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CASE/AFFAIRE NO. IT-04-82-T DATE 17 May 2007

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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
BEZRUCHENKO 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 Boškosi
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 Viktor Bezruchenko" ("Motion") filed on 18 April 2007 by the Defence for Ljube Boškoski ("Boškoski Defence"). The Motion is joined by the Defence for Johan Tarčulovski ("Tarčulovski Defence").

1. Background

2. On 11 September 2006, the Boškoski 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 Viktor Bezruchenko ("Report"), disclosed to them on 31 March 2006 by the Office of the Prosecutor ("Prosecution").² Both the Boškoski 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 Colonel Viktor Bezruchenko" ("Response to the Notices"), in which it addressed the Defence's arguments and requested that the expert Report be admitted into evidence. On 28 September 2006 the Boškoski 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. On 4 April 2007, the Prosecution filed the "Submission of Addendum to Viktor Bezruchenko's Expert Report filed 31 March 2006" ("Addendum"). On 11 April 2007, the Boškoski Defence filed its "Response Regarding Prosecution Motion to Add to Mr Bezruchenko's Report", whereby it expressed no objection to the Addendum to the Report. On 16 April 2007, the Prosecution filed a "Motion for Permission to Submit Corrigendum to Viktor Bezruchenko's Expert Report filed 31 March 2006" ("Corrigendum"). On 18 April 2007, the Prosecution filed its "Reply

¹ Boškoski Defence Notice Pursuant to Rule 94*bis* in respect of the Prosecution's Proposed Expert Report of Viktor Bezruchenko; Confidential Notice to the Trial Chamber on the Military Expert Report.

² 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.

to «Boškoski Defence Response Regarding Prosecution Motion to Add to Mr Bezruchenko's Report»”.

5. As indicated earlier, on 18 April 2007, the Boškoski Defence filed the Motion, in which it requests that Viktor Bezruchenko should not testify as an expert witness and that his Report be inadmissible. The Boškoski Defence seeks leave to exceed the permissible number of words in its Motion. On 27 April 2007, the Tarčulovski Defence filed confidentially “Johan Tarčulovski Notice re Boškoski Motion for Exclusion of Proposed Evidence of Mr Viktor Bezruchenko”, whereby it supports the position of the Boškoski Defence expressed in the Motion.

6. On 2 May 2007, the Prosecution filed its “Response to Boškoski Defence Motion for the Exclusion of Proposed Expert Evidence of Viktor Bezruchenko” (“Response”), requesting that the Motion be denied. On 7 May 2007, the Boškoski Defence filed the “Boškoski Defence 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

7. 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 the Motion is based on documentation mostly available to the Boškoski Defence at the time of filing its Notice.³ 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.⁴ 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 report⁵ 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.⁶ Accordingly, a notice under Rule 94*bis* of the Rules can result only in the

³ Response, para 2.

⁴ Reply, para 6.

⁵ 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.

⁶ *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 (“*Martić Decision*”), para 22.

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, joined by the Tarčulovski Defence, seeks a ruling of inadmissibility of both the proposed Report and the evidence of the proposed expert witness. For this reason, Rule 94bis 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 94bis. The objection by the Prosecution is unfounded.

3. Law

8. The Motion, similarly to the Notices, focuses on the qualifications of the proposed expert witness in view of his close bonds with the Prosecution and the character of his Report, which, the Boškoski Defence submits, contains a judicial evaluation of proposed evidence. 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)”.⁷ Concerns relating to expert witnesses’ independence have been usually considered in the case-law of the Tribunal as matters of weight rather than admissibility.⁸ They can be appropriately dealt with in cross-examination of the witness.⁹

4. Discussion

9. The Report by Colonel Viktor Bezruchenko deals with the structure and operations of the National Liberation Army, the organisation of the Macedonian security forces, as well as actions of the Macedonian Army and Macedonian police in and around the village of Ljuboten on 10, 11 and 12 August 2001. These issues are of relevance to the determination whether there was an armed conflict and the nexus between the alleged conflict and the alleged conduct of the Accused. It has been demonstrated that the proposed evidence is relevant, within the meaning of Rule 89(C) of the Rules.

⁷ *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-T, Decision Concerning the Expert Witnesses Ewa Tabeau and Richard Philipps, 3 July 2002 (“*Galić Decision*”), p 2.

⁸ *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-T, Decision on Prosecution’s Submission of Statement of Expert Witness Ewan Brown, 3 June 2003 (“*Brđanin Decision*”), p 4; *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, 9 September 2002, Transcript p 9966.

⁹ *Brđanin decision, ibid.*; *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-PT; Decision on the Defence Motions to Oppose Admission of Prosecution Expert Reports Pursuant to Rule 94bis, 1 April 2004, p 4.

10. According to the material supplied by the Prosecution, Colonel Bezruchenko is a military analyst, who studied arms operations and tactics, and has experience in the former Yugoslavia. He understands the Macedonian language.¹⁰ The Chamber finds that Colonel Bezruchenko is properly characterised as an expert under the definition quoted earlier in this Decision, based on his specialised knowledge of the military and experience in the former Yugoslavia at the relevant time, and that he has the necessary expertise to give evidence on the issues dealt with in the Report.

11. The Boškoski Defence submits that Colonel Viktor Bezruchenko is too close to the Prosecution team to be capable of acting as an expert. He was present at “suspect interviews” of several witnesses and asked questions to at least three suspects, of whom one is a proposed Prosecution witness. Colonel Bezruchenko was present during the taking of statements of at least 20 Prosecution witnesses. The Boškoski Defence submits that the proposed expert has acted as a full member of the Prosecution team and therefore lacks the necessary independence. The Boškoski Defence makes reference to the decision of 13 July 2006 given in the case of *Prosecutor v. Milan Milutinović et al.*¹¹ The Prosecution argues that it has been the established practice of the Tribunal to admit reports and testimony of qualified experts who are employees of the Office of the Prosecutor. It submits that Colonel Bezruchenko’s participation in the investigation and preparation of the case has not threatened his objectivity and impartiality as an expert witness.¹²

12. The active involvement of the proposed expert witness in the investigation of the case on behalf of the Prosecution is a factor capable of affecting the reliability of that witness’ Report and potential evidence. It will need to be evaluated carefully in each such case. The involvement in a particular case may be such that the reliability of the opinions of the expert cannot be accepted. However, the alleged lack of impartiality, even if established to the degree suggested by the Defence, does not appear to be such as to deprive this proposed evidence of probative value and render it inadmissible on that basis. The Chamber observes that expert witnesses are often connected, to a varying degree, with the party which seeks to call them to testify. It has been the position of other Trial Chambers that the mere fact that the expert witness is employed by a party does not disqualify him or her to be called and testify as an expert witness.¹³ The *Milutinović* Trial Chamber, on which ruling the Boškoski Defence relies, attached more weight to the connection, in the circumstances of that case, of the expert witness with the Prosecution. It found that the proposed expert gave the impression of being far closer to the case than would be appropriate for an

¹⁰ Curriculum vitae appended to the report of Colonel Bezruchenko disclosed to the Defence on 31 March 2006.

¹¹ Motion, paras 10-16.

¹² Response, paras 5-7; 13-14.

¹³ *Galić* Decision, p 3; *Martić* Decision, para 37.

expert.¹⁴ The proposed expert in that case had assisted in a number of witness, suspect and accused interviews.¹⁵ The *Milutinović* Trial Chamber ruled that the proposed expert should testify as a witness of fact rather than an expert witness.¹⁶ The factual circumstances of the present case are not the same as those in *Milutinović* in this respect. The Chamber is not persuaded that there is need to alter the proposed status of Colonel Viktor Bezruchenko as an expert witness. The degree of his connection with the Prosecution can be explored by the Defence in cross-examination and will be taken into account by the Chamber in assessing the weight to be attached to the evidence of the expert witness. It will be open to both Defence teams to examine the extent to which the involvement of Colonel Bezruchenko in the interviewing of witnesses and his subsequent reliance on statements and material obtained with his active participation affected the content of his Report and testimony, if he testifies.

13. The Boškoski Defence submits that the main issues dealt with in the Report of Mr Bezruchenko are of a legal nature and should be left for the Trial Chamber's determination. The Defence argues that the Report does not disclose how the proposed expert's opinions on those issues could result from the application of his alleged expertise. The Defence submits that the Report contains a review of the Prosecution's proposed evidence with comments on its reliability.¹⁷ The Prosecution submits that there is no attempt in the Report to usurp the Trial Chamber's exclusive competency as a trier of fact. It argues that Mr Bezruchenko made no legal conclusions as to the existence of an armed conflict, as suggested by the Defence.¹⁸

14. The Report contains references to "an armed conflict" and "warring parties". It is suggested in the Report that "an armed conflict existed in Macedonia at least between January and September 2001".¹⁹ The Report also deals with the alleged command authority of the Accused Boškoski and, in particular, with his alleged "operational control of police forces"²⁰ and "disciplinary powers".²¹ It makes reference to a police unit allegedly under the command of the Accused Tarčulovski.²² The questions whether there was an armed conflict on the territory of the Former Yugoslav Republic of Macedonia at the time of the events alleged in the Indictment and whether the Accused exercised command over any of the troops allegedly involved in the perpetration of the crimes charged in the

¹⁴ *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, 13 July 2006 ("*Milutinović* Decision"), Transcript pp 840-844.

¹⁵ *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-PT, Prosecution Submissions Regarding Expert Witnesses Philip Coo and Ingeborg Joachim, 28 June 2006, para 19.

¹⁶ *Milutinović* Decision, Transcript p 840.

¹⁷ Motion, paras 17; 30-47.

¹⁸ Response, paras 18-21.

¹⁹ Report, para 10.

²⁰ Report, paras 371, 404, 406.

²¹ Report, para 429.

²² Report, para 512, 513, 522.

Indictment are the ultimate issues in the case to be determined by the Chamber. However, the expert witness' conclusions or suggestions on these issues are scarce in the Report. Unlike in the case of *Kordić and Čerkez*, referred to by the Boškoski Defence, the Report is not "littered" with them.²³ To the limited extent that the Report may be found to express itself too directly, the Chamber is well capable of confining it within proper limits. Apart from those occasional suggestions, the Report focuses on the specific questions put to the expert witness by the Prosecution, relating to, *inter alia*, the structure of the National Liberation Army and organisation of the Macedonian police.

15. The Boškoski Defence submits that the analysis of the structure and organisation of the Ministry of Interior made in the Report requires no military expertise.²⁴ The Prosecution states that this part of the Report deals with the legal and constitutional bases for the Army of the Republic of Macedonia and the Ministry of Interior and their structures. It submits that there is no attempt to comment on these bases in a way which demands legal expertise and that these comments are necessary for a comprehensive and competent military analysis.²⁵ The contested analysis appears to have been included in the Report in relation with the allegation of the Indictment that the Accused Boškoski was the Minister of Interior and in this position exercised command over the alleged crime perpetrators. As this part of the Report deals with an institution of a civilian nature, its preparation does not seem to have required expertise in the military field. Therefore, it can be of limited assistance to the Chamber. However, the analysis of the organisation of the Ministry of Interior is only a small part of the Report. In its other parts the Report appears to have been based on the military expertise of the expert witness. The Chamber finds that, on its own, the inclusion of the section on the Ministry in the Report is not a sufficient reason to exclude the entire Report.

16. It has not been demonstrated that the Report of Colonel Viktor Bezruchenko 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 exceed the word limit in the Motion,
- **GRANTS** leave to the Boškoski Defence to reply to the Response and takes note of the content the Reply,
- **GRANTS** leave to the Prosecution to file the Corrigendum,

²³ See *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-T, 28 January 2000, Transcript p 13306.


²⁴ Motion, paras 34, 42.

²⁵ Response, para 15.

- **GRANTS** leave to the Prosecution to supplement the Report of Colonel Viktor Bezruchenko with the Addendum and takes note of the disclosure of the Addendum to the Defence,
- **DENIES** the Motion,
- **ORDERS** that Colonel Viktor Bezruchenko shall appear for cross-examination,
- **DEFERS** its decision on the admission of the Report into evidence until the time of the testimony of Colonel Viktor Bezruchenko.

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]