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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-05-87-T

Date: 16 November 2006

Original: English

IN THE TRIAL CHAMBER

Before: **Judge Iain Bonomy, Presiding**
Judge Ali Nawaz Chowhan
Judge Tsvetana Kamenova
Judge Janet Nosworthy, Reserve Judge

Registrar: **Mr. Hans Holthuis**

Decision of: **16 November 2006**

PROSECUTOR

v.

MILAN MILUTINOVIĆ
NIKOLA ŠAINOVIĆ
DRAGOLJUB OJDANIĆ
NEBOJŠA PAVKOVIĆ
VLADIMIR LAZAREVIĆ
SRETEN LUKIĆ

DECISION ON OJDANIĆ MOTION TO PRECLUDE PARTIES FROM CALLING EXPERT WITNESSES

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Mr. Tomislav Višnjić and Mr. Norman Sepenuk for Mr. Dragoljub Ojdanić
Mr. John Ackerman and Mr. Aleksandar Aleksić for Mr. Nebojša Pavković
Mr. Mihajlo Bakrač and Mr. Đuro Čepić for Mr. Vladimir Lazarević
Mr. Branko Lukić and Mr. Dragan Ivetić for Mr. Sreten Lukić

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 "General Ojdanić's Motion to Preclude Parties from Calling Expert Witnesses", filed on 9 October 2006 ("Motion") and the "Pavković Joinder in Ojdanić Motion to Preclude Parties from Calling Expert Witnesses", filed on 16 October 2006 ("Pavković Joinder"), which joins in the Motion, and hereby renders its decision thereon.

1. In the Motion, Ojdanić's Defence contends that the Trial Chamber should "exercise its power and discretion to preclude all parties from calling expert witnesses, and to call as Trial Chamber witnesses at the end of the case those experts who it believes will assist it in coming to a fair determination of the live issues in the case."[1]

2. On 17 October 2006, the Defences for Milutinović, Šainović, Lazarević, and Lukić filed a joint response to the Motion ("Defence Joint Response"), in which they assert their right to call both fact witnesses and expert witnesses.[2] The Prosecution filed its response on 20 October 2006 ("Prosecution Response"), in which it opposes the Motion and requests the Trial Chamber to deny it.[3]

Arguments of the Parties

3. In support of its Motion, Ojdanić generally argues that, "[w]hile primarily adversarial, the Rules of Procedure and Evidence of the ICTY sought to include features from the inquisitorial system model thought to be best suited for achieving justice" and that "the rights of all parties [] to a fair and expeditious trial, and to equality of arms, will be best served by adopting the inquisitorial system model rather than the adversary system model with respect to expert witnesses."[4] In particular, Ojdanić submits that there is no provision in the Statute or Rules of Procedure and Evidence ("Rules") that gives a party a right to call an expert witness,[5] and that "[t]he Trial Chamber has wide discretion whether to admit expert testimony."[6]

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[1] Motion, para. 20; *see* also paras. 1, 11.

[2] Joint Response, paras. 2–3.

[3] Prosecution Response, para. 12.

[4] Motion, paras. 2–3.

[5] Ojdanić submits that expert witnesses are mentioned only in Rule 90(C), which allows expert witnesses to be present during other testimony, and Rule 94 *bis*, which governs disclosure of and objections to reports of expert witnesses. Motion, para. 4.

[6] Motion, para. 5.

Referring to Rules 89 (C)[7], 73 *bis* (C), and 73 *ter* (C),[8] Ojdanić concludes that "this Trial Chamber has the power to preclude the parties from calling expert witnesses."[9] He further submits that the right of the Trial Chamber to call its own witnesses embodied in Rule 98 "extends to calling expert witnesses"[10] and that "Rule 85 provides that evidence ordered by the Trial Chamber pursuant to Rule 98 be heard after the evidence presented by all the parties."[11]

4. In regard to the standard for admission of the expert testimony, Ojdanić submits that expert testimony should only be admitted when the Trial Chamber determines that it genuinely needs assistance and after having heard the evidence from all parties.[12] He alleges that "much of the testimony [proposed in this case] is unnecessary, or to be presented by unnecessarily partisan witnesses."[13] He argues that, after hearing the fact witnesses, as well as consulting documents admitted into evidence, the Trial Chamber may well conclude that the testimonies of the ten expert witnesses proposed by the Prosecution are unnecessary, and in some cases also cumulative and self-evident.[14]

5. Ojdanić estimates that "almost 40 trial days will be taken up with the expert witnesses" and that "the goal of a fair and expeditious trial would be better served by the Trial Chamber first determining if it truly needs assistance on an issue, and if so, by focusing the remit to the narrow issues deemed to be important, and selecting an objective expert who could best provide that assistance."[15] Additionally, he argues that the use of the inquisitorial system model for expert witnesses is better suited to this Tribunal because "the facts are decided by professional judges rather than lay juries" and because of "the gross inequity in resources afforded to the prosecution and defence to retain expert witnesses."[16]

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[7] Pursuant to Rule 89 (C) "[a] Chamber may admit any relevant evidence which it deems to have probative value". Rule 89 (D) further provides that [a] Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial. *See* Motion, para. 6.

[8] Rules 73 *bis*(C) and 73 *ter*(C) "provide that the Trial Chamber has the power to limit the number of witnesses a party may call ... includ[ing] designating specific witnesses who may not be called". Motion, para. 6.

[9] Motion, para. 7.

[10] Rule 98 provides that "[a] Trial Chamber may order either party to produce additional evidence" and "it may *proprio motu* summon witnesses and order their attendance." *See also* Motion, para. 8.

[11] Motion, para. 10.

[12] Motion, para. 12.

[13] Motion, para. 13.

[14] The proposed expert witnesses are Budomir Babović, Eric Baccard, Patrick Ball, Helge Brunborg, Sir Peter de la Billiere, Ingeborg Joachim, Ivan Kristan, Andras Riedlmayer, and Antonio Alonso. *See further* Motion, para. 13.

[15] Motion, para. 15.

[16] Motion, paras. 18–19.

6. In the Defence Joint Response, Milutinović, Šainović, Lazarević, and Lukić assert their "right to provide a full and complete defence in response to the allegations made by the Prosecution and the evidence adduced at trial by the Prosecution, both during the presentation of Prosecution evidence pursuant to Rule 85 (A)(i) and during the presentation of their respective defence cases pursuant to Rule 85 (A)(ii)."[17] "In particular, the Accused assert their right to call both fact witnesses and expert witnesses of their choice as provided for in Rules 85 (A)(ii), Rule 94 *bis*, Rule 65 *ter*(G), subject to the power of review of the Trial Chamber set out in Rule 73 *ter*."[18]

7. In its response, the Prosecution "does not disagree with the general argument that the Trial Chamber has broad discretion regarding the admission of evidence", but it "strongly object[s] to the timing of the 'Motion to Preclude' and vigorously oppose[s] the relief requested as being contrary to the interests of a fair trial."[19] The Prosecution submits that Ojdanić's argument that the expert testimony be admitted only when the Trial Chamber determines that it needs assistance and only at the end of the case "ignores the possibility that a party may also be in the best position to determine whether or not an expert witness will be helpful to the Trial Chamber in understanding the party's theory of the case or other evidence to be presented in the case."[20]

8. The Prosecution submits that "[t]he Trial Chamber has already made inquiry during the pre-trial stage of this case regarding the Prosecution's proposed experts and the nature of their anticipated evidence and at that time permitted the experts to remain on the witness list" and "has [also] made a finding [that] Mr. Coo will not be permitted to testify as an expert witness."[21] In regard to Ojdanić's argument describing "a trend" to recognize the using of neutral experts selected by the Court, the Prosecution submits that "[t]he changes cited by the Ojdanić Defence to support his claim of a trend were well known during the pre-trial preparations in this case and should have been brought up at an earlier stage."[22]

9. The Prosecution further argues that "under [the] Rules in [the Tribunal's] hybrid system, the Prosecution still bears the burden of proof of going forward" and, "if the Prosecution has not produced sufficient evidence at the conclusion of its case-in-chief the Trial Chamber could [] acquit the Accused of all or some of the charges at the time of the Rule

[17] Defence Joint Response, para. 2.
[18] Defence Joint Response, para. 3.
[19] Prosecution Response, para. 2.
[20] Prosecution Response, para. 3.
[21] Prosecution Response, para. 4.
[22] Prosecution Response, para. 5.

98 *bis* hearing without even having heard any expert evidence."[23] The Prosecution alleges that Ojdanić "fails to address the unfairness his proposal would work on the Prosecution even though they are clearly aware that this would be the result."[24]

10. The Prosecution also rejects the Defence arguments regarding saving of the time maintaining that "it is highly speculative as to the number of hours that expert testimony will take in this case"[25] and that, if the Motion were granted, "the Prosecution would likely seek leave to appeal and/or to add additional witnesses to establish some of the matters it currently seeks to introduce through the experts. In both circumstances it is likely that the time-savings, if any, of precluding experts does not justify such a drastic and unfair step at this relatively late stage of the proceedings."[26]

Discussion

11. The Trial Chamber has carefully considered all the arguments advanced by the parties that are relevant to a determination of the Motion. At the outset, the Trial Chamber observes that it is not in dispute that the Trial Chamber has broad discretion regarding the admission of evidence. However, there is a dispute between the parties as to whether the Trial Chamber should exercise its discretion to preclude all parties from calling the expert witnesses at this stage of the proceedings and to call as Trial Chamber witnesses at the end of the case those expert witnesses deemed necessary and chosen by the Trial Chamber at that time.

12. As correctly observed by the Prosecution, the Trial Chamber has already made inquiries during the pre-trial stage of this case regarding the Prosecution's proposed experts and the nature of their anticipated evidence. In accordance with Rule 94 *bis*, the Trial Chamber has ordered the Defence to file their notices pursuant to Rule 94 *bis* informing the Trial Chamber of their acceptance/non-acceptance of the proposed expert witnesses' reports, their wish to cross-examine the proposed expert witnesses, and their challenges to the relevance of the reports or to qualifications of the proposed expert witnesses. [27] The expert

[23] Prosecution Response, para. 6.

[24] Rule 85 provides that "evidence ordered by the Trial Chamber is to be heard only after the evidence presented by all the parties." Prosecution Response, para. 7

[25] Prosecution Response, para. 8.

[26] Prosecution Response, para. 9.

[27] *See Prosecutor v. Milutinović, Ojdanić and Šainović*, Case No. IT-99-37-PT Scheduling Order of 28 July 2004; Status Conference held on 15 September 2004, Case IT-99-37-PT, T. 704 (15 September 2004); *Prosecutor v. Milutinović, Ojdanić and Šainović*, Case No. IT-99-37-PT, Further Order to Prosecution to Respond to Defence Notice Pursuant to Rule 94 *bis* (B), 29 September 2004; Status Conference held on 18 January 2005, Case No. IT-99-37, T. 864 (18 January 2005); Status Conference held on 25 August 2005, Case No. IT-05-87, T. 66 (25 August 2005); *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-PT, Order of Pre-

witnesses and their reports have been regularly discussed during the pre-trial phase of the proceedings, namely at the Status Conferences and Rule 65 *ter* Conferences.[28]

13. The expert witnesses and the challenges to their testimonies were also discussed during the Pre-Trial Conference held on 7 July 2006,[29] as well as at the beginning of the trial. During the Pre-Trial Conference, the Trial Chamber issued and oral decision concerning the expert report of Ingeborg Joachim and decided the following:

> So what we can do today is simply indicate to the Prosecution that on the face of it the Trial Chamber finds substance in at least part of this report. We find that the witness is suitably qualified, through experience and also through her professional training, to give expert evidence. But the extent to which this report will be admitted and she will be allowed to give evidence will be determined in the *period immediately before she gives evidence* (emphasis added).[30]

14. During the Pre-Trial Conference the Trial Chamber also defined the process of dealing with the expert witness reports in the following terms:

> Now, this may be a suitable opportunity to outline a process to be followed in dealing with experts. As I indicated earlier in relation to each expert that the Trial Chamber will want to have a look at the report and the evidence that's intended to be led from the witness some time in advance of that witness appearing. So it would, I think, *be appropriate for the Prosecution to raise it as an issue ten days or so or perhaps -- sufficient number of days before the witness comes to the Tribunal I think, for you to change the arrangements if necessary, to change the extent to which the evidence will be admitted* (emphasis added). It will be obvious to us from your witness lists roughly when the witness is proposed, but it will be for you to identify it more particularly as the witness is about to give evidence.[31]

15. At the beginning of the trial, on 13 July 2006, the Trial Chamber issued an oral decision ordering that expert witness Philip Coo would not be permitted to testify as an expert witness. The Trial Chamber, however, allowed for the possibility that he could give evidence as a fact witness, holding as follows:

> As far as Coo is concerned, the Trial Chamber consider that in this case he is too close to the team, in other words to the Prosecution presenting the case, to be regarded as an expert .... On the other hand, we are entirely satisfied that *it's appropriate for him as an investigator to give evidence on matters of fact* (emphasis added), and indeed we will be greatly assisted, we have little doubt, by his evidence in relation to matters of fact, identifying what documents he found

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Trial Judge Arising from Status Conference, 1 September 2005, p. 8; *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-PT, Rule 65 *ter* Conference, T. 310–311 (21 June 2006).

[28] *See* for example the transcript from the Status Conference of 25 August 2005 (T. 66–73); Status Conference of 31 March 2006 (T.164–192), Rule 65 *ter* Conference held on 23 August 2005 (T. 2), Rule 65 *ter* Conference held on 8 November 2005 (t. 80), Rule 65 *ter* Conference held on 30 March 2006 (t. 134), Rule 65 *ter* Conference held on 26 April 2006 (T. 230), Rule 65 *ter* Conference held on 17 May 2006 (T. 252), Rule 65 ter Conference held on 21 June 2006 (T. 310–311).

[29] Pre-Trial Conference, T. 286–330 (7 July 2006).

[30] Pre-Trial Conference, T. 300 (7 July 2006).

[31] Pre-Trial Conference, T. 300 (7 July 2006).

> .... Now, again, there will be a final opportunity to discuss his evidence before he gives it, if there's any further objection to be taken.[32]

16. In the "Decision on Prosecution Request for Certification of Interlocutory Appeal of Decision on Admission of Witness Philip Coo's Expert Report", filed on 30 August 2006 ("Certification Decision"), the Trial Chamber held that "[it] has yet to decide which portions of the report will be admitted and which will be excluded. Only then will the full extent to which his proposed evidence will be excluded be clear. A hearing to determine that will be held some time prior to the projected date of his testimony."[33]

17. As for the expert report of Ivan Kristan, which has also been discussed during the trial on 13 July 2006, the Trial Chamber has not yet made any final determinations in regard to the status of the report, but it merely addressed some of the challenges and gave preliminary observations on how it considered the report at first glance.[34] The Trial Chamber held that "[the question] whether he is an expert or not will be resolved shortly before he gives evidence by further debate."[35]

18. On the basis of the foregoing, the Trial Chamber considers that the Defence had ample opportunity during the pre-trial proceedings or at the beginning of the trial to propose to the Trial Chamber the adoption of the inquisitorial system model rather than the adversarial system model with respect to expert witnesses. The Defence had an opportunity, for example, to raise this issue when ordered to file their notices pursuant to Rule 94 *bis* or at any Rule 65 *ter* or Status Conferences when they were invited to file submissions regarding the expert witnesses. Moreover, the Defence could have filed the Motion at the pre-trial conference or the beginning of the trial. Instead, Ojdanić proposes a new methodology on the selection and

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[32] T. 839–842 (13 July 2006).

[33] Certification Decision, para. 11.

[34] Judge Bonomy held the following:

> The Chamber does not regard the involvement of Kristan in the events of which his report talks as a barrier to his giving evidence; however, there are more substantial issues to be debated about whether it's appropriate for him to give evidence as an expert or whether it would be more appropriate for him to give evidence of fact on which the Trial Chamber—or by which the Trial Chamber would be guided towards proper conclusions. But as I indicated, the broader issue is one to be addressed as we get nearer the stage of hearing his evidence. T. 340 (13 July 2006).

[35] Judge Bonomy stated the following:

> The only question we undertook to decide at this stage in relation to Kristan was whether the fact that he had participated in some of the events was a barrier to him being regarded as an expert, and the decision on that is that it is not a barrier. I then expressed a preliminary view that his evidence might be better viewed as simply evidence of fact. He draws together a lot of material that it's useful to have in that form for the Trial Chamber to make—to draw its own conclusions because they are largely matters of law. But I think I made it clear that that issue, whether he is an expert or not, will be resolved shortly before he gives evidence by further debate. And I was simply trying to give guidance about how we see it at first blush. And if you're able to agree on how his evidence might be presented as a result of that indication, then that would be of great assistance to us. T. 843–844 (13 July 2006).

admission of the expert witnesses only now, when the trial has already been underway for over four months. The Trial Chamber also notes that the testimony of the first expert witness, Andras Riedlmayer, already concluded on 1 November 2006 and that, according to the Prosecution witness notifications, three additional experts, namely Antonio Alonso, Helge Brunborg, and Eric Baccard, will be called by the Prosecution to testify in November 2006.[36] The Trial Chamber considers that approving the proposed modifications of the practice adopted by the Trial Chamber with respect to selecting and calling expert witnesses at this stage of the proceedings would run counter to the interests of a fair trial. The Motion has not been generally supported by all the Accused; four of the Accused disagree with the Motion and explicitly assert their right to call the expert witnesses of their choice as provided by the Rules. Hence, the proposed modification would require parties to revise their tactics during the trial, four months after the start of the trial.

19. The Trial Chamber notes that, apart from the oral decisions above, namely the oral decisions regarding the expert witnesses Ingeborg Joachim and Philip Coo, it has not yet assessed the status of the expert witnesses nor decided the extent to which their reports will be admitted into evidence. It has also not yet made determinations regarding the admission of the reports and has therefore not yet considered the challenges to the qualifications of the expert witnesses, the relevance, and probative value of their reports.[37] So far, the Trial Chamber has only indicated that it would make the respective determinations "in the period before [the expert witness] gives the evidence".[38] At that time, when considering the relevance and probative value of the expert reports, the Trial Chamber will, as requested by Ojdanić, also decide whether the expert witness' testimony is "necessary" or to what extent of the expert witness' testimony is "necessary" in this case.

20. For all the foregoing reasons, pursuant to Article 54 and 94 *bis*, the Trial Chamber hereby **DENIES** the Motion.

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[36] Prosecution Provisional List of Witnesses for the Month of November, filed on 2 October 2006.

[37] *See Prosecutor v. Brđanin*, Case No. IT-99-36-T, Decision on Prosecution's Submission of Statement of Expert Witness Ewan Brown, 3 June 2003, p. 4 (holding that "[a]ny concerns relating to the witness's independence and impartiality, the accuracy of his evidence, or the extent to which his evidence will be helpful to this Trial Chamber are matters of weight, not admissibility, and can be properly addressed during cross-examination.")

[38] Pre-Trial Conference, T. 300 (7 July 2006).

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

Judge Iain Bonomy
Presiding

Dated this sixteenth day of November 2006
At The Hague
The Netherlands

[Seal of the Tribunal]