

**UNITED
NATIONS**



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: 14 September 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: 14 September 2012

PROSECUTOR

v.

RATKO MLADIĆ

PUBLIC

**DECISION ON THE PROSECUTION SUBMISSIONS ON THE
EXPERT STATEMENT OF PROSECUTION WITNESS
TEUFKA IBRAHIMEFENDIĆ PURSUANT TO RULE 94 *BIS***

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 6 January 2012, the Prosecution reclassified Dr Teufika Ibrahimefendić as an expert witness and indicated that it will “not seek to tender any report authored by Dr Ibrahimefendić but will elicit her expert opinion regarding common psychological impacts of the Srebrenica massacres”.¹ At the 16 January 2012 Rule 65 *ter* meeting, the Prosecution announced its intention to offer Dr Ibrahimefendić’s testimony in the *Krstić* trial as a “full statement” of the expert witness under Rule 94 *bis* of the Tribunal’s Rules of Procedure and Evidence (“Rules”).² The Defence contended that this proposition did not conform to Rule 94 *bis* of the Rules.³ On 24 January 2012, the Chamber instructed the Prosecution to file written submissions on the matter by 17 February 2012 and instructed the Defence to file any response two weeks thereafter.⁴ The Prosecution filed its submissions on 17 February 2012 (“Submissions”).⁵ On 2 March 2012, the Defence responded to the Submissions (“Response”).⁶

2. In its Submissions, the Prosecution contends that Dr Ibrahimefendić’s witness statement of 20 June 2000 and transcripts of her prior testimonies in the *Krstić*⁷ and *Tolimir*⁸ trials (collectively, “Statement”) qualify as a full expert statement pursuant to Rule 94 *bis* of the Rules.⁹ The Prosecution submits that the Statement furnishes the Defence with sufficient information about Dr Ibrahimefendić’s qualifications and anticipated testimony as an expert witness, and enables it to properly respond pursuant to Rule 94 *bis* (B).¹⁰ In addition, the Statement demonstrates that Dr Ibrahimefendić’s specialised knowledge and training would assist in understanding key issues.¹¹ The Prosecution does not, however, seek admission of the Statement into evidence, but intends to call Dr Ibrahimefendić as a *viva voce* witness, whereby the Defence will have the opportunity for cross-examination.¹²

¹ Fourth Prosecution Report on Pre-Trial Preparations, 6 January 2012 (Confidential with Confidential Annexes A to C), para. 30, Annex C (Status of Expert Reports), p. 31837.

² Rule 65 *ter* meeting (16 January 2012), T. 41. See also T. 174.

³ Rule 65 *ter* meeting (16 January 2012), T. 40, 42-43. See also T. 174-175.

⁴ See T. 209.

⁵ Prosecution Submissions on the Expert Statement of Prosecution Witness Teufika Ibrahimefendić pursuant to Rule 94*bis*, 17 February 2012.

⁶ Defence Response to Prosecution Submission on the Expert Statement of Prosecution Witness Teufika Ibrahimefendić pursuant to Rule 94*bis*, 2 March 2012.

⁷ *Prosecutor v. Radislav Krstić*, Case No. IT-98-33-T.

⁸ *Prosecutor v. Zdravko Tolimir*, Case No. IT-05-88/2-T.

⁹ Submissions, paras 1, 5-6.

¹⁰ Submissions, paras 1, 5-6, 9, 13.

¹¹ Submissions, paras 10-11, 13.

¹² Submissions, paras 3, 8, 13.

3. In its Response, the Defence argues that neither the wording of Rule 94 *bis* of the Rules nor jurisprudence supports the introduction of entirely *viva voce* expert testimony.¹³ The Defence adds that the Statement does not deal with theoretical issues and merely addresses facts and events without referring to sources and without explaining, *inter alia*, the object/field of Dr Ibrahimfendić's expert analysis, specialised knowledge, and methodology.¹⁴ The Defence submits that accommodating the deviation from Rule 94 *bis* proposed by the Prosecution would not only prevent the Defence from challenging the expert's anticipated evidence and qualifications in accordance with Rule 94 *bis* (B) and preparing adequately for cross-examination, but would also deprive the Chamber of the opportunity to evaluate a written report and determine Dr Ibrahimfendić's expert status before her appearance in court.¹⁵ The Defence further notes that as the Statement includes transcripts of Dr Ibrahimfendić's testimony as a fact witness in the *Krstić* and *Tolimir* trials, her qualifications as an expert have not been previously tested before this Tribunal.¹⁶ Accordingly, the Defence requests that the Chamber deny the Prosecution Motion and order the Prosecution, if it still wishes to present Dr Ibrahimfendić as an expert witness, to submit a written report in compliance with Rule 94 *bis*.¹⁷ The Defence reserves its right to file a Rule 94 *bis* notice if the Prosecution is directed to file an expert report.¹⁸ If, however, the Chamber grants the Prosecution Motion, the Defence seeks guidance from the Chamber on how to proceed in relation to the remaining requirements of Rule 94 *bis*.¹⁹

II. APPLICABLE LAW

4. Rule 94 *bis* of the Rules governs the testimony of expert witnesses:

(A) 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.

(B) 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 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.

¹³ Response, paras 6-9, 12, p. 7.

¹⁴ Response, paras 10-11, 13.

¹⁵ Response, paras 6, 8-9, 11-13, 15, p. 7.

¹⁶ Response, para. 4.

¹⁷ Response, p. 7.

¹⁸ Response, para. 3.

¹⁹ *Ibid.*

(C) If the opposing party accepts the statement and/or report of the expert witness, the statement and/or report may be admitted into evidence by the Trial Chamber without calling the witness to testify in person.

5. Rule 94 *bis* of the Rules provides for (1) a timetable for the disclosure of statements and/or reports of expert witnesses, and (2) the admission of the expert statement and/or report without calling the expert witness to testify, if the opposing party accepts the expert statement and/or report.²⁰

III. DISCUSSION

6. The majority, Judge Moloto dissenting, is of the view that Rule 94 *bis* of the Rules does not exclude under all circumstances the elicitation of expert opinion *viva voce*, that is, through oral testimony without the accompanying tender of an expert statement and/or report, or through oral testimony which goes beyond the scope of the expert statement and/or report. The majority therefore defers the Chamber's final decision on this issue until after having been further briefed on the modalities the Prosecution intends to use when presenting the evidence of Dr Ibrahimfendić, if established that she qualifies as an expert.

7. The Chamber notes that the Prosecution disclosed Dr Ibrahimfendić's witness statement and the transcripts of her testimony in the *Krstić* and *Tolimir* trials as a "full statement" under Rule 94 *bis*. The majority, Judge Moloto dissenting, considers that these materials, despite Dr Ibrahimfendić testifying as a fact witness in the *Krstić* and *Tolimir* trials, set out her relevant training and work experience so as to provide the Defence with sufficient information to challenge her qualifications as an expert.²¹ Therefore, the Defence can indicate whether it challenges the qualifications of Dr Ibrahimfendić as an expert under Rule 94 *bis* (B) (iii). Only after the Defence has filed this notice will the Chamber determine whether Dr Ibrahimfendić qualifies as an expert witness, and if so, whether her proposed evidence falls within her expertise. If both these queries are answered in the affirmative, the Chamber will, after having heard the Parties, establish the modalities for the receipt of her evidence, including whether the Prosecution will be required to tender her statement and/or report.

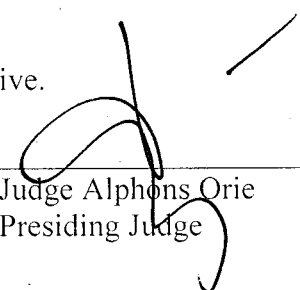
²⁰ *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92 *bis* (C), 7 June 2002, para. 39.

²¹ See, e.g., Submissions, Appendix A (OTP Witness Statement of Teufika Ibrahimfendić, dated 20 June 2000), pp. 2-3; Submissions, Appendix B (Testimony of Teufika Ibrahimfendić in *Prosecutor v. Radislav Krstić*, Case No. IT-98-33-T, dated 20 June 2000), pp. 5805-5812; Submissions, Appendix C (Testimony of Teufika Ibrahimfendić in *Prosecutor v. Zdravko Tolimir*, Case No. IT-05-88/2-T, dated 17 February 2011), pp. 10073-10076.

IV. DISPOSITION

8. For the foregoing reasons, the Chamber, by majority, Judge Moloto dissenting, hereby **INSTRUCTS** the Defence to file a notice pursuant to Rule 94 *bis* (B) of the Rules, indicating whether it challenges the qualifications of Dr Ibrahimefendić as an expert, within 30 days of this decision, and **DEFERS**, until after the notice is filed, its decision on whether the Prosecution will be required to tender a statement and/or report of Dr Ibrahimefendić, whether she should be considered as a fact or expert witness, and if deemed an expert witness, whether her proposed evidence falls within her expertise.

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



Judge Alphons Orie
Presiding Judge

Dated this fourteenth day of September 2012
At The Hague
The Netherlands

[Seal of the Tribunal]

DISSENTING OPINION BY JUDGE BAKONE JUSTICE MOLOTO

I respectfully disagree with my colleagues in this matter. The Prosecution, as the party calling an expert witness, is required pursuant to Rule 94 *bis* (A) to disclose his/her "statement and/or report" (hereinafter "statement"). It is my view that in practice, not only must the statement be disclosed pursuant to Rule 94 *bis* (A), but it must also be tendered into evidence so as to enable the Defence to prepare its Rule 94 *bis* (B) notice and avoid litigation by ambush. Rule 94 *bis* (A) lays down its own disclosure regime in recognition of the fact that an expert deals with specialised and technical topics not generally known by lay people, and thus the opposing party must be given advance notice of his/her testimony so as to prepare therefor. The opposing party, for instance, may wish to engage its own expert to analyze the witness's statement.

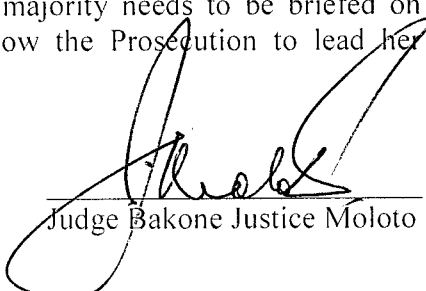
I further consider that Rule 94 *bis* (B) must be applied in its entirety at the outset and not piecemeal as the majority does. The majority orders the Defence to indicate at this time only whether it challenges the qualifications of Dr Ibrahimfendić as an expert. I find this problematic as an expert witness's qualifications are usually part of the statement. If the Prosecution is eventually allowed to call her *viva voce* without tendering her statement, the Defence is left uncertain as to whether the qualifications described in her consolidated statement will be the ones presented in court. Without such assurance, the Defence is unable to decide whether to challenge or accept Dr Ibrahimfendić's qualifications. The situation is further rendered uncertain by the majority's deferral of action on the Prosecution's declaration of intent to call Dr Ibrahimfendić *viva voce*.

The majority requires the Defence to provide a Rule 94 *bis* (B) notice indicating whether the latter challenges Dr Ibrahimfendić's qualifications as an expert, but does not guide it as regards the remaining requirements of Rule 94 *bis* (B). The Defence in fact requests the Chamber to provide guidance on how to proceed should the Chamber decide to approve the Prosecution's proposed deviation from the wording of Rule 94 *bis*. I consider that the majority, by instructing the Defence to file a Rule 94 *bis* (B) notice indicating whether it challenges the qualifications of Dr Ibrahimfendić as an expert, implicitly approved in part the Prosecution's proposed deviation from Rule 94 *bis*, but did not provide the necessary guidance to the Defence. It is my firm view that the majority should have done so. The Defence needs to be guided as to when, if at all, it will have an opportunity to exercise its rights under the remainder of Rule 94 *bis* (B). For instance, should the Prosecution lead Dr Ibrahimfendić *viva voce*, the Defence must be advised whether it will be granted a postponement so as to prepare for cross-examination and if so, how much time will be given. If no postponement is granted, the Defence's right to receive disclosure of the statement of an expert witness at least 30 days before his/her testimony, a corollary of the Defence obligation to provide its Rule 94 *bis* (B) notice within thirty days of the disclosure of the statement, will be rendered nugatory.

The prevailing uncertainty similarly affects the implementation of the remainder of Rule 94 *bis* (B) (iii), rendering the Defence unable to indicate whether it challenges all or parts of the statement. The majority's piecemeal approach to the implementation of the Rule

likewise prevents the Defence from complying with Rule 94 *bis* (B) (i) as there is nothing to accept if the Defence does not know whether the statement will be tendered, and from indicating under Rule 94 *bis* (B)(ii) whether it wishes to cross-examine Dr Ibrahimefendić.

On a final note, I find it unclear what further modalities to be used by the Prosecution for the presentation of Dr Ibrahimefendić's evidence the majority needs to be briefed on before arriving at a final decision on whether to allow the Prosecution to lead her evidence *viva voce* without tendering her statement.



Judge Bakone Justice Moloto