



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-04-82-T
Date: 17 May 2007
Original: English

IN TRIAL CHAMBER II

Before: Judge Kevin Parker, Presiding
Judge Christine Van Den Wyngaert
Judge Krister Thelin
Registrar: Mr. Hans Holthuis
Decision: 17 May 2007

PROSECUTOR

v.

**LJUBE BOŠKOSKI
JOHAN TARČULOVSKI**

PUBLIC
**DECISION ON MOTION TO EXCLUDE THE
PROSECUTION'S PROPOSED EVIDENCE OF EXPERT
BURGESS AND HIS REPORT**

The Office of the Prosecutor:

Mr. Daniel Saxon
Ms. Joanne Motoike
Mr. Matthias Neuner
Ms. Meritxell Regue

Counsel for the Accused:

Ms. Edina Rešidović and Mr. Guénaél Mettraux for Ljube Bošković
Mr. Antonio Apostolski and Ms. Jasmina Živković for Johan Tarčulovski

1. This Trial Chamber (“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 seized of a partly confidential “Motion for the Exclusion of Proposed Expert Evidence of Mr Terry Burgess” (“Motion”) filed on 18 April 2007 by the Defence for Ljube Bošković (“Bošković Defence”).

1. Background

2. On 11 September 2006, the Bošković Defence and the Tarčulovski Defence filed, pursuant to Rule 94*bis* of the Rules of Procedure and Evidence (“Rules”), notices¹ (“Notices”) indicating their position regarding a report of the proposed expert witness Terry Burgess (“Report”),² disclosed to them on 31 March 2006 by the Office of the Prosecutor (“Prosecution”).³ Both the Bošković Defence and the Tarčulovski Defence indicated that they wished to cross-examine the expert witness and that they challenged his qualifications as an expert and the relevance of his Report.

3. On 25 September 2006, the Prosecution filed its “Joint Response to the Notices Dated 11 September 2006 Filed by the Two Accused Pursuant to Rule 94*bis* Regarding Expert Report of Terry Burgess” (“Response to the Notices”), in which it addressed the Defence’s arguments and requested that Mr Terry Burgess be allowed to testify as an expert. On 28 September 2006 the Bošković Defence filed its “Motion to Strike Out Prosecution’s Filings or, in the Alternative, Seeking Leave to Reply and Reply to the Prosecution’s Joint Responses Dated 26 September 2006”, seeking to have the Prosecution’s Response to the Notices struck out, or, should the Response be considered, seeking leave to reply to it.

4. As indicated earlier, on 18 April 2007, the Bošković Defence filed the Motion, in which it requests that Mr Terry Burgess should not testify as an expert witness and that his Report be inadmissible. On 2 May 2007, the Prosecution filed its “Response to Bošković Defence «Motion for the Exclusion of Proposed Expert Evidence of Mr. Terry Burgess»” (“Response”), requesting that the Motion be denied. On 7 May 2007, the Bošković Defence filed the “Bošković Defence

¹ Bošković Defence Notice Pursuant to Rule 94*bis* in respect of the Prosecution’s Proposed Expert Report of Terry Burgess; Confidential Notice to the Trial Chamber on the Expert Statement of Expert Witness Terry Burgess.

² Assessment of the *de Facto* Functioning of the Ministry of Interior (“MOI”) and the Existence of a Functioning Chain-of-Command.

Reply Concerning Defence Motion for Exclusion of Prosecution Proposed Expert Evidence” (“Reply”), whereby it seeks leave to reply to the Response and submits its reply.

2. Preliminary objection

5. The Prosecution raises a preliminary objection against the Motion, arguing that such a motion is not envisaged in Rule 94*bis* of the Rules and that none of the submissions made in the Motion is based on information or material that was not available to the Boškoski Defence at the time of filing its Notice.⁴ The Boškoski Defence contends that the Motion is not based on Rule 94*bis* of the Rules and that it challenges the admissibility of proposed evidence.⁵ As indicated earlier, the Notices were filed by the Defence for both Accused within the procedure envisaged in Rule 94*bis* of the Rules. That Rule provides for a possibility of the admission into evidence of a report⁶ prepared by an expert witness without calling that witness to testify in person. The Trial Chamber may do so, when the opposing party accepts the report (paragraphs (B)(i) and (C) of the Rule). The opposing party may, however, file a notice indicating that it wishes to cross-examine the expert witness and that it challenges his qualifications as an expert or the relevance of all or parts of the report (paragraphs (B)(ii) and (iii) of the Rule). When such a notice is filed and it is based on grounds which are not considered unreasonable, the Trial Chamber may admit the report into evidence only after the expert witness is called and has testified in person.⁷ Accordingly, a notice under Rule 94*bis* of the Rules can result only in the challenged expert report being precluded from its admission without the expert witness being called to testify. The present Motion is of a different nature. The Boškoski Defence seeks a ruling of inadmissibility of both the proposed Report and the evidence of the proposed expert witness. For this reason, Rule 94*bis* of the Rules is not applicable to the Motion. Rather, the Motion falls within the scope of the rules on the admissibility of evidence and therefore it can be considered by the Chamber irrespectively of the prior filing of the Notices under Rule 94*bis*. The objection by the Prosecution is unfounded.

³ The Notices were filed before the deadline set out by the Pre-Trial Judge; Decision on Request to Declare the Envisioned Deadlines Invalid and Defence Counsel Motion Seeking New Deadlines, 16 August 2006.

⁴ Response, para 4.

⁵ Reply, para 6.

⁶ On 22 September 2006 an amendment to the Rule entered into force to the effect that the Rule applies to “the full statement and/or report of any expert witness”. The Rule previously referred to a statement only.

⁷ *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-T, Decision on Prosecution’s Motion for Admission of Expert Reports, 7 November 2003, para 26; *Prosecutor v. Milan Martić*, Case No. IT-95-11-T, Decision on Prosecution’s Motions for Admission of Transcripts Pursuant to Rule 92*bis*(D) and of Expert Reports Pursuant to Rule 94*bis*, 13 January 2006, para 22.

3. Law

6. The Motion, similarly to the Notices, focuses on the qualifications of the proposed expert witness and the relevance of his Report. The Rules do not provide specific guidelines on the admissibility of testimony given by expert witnesses, or criteria for the admission of their reports. Pursuant to Rule 89(C) of the Rules “a Chamber may admit any relevant evidence which it deems to have probative value.” It was held by the Tribunal that an expert witness is “a person whom by virtue of some specialised knowledge, skill and training can assist the trier of fact to understand or determine an issue in dispute (and to that end testifies)”⁸

4. Discussion

7. The Report by Mr Terry Bruggess deals with *de facto* practices of the Ministry of Interior and the police of the Former Yugoslav Republic of Macedonia (“FYROM”), as well as the operational chain of command within the Ministry, in 2001 and 2002. Contrary to the position of the Boškoski Defence,⁹ these issues are of relevance to the determination whether the Accused Ljube Boškoski had effective control over the persons who allegedly committed the crimes charged in the Indictment. It has been demonstrated that the proposed evidence is relevant, within the meaning of Rule 89(C) of the Rules. The relevance of the “Community Policing Assessment Reports” appended to the Report is less apparent. Small portions of the Assessment Reports have been referred to in the Report and, to this extent, the reports appear to support some of the conclusions made in the Report. The issue of relevance of those reports may need to be discussed at the time the Report is tendered into evidence, if the proposed expert witness testifies.

8. According to the material supplied by the Prosecution, Mr Terry Burgess is a certified police instructor with extensive work experience in the field of law enforcement. He completed the Maine Criminal Justice Academy Basic Police School and FBI National Academy, where he studied subjects related to the management of police functions. In April 2001, Mr Burgess was offered an assistant directorship of the new Police Academy in Macedonia organised as part of the International Criminal Investigative Training and Assistance Program, which provides law enforcement training to foreign law enforcement agencies. In his position as Senior Advisor to the Macedonian National Police, he worked closely with a number of local police units and senior

⁸ *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-T, Decision Concerning the Expert Witnesses Ewa Tabeau and Richard Philipps, 3 July 2002, p 2.

⁹ Motion, para 41.

members of the police and Ministry of Interior.¹⁰ The Chamber finds that Mr Terry Burgess is properly characterised as an expert under the definition quoted earlier in this Decision, based on his specialised knowledge of the police and experience in the FYROM at the relevant time, and that he has the necessary expertise to give evidence on the issues dealt with in the report.

9. The Boškoski Defence submits that the Prosecution has failed to disclose to the Defence the material upon which Mr Terry Burgess relied to prepare the Report. The Boškoski Defence submits that some conclusions in the Report are based on material that neither is in evidence, nor is proposed to be tendered into evidence.¹¹ The Prosecution argues that the Report is extensively footnoted and that it includes as attachments the Assessment Reports, referred to in the footnotes.¹² The Chamber observes that the Report contains a number of references to the Assessment Reports, appended to the Report. Mr Terry Burgess is mentioned among the authors of the Assessment Reports and thus will be in a position to explain how they were prepared and what was the source of information on which they are based. It is to be noted that the Report is based, at least to a great extent, on information that Mr Burgess appears to have received directly from police officers and members of the Ministry of Interior. Should he come to testify, the Defence will be able to cross-examine him and assess the reliability of the information provided by him.

10. The Boškoski Defence submits that the evidence of Mr Terry Burgess is an attempt to usurp the function of the Trial Chamber in that it purports to be relevant to the issue whether the Accused Boškoski had effective control over the alleged perpetrators of the crimes charged in the Indictment, which is one of the “ultimate” issues to be decided by the Trial Chamber.¹³ The mere relevance of the proposed expert evidence to an issue which the Chamber must decide cannot be regarded as indicative of the expert’s intention to usurp the role of the Chamber. Further, the Boškoski Defence has failed to demonstrate that Mr Terry Burgess directly expressed his opinion on any of the issues that could be regarded as ultimate in the present case and, if so, how this could affect the admissibility of the remainder of his proposed evidence. This argument of the Defence is unsubstantiated.

11. It has not been demonstrated that the Report of Mr Terry Burgess should be excluded and that he should not testify as an expert witness. For the foregoing reasons, the Trial Chamber

- **GRANTS** leave to the Boškoski Defence to reply to the Response and takes note of the content the Reply,

¹⁰ Response, paras 12-14; Curriculum vitae appended to the Report.

¹¹ Motion, paras 35-37.

¹² Response, para 27.

¹³ Motion, paras 27-33.

- **DENIES** the Motion,
- **ORDERS** that Mr Terry Burgess shall appear for cross-examination,
- **DEFERS** its decision on the admission of the Report and documents attached to it into evidence until the time of the testimony of Mr Terry Burgess.

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

Dated this seventeenth day of May 2007
At The Hague
The Netherlands



Judge Kevin Parker

Presiding Judge

[Seal of the Tribunal]