

IT-09-92-T
D46821-D46815
09 NOVEMBER 2012

46821

Rj



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-09-92-T
Date: 9 November 2012
Original: English

IN TRIAL CHAMBER I

Before: Judge Alphons Orie, Presiding
Judge Bakone Justice Moloto
Judge Christoph Flügge

Registrar: Mr John Hocking

Decision of: 9 November 2012

PROSECUTOR

v.

RATKO MLADIĆ

PUBLIC

**DECISION ON DEFENCE NOTICE CONCERNING
PROPOSED EXPERT WITNESSES MARTIN OLS AND SUSAN
MALJAARS**

Office of the Prosecutor
Mr Dermot Groome
Mr Peter McCloskey

Counsel for Ratko Mladić
Mr Branko Lukić
Mr Miodrag Stojanović

I. PROCEDURAL HISTORY AND SUBMISSIONS OF THE PARTIES

1. On 27 April 2012, the Prosecution filed its notice of disclosure of the expert reports of Mr Martin Ols (“Ols”) and Dr Susan Maljaars (“Maljaars”) pursuant to Rule 94 *bis* (A) of the Tribunal’s Rules of Procedure and Evidence (“Notice of Disclosure” and “Rules” respectively).¹ The Prosecution has submitted what it refers to as Ols’ 24 February 2000 Automated Ballistic Comparison Report in Annex A, and Maljaars’ 11 February 2000 report, as well as her CV in English, in Annex B.²

2. On 29 May 2012, the Defence filed its notice pursuant to Rule 94 *bis* (B) of the Rules, and an accompanying motion to compel the Prosecution to provide further information (“Notice and Motion to Compel”).³ It submitted that it had not been provided with the material and information required for it to properly challenge the qualifications of Ols and Maljaars and their respective reports.⁴ In relation to the reports in particular, it avers that they are deficient in that (1) they do not identify the primary tasks and issues which the reports deal with; (2) do not contain any information regarding the applied methodology; and (3) contain no references of any supporting or related material identified.⁵ The Defence requested that the Chamber dismiss the Notice of Disclosure, compel the Prosecution to provide the requested material and information, and allow the Defence 30 days from the date of its provision to file a Rule 94 *bis* (B) notice for these two witnesses.⁶ It submitted that alternatively, the Chamber should consider its Notice and Motion to Compel as the actual notice pursuant to Rule 94 *bis* (B)(i)-(iii), whereby it does not accept the reports of Ols and Maljaars, wishes to cross-examine them both, and challenges their qualifications as experts as well as the relevance and reliability of the entirety of their respective reports.⁷

¹ Prosecution’s Notice of Disclosure of Expert Reports of Mr Martin Ols (RM625) and Dr Susan Maljaars (RM626) pursuant to Rule 94 *bis*, 27 April 2012.

² Notice of Disclosure, paras 2-3. See Annexes A and B.

³ Defence Notice and Motion to Compel Prosecution to Provide Information Regarding: Prosecution’s Notice of Disclosure of Expert Reports of Mr Martin Ols (RM625) and Dr Susan Maljaars (RM626) pursuant to Rule 94 *bis*, 29 May 2012.

⁴ Notice and Motion to Compel, paras 6-11.

⁵ Notice and Motion to Compel, para. 8.

⁶ Notice and Motion to Compel, Relief Sought, pp. 5-6.

⁷ Notice and Motion to Compel, Relief Sought, p. 6.

3. On 12 June 2012, the Prosecution responded to the Notice and Motion to Compel (“Response”).⁸ It conceded that it failed to provide the Defence with some of the material required to challenge the qualifications of these two witnesses, and provided this material in Annexes to the Response.⁹ It submitted, however, that contrary to the Defence submissions in this respect, the Notice of Disclosure clearly set out the fields of expertise of these two witnesses, which were, in addition, also already set out in the Prosecution’s motion of 4 April 2012, by which it sought to add Ols and Maljaars to its Rule 65 *ter* witness list.¹⁰ The Prosecution further objected to the Defence’s characterization of the reports as being deficient, taking the position that the arguments raised by the Defence in this respect go to weight rather than admissibility, and noting that the Defence will have the opportunity to address any of its concerns during cross-examination.¹¹

4. The Defence requested leave to reply to the Response on 19 June 2012, attaching the reply as an Annex to the request (“Request” and “Reply”, respectively).¹² The Chamber granted the Request and informed the parties accordingly through an informal communication on 28 June 2012. In the Reply, the Defence limited its further submissions to Ols’ report. Besides maintaining that the report is deficient because it fails to properly set out the applied methodology, the Defence submitted that the Prosecution has incorrectly characterized the report as being authored by Ols.¹³ It pointed out that there were three other examiners who signed the report and that the role they played in compiling the report is a “critical fact” the Defence is entitled to know about in order to be able to prepare for Ols’ cross-examination.¹⁴ As a result of this “ambiguity”, it contended that the report should not be admitted into evidence.¹⁵ Finally, it submitted that the Prosecution’s reference to submissions in its motion to amend the witness list in an attempt to “supplement

⁸ Prosecution Response to Defence Notice and Motion to Compel Prosecution to Provide Information Regarding: Prosecution’s Notice of Disclosure of Expert Reports of Mr Martin Ols (RM625) and Dr Susan Maljaars (RM626) pursuant to Rule 94 *bis*, with Annexes A, B and C, 12 June 2012.

⁹ Response, para. 5; Annex A and B. It also disclosed a BCS version of an Information Report disclosed as part of the Ols’ proffered expert report. *See* Response, para. 10; Annex C.

¹⁰ Response, para. 6. *See* Prosecution Motion for Leave to Amend its Rule 65 *ter* Witness List, 4 April 2012, para. 16. The Defence responded to this Motion on 18 April 2012. The Chamber granted the addition of these two witnesses to the Prosecution’s witness list in an oral decision relating to Rule 73*bis* (C), on 24 April 2012 (T. 313).

¹¹ Response, para. 7.

¹² Defence Request to File Reply to Notice and Motion to Compel Prosecution to Provide Information Regarding: Prosecution’s Notice of Disclosure of Expert Reports of Mr Martin Ols (RM625) and Dr Susan Maljaars (RM626) pursuant to Rule 94 *bis*, 19 June 2012 (“Request”), with Reply in Annex A.

¹³ Reply, paras 3, 6.

¹⁴ Reply, para. 4.

¹⁵ Reply, para. 5.

deficiencies in the proposed expert reports” is improper, and that if the “Report and Expert notice do not suffice for Rule 94*bis* standards, the witness should be excluded as an expert.”¹⁶

II. APPLICABLE LAW

5. The Chamber refers to the applicable law pertaining to Rule 94 *bis* of the Rules set out in an earlier decision.¹⁷

III. DISCUSSION

6. A part of the first relief sought by the Defence, namely, compelling the Prosecution to provide it with Ols’ CV and a copy of Maljaars’ CV in BCS, became moot by the attachment of this material to the Response. In its Reply, the Defence made no further submissions concerning the lack of qualifications of either of the two witnesses.¹⁸

7. The Chamber notes, further, that while the Prosecution did not originally intend to call either Ols or Maljaars as *viva voce* witnesses, it submitted in its Notice of Disclosure that it would do so if the Defence expressed a wish to cross-examine them.¹⁹ Ols and Maljaars are, therefore, available for cross-examination.

(i) Ols

8. Ols’ CV demonstrates that since 1995, and at the time the report was produced in 2000, he was employed as a “Firearms and Toolmark examiner” by the Bureau of Alcohol, Tobacco and Firearms within the United States Department of Justice (“Bureau of ATF”). Under this same title, he worked at the Bureau of Forensic Services of the State Laboratory Headquarters in Idaho from 1990-1995, before which he served as a “Physical Science Technician” for the United States

¹⁶ Reply, paras 7-9.

¹⁷ Decision on Defence Request to Disqualify Richard Butler as an Expert and Bar the Prosecution from Presenting his Reports, 19 October 2012, paras 4-9.

¹⁸ In its Reply, the Defence points out in this regard that the Prosecution, by referring to its motion to amend its witness list and the setting out of the expertise of the respective witnesses therein, improperly sought to “cure defects” in its Notice of Disclosure (Reply, para. 8). The Chamber does not accept this submission; the Prosecution was not relying on the submissions made in the motion to amend its witness list, but simply stating that the fields of expertise of the respective witnesses had been set out already once before, in addition to being clearly defined again in the Notice of Disclosure.

¹⁹ Notice of Disclosure, para. 1. See Addendum to Prosecution’s Submission of a Revised Witness List, 19 July 2012, Annex A, Rule 65 *ter* summaries, pages (iii) and (iv)).

Federal Bureau of Investigation 1986 and 1990. He has undergone extensive training in the field of firearms expertise since 1988 and served as an instructor in evidence collection and preservation, "Integrated Ballistic Identification Systems", and "Installation, training support and functioning of Rapid Brass Identifier" since 1990. Further, Ols' CV shows that he has published extensively in this field. The Chamber is satisfied that Ols has specialized knowledge in the field of firearms and that this knowledge may assist the Chamber in understanding the evidence to be presented by the Prosecution in this case.

9. The proffered expert report originates from the Forensic Science Laboratory of the Bureau of ATF and records that the type of examination carried out on the cartridge cases listed in the first part of the report is known as an "Automated Ballistic Comparison". The report lists a series of cartridge case exhibits on which "microscopic examination" was conducted, and lists those that were identified as "having been fired in the same firearms",²⁰ The results of the examination are followed by an "Information Report", bearing an ICTY letterhead, and containing an "Analysis of results" which seeks to link specific shell casings to particular gravesites related to the alleged killings of Bosnian Muslims from Srebrenica.²¹

10. The Chamber finds that the information contained in the report, as described above, does not suffice for purposes of allowing the Defence to challenge it pursuant to Rule 94 *bis* of the Rules. The report fails to detail the methodology applied and does not specify the type of identification system employed to conduct the examination. Moreover, while the report specifies that the "submitted items will be retained in the laboratory for additional examination purposes", the report includes no information regarding whether the cartridge cases were photographically documented, either by the ATF or by the Prosecution. If such photographic material exists, the Chamber considers that this, and any other related material, should be made accessible to the Defence to assist in defining any challenges it may have to the report.

11. The Chamber further accepts that on its face, it would appear that more than one person provided the evidence contained in what is being proffered as Ols' report.²² It also accepts that it is

²⁰ Notice of Disclosure, Annex A, p. 9.

²¹ Notice of Disclosure, Annex A, ERN: 00922722A-00922722C.

²² The material in the report is described as "evidence received on November 13, 1997, (Submission 2) from Firearms Examiner Martin Ols, and February 10, 1999, (Submission 3) from Investigator Jan Kruszewski" of the

not entirely clear what the precise role of the additional persons who signed the report was.²³ The Chamber however does not agree with the Defence position that this “missing” information is a “critical fact” that the Defence is entitled to know in advance to be able to prepare for the examination of the witness. Ols is best placed to provide the Defence with answers in this respect when he appears for cross-examination. Any answers that Ols can provide may impact the weight the Chamber gives to the report, should it be admitted into evidence. Possible admission would, therefore, only take place following the completion of Ols’ testimony.

(ii) Maljaars

12. As demonstrated by her CV, Maljaars’ work experience includes employment as a researcher for the Netherlands Forensic Institute, where she was engaged, as a forensic expert, in examining hair, fibres, and textile for the purpose of criminal investigation and prosecution. In 1987, she obtained a major in analytical chemistry at the Van Leeuwenhoek Institute in Delft, followed by a university major in theoretical chemistry in 2003. She has a publication in the field of forensic fibre analysis. The Chamber considers that her specialized knowledge in this field may assist it in understanding the evidence to be presented by the Prosecution in this case.

13. For her report, Maljaars conducted an investigation of textiles upon instruction of the OTP. The report contains a list of materials (pieces of textile material, blindfolds, and ligatures) submitted to her for analysis from a number of locations related to the alleged killings of Bosnian Muslims from Srebrenica.²⁴ It clearly sets out the scope of her investigations related to these items and the results of her investigations.²⁵ Several Appendices attached to her report contain photographs of the items upon which her investigation was based.²⁶ The Chamber finds that for the purposes of Rule 94 *bis* (B), the information provided by the Prosecution is sufficient. The Defence may address any concerns it has concerning the defined task, as well as the alleged deficient methodology and lack of references to supporting material in the report, with the witness when she appears for cross-examination.

Office of the Prosecutor (“OTP”) of the ICTY, collectively referred to by the Prosecution as the “ATF report”. See Notice of Disclosure, Annex A, p. 1.

²³ The ATF report is signed by three “Firearms/Toolmark” examiners, including Ols, in addition to bearing the signature of the Chief of the Firearms Section, who reviewed it. See Notice of Disclosure, Annex A, p. 15.

²⁴ Notice of Disclosure, Annex B, pp. 1-10.

²⁵ Notice of Disclosure, Annex B, pp. 10-24.

²⁶ Notice of Disclosure, Annex B, Appendices I-V.

IV. DISPOSITION

14. For the foregoing reasons, pursuant to Rule 94 *bis* of the Rules, the Chamber hereby

DECLARES MOOT, in part, the Defence request to compel the Prosecution to provide additional material and information concerning the witnesses' qualifications and their respective reports;

GRANTS the Defence's alternative request to consider the Notice and Motion to Compel as the actual notice pursuant to Rule 94 *bis* (B)(i)-(iii);

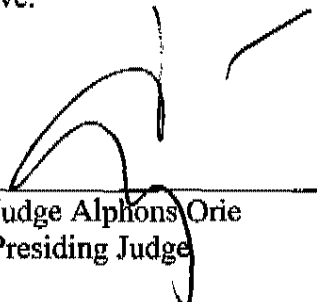
DECIDES that Ols and Maljaars may testify as expert witnesses;

ORDERS the Prosecution to provide the Defence with the information, and make accessible the material, if any, detailed in paragraph 10 of this decision with respect to Ols' report, with a view to assisting the Defence in defining any challenges it may have to the report during cross-examination of the witness, and to notify the Chamber when this has been done, accordingly;

DECIDES that Ols may be called as a witness at the earliest 30 days from the date that the Defence has received this information and material;

DEFERS its decision on admission of the respective reports of these witnesses, either in part or in their entirety, until the time of their respective testimonies.

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



Judge Alphons Orie
Presiding Judge

Dated this ninth day of November 2012
At The Hague
The Netherlands

[Seal of the Tribunal]