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United Nations
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International Criminal Tribunal for the Former Yugoslavia

Court Management and Support Services Section

Tribunal Pénal International pour l'ex-Yougoslavie

Section des Services d'administration et d'appui judiciaire

CASE/*AFFAIRE* NO.	**IT-05-87-T**	**DATE**	**09 October 2006**

FROM/*DE* **RIAZ HAIDER, COURT OFFICER**

TO/*A*

0 President/*Président*	X Prosecutor/*Procureur*	X Defense Counsel/*Conseil de la Défense*	cc
0 Appeals Chamber/ *Chambre d'appel*	X Case Manager/ *Commis aux affaires*	**Mr. Fila/Mr. Petrović** **Mr.Visnjić/Mr. Sepenuk** **Mr. O'Sullivan/Mr. Zecević** **Mr. Ackerman / Mr. Aleksić** **Mr. Bakrač / Mr. Čepić** **Mr. Lukic/Mr Ivetic**	
0 Trial Chamber I/ *Chambre de 1ère instance I*	0 Chief of Investigations/ *Chef des enquêtes*		
0 Trial Chamber II/ *Chambre de 1ère instance II*	.....		
X Trial Chamber III/ (4) *Chambre de 1ère instance III*	.....		

0 Embassy/*Ambassade*

0 Other/*Autre*

X Registrar/Deputy Registrar/*Greffier/Greffier adjoint* **MR. A. DE WITT**	X VWS Coordinator/*Coordinateur de la SVT* **MS. W. LOBWEIN**
X Senior Legal Officer/*Juriste hors-classe* **MR. G. BOAS / MS. L. DAVIDSON/ MR. G. DAWSON**	0 UNDU Commanding Officer/*Commandant du QPNU*
X PTV/~~MOW~~	X OLAD

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0 Order/Decision issued by the President on/*Ordonnance/Décision émise par le Président le* _____/_____/_____

X Motion/~~Request~~/~~Application~~ submitted by ~~Prosecution~~/Defence Counsel on/
Motion/Requête/Demande présentée par l'Accusation/le Conseil de la défense le 09/10/06

0 Response/reply/brief submitted by Prosecution/Defence Counsel on/
Réponse/Réplique/Mémoire présenté(e) par l'Accusation/le Conseil de la défense le _____/_____/_____

0 Decision of the Registrar on/*Décision du Greffier le* _____/_____/_____

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THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA

CASE No. IT-05-87-T

IN THE TRIAL CHAMBER

Before: Judge Iain Bonomy, Presiding
Judge Ali Nowaz Chowhan
Judge Tsvetana Kamenova
Judge Janet Nosworthy (Reserve)

Registrar: Mr. Hans Holthuis

Date Filed: 9 October 2006

THE PROSECUTOR

v.

MILAN MILUTINOVIC
NIKOLA SAINOVIC
DRAGOLJUB OJDANIC
NEBOJSA PAVKOVIC
VLADIMIR LAZAREVIC
SRETEN LUKIC

GENERAL OJDANIC'S MOTION TO PRECLUDE
PARTIES FROM CALLING EXPERT WITNESSES

The Office of the Prosecutor:
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Mr. Eugene O'Sullivan and Mr. Slobodan Zecevic for Milan Milutinovic
Mr. Toma Fila and Mr. Vladimir Petrovic for Nikola Sainovic
Mr. John Ackerman and Mr. Aleksander Aleksic for Nebojsa Pavkovic
Mr. Mihaljo Bakrac and Duro Cepic for Vladimir Lazarevic
Mr. Branko Lukic and Mr. Dragan Ivetic for Mr. Sreten Lukic

1. General Dragoljub Ojdanic respectfully moves the Trial Chamber for an order precluding the parties from calling expert witnesses. He contends that any expert witnesses should be selected and called by the Trial Chamber after it has heard the factual evidence from all parties.

2. The International Tribunals have carried forward the innovation begun at Nuremburg to blend and balance elements from the Continental European inquisitorial system and the Anglo-American adversary system. While primarily adversarial, the Rules of Procedure and Evidence of the ICTY sought to include features from the inquisitorial system thought to be best suited for achieving justice.[1]

3. Ideally, by selecting the best features from each system, international criminal justice will be promoted. General Ojdanic believes that the rights of all parties in his case 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.

The Trial Chamber's Power

4. There is nothing in the Statute or Rules of Procedure and Evidence which gives a party a right to call an expert witness. Indeed, expert witnesses are not mentioned in the Statute at all, and are mentioned in only two sections of the Rules—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.

5. An expert witness has been defined in the jurisprudence of the International Tribunals as a person whom, by virtue of some specialized knowledge, skill, or training can assist the Trial Chamber to understand or determine an issue in dispute.[2] The standard for admission of expert testimony is whether the specialized knowledge possessed by the expert, applied to the evidence which is the foundation of the opinion,

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[1] Morris & Scharf, *An Insider's Guide to the International Criminal Tribunal for the former Yugoslavia* (1994) at p. 258

[2] *Prosecutor v Martic*, No. IT-95-11-T, *Decision on Prosecution's Motions for Admission of Transcripts Pursuant to Rule 92 bis and of Expert Reports Pursuant to Rule 94 bis* (13 January 2006) at para. 22; *Prosecutor v Brima et al*, No. SCSL-2004-16-T, *Decision on Prosecution Request for Leave to Call an Additional Witness (Zainab Hawa Bangoura) Pursuant to Rule 73 bis(E) and on Joint Defence Notice to Inform the Trial Chamber of its Position vis-à-vis the Proposed Expert Witness (Mrs. Bangura) Pursuant to Rule 94 bis* (5 August 2005) at para. 31

may assist the Chamber in understanding the evidence.[3] The Trial Chamber has wide discretion whether to admit expert testimony.[4]

6. A Trial Chamber also has the discretion, pursuant to Rule 89(C), not to admit evidence which it deems to lack probative value compared with its effect on a fair and expeditious trial.[5] In addition, Rule 73 *bis* (C) and Rule 73 *ter* (C) provide that the Trial Chamber has the power to limit the number of witnesses a party may call. Applying the reasoning of this Trial Chamber with respect to Rule 73 *bis* (D), this power includes designating specific witnesses who may not be called.[6]

7. Therefore, this Trial Chamber has the power to preclude the parties from calling expert witnesses.

8. The Trial Chamber also has the right to call its own witnesses. Rule 98 provides that:

> "A Trial Chamber may order either party to produce additional evidence. It may *proprio motu* summon witnesses and order their attendance."

9. That right extends to calling expert witnesses.[7] This aspect of the inquisitorial system was provided in the Rules of the Tribunal after the experience of the Tokyo Tribunal, where the judges felt that not all relevant evidence was made available by the parties.[8]

10. Rule 85 provides that evidence ordered by the Trial Chamber pursuant to Rule 98 be heard after the evidence presented by all the parties.

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[3] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Motion for Exclusion of Expert Witness Statement of Filip Reyntjens* (28 September 2004) at para. 8
[4] *Prosecutor v Stakic*, No. IT-97-24-A, *Judgement* (22 March 2006) at para. 153; *Prosecutor v Milosevic*, No. IT-02-54-T, *Decision on Admissibility of Expert Report of Vasilije Krestic* (7 December 2005) at para. 6; *Prosecutor v Simba*, No. ICTR-2001-76-I, *Decision on Prosecutor's Motion for Admission of Testimony of an Expert Witness* (14 July 2004); *Prosecutor v Musema*, No. ICTR-96-13-T, *Decision on Prosecutor's Request to Call Six New Witnesses* (20 April 1999) at paras. 16-17; *Prosecutor v Nahimana et al*, No. ICTR-99-52-T, *Decision on the Expert Witnesses for the Defence* (24 January 2003) at para. 8
[5] *Prosecutor v Bagosora et al*, No. ICTR-98-41-AR93, *Decision on Prosecutor's Interlocutory Appeals Regarding Exclusion of Evidence* (19 December 2003) at para. 16
[6] *Decision on Application of Rule 73 bis* (11 July 2006) at para. 9
[7] *Prosecutor v Stakic*, No. IT-97-24-A, *Judgement* (22 March 2006) at para. 158; *Prosecutor v Kupreskic et al*, No. IT-95-16-T, *Judgement* (14 January 2000) at paras. 75-76
[8] Morris & Scharf, *An Insider's Guide to the International Criminal Tribunal for the former Yugoslavia* (1994) at p. 258

The Trial Chamber's Discretion

11. Having established that the Trial Chamber has the power to preclude parties from calling expert witnesses, and to call expert witnesses *proprio motu* at the conclusion of the evidence, General Ojdanic respectfully submits that the Trial Chamber should exercise that power in this case.

12. Since expert testimony is designed to assist the Trial Chamber, it should only be admitted when the Trial Chamber determines that it genuinely needs assistance. It is respectfully submitted that such a determination is best made in this case after the Trial Chamber has heard the evidence from all parties.

13. An examination of the subjects of the proposed expert testimony in this case demonstrates that much of the testimony is unnecessary, or to be presented by unnecessarily partisan witnesses.

(A) Budomir Babovic is proposed to give testimony on the *de jure* structure of the Serbian Ministry of Interior.[9] It is respectfully submitted that after hearing the fact witnesses, including former employees of the Ministry of Interior, the Trial Chamber may well conclude that such testimony is unnecessary.

(B) Eric Baccard is proposed to give testimony on the result of forensic tests on exhumed gravesites.[10] It is respectfully submitted that after hearing the fact witnesses, the Trial Chamber may well conclude that such testimony is unnecessary—or that expert testimony is only necessary on a limited number of sites where the Trial Chamber is in doubt based upon the factual evidence presented during the trial.

(C) Patrick Ball is proposed to give testimony, based on statistical analysis, of why Albanians left Kosovo.[11] It is respectfully submitted that after hearing the fact witnesses, the Trial Chamber may well conclude that such testimony is unnecessary. In addition, this evidence is highly controversial given the self-described "innovative" nature of Mr. Ball's science and his role as public cheerleader for the prosecution of President Milosevic. The defence will likely want to call two witnesses to rebut his testimony—a demographer and a statistician.

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[9] *Prosecution's Pre-Trial brief* (11 June 2006) at p. 13
[10] *Prosecution's Pre-Trial brief* (11 June 2006) at p.15
[11] *Prosecution's Pre-Trial brief* (11 June 2006) at p.16

(D) Helge Brunborg is proposed to give testimony on the demographics in Kosovo just prior to the indictment period.[12] It is respectfully submitted that after hearing the fact witnesses, the Trial Chamber may well conclude that such testimony is unnecessary. Alternatively, the Trial Chamber may determine to consult undisputed reference documents rather than to hear expert testimony on demographics.

(E) Sir Peter de la Billaire is proposed to give his opinion on command and coordination principles as they applied to the Yugoslavian Army.[13] It is respectfully submitted that after hearing the fact witnesses, including many officers of the Yugoslavian Army, and examining hundreds of internal Army documents, the Trial Chamber may well conclude that such testimony is unnecessary, or a usurpation of the fact finding role of the Chamber. In addition, this is a typical example of a battle of partisan experts, with the prosecution calling a military expert from one belligerent (NATO and its member States, including the United Kingdom) and the defence calling a military expert from another belligerent (FRY).

(F) Inge Joaquim is proposed to testify on the psychological and other effects of sexual assault.[14] It is respectfully submitted that after hearing testimony from sexual assault victims themselves, the Trial Chamber may well conclude that the proposed expert testimony is cumulative, self-evident and unnecessary.

(G) Ivan Kristan is proposed to testify as an expert on the constitutional structure of the former Yugoslavia.[15] Another unnamed constitutional expert is also proposed to be called by the prosecution.[16] It is respectfully submitted that after hearing testimony from the holders of many of the positions within this structure, as well as consulting documents admitted into evidence concerning the laws and structure of the former Yugoslavia, the Trial Chamber may well conclude that the proposed expert testimony is unnecessary. Given that these are matters of interpretation of written laws, the Trial Chamber is well-suited to make such determinations on its own.

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[12] *Prosecution's Pre-Trial brief* (11 June 2006) at p.24
[13] *Prosecution's Pre-Trial brief* (11 June 2006) at p.37
[14] *Prosecution's Pre-Trial brief* (11 June 2006) at p. 68
[15] *Prosecution's Pre-Trial brief* (11 June 2006) at p. 80
[16] *Prosecution's Pre-Trial brief* (11 June 2006) at p. 219

(H) Andrias Riedlmayer is proposed to testify as an expert on the destruction of cultural properties in Kosovo.[17] It is respectfully submitted that after hearing testimony from fact witnesses, the Trial Chamber may well conclude that the proposed expert testimony is unnecessary, or that the witness should testify as a fact witness rather than providing opinions as an expert.

(I) A DNA Expert is also proposed to be called. It is respectfully submitted that after hearing testimony from fact witnesses, including testimony concerning the recovery of personal effects from gravesites, the Trial Chamber may well conclude that the proposed expert testimony identifying the bodies is unnecessary.

14. These 10 expert witnesses are estimated by the prosecution to consume a total of 38.5 hours of trial time for direct examination. Multiplying this (by four) for cross examination and equal time for direct and cross examination of defence experts, an estimated 154 hours of trial time—or almost 40 trial days will be taken up with expert witnesses.

15. Rather than take up so much trial time observing the experts and the parties "slugging it out", 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.

16. General Ojdanic understands that this reasoning led to the revision of the way in which experts are used in civil cases in the United Kingdom. While the Presiding Judge is undoubtedly far more familiar with this matter than General Ojdanic, General Ojdanic understands that the English Civil Procedure Code of 1998 moved towards the inquisitorial model for expert witnesses by providing that parties are to appoint an agreed joint experts wherever possible (rr.35.7, 35.8) and that all experts now have an overriding duty to the Court (r.35.3), rather than the party instructing them.[18]

17. In the United States, Federal Rules of Evidence 706 allows for the Judge to choose and appoint expert witnesses. Therefore even in common law, adversarial

[17] *Prosecution's Pre-Trial brief* (11 June 2006) at p. 135
[18] Dwyer, *Changing Approaches to Expert Evidence in England and Italy* (2003) www.law.qub.ac.uk/ice/papers/expert2.pdf. at page 4

systems, there is a trend to recognize the wisdom of using neutral experts selected by the Court.

18. General Ojdanic contends that use of the inquisitorial system model for expert witnesses is better suited to this Tribunal where the facts are decided by professional judges rather than lay juries. Since the Trial Chamber is the finder of fact and not simply a referee, it is in the best position to determine the issues upon which it wishes to hear expert testimony and the particular expert it wishes to hear it from.

19. The inquisitorial system for expert witnesses is also best suited to this Tribunal as a result of the gross inequity in resources afforded to the prosecution and defence to retain expert witnesses. While the prosecution has unlimited funds and multiple cases in which it can retain experts, the defence is severely limited in the funding allowed for expert witnesses. In this case, it is estimated that the amount of funds that the Tribunal will allocate for defence experts will result in a greater than 10:1 ratio of resources between the prosecution and the organizations with whom it works on the one hand, and the defence on the other. This raises a serious issue of equality of arms if the adversarial system is employed in our trial as to expert witnesses.

Conclusion

20. For all of the above reasons, General Ojdanic 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.

Respectfully submitted,

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