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-03-67-T

Date: 12 February 2008

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French

IN TRIAL CHAMBER III

Before: **Judge Jean-Claude Antonetti, presiding**
Judge Frederik Harhoff
Judge Flavia Lattanzi

Registrar: **Mr Hans Holthuis**

Decision of: **12 February 2008**

THE PROSECUTOR

v.

VOJISLAV ŠEŠELJ

PUBLIC DOCUMENT

DECISION ON EXPERT STATUS OF REYNAUD THEUNENS

The Office of the Prosecutor

Mr Daryl Mundis

The Accused

Mr Vojislav Šešelj

1. Trial Chamber III ("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 the submission of the report of military expert Reynaud Theunens ("Theunens Report").[1]

I. PROCEDURAL BACKGROUND

A. The Theunens Report

2. On 31 March 2006, the Office of the Prosecutor ("Prosecution") filed a confidential motion related to the submission of an expert report, with confidential and *ex parte* annexes ("Motion of 31 March 2006"),[2] in which it requested *inter alia* the disclosure, 30 days before the commencement of the trial, of certain so-called sensitive passages of the Theunens Report, because they permitted the identification of three protected witnesses.

3. The Motion of 31 March 2006 had four annexes, including Annex I, the Theunens Report in its entirety, and Annex II, its redacted version. Annex III contained the list of sensitive materials and Annex IV contained information regarding the three protected witnesses concerned.

4. On 2 October 2006, Trial Chamber I ("Chamber I") ordered: (1) that the Theunens Report be disclosed to the "Defence" in its entirety since the issue of delayed disclosure of certain passages of the Theunens Report 30 days before the commencement of the trial was moot;[3] and (2) that the sensitive passages of the Theunens Report and the sensitive materials not be disclosed to the public until further order ("Decision of 2 October 2006"). Chamber I stayed its ruling on the request to place the entirety of the Theunens Report under seal and to make the redacted Theunens Report available to the public, until its possible admission into the record.

5. Regarding the disclosure of the Theunens Report to Vojislav Šešelj ("Accused"), the Prosecution stated that it was disclosed to the Accused in redacted form on 17 May 2007 and the Accused, during the status conference of 22 May 2007, confirmed that "a few days earlier" he had received it in a language he understands.[4]

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[1] Because the submission of the Theunens report was the subject of a complex procedure, *see* the Procedural Background explained in paragraphs 2-10 below.
[2] Prosecution Motion Concerning the Filing of an Expert Report, with confidential and *ex parte* annexes, confidential, 31 March 2006.
[3] In fact, as of the date of the decision, the trial was scheduled to begin within the following 30 days.
[4] *See* Decision on the Re-Examination of the Decision of Trial Chamber I of 2 October 2006 (Motion No. 286), 14 June 2007 ("Decision of 14 June 2007"), p. 2 referring to the Status Conference of 22 May 2007, Transcript in

6. At the status conference of 5 June 2007, the Accused stated his objection in principle to the Theunens Report, while pointing out that he could provide a reasoned response to the Report only after receiving it in its entirety.[5]

7. On 14 June 2007, the pre-trial Judge denied the Accused's motion for reconsideration of Decision of 2 October 2006 and ordered: (1) the Prosecution to disclose the Theunens Report in unredacted form to the Accused no later than 30 days before the definitive date of the commencement of the trial; (2) no later than 14 days after receipt of the Decision of 14 June 2007 in a language he understands, the Accused to supplement his oral objection to the Theunens Report by way of a written response, indicating whether he challenges the expert status of Reynaud Theunens ("the Witness") and the relevance of the Theunens Report in whole or in part, in which case he would indicate which parts are challenged; (3) if he so wished, the Accused had leave to file a supplementary response pursuant to Rule 94 *bis* of the Rules of Procedure and Evidence ("Rules") within 14 days following receipt of the complete Theunens Report in a language he understands, which was to be strictly limited to the sensitive passages; and (4) the Prosecution to organize the order of witnesses it intended to call so as to give the Accused sufficient time to prepare his cross-examination of Reynaud Theunens.

8. On 16 July 2007, the Chamber ordered the seizure of the unredacted Report which in principle had been disclosed to the Standby Counsel for the Accused on 17 October 2006, given the fact that the Prosecution had disclosed it to him in accordance with the Decision of 2 October 2006.[6]

9. In accordance with the Decision of 14 June 2007, according to the information received from the Prosecution at the request of the Chamber, the unredacted Report was disclosed to the Accused on 3 October 2007 amongst the documents disclosed under Rule 65*ter* of the Rules.

10. The Accused submitted his Response to the Theunens Report on 3 January 2008, and it was filed on 6 February 2008.

French ("T(F)") 1165. The Accused mentions the date of 18 May 2007 in the response to the Theunens Report, *see* Notice of Professor Vojislav Šešelj Concerning the Report by a Team of Military Analysts Represented by Reynaud Theunens, ("Response"), p. 2.

[5] Status conference of 5 June 2007, T(F) 1230.

[6] Order for the Seizure of the Unredacted Version of the Expert Report of Mr Theunens Disclosed to Mr Hooper on 17 October 2006, confidential, 10 July 2007.

B. *Addendum* to the Theunens Report

11. At the hearing of 4 April 2007, the Prosecution announced that it was going to file an *Addendum*.[7] On 4 July 2007, the Prosecution filed a confidential and *ex parte* motion for delayed disclosure to the Accused of passages of the *addendum* to the report related to documents received by the Serbian Security and Information Agency.[8]

12. On 12 July 2007, the Chamber ordered, confidentially and *ex parte*, the Prosecution to redraft its motion in accordance with Rules 54*bis* and 70 of the Rules related to the protection of documents originating from national authorities, or to disclose the *addendum* to the Accused in its entirety ("Decision of 12 July 2007").[9]

13. The Prosecution did not redraft its motion, but on 16 August 2007, in compliance with the Decision of 12 July 2007, it publicly filed a document titled "Prosecution's Notification under Rule 94 *bis* of Disclosure of Expert Report of Mr. Theunen[s] and of Compliance with the Pre-Trial Judge's Decision of 12 July 2007" ("Addendum"). The Accused confirmed receipt of this document in BCS on 12 September 2007.[10]

14. In his Response, the Accused mentioned the dates of 11 September 2007 and 18 December 2007 as receiving *"addenda"*.[11]

II. PRELIMINARY OBSERVATIONS

15. The Chamber notes that the disclosure of the Theunens Report in its unredacted version was made by the Prosecution within the time-limit ordered in the Decision of 14 June 2007.

16. The Chamber notes nonetheless that this disclosure was made in the form of disclosure of exhibits from the Rule 65*ter* list[12] amongst a vast number of exhibits contained in a total of 150 binders. As the Prosecution did not file the unredacted version of the Theunens Report in the form of a submission, as it did for the other reports, including that of expert witness Yves Tomić,[13] it is possible that on 3 October 2007 the Accused was not aware that he was in

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[7] Hearing of 4 April 2007, T(F). 1039.
[8] Prosecution's Motion Concerning the Filing of an Addendum to an Expert Report - Confidential and *Ex Parte* with Confidential and *Ex Parte* Annexes, confidential and *ex parte*, 4 July 2007.
[9] Decision on Prosecution Motion to File an Addendum to an Expert Report, confidential and *ex parte*, 12 July 2007.
[10] Procès-verbal of reception of documents, dated 12 September 2007, signed by the Accused.
[11] Response, p. 2.
[12] Procès-verbal of reception of documents, issued by the Prosecution and bearing number 78, dated 3 October 2007, signed by the Accused. Eight binders were transmitted during this disclosure. The only information allowing for the content of the disclosure to be known was the numbers of the 65*ter* exhibits list, without explicit reference to the Theunens Report.
[13] Prosecution Submission of the Expert Report of Yves Tomić, 23 May 2006.

possession of this version of the report. Moreover, the Accused complained after 3 October 2007 that he still had not received the unredacted version of the Theunens Report,[14] and at the hearing of 5 February 2008 stated that he was confused about the Theunens Report and the redacted portions.[15]

17. The Chamber notes that the only title of the *Addendum* filed publicly on 16 August 2007 may be misleading since it suggests that the Theunens Report is being disclosed under Rule 94 *bis* of the Rules, when in fact that disclosure had already been made, at least in its redacted form, on 17 or 18 May 2007. The second disclosure of the *Addendum* by the Prosecution on 17 December 2007, which was already made on 12 September 2007, only served to add to the confusion in the proceedings with regard to the Theunens Report. The word "*addenda*" in the Response indicates that the Accused believes that he had received two *addenda* to the Theunens Report when in fact only one *addendum* to the Report exists.

18. The Chamber notes that the Accused failed to respect the time-limits prescribed by the Decision of 14 June 2007. Moreover, as the Response had a total of 30,487 words, the Accused also failed to respect the word-limit provided for in the practice direction in this area.[16] Concerning the version on the basis of which the Response was drafted, the Accused stated that it was not the Theunens Report in its entirety.[17]

19. Nevertheless, the Chamber notes that the successive disclosure of the different versions of the Report, the very form of the disclosure, as well as the title and disclosure of the *Addendum* to the Report made on several occasions, lead to confusion. In addition, both the Prosecution and the Accused consider the Witness as a very important witness for the Prosecution case.[18] In light of the particularly confusing circumstances surrounding the procedure related to the disclosure of this report, and in light of the importance of this evidence, the Chamber exceptionally accepted the filing of the Response.

20. In future, the Chamber recalls the obligations binding on both Parties for an efficient and orderly conduct of the trial.

21. First, the Chamber stresses the importance for the Prosecution to file export reports with the Registry in the same manner as it has for the other witnesses it intends to call as experts, and

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[14] Status conference, 23 October 2007, T(F) 1611.
[15] Hearing of 5 February 2008, T(F) 3090.
[16] Practice Direction on the Length of Briefs and Motions (IT/184. Rev. 2), 16 September 2005 ("Practice Direction").
[17] Hearing of 7 February 2008, T. 3299. Here, the Chamber refers to the English transcript because it appears that the French version contains an error.
[18] *See* hearing of 15 January 2008, T(F) 2298 and the summary of points on which the Witness will give evidence and the relevant counts in the Indictment, contained in the final revised witness list of 29 March 2007.

to avoid disclosing the same document several times. The Chamber stresses the importance of clarity in the titles and content of the submissions and recalls the request it made to avoid a repetition of written submissions entitled *addendum* and *corrigendum.*[19]

22. Second, even if the Chamber takes note of the position of the Accused who accepts the risk that his submissions may be denied,[20] it wishes to recall once again the importance and obligation for the Accused to respect the time- and word-limits provided for in the Rules and the Practice Direction as well as the time-limits set by the Chamber. In cases where the Accused does not himself draft the documents he submits, his associates must be reminded of the said obligations.

III. ARGUMENTS PRESENTED BY THE ACCUSED

23. In his Response the Accused states that he:

(i) challenges the Expert Report and its *addenda*;

(ii) wishes to cross-examine the Witness; and

(iii) challenges the relevance of the entire Expert Report and its *addenda*, and the expert status of the Witness.[21]

24. The Accused questions the methodology, because the "drafters" of the Theunens Report used inappropriate procedures, information, classifications and data analyses.[22]

25. The explanation given by the Accused about the errors in methodology concern the Witness's bias. The Accused argues that the Witness cannot be an impartial military expert and an investigator for the Prosecution at the same time and that he was an analyst with UNPROFOR in Croatia from 1994 to 1995.[23] In support of his argument that the Chamber should not qualify the Witness as an expert because of his proximity to the Prosecution, the Accused refers to a decision in the *Milutinović* case concerning Witness Philip Coo.[24]

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[19] *See* Order Setting the Guidelines for the Presentation of Evidence and the Conduct of the Parties During the Trial, 15 November 2007, para. 31 of the Annex.
[20] Hearing of 7 February 2008, T(F) 3297.
[21] Response, p. 2. The Accused challenges the entire Report by responding to each section, *see* Response, pp. 6-95.
[22] *Id.*, p. 3.
[23] *Id.*, p. 6.
[24] *Id.*, p. 6.

IV. APPLICABLE LAW

26. Rule 94 *bis* of the Rules reads as follows:

> (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.
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> (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:
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> (i) it accepts the expert witness statement and/or report; or
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> (ii) it wishes to cross-examine the expert witness; and
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> (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.
>
> (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.

27. The term "expert" has been defined in the case-law as "a person who by virtue of some specialised knowledge, skill or training can assist the trier of fact to understand or determine an issue in dispute".[25]

28. The attribution of the expert status of a witness called by one of the Parties, in view of the information provided by that Party, is a matter within the discretionary power of the Chamber.[26] The Chamber may have recourse to *curricula vitae*, articles, publications, professional experience or other information related to the witness for whom the expert qualification is requested.[27]

29. The Chamber recalls that the mere fact that an expert witness is employed by or paid by one of the Parties does not disqualify him from being called as an expert witness.[28] The Appeals Chamber of the Tribunal and of the International Criminal Tribunal for Rwanda ("ICTR") also held that an expert is obliged to testify with the utmost neutrality and with scientific objectivity, specifying that "the party alleging bias on the part of an expert witness may demonstrate the said

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[25] Decision on Anthony Oberschall's Status as an Expert, 30 November 2007 ("*Oberschall* Decision"), p. 2 referring to *The Prosecutor v. Pavle Strugar*, Decision on the Defence Motions to Oppose Admission of Prosecution Expert Reports Pursuant to Rule *94bis*, Case No. IT-01-42-PT, 1 April 2004, p. 4.

[26] *Oberschall* Decision, p. 2 referring to *Sylvestre Gacumbitsi v. The Prosecutor,* Case No. ICTR-2001-64-A, Appeal Judgement, 7 July 2006, para. 31.

[27] *Ibid.* This decision refers to *The Prosecutor v. Dragomir Milošević,* Case No. IT-98-29/T, Decision on Admission of Expert Report of Robert Donia, 15 February 2007, para. 7.

[28] *The 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. 5 cited in *The Prosecutor v. Ferdinand Nahimana et al.*, Case No. ICTR-99-52-A, Appeal Judgement, 28 November 2007 ("*Nahimana et al.* Appeal Judgement"), para. 282 and *The Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-AR73.2, Decision on Joint Defence Interlocutory Appeal Concerning the Status of Richard Butler as an Expert Witness, 30 January 2008 ("*Popović* Decision"), para. 20.

bias through cross-examination, by calling its own expert witnesses or by means of an expert opinion in reply".[29]

30. The Chamber recalls that challenges regarding the bias of a witness called as an expert are a matter related to the evaluation of the evidence given by him and not its admissibility.[30] Only very rarely have the Trial Chambers refused to admit this type of evidence on the basis of bias or the appearance of bias. This refusal was nonetheless grounded in the fact that there was a lack of basic indicia of reliability such that the evidence was removed of any probative value.[31] One example of a situation where the minimum threshold for indicia of reliability was not met is in the *Akayesu* case before the ICTR, where the witness the defence intended to call as an expert was another accused before that Tribunal.[32]

31. Finally , the Chamber finds that the reference to the *Milutinović* case concerning Witness Philip Coo can be of no assistance to the Chamber in this case because the circumstances related to the employment of the Witness within the Office of the Prosecutor are not comparable. The Chamber in the *Milutinović* case considered that Witness Philip Coo was too close to the Prosecution team and too close to the case[33] in light of the circumstances of the case.[34]

V. DISCUSSION

32. The Witness's field of expertise, specified by the Prosecution in the Motion of 31 March 2006, is in military matters. The Report, whose temporal scope covers the period material to the Indictment, presents the structure of the Serbian forces involved in the conflict in Croatia and Bosnia and Herzegovina and focuses on the volunteers of the Serbian Radical Party and the Serbian Chetnik Movement, as well as their role during the conflict.

33. The following information emerges in particular from the Witness's *curriculum vitae*: he has a Degree in social and military sciences from the Belgian Royal Military Academy and holds the military rank of Commandant ("OF-3"). He has been employed by the Office of the

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[29] *Popović* Decision, para. 20 citing *Nahimana et al.* Appeal Judgement, para. 199.
[30] *See Brđanin* Decision, p. 5.
[31] *Popović* Decision, para. 22.
[32] The witness was Ferdinand Nahimana, *see The Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Decision on a Defence Motion for the Appearance of an Accused as an Expert Witness, 9 March 1998, p. 2.
[33] *The Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, 13 July 2006, T(F) 840.
[34] *See The Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, Decision on Prosecution Request for Certification of Interlocutory Appeal of Decision on Admission of Witness Philip Coo's Expert Report, 30 August 2006 ("*Milutinović* Decision"), para. 10, where the Chamber states in particular that the fact that Philip Coo had been employed by the Office of the Prosecutor since 1999 when the investigations in this case began, that he advised the Office of the Prosecutor on how to present this case and on how to conduct interviews of certain accused persons and other military personnel. The *Milutinović* Chamber, furthermore, did not rule out the appearance of this witness as a factual witness if the Prosecution intended to call him as such, *Milutinović* Decision, para. 11.

Prosecutor of the Tribunal since 2001 as an intelligence analyst at the military analysis team.[35] He previously worked in the Belgian Ministry of Defence, for the Royal Military Academy and for the Belgian Armed Forces based in Germany. With regard to his professional field experience, the Witness participated in three United Nations peacekeeping operations in the former Yugoslavia, one in Bosnia and Herzegovina and the other two in Croatia. The Witness has written articles which in all likelihood are the result of his field experience[36] and has authored three reports before the Tribunal about the armed forces, each time in the context of a region of the former Yugoslavia.[37]

34. The Chamber considers that in light of this information, in particular his professional experience in the field of military analysis in the former Yugoslavia, the Witness is authorized to testify as an expert within the meaning of Rule 94 *bis* of the Rules, about the subject matter addressed in his report.

35. The Chamber further notes that the Witness has already testified before the Tribunal as an expert called by the Prosecution.[38]

36. The Chamber considers, in light of the objections raised by the Accused, that the Witness should appear before the Tribunal in order to answer questions from the Prosecution, the Accused and, possibly, the Chamber. In cross-examination, the Accused will have the opportunity to challenge the probative value, relevance and reliability of the conclusions contained in the Theunens Report.

37. The Chamber will assess the relevance and probative value of the Theunens Report and will rule on the admission of the said Report into the record in the light of the evidence of the Witness in this case.

VI. DISPOSITION

38. For these reasons, in accordance with Rule 94 *bis* of the Rules, **ORDERS** that,

(i) Reynaud Theunens shall appear before the Chamber as an expert to be examined by the Parties and the Chamber.;

(ii) the duration of the direct examination shall not exceed five hours; and

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[35] Intelligence Analyst at the Military Analysis Team.
[36] "Intelligence and Peace Support Operations: Some Practical Concepts", "*Intelligence en Vredesoperaties*", "UNTAES and the Military Challenges in Eastern Slavonia".
[37] "SFRY Armed Forces OG South and the Operations in Slavonia, Baranja and Western Srem (SBWS)", "Milan Martić and the SAO Krajina/RSK TO-SVK", "The SFRY Armed Forces and the Conflict in Croatia".
[38] Case No. IT-02-54 (*Milošević*), Case No. IT-95-11 (*Martić*) and Case No. IT-95-13 (*Mrkšić et al.*).

(iii) the duration of the cross-examination shall not exceed five hours.

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

/signed/

Jean-Claude Antonetti

Presiding Judge

Dated this twelfth day of February 2008

At The Hague

The Netherlands

[Seal of the Tribunal]