



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-05-87/1-PT
Date: 16 April 2008
Original: English

IN TRIAL CHAMBER III

Before: Judge Frederik Harhoff, Pre-Trial Judge
Registrar: Mr. Hans Holthuis
Decision of: 16 April 2008

THE PROSECUTOR

v.

VLASTIMIR ĐORĐEVIĆ

PUBLIC

**DECISION ON VLASTIMIR ĐORĐEVIĆ'S MOTION FOR EXTENSION OF TIME
TO FILE OBJECTIONS PURSUANT TO RULE 94 *BIS* (B)**

Office of the Prosecutor

Mr. Thomas Hannis
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Counsel for the Accused

Mr. Dragoljub Đorđević
Mr. Veljko Đurđić

I, **Frederik Harhoff**, Judge 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”), having been assigned as the Pre-Trial Judge in the present case pursuant to Rule 65 *ter* of the Rules of Procedure and Evidence of the Tribunal (“Rules”) by order of the Presiding Judge of Trial Chamber III dated 22 June 2007,¹ am seized of “Vlastimir Đorđević’s Motion for Extension of Time to File 94 *bis* (B)” [sic] filed on 2 April 2008 (“Motion”), and hereby issue this Decision thereon.

A. Procedural History of the Motion

1. On 2 November 2007, the Prosecution agreed to submit its expert reports pursuant to the Pre-Trial Chamber pursuant to Rule 94 *bis* not later than 15 March 2008.² At the Status Conference held on 22 February 2008, the Prosecution repeated that it would comply with the obligation to submit its expert reports pursuant to Rule 94 *bis* by 15 March 2008.³

2. At the conference held pursuant to Rule 65 *ter* on 28 March 2008, the Prosecution represented that it had delivered all expert reports to the Defence in English and B/C/S, including all corrigenda and addenda, with the exception of “some supporting material and the transcript,” which the Prosecution stated was not yet available in B/C/S, but which had been provided in English.⁴ The Prosecution further filed a notice of disclosure of expert reports on 18 March 2008 in which the Prosecution further submitted that it had disclosed seven expert reports to the Defence.⁵

3. On 3 April 2008, the Defence filed the Motion, stating its request for an extension of time for filing its notice pursuant to Rule 94 *bis* (B). In the Motion, the Defence submits that it is not presently able to file its notice for several different reasons, including an averment that the Prosecution has failed to provide full disclosure of the expert reports it intends to use. Specifically, the Motion alleges that the Prosecution’s disclosures with respect to its expert reports did not include: 1) the updated *curriculum vita* of Patrick Ball (B/C/S translation); and, 2) Philip Coo report: “An Analysis of their Organisation, Command & Control, and Operations – Addendum”

¹ President’s Order Regarding Composition of a Bench of the Trial Chamber and Appointing Pre-Trial Judge, 22 June 2007, p. 3; *see also* President’s Order Assigning *Ad Litem* Judges to Pre-Trial Proceedings, President, 21 June 2007; Vice-President’s Order Assigning a Case to a Trial Chamber, 18 June 2007.

² *Prosecutor v. Vlastimir Đorđević*, Case No. 05-87/1-PT, Status Conference, Transcript, 2 November 2007, pp. 21 – 22.

³ *Prosecutor v. Vlastimir Đorđević*, Case No. 05-87/1-PT, Status Conference, 22 February 2008, Transcript, pp. 35 – 36.

⁴ *Prosecutor v. Vlastimir Đorđević*, Case No. 05-87/1-PT, Rule 65 *ter* Conference, 28 March 2008, Transcript, p. 74.

⁵ *Prosecutor v. Vlastimir Đorđević*, Case No. 05-87/1-PT, Prosecution’s Notice Re Disclosure of Expert Reports.

(B/C/S/ translation).⁶ The Defence also requested the *curriculum vita* of Philip Coe in English and in B/C/S, believing it had not received this document.⁷

4 On 14 April 2008, the Prosecution filed its response to the Motion.⁸ In its Response, the Prosecution indicates that it does not oppose an extension of time, but argues that the period of the delay should be no more than 30 days from the date of disclosure of the outstanding materials.⁹

B. Analysis

5. At the outset, I note that the Prosecution's Response acknowledges that the representations it made at the Status Conferences, and at the Rule 65 *ter* conference, have, apparently, been less than fully candid. As the Pre-Trial Judge, I relied upon the Prosecution's representations at the Status Conferences and at the Rule 65 *ter* conference to be an accurate report of the state of disclosures with respect to the expert reports. In its Response, the Prosecution counters its own oral representations that it had disclosed in full the materials required pursuant to Rule 94 *bis*, conceding that:

- in response to an e-mail request of the Defence sent on 19 March 2008, the Prosecution provided on 2 April 2008 three requested documents that the Defence indicated it had not received on the list provided by the Prosecution on 11 December 2007;¹⁰
- the Prosecution provided an index of the documents it intends to tender at trial through its expert witnesses pursuant to Rule 94 *bis*, and that the index contained fewer documents than the listed documents in the 11 December 2007 disclosure;¹¹
- of the three documents disclosed on 2 April 2008, two of the documents, consisting of the B/C/S and English version of the *curriculum vita* of Dr. Eric Baccard, had apparently been disclosed but had been placed in a folder belonging to an unrelated witness, Mr. Paddy Ashdown;¹²

⁶ Motion, para. 8.

⁷ *Ibid.*

⁸ *Prosecutor v. Vlastimir Đorđević*, Case No. 05-87/1-PT, Prosecution Response to Vlastimir Đorđević's Motion for Extension of Time to File 94 *BIS* (B), 14 April 2008.

⁹ Response, para. 1.

¹⁰ *Ibid.*, para. 5

¹¹ *Ibid.*, para. 5

¹² *Ibid.*, para. 6

- the third document, being the B/C/S version of Mr. Philip Coo's Report, had been only partially disclosed in the 11 December 2007 disclosure, and was missing five pages of the report in that disclosure;¹³
- the English version of Mr. Coo's *curriculum vita* was apparently disclosed on or after 9 April 2008;¹⁴
- a document, which the Prosecution refers to as K053-8187-K053-8191-BCST and which the Prosecution states the Defence calls "An Analysis of their Organization, Command & Control, and Operations – Addendum" was provided on 2 April 2008;¹⁵ and,
- the B/C/S translations of the *curricula vitae* of Mr. Coo and Dr. Patrick Ball have not yet been provided and are due back from CLSS on 30 April 2008.¹⁶

6. At a minimum, therefore, it is clear that the Prosecution provided me with incomplete and inaccurate information during the Status Conferences as regards the condition of its disclosures. Additionally, the above summary indicates that the disclosure has been done in such a way that it would have been difficult, if not impossible, for the Defence, to determine whether it had sufficient information to provide its notices called for by Rule 94 *bis* (B).

7. Rule 94 *bis* (A) states, "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." In this case, with the concurrence of the Prosecution, I required the disclosures of the expert reports not later than 15 March 2008. It is clear that the Prosecution did not disclose the "full statement and/or report" within the time limit established as to at least one of the expert reports.

8. Rule 94 *bis* (B) requires that, "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 (ii) it wishes to cross-examine the expert witness; and (iii) it challenges the

¹³ *Ibid.*, para. 6

¹⁴ *Ibid.*, para. 9.

¹⁵ *Ibid.*, para. 6, and footnote 5 in the Response.

¹⁶ *Ibid.*, para. 10.

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.”

9. While Rule 94 *bis* is silent on the question of providing the *curricula vitae* of proposed expert witnesses, such credentials of an expert are necessary in order to file the required notice and must be provided to enable the opposing party to indicate whether or not it accepts or challenges the qualifications of the witness as an expert.¹⁷

10. In respect of the B/C/S translations that remain outstanding, where those outstanding translations relate to a “statement of a witness,” those statements are required to be provided in a language that the Accused understands, pursuant to Rule 66(A)(ii).¹⁸ However, it would not appear that the *curricula vitae* are within that Rule, given that these do not constitute a “statement of a witness.”

11. It is against this background that the Defence’s Motion is before me for decision.

12. As it presently stands, the Defence is not in possession of all the required materials to cause the 30-day time period to begin to run. In fact, the Prosecution’s Response indicates that it can only complete its disclosure obligations on 30 April.¹⁹ It is unclear why the *curriculum vitae* of two witnesses, which it appears from the submissions are the last translations pending, would take the length of time submitted by the Prosecution to be translated to B/C/S. However, even were it possible to complete the translations into B/C/S in a more timely manner, it would appear that the earliest date upon which the 30-day window for the required Rule 94 *bis* (B) notice will be in late May 2008, depending upon whether the Prosecution takes timely efforts to deliver the materials.

13. The Defence includes, in its several reasons requesting a delay in filing its Rule 94 *bis* (B) notices, that its motion alleging defects in the form of the Indictment remained pending before the Chamber.²⁰ The Pre-Trial Chamber filed its decision on this motion on 4 April 2008.²¹ However, even if the Chamber had not issued its decision on the motion alleging defects in the form of the Indictment, this would not warrant a delay in submitting the notices called for under Rule 94 *bis*

¹⁷ *Prosecutor v. Momčilo Perišić*, Case No. IT-04-81-PT, Order on Defence Submissions Regarding Various Experts’ Reports Disclosed by the Prosecution Pursuant to Rule 94*bis*, 2 February 2007, paras. 6 – 8.

¹⁸ *Ibid.*, para. 5.

¹⁹ Response, para. 10.

²⁰ Motion, para. 2, in reference to Vlastimir Đorđević’s Preliminary Motion Alleging Defects in the Form of the Indictment, filed on 19 October 2007.

²¹ *Prosecutor v. Vlastimir Đorđević*, Case No. IT-05-87/1-PT, Decision on Form of Indictment, 3 April 2008, filed on 4 April 2008.

(B). The assessment of the experts' qualifications and reports is independent of the submissions of the revised Indictment.

14. The Defence also submits that it should not be required to respond to the Rule 94 *bis* materials until after the Prosecution files, and the Chamber rules, upon a potential future motion for leave to amend the Indictment in this case.²² The Defence submits that the most practical way to proceed is for the Defence to be put on notice of the final charges against the accused, “so it can meaningfully make only necessary challenges to the proposed OTP expert witnesses.”²³ That argument is rejected, as the notice required under Rule 94 *bis* does not require anything more than informing the Chamber whether the opposing party accepts or rejects the expert report, accepts or rejects the status of the witness as an expert, and whether it wishes to cross-examine the expert if the witness is accepted as such. None of these notices will be substantially affected by further, possible amendment of the Indictment.

15. It is clear, however, in light of the foregoing history of the disclosures of the expert reports pursuant to Rule 94 *bis*, that the Defence should not be required to file its notices under Rule 94 *bis* (B) under the present state of disclosure, and that a new deadline should be set for the Prosecution to meet its obligations for disclosure, as well as for the Defence to submit its required notifications.

16. Rule 68 *bis*—entitled “Failure to Comply with Disclosure Obligations”—provides for sanctions to be imposed upon a party who fails to perform its disclosure obligations. Such sanctions may involve a party being prohibited from leading the affected evidence.

²² Motion, paras. 12 – 13.

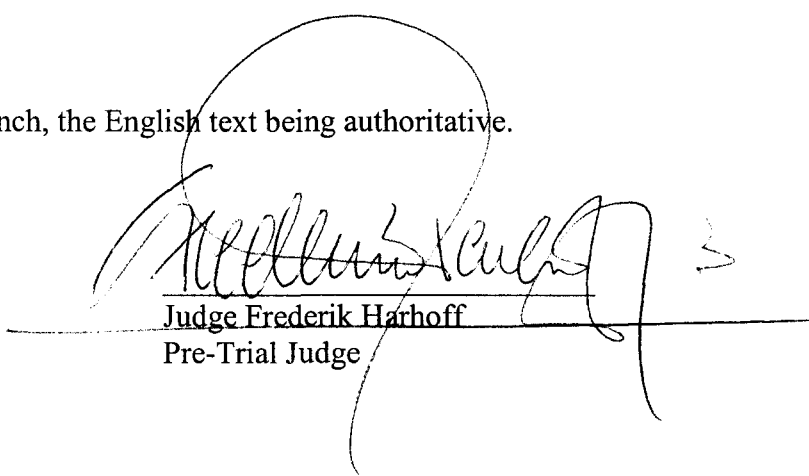
²³ *Ibid.*, para. 13.

C. Disposition

17. For the reasons stated above, pursuant to Rules 54, 65 *ter*, and 94 *bis*, 127 of the Rules of Procedure and Evidence of the Tribunal, **I HEREBY ORDER:**

1. The Prosecution shall comply with its obligations to disclose to the Defence the expert witness reports it intends to use in the Prosecution's case-in-chief not later than **25 April 2008**.
2. The Prosecution shall, in its disclosure, provide, in a language the Accused understands, those materials which constitute "statements of the witness, under Rule 66(A)(ii) and must do so within the stated revised deadline.
3. If, for any reason, the Prosecution considers that it will be unable to comply with the revised deadline stated in this Disposition, it shall file a request for extension of its deadline, providing a full explanation of the reasons it cannot meet the revised deadline, no later than seven calendar days before the revised deadline.
4. The Defence motion is **GRANTED**, in part, and the deadline within which the Defence must file its notices pursuant to Rule 94 *bis* (B) is **ENLARGED** until **31 May 2008**.
5. The Motion is **DENIED** the motion in all other respects.

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



Judge Frederik Harhoff
Pre-Trial Judge

Dated this sixteenth day of April 2008
At The Hague
The Netherlands

[Seal of the Tribunal]