";²⁰

CONSIDERING the written and oral submissions of the parties, and that there is now no reasonable basis for confusion as to the Prosecution's intention to adduce expert evidence from the Witness, and that no purpose would be served by requiring the Prosecution to file a notice specifying the Witness's "status in these proceedings";²¹

¹⁷ For example, if a given rule contained a time limit of "within one day of" an event, this would clearly require a response on the day after the event, not on the same day. Yet the requirement of a response on the same day would be the anomalous result if Gvero's construction of Rule 126 *bis*—that is, that the day of the original filing counts as the first day of the 14-day time limit—were the correct one. The exclusion of the day of the original filing is also consistent with the Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings Before the International Tribunal ("Practice Direction"), which provides that the time limits set forth therein "shall run from, *but shall not include*, the day upon which the relevant document is filed." See Practice Direction, Section VI, para. 16 (entitled "Calculation of time") (emphasis added). Although not controlling, the language of the Practice Direction explicitly accords with the construction of Rule 126 *bis* adopted by the Trial Chamber in the present Decision.

¹⁸ Trial Chambers appear to have routinely construed the 14-day time limit of Rule 126 *bis* to exclude the day of the original filing from the calculation of the 14-day time limit. See *e.g.*, *Prosecutor v. Marijačić and Rebić*, Case No. IT-95-14-R77.2, Decision on (1) Defence for the Accused Markica Rebić Motion for Extension of Time; and (2) Defendant Ivica Marijačić's Emergency Motion for Clarification From the Trial Chamber, 8 July 2005, p. 2 (declaring a response deadline—pursuant to Rule 126 *bis*—of 7 July 2005 for a motion filed on 23 June 2005); *Prosecutor v. Milutinović, Šainović, Ojdanić, Pavković, Lazarević, and Lukić*, Case No. IT-05-87, Order Varying Time Limit for Defence Response to Partly Confidential Prosecution Motion for Testimony of Witness K58 to be Heard via Video-Link Conference, 25 October 2006, p. 2 (noting that, pursuant to Rule 126 *bis*, the response to a motion filed on 20 October 2006 would be due no later than 3 November 2006).

¹⁹ Rule 126(B).

²⁰ Decision Regarding Prosecution's Rule 94 *bis* Notice, 6 March 2007, para. 13.

²¹ Miletić Motion, para. 12.

CONSIDERING that the Witness will be subject to cross-examination at trial;²²

CONSIDERING, however, that Miletić and Gvero challenge whether the Witness should be permitted to give expert evidence in this case, and that this challenge has been raised within the response time required under Rule 94 *bis*(B),²³ and that no purpose would be served by requiring either Miletić or Gvero to file any additional notice under Rule 94 *bis*(B);²⁴

CONSIDERING that whether the Witness will be permitted to give expert evidence in this case should be decided by the Trial Chamber after it has received written submissions from the parties arguing the merits of their respective positions;

PURSUANT TO Rules 54, 94 *bis*, 126 and 126 *bis* of the Rules,

HEREBY ORDERS as follows:

1. Miletić and Gvero are granted leave to reply.
2. Gvero's request to strike the Prosecution's 2 January 2007 Response as untimely is denied.
3. No later than 20 April 2007, Miletić and Gvero shall file written submissions detailing all their objections to the Witness testifying as an expert in this case.
4. Within 14 days of the Defence submissions, the Prosecution shall file its response.
5. In all other respects the Motion and the Miletić Motion are denied.

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



Carmel Agius
Presiding

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

[Seal of the Tribunal]

²² The Prosecution has never proposed that the written evidence of the Witness should be admitted without the Witness being subject to cross-examination at trial pursuant to Rules 92 *bis*(A) or 94 *bis*(C).

²³ See Motion, para. 9 (giving notice pursuant to Rule 94 *bis*(B) that Gvero does not accept the Witness's "purported expert statement", wishes to cross-examine the witness, and challenges his qualifications as an expert).

²⁴ As noted, Gvero has unequivocally invoked Rule 94 *bis*(B). In the Miletić Motion, Miletić states that he "will wish to cross-examine [the Witness] regardless of the status ultimately given him." Miletić Motion, para. 11. Accordingly, in this case the Trial Chamber will construe the Miletić Motion as a timely response pursuant to Rule 94 *bis*(B), announcing Miletić's challenge to the Witness's qualifications as an expert and his desire to cross-examine the Witness. Any additional "notice" would be superfluous.