

**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-04-75-PT
Date: 27 September 2012
Original: English

IN THE TRIAL CHAMBER

Before: Judge Guy Delvoie, Presiding
Judge Burton Hall
Judge Antoine Kesia-Mbe Mindua

Registrar: Mr. John Hocking

Decision: 27 September 2012

PROSECUTOR

v.

GORAN HADŽIĆ

PUBLIC

**DECISION ON DEFENCE REQUEST TO STRIKE EXPERT WITNESS AND
ASSOCIATED EXPERT REPORT**

The Office of the Prosecutor:

Mr. Douglas Stringer

Counsel for Goran Hadžić:

Mr. Zoran Živanović

Mr. Christopher Gosnell

1. **THIS TRIAL 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 seised of the “Notice on Expert Witnesses Pursuant to Rule 94 *bis* (B)” (“Notice”), filed by the Defence on 8 August 2012. On 14 September 2012, the Prosecution filed the “Prosecution Response to ‘Defence Notice on Expert Witnesses Pursuant to Rule 94 *bis* (B)’ of 8 August 2012” (“Response”).¹

A. Background

2. On 10 July 2012, the Prosecution filed the “Prosecution Notice of Compliance with Rule 94 *bis* (A)” in accordance with Rule 94 *bis* (A) of the Rules of Procedure and Evidence of the Tribunal (“Rules”).

B. Submissions

3. The Defence filed its Notice pursuant to Rule 94 *bis* (B) of the Rules, in which was embedded a request that one Prosecution expert witness, Reynaud Theunens, and his “expert reports” be struck from the Prosecution’s Rule 65 *ter* (E) witness list (“Witness List”) and Rule 65 *ter* (E) exhibit list (“Exhibit List”) respectively.² The Defence submits that Theunens’ expert report has not been validly filed in accordance with Rule 94 *bis* (A) of the Rules because the report is comprised of portions of previous reports of the witness submitted in other cases before the Tribunal and that these portions fail to comprise a “full statement and/or report” in this case.³ Additionally, the Defence submits that there are only three non-overlapping references to Hadžić in the report and that each of these references merely summarise documents and do not reflect the application of Theunens’ expertise in respect of Hadžić’s position.⁴ The Defence submits that no expertise is provided in respect of Hadžić himself, asserting that this is the sole purpose and justification for the admission of expert evidence and reports.⁵

4. The Prosecution submits that it has complied with the requirements of Rule 94 *bis* (A) of the Rules by disclosing Theunens’ expert report and providing the Defence with notice of his expertise

¹ While the request of the Defence was not expressly submitted as a motion, the Trial Chamber determined that, in the interests of trial efficiency, the request could be entertained without requiring the Defence to file a separate motion on the same issue. The Prosecution was asked to submit any response to the request in the Notice by 14 September 2012. Rule 65 *ter* Conference, 6 September 2012, T. 82-83 (confidential).

² Notice, paras 1-5. See Prosecution Notice of Rule 65 *ter* (E) Filings, 20 June 2012, confidential Annex A, p. iii, and confidential Annex E, pp. 35 (01061), 80 (02589), 81 (02641), 98 (03268), 99 (03278).

³ Notice, paras 1, 3-4.

⁴ Notice, para. 4.

⁵ Notice, para. 4.

and expected evidence.⁶ The Prosecution points out that Theunens has been recognised as an expert by six other Trial Chambers of the Tribunal⁷ and submits that the Rules do not preclude filing an expert report comprised of excerpts of prior reports.⁸ The Prosecution argues that there is no requirement that a Rule 94 *bis* report must mention an accused by name or specifically focus on an accused and that the role of an expert is to provide Judges with information useful to an evaluation of the facts.⁹ The Prosecution submits that this is the role envisioned for Theunens and his expert report.¹⁰ Finally, the Prosecution avers that the Defence's concerns in the Notice should be properly addressed through cross-examination and by calling its own expert and fact witnesses.¹¹

5. The Prosecution notes that, with leave of the Chamber, the different components of Theunens' report could be combined into a single document to facilitate its use during the trial.¹²

C. Applicable Law

6. Rule 94 *bis* (A) provides that the full statement 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. Rule 94 *bis* (B) provides that, within thirty days of disclosure of the statement 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: (a) it accepts the expert witness statement or report; or (b) it wishes to cross-examine the expert witness; and (c) it challenges the qualifications of the witness as an expert or the relevance of all or parts of the statement or report and, if so, which parts.

D. Discussion

7. According to the 10 July Notice of the Prosecution, pursuant to Rule 94 *bis* (A), the expert report of Theunens is comprised of portions of his previous reports in other cases before the Tribunal, as follows:

- (a) Part I, pages 1-194, of his expert report from *Prosecutor v. Radovan Karadžić* (Case No. IT-95-5/18-1);¹³

⁶ Response, paras 1, 11, 26.

⁷ Response, para. 11.

⁸ Response, paras 9-10.

⁹ Response, paras 13, 16-17, 19.

¹⁰ Response, para. 13.

¹¹ Response, para. 20.

¹² Response, para. 25.

¹³ Rule 65 *ter* 03278.

- (b) Pages 81-120 of Part I and pages 65-80, 87-96, and 97-138 of Part II of his expert report from *Prosecutor v. Jovica Stanišić and Franko Simatović* (Case No. IT-03-69);¹⁴
- (c) Pages 84-181 of his expert report from *Prosecutor v. Milan Martić* (Case No. IT-95-11);¹⁵
- (d) Pages 56-128 of Part II of his expert report from *Prosecutor v. Mile Mrkšić* (Case No. IT-95-13/1);¹⁶
- (e) Pages 100-124 of Part II of his expert report from *Prosecutor v. Vojislav Šešelj* (Case No. IT-03-67).¹⁷

8. In relation to the Defence submissions that challenge the status of Theunens as an expert witness and the substance of his expert report, the Trial Chamber considers that it is premature to determine such matters. The Defence may explore Theunens' expertise and the content of his report during cross-examination, and the Trial Chamber will take any such Defence challenges into account in its final deliberations. The Defence will also have the opportunity of making any submissions on Theunens' expertise and evidence that it considers necessary and appropriate during its closing submissions in this trial.

9. Regarding the Defence's submissions on the form of the expert report, there is no Rule that precludes the filing of an expert report comprised of excerpts from previous reports. However, the Trial Chamber notes that the Prosecution has not uploaded to eCourt a consolidated document that includes the portions designated in the 10 July Notice. Instead, the Prosecution has uploaded the five previous reports in full from which the expert report is drawn, as well as numerous documents associated with these reports. The result is that the Defence and the Chamber are left (a) to sift through the entirety of the five previous reports—which consist of approximately two-thousand pages—in order to extract the expert report and (b) to review many documents that are essentially duplicates of each other or that appear to be not strictly necessary. The parties were advised that, when preparing for the trial, each party is responsible for presenting its evidence in a specific and concentrated matter and that the parties must be careful to select evidence they will seek to tender, ensuring that it is relevant and has probative value.¹⁸ The Trial Chamber therefore will strike the full reports and associated documents from the Exhibit List and order the Prosecution to remove them from eCourt. The Trial Chamber will also order the Prosecution to upload to eCourt a

¹⁴ Rule 65 *ter* 03268.

¹⁵ Rule 65 *ter* 01061.

¹⁶ Rule 65 *ter* 02589.

¹⁷ Rule 65 *ter* 02641.

¹⁸ Rule 65 *ter* Conference, 14 December 2011, T. 17-18 (confidential).

consolidated report (with one Rule 65 *ter* number) consisting of only those portions in the 10 July Notice, as well as any associated documents it intends to tender as evidence (*e.g.*, curriculum vitae).

10. Furthermore, the Prosecution has included Theunens' expert reports from the *Gotovina* (IT-06-90) and *S. Milošević* (IT-02-54) cases in its Exhibit List, along with some documents associated with these reports. Theunens' expert report in this case does not appear to include portions of the expert reports from the *Gotovina* or *S. Milošević* cases. The Trial Chamber therefore will strike these reports and associated documents from the Exhibit List and order the Prosecution to remove them from eCourt.

E. Disposition

11. Accordingly, the Trial Chamber, pursuant to Rules 54 and 94 *bis* of the Rules, hereby:

DENIES the Motion;

Ex proprio motu

STRIKES from the Prosecution's Rule 65 *ter* (E)(iii) Exhibit List the documents with the following Rule 65 *ter* numbers: 01061; 02589; 02641; 03268; 03278; 03279; and 03280;

ORDERS the Prosecution to:

- (a) remove from eCourt the documents with the following Rule 65 *ter* numbers: 01061; 02589; 02641; 03268; 03278; 03279; and 03280;
- (b) amalgamate into one document, and assign one Rule 65 *ter* number to that amalgamated document, the following:
 - i. Part I, pages 1-194, of Reynaud Theunens' expert report from *Prosecutor v. Radovan Karadžić* (Case No. IT-95-5/18-1);
 - ii. Pages 81-120 of Part I and pages 65-80, 87-96, and 97-138 of Part II of Reynaud Theunens' expert report from *Prosecutor v. Jovica Stanišić and Franko Simatović* (Case No. IT-03-69);
 - iii. Pages 84-181 of Reynaud Theunens' expert report from *Prosecutor v. Milan Martić* (Case No. IT-95-11);
 - iv. Pages 56-128 of Part II of Reynaud Theunens' expert report from *Prosecutor v. Mile Mrkšić* (Case No. IT-95-13/1);

v. Pages 100-124 of Part II of Reynaud Theunens' expert report from *Prosecutor v. Vojislav Šešelj* (Case No. IT-03-67);

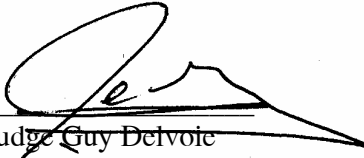
(c) upload to eCourt and notify the Trial Chamber and the Defence—by no later than 5 October 2012—the amalgamated document and any associated documents it intends to tender as evidence (*e.g.*, curriculum vitae);

STRIKES from the Prosecution's Rule 65 *ter* (E)(iii) Exhibit List the documents with the following Rule 65 *ter* numbers: 02808; 03259; 03260; 03261; 03262; 03263; 03264; 03265; 03266; 03267; 03269; 03270; 03271; 03272; 03273; 03274; 03275; 03276; 03277; 03281; 03282; and 03283;

ORDERS the Prosecution to remove from eCourt the documents with the following Rule 65 *ter* numbers: 02808; 03259; 03260; 03261; 03262; 03263; 03264; 03265; 03266; 03267; 03269; 03270; 03271; 03272; 03273; 03274; 03275; 03276; 03277; 03281; 03282; and 03283.

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

Done this twenty-seventh day of September 2012,
At The Hague,
The Netherlands.



Judge Guy Delvoic
Presiding

[Seal of the Tribunal]