

IT-04-81-T
D15746 - D15742
17 NOVEMBER 2008

15746
Kj

**UNITED
NATIONS**



International Tribunal for the Prosecution of
Persons Responsible for Serious Violations of
International Humanitarian Law Committed in
the Territory of Former Yugoslavia since 1991

Case No. IT-04-81-T
Date: 17 November 2008
Original: English

IN TRIAL CHAMBER I

Before: Judge Bakone Justice Moloto, Presiding
Judge Pedro David
Judge Michèle Picard

Registrar: Mr. Hans Holthuis

Decision of: 17 November 2008

PROSECUTOR

v.

MOMČILO PERIŠIĆ

PUBLIC

**DECISION ON EXPERT REPORTS OF HELGE
BRUNBORG**

The Office of the Prosecutor

Mr. Mark Harmon
Mr. Daniel Saxon

Counsel for the Accused

Mr. Novak Lukić
Mr. Gregor Guy-Smith

TRIAL CHAMBER I (“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 Defence’s “Partly Confidential (Confidential Annex A) Notice Pursuant to Rule 94 *bis* Concerning Prosecution Expert Disclosures” (“Notice”) filed on 13 November 2006¹ and hereby renders its Decision.

I. PROCEDURAL HISTORY

1. On 14 June 2006, the Pre-Trial Judge ordered the Prosecution “to provide the reports of any expert witnesses to be called” and set the deadline of 20 October 2006 (“Order of 14 June 2006”).²
2. On 13 November 2006 the Defence filed its Notice in which it states in relation to Helge Brunborg that it “does not accept the expert witness statement, does wish to cross-examine the expert and does not accept the qualifications of the witness for each of the conclusions reached”.³ The Defence noted that some reports of Mr. Brunborg have no B/C/S version and one report has no English version.⁴
3. On 2 February 2007 the Pre-Trial Chamber issued its “Order on Defence Submissions Regarding Various Experts’ Reports Disclosed by the Prosecution Pursuant to Rule 94 *bis*” ordering the Prosecution to make available to the Defence B/C/S translations of several expert witness reports, including those of Helge Brunborg, within 14 days.⁵ On 19 February 2007, the Prosecution filed its response stating that it had complied with the Trial Chamber’s Order.⁶
4. On 31 October 2008, the Prosecution filed its “Submission of Expert Reports by Helge Brunborg and Curriculum Vitae” which contained seven expert reports of Helge Brunborg:
 - i. “Report on the Number of Dead and Missing in Srebrenica”, dated 12 February 2000;

¹ The Trial Chamber notes that the Notice originally filed on 13 November 2006 is entitled “Partly Confidential (Confidential Annex A) Notice Pursuant to Rule 94 *bis* Concerning Prosecution Expert Richard Butler.” On 15 November 2006, the Defence filed its “Clarification in Respect to *Partly Confidential* Notice Pursuant to Rule 94 *bis* dated 13 October 2006 [*sic*] Concerning Prosecution Expert Disclosures” in which it clarified that the notice filed on 13 November 2006 in relation to the 17 Prosecution witnesses should have been entitled “Partly Confidential (Confidential Annex A) Notice Pursuant to Rule 94 *bis* Concerning Prosecution Expert Disclosures”.

² Status Conference, 14 June 2006, T. 50. On 5 October 2006, the Prosecution filed a “Motion to Vacate Order of 14 June 2006 Concerning Filing Time for Military Experts Reports with Confidential Annex A” (“Motion to Vacate”). The Motion to Vacate was denied on 11 October 2006. *See* Decision on Prosecution’s Motion to Vacate Order of 14 June 2006. *See also* Status Conference, 11 October 2006, T. 66.

³ Notice, para. 9.

⁴ Notice, para. 9.

⁵ Order on Defence Submissions Regarding Various Experts’ Reports Disclosed by the Prosecution Pursuant to Rule 94 *bis*, 2 February 2007, para. 5.

⁶ Response to Trial Chamber’s Order on Defence Submissions Regarding Various Experts’ Reports Disclosed by the Prosecution Pursuant to Rule 94 *bis*, 19 February 2007, para. 2.

- ii. “Srebrenica Missing: Persons Reported Missing After the Take-over of the Srebrenica” dated 2 May 2000;
- iii. “Addendum on the Number of Missing and Dead from Srebrenica”, dated 12 April 2003;
- iv. “2004 Addendum to the List of Missing Persons from Srebrenica”, dated 25 January 2004;
- v. “Rebuttal Report Blagojević et al. (IT-02-60) Regarding: Report on the Number of Missing and Dead from Srebrenica”, dated 25 August 2004;
- vi. “Missing and Dead from Srebrenica: The 2005 Report and List, Expert Report for the Case of Vujadin Popović, et al., IT-05-88”, dated 16 November 2005; and
- vii. “Identified Persons Among the Missing and Dead from Srebrenica, An Addendum to the Expert Report: Missing and Dead from Srebrenica: The 2005 Report and List”, dated 21 November 2005.⁷

II. APPLICABLE LAW

5. Rule 94 *bis* of the Rules of Evidence and Procedure (“Rules”) reads as follows:

Rule 94 *bis* 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.
- (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.

⁷ The Trial Chamber notes that this list does not include the report for which the Defence stated that no English translation was available. The Prosecution clarified through informal communication with the Trial Chamber’s Legal Officer that such report was not authored by Mr. Brunborg and will not be used with this witness.

6. The jurisprudence of the Tribunal has established a number of requirements which must be met before an expert statement or report is admissible in evidence. They include:

- (i) the proposed witness is classified as an expert;
- (ii) the expert statements or reports meet the minimum standard of reliability;
- (iii) the expert statements or reports are relevant and of probative value; and
- (iv) the content of the expert statements or reports falls within the accepted expertise of the witness.⁸

7. The term “expert” has been defined by the jurisprudence of the Tribunal as “a person whom by virtue of some specialised knowledge, skill or training can assist the trier of fact to understand or determine an issue in dispute”⁹. In determining whether a particular witness meets these criteria, the Trial Chamber should take into account the witness’s former and present positions and professional experience through reference to the witness’s CV as well as the witness’ scholarly articles, other publications or any other pertinent information about the witness.¹⁰

8. The content of the statement or report must fall within the expert witness’s area of expertise.¹¹ This requirement ensures that the statements or reports of an expert witness will only be treated as expert evidence, insofar as they are based on the expert’s specialised knowledge, skills or training. Statements that fall outside the area of expertise will be treated as personal opinions of the witness and will be weighted accordingly.¹²

III. DISCUSSION

9. Mr. Brunborg’s curriculum vitae shows that he has a Ph. D in economics, with focus in demography and econometrics. He possesses many years of experience in statistics and demographic research and analysis, and in analysing population data. He has also authored scholarly articles in demography of armed conflict. The Trial Chamber is therefore satisfied that Mr. Brunborg qualifies as an expert within the meaning of Rule 94 *bis* of the Rules.

⁸ *Prosecutor v. Lukić and Lukić*, IT-98-32/1-T, Decision on Second Prosecution Motion for the Admission of Evidence Pursuant to Rule 92*bis* (Two Expert Witnesses), 23 July 2008, para. 15.

⁹ *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-T, Decision Concerning the Expert Witnesses Ewa Tabeau and Richard Philipps, 3 July 2002, p. 2. (“*Galić* Decision Experts Tabeau and Philipps”).

¹⁰ *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, Decision on Expert Status of Reynaud Theunens, 12 February 2008, para. 28, with further references; *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-T, Decision on Defence Expert Witnesses, 21 August 2007, para. 6, with further references.

¹¹ *Prosecutor v. Milan Martić*, Case No. IT-95-11-T, Decision on Defence’s Submission of the Expert Report of Professor Smilja Avramov Pursuant to Rule 94*bis*, 9 November 2006, (“*Martić*, Decision Expert Avramov”) para. 12.

¹² *Ibid.*, para. 12.

10. Mr. Brunborg's reports analyse population data to validate the number of missing persons in connection with the fall of the Srebrenica enclave. The reports evaluate the data on missing persons from various sources, such as the database on missing persons on the territory of Bosnia and Herzegovina by the International Committee of the Red Cross, the Ante-Mortem Database of the humanitarian organisation Physicians for Human Rights and the Mortality Database of Muslims Against Genocide. In his reports, Mr. Brunborg compares this data with other data from before and after the war, such as Organisation for Security and Co-operation in Europe voters' registration and census data from Bosnia and Herzegovina to arrive at a consolidated list of missing persons.

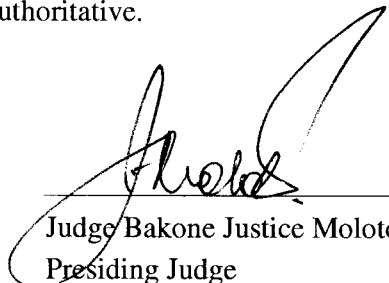
11. Mr. Brunborg's reports clearly outline the methodology used and make conclusions based on an analysis of various population data. The reports also provide an overview of both the sources and the data processing methods used by those organisations, upon whose data Mr. Brunborg's analysis is based. The Trial Chamber is therefore satisfied that these reports fall within Mr. Brunborg's area of expertise, and that they contain *prima facie* reliable and relevant information to the case.

IV. DISPOSITION

FOR THE FOREGOING REASONS and **PURSUANT TO** Rules 54 and 94 *bis* of the Rules, the Trial Chamber

DISMISSES the Defence's challenges to Mr. Helge Brunborg's qualifications as an expert; and **ORDERS** that Mr. Helge Brunborg shall appear before the Trial Chamber as an expert to be examined by the Parties and the Trial Chamber.

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



Judge Bakone Justice Moloto
Presiding Judge

Dated this seventeenth day of November 2008

At The Hague

The Netherlands

[Seal of the Tribunal]