



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

IT-96-23-T &

IT-96-23/1-T

① 5130 - ① 5122

03 July 2000

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Case No. IT-96-23-T &
IT-96-23/1-T

Date: 3 July 2000

Original: English

IN TRIAL CHAMBER II

Before: Judge Florence Ndepele Mwachande Mumba, Presiding
Judge David Hunt
Judge Fausto Pocar

Registrar: Mrs. Dorothee de Sampayo Garrido-Nijgh

Decision of: 3 July 2000

PROSECUTOR

v.

**DRAGOLJUB KUNARAC
RADOMIR KOVAČ**

and

ZORAN VUKOVIĆ

**DECISION ON PROSECUTION'S MOTION FOR EXCLUSION OF EVIDENCE
AND LIMITATION OF TESTIMONY**

Office of the Prosecutor:

Mr. Dirk Ryneveld
Ms. Peggy Kuo
Ms. Hildegard Uertz-Retzlaff
Mr. Daryl Mundis

Counsel for the Accused:

Mr. Slaviša Prodanović and Ms. Mara Pilipović for the accused Dragoljub Kunarac
Mr. Momir Kolesar and Mr. Vladimir Rajić for the accused Radomir Kovač
Mr. Goran Jovanović and Ms. Jelena Lopičić for the accused Zoran Vuković

A. INTRODUCTION

1. This Trial Chamber is seised of the “Prosecutor’s Motion to Exclude Certain Defence Evidence and Limit Testimony” (“Motion”) filed on 15 June 2000. The “Defence of the Accused Mr. Dragoljub Kunarac, Mr. Radomir Kovač and Mr. Zoran Vuković Response to the Prosecutor Motion to Exclude Certain Defence Evidence and Limit Testimony” (“Response”) was filed on 20 June.

B. THE RELIEF SOUGHT BY PROSECUTOR

2. The Prosecutor seeks an order from the Trial Chamber limiting the presentation of the defence case in relation to the report of a defence expert, Dr. Radinović (“Expert”) and 18 videotapes.¹ In particular,
 - (a) The Prosecutor seeks the exclusion of those portions of the Expert’s report (“Report”) which deal with matters beyond his expertise or which are irrelevant. The Prosecutor also requests the imposition of a corresponding limit on the Expert’s *viva voce* testimony. The Prosecutor specifically submits that the evidence tendered through Dr. Radinović should be limited to matters covered in pages 4666-4657 (“Annex I – Command Responsibility of Dragoljub Kunarac”)² of the Report, and that the defence be limited during the course of his direct examination to issues concerning command responsibility.³
 - (b) The Prosecutor also seeks the exclusion of the 18 videotapes, unless the defence can show that they are relevant to the case against the three accused.⁴

C. DISCUSSION

3. Rule 89(C) of the Rules of Procedure and Evidence (“Rules”) provides that “A Chamber may admit any relevant evidence which it deems to have probative value”. The Trial Chamber may thus rule that evidence is inadmissible where it is irrelevant to the charges against an accused or where it has no probative value. “Evidence”, in this context, includes any written statements or reports adduced as evidence.

¹ Motion, para. 11.

² All the Radinović Report page references are to the Registry page numbers.

4. In general, an expert may express an opinion (within the confines of his or her expertise) upon facts which are established in the evidence (either by the expert's own evidence or independently), if that opinion is relevant to the issues in the case. The Trial Chamber is not bound to accept that opinion. If the Trial Chamber does not accept that the facts upon which the opinion is based have been established, that opinion has no probative value and it is inadmissible for that reason.

(a) The Radinović Report

5. The specific relief sought by the Prosecutor in relation to the Report is essentially the exclusion of the whole of the Report except for pages 4666-4657 ("Annex I – Command Responsibility of Dragoljub Kunarac"), with the Expert's oral testimony being limited accordingly. However, the Motion does not identify the Prosecutor's complaints in relation to the remainder of the Report, which includes the 63 documentary exhibits forming an integral part of that Report. The Trial Chamber has considered the admissibility of only those portions which the Prosecutor has expressly dealt with. The Trial Chamber will not consider at this stage the blanket exclusion request in relation to the remainder of the Report.
6. The Trial Chamber deals first with those portions of the Report which it considers inadmissible *on their face* because of the irrelevance of the evidence to the specific charges against the three accused. At this stage, the Prosecutor's complaints on the following portions of the Report are upheld:

(a) Pages 4825-4819 ("*General Introductory Remarks*")

The historical background of the conflict is not relevant to the charges against the three accused, as the innocence or guilt of the three accused does not turn on any historical reasons for the armed conflict. This portion is inadmissible on that basis and not, as the Prosecutor submits,⁵ because it is beyond the expertise of Dr. Radinović.

- (b) Pages 4818-4808 ("*Disintegration of Yugoslavia*")** *This portion of the report deals with the historical lead-up to the break up of the Socialist Federal Republic of Yugoslavia*

³ Motion, para. 11(a).

⁴ Motion, para. 11(b).

⁵ Motion, para. 6(a).

Pages 4801-4782 ("Secession of Slovenia and Croatia and its Impact on the JNA")

Pages 4781-4751 ("Secession of Bosnia and Herzegovina and the Creation of the Republic of Srpska Army (VRS)")

Pages 4751-4736 ("Relations between JNA (Army of Yugoslavia) and the Republic of Srpska Army (VRS)")

Nothing on the face of these portions of the Report indicates that this material, with the possible exception of material which purports to go to the existence of an armed conflict, is relevant in any way to the issues arising from the charges against the three accused. Even assuming that parts of this material are relevant to the existence of an armed conflict in the time and place relevant to these proceedings, admission of evidence on that issue is unnecessary as the Prosecutor and the defence have agreed that, from April 1992 until at least February 1993, there was an armed conflict in the Foča area between mostly Serb ethnic forces on the one side and mostly ethnic Muslim forces on the other.⁶ The defence submits in their Response that, notwithstanding this agreement as to the existence of an armed conflict, it is also necessary to establish "the real and deep link between the acts of the accused and the arm(ed) conflict".⁷ The Prosecutor does not have to establish a "real and deep link" as the defence asserts. The Trial Chamber is of the view that, in relation to Article 3, what is required is that the offences were committed in the context of an armed conflict, whether that conflict is international or internal in character.⁸ In relation to Article 5, what is required is that the crimes were related to the attack on a civilian population (occurring during an armed conflict) and that the accused knew that his crimes were so related.⁹ In any event, there is nothing in any of these portions which has any relevance to the issue of whether the various acts of the accused were linked to either the armed conflict or the attack on the civilian population.

Given the absence in the indictments against the accused of any charges under Article 2 of the Statute, the international or internal character of the armed conflict is not in issue in these proceedings, and thus the relationships between the armed forces

⁶ Prosecution Submission Regarding Admissions and Contested Matters, 1 Feb 2000; Prosecution Submission Regarding Admissions and Contested Matters Regarding the Accused Zoran Vuković, 8 Mar 2000; see paras 1 and 2 of "Admissions by the Parties and Other Matters not in Dispute".

⁷ Response, p 3.

⁸ *Prosecutor v Tadić*, IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 Oct. 1995, paras. 70 and 94; *Prosecutor v Furundžija*, IT-95-17/1-T, Judgement, 10 Dec 1998, para. 132.

⁹ *Prosecutor v Tadić*, IT-94-1-A, Judgement, 15 July 1999, paras. 251 and 271.

of the various entities at the time is also not in issue. The material relating to the relations between the Yugoslav People's Army and the Republika Srpska Army cannot therefore be said to be relevant to any of the issues raised by the charges against the accused.

(c) *Pages 4725-4700 ("Preparations of Muslims for War and Pre-War Tensions")*

The analysis of the events leading up to the armed conflict is not relevant to the charges against the three accused. As already noted, the existence of an armed conflict is an agreed fact between the parties. The preparations of the participants to the conflict, and any question of which (if either) of the parties initiated the conflict, have no relevance to those charges. This portion is inadmissible on that basis and not, as the Prosecutor submits,¹⁰ because it is beyond the expertise of Dr. Radinović.

(d) *Pages 4692-4689 (the sub-portion "Preparations of Muslims for Taking Over of Foča" under the heading "Combat Actions in Foča")*

This very general material, alleging the arming and preparation of unidentified "Muslims" for a surprise attack on Foča, is not relevant, for the reasons described in paragraphs (b) and (c) above. The Prosecutor further objects that the material is inadmissible because Dr. Radinović has no first-hand knowledge of most of the events described in the Report and therefore the Trial Chamber lacks the means to test the reliability of the incorporated hearsay information.¹¹ The Trial Chamber repeats that the evidence of an expert has probative value only to the extent that it is based on facts which are themselves proved by admissible evidence, and where that evidence is accepted by the Trial Chamber. Whilst it would not be necessary for Dr. Radinović to have first-hand knowledge of the facts relied upon in his Report, any fact of this nature stated in his Report, subject to it being established to be relevant in some way, would be accepted by the Trial Chamber only if it is established in some alternative way by admissible evidence.

7. Secondly, the Trial Chamber considers the remainder of the portions of the Report about which the Prosecutor has expressly complained. The Prosecutor has failed to convince the

¹⁰ Motion, para. 6(c).

¹¹ Motion, para. 7.

Trial Chamber that the following portions of the Report are *on their face* inadmissible as being irrelevant to the charges against the three accused:

- (a) *Pages 8734-4726 ("Upper Drina River Valley (Podrinje) as a Region of Bosnia and Herzegovina")*

It may be true that geography and demographics are beyond the expertise of Dr. Radinović. However, the geography and demographics of the Foča environs may be relevant to the trial in various ways (such evidence having been led by the Prosecutor herself), and to the extent that the Prosecutor agrees with the information provided in this portion or it is independently established, this portion is relevant, provided that any relevant opinion which the witness may express is shown to be within his expertise. The limits of that expertise will have to be determined when the witness gives evidence.

- (b) *Pages 4699-4692 and 4676-4672 (the sub-portions "Operative and Tactical Significance of the Upper Drina River Valley", "Territorial Defense of the Upper Drina River Valley Before the War" and "Attacks of Muslim Army on the Territory of Foča" under the heading "Combat Actions in Foča")*

These sub-portions of the Report may relate in some way to the widespread or systematic attack against any civilian population requirement under Article 5 (crimes against humanity). As the indictments in this case include Article 5 counts, these sub-portions appear to be relevant, subject to the Trial Chamber's determination of the weight to be attached to them.

- (c) *Pages 4681-4767 (the sub-portions "Military Organizing of Serbs in Foča" and "Organization of the Republic of Srpska Army in Foča" under the heading "Combat Actions in Foča")*

Again, these sub-portions of the Report again may relate in some way to the widespread or systematic attack against any civilian population requirement under Article 5 (crimes against humanity). These sub-portions appear to be relevant, subject to the Trial Chamber's determination of their weight. These sub-portions may also be relevant to the command structure of the unit or units to which the three

accused are alleged to have belonged; this can only be determined after further argument.

- (d) *Pages 4688-4681 and 4672-4667 (the sub-portions "Commencement of Actions in Foča", "Actions in the Surroundings of Foča" and "Departure of Muslims from Foča" under the heading "Combat Actions in Foča")*

These sub-portions of the Report may be relevant to the widespread or systematic attack against any civilian population requirement under Article 5 (crimes against humanity). The Prosecutor's complaints that Dr. Radinović has no first-hand knowledge of most of the events described in these sub-portions and therefore the Trial Chamber lacks the means to test the reliability of the incorporated hearsay information¹² are rejected. As has been held in paragraph 6(d) above, an expert need not necessarily have first-hand knowledge of events described by him or her in a report. It is open to the Prosecutor to rebut evidence adduced by an expert and admitted by the Chamber.

8. In its Response, the defence appears to contend that, since the general background sections of the indictments refer to the general conditions that prevailed in the Foča municipality and the former Yugoslavia in general, it is justified in similarly referring to those conditions in the Report.¹³ That contention is not one of universal application. It is certainly open to the defence to lead evidence which disputes that which has been led by the Prosecutor, but only so far as the evidence is relevant to issues which the Trial Chamber has to determine. The Trial Chamber does *not* have to determine the historical reasons for the armed conflict, or who was responsible for initiating the conflict, or (in the present proceedings) whether the Bosnian Muslims committed or intended to commit any war crimes. Insofar as the factual basis for the opinions expressed by the Expert, or the opinions themselves, are relevant only to those issues, they are irrelevant, and inadmissible for that reason.

(b) The videotapes

9. The Prosecutor has objected in the Motion to the admission of 18 videotapes, which are said to depict primarily pre-war political rallies and speeches by members of the SDA and SDS,

¹² Motion, para. 7.

¹³ Response, p. 2.

and which she claims that “the Defence proposes to introduce in their case-in-chief”. The basis of the objection is that the tapes are irrelevant.¹⁴

10. The defence, in its Response, notes that it has not tendered the videotapes in evidence and that it “most likely will not tender [them] into evidence, but might use [them] during the opening statement, which cannot be limited.”¹⁵ At this point in the proceedings, therefore, there is no need for the Trial Chamber to express any view as to the admissibility of these videotapes, which in any event it is not in a position to do on the basis only of the “partial synopses” of their content contained in the Motion.¹⁶ However, the Trial Chamber does emphasise that there is no justification for the defence submission that the material in the opening statement cannot be limited. The opening statements which the parties are permitted by Rule 94 to make are intended only to assist the Trial Chamber in understanding the evidence which is to be placed before it. Such assistance can only be provided if the material in the opening statement is limited to the issues raised by the charges against the accused and any issues which the accused may legitimately raise in their defence. Should the defence seek to introduce in their opening statement material which has no relevance to those issues, the Trial Chamber will exercise its powers to exclude it at that time.

(c) Evidence related to the *tu quoque* defence

11. It appears that the Prosecutor, as part of the specific relief sought in relation to the Report, generally seeks the exclusion of evidence supporting the legally impermissible defence of *tu quoque*.¹⁷ The Prosecutor does not contend that the defence does or intends to raise this defence, nor does the defence refer to this defence in its Response. The Trial Chamber considers that it is therefore premature to make any findings on this submission at this stage. Should an attempt be made by the defence to elicit evidence which relates to such a defence, the Trial Chamber will have to consider whether the evidence also raises any issues apart from that defence which are relevant to the charges against the accused.

¹⁴ Motion, para. 9.

¹⁵ Response, pp. 3-4.

¹⁶ Motion, para. 10.

¹⁷ Motion, paras. 2 and 8(a)(1).

D. DISPOSITION

12. Pursuant to Rule 89(C) of the Rules, the Motion is granted in part in the following terms: The portions of the Report referred to in paragraph 6 are inadmissible. The expert's *viva voce* testimony will be limited accordingly. The remaining relief sought by the Prosecutor is refused at this stage.

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



Judge Mumba
Presiding

Dated this third day of July 2000,
At The Hague,
The Netherlands

Seal of the Tribunal