

**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-98-29/1-T

Date: 21 August 2007

Original: English

IN TRIAL CHAMBER III

Before: Judge Patrick Robinson, Presiding
Judge Antoine Kesia-Mbe Mindua
Judge Frederik Harhoff

Registrar: Mr. Hans Holthuis

Date: 21 August 2007

PROSECUTOR

v.

DRAGOMIR MILOŠEVIĆ

Public Filing

DECISION ON DEFENCE EXPERT WITNESSES

The Office of the Prosecutor:

Mr. Stefan Waespi
Ms. Carolyn Edgerton
Mr. John Docherty

Counsel for the Accused:

Mr. Branislav Tapušković
Ms. Branislava Isailović

A. Procedural Background

1. Trial Chamber III (“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 four notifications concerning expert witnesses, filed by the Defence.
2. On 12 July 2007, the Defence filed its “Notice of Disclosure of the Expert Report of Mr Desimir Garović (Rule 94 *bis*) with Public Annex A” as well as its “Notice of Disclosure of the Expert Report of Mr Ivan Stamenov (Rule 94 *bis*) with Public Annex A”. On 13 July 2007, the Defence filed its “Notice of Disclosure of Expert Report of Mr Miloje Pršić (Rule 94 *bis*) with Public Annex A”. Finally, on 16 July 2007, the Defence filed its “Notice of Disclosure of Expert Report of Dr Ivica Milosavljević (Rule 94 *bis*) with Public Annex A”.
3. On 7 August 2007, the Office of the Prosecutor (“Prosecution”) filed the “Prosecution’s Motion to Wholly Exclude the Testimony of the Defence Expert Witness Dr Ivica Milosavljević and to Exclude in Part the Testimony of Defence Expert Witness Mr Ivan Stamenov, together with Request for Cross-examination” (“Prosecution First Motion”). On 13 August 2007, the Prosecution filed the “Prosecution’s Motion to Exclude Expert Report and Testimony of Defence Historical Expert Miloje Pršić on Grounds of Lack of Qualifications” (“Prosecution Second Motion”).
4. On 15 August 2007, the Defence filed its “Conclusions en Reponse de Prosecution’s Motion to Wholly Exclude the Testimony of the Defence Expert Witness Dr Ivica Milosavljević and to Exclude in Part the Testimony of Defence Expert Witness Mr Ivan Stamenov, [together] with Request for Cross-examination” (Defence First Response”) as well as its “Conclusions en Reponse de Prosecution’s Motion to Exclude Expert Report and Testimony of Defence Historical Expert Miloje Pršić on Grounds of Lack of Qualifications avec le Confidentiel Annexe A” (Defence Second Response”).
5. The Trial Chamber, by oral decision of 21 August 2007, decided that Ivan Stamenov must be called for cross-examination. The Trial Chamber heard further arguments regarding the Report of Miloje Pršić on 21 August 2007.

B. Admissibility of Expert Statements

6. As set out previously in the Trial Chamber's Decision on Admission of Expert Report of Robert Donia,¹ as a first requirement, the witness has to be an "expert". The term "expert" has been defined as "a person whom by virtue of some specialized knowledge, skills or training can assist the trier of fact to understand or determine an issue in dispute".² For the purposes of determining whether a witness meets this requirement, the witness' former and present positions and professional experience are important.³ The qualifications and expertise of a witness can be determined by reference to the witness' *curriculum vitae*, but also the witness' scholarly articles, other publications or any other information concerning the witness.⁴

7. Secondly, the expert statement or report must meet the minimum standards of reliability. There must be sufficient information as to the sources used in support of the statements. The sources must be clearly indicated and accessible in order to allow the other party or the Trial Chamber to test or challenge the basis on which the expert witness reached his or her conclusions.⁵ In the absence of clear references or accessible sources, the Trial Chamber will not treat such a statement or report as an expert opinion, but as the personal opinion of the witness, and weigh the evidence accordingly.⁶

8. An expert is expected to make statements and draw conclusions independently and impartially. The fact that the witness has been involved in the investigation and preparation of the Prosecution or Defence case or is employed or paid by one party does not disqualify him or her as an expert witness or make the expert statement or report unreliable.⁷ Concerns relating to the witness' independence or impartiality do not affect the admissibility of the witness' statement or

¹ Filed on 15 February 2007.

² *Galić* Decision Experts Tabeau and Philipps, p. 2. See also *Prosecutor v. Radoslav Brdanin*, Case No. IT-99-36-T, Decision on Prosecution's Submission of Statement of Expert Witness Ewan Brown, 3 June 2003 ("*Brdanin* Decision Expert Brown"), p. 4; *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-PT, Decision on the Defence Motions to Oppose Admission of Prosecution Expert Reports Pursuant to Rule 94 bis, 1 April 2004, p. 4; *Prosecutor v. Milan Martić*, Case No. IT-95-11-T, Decision on Prosecution's Motions for Admission of Transcripts Pursuant to Rule 92 bis (D) and of Expert Reports Pursuant to Rule 94 bis", 13 January 2006 ("*Martić* Experts Decision"), para. 37.

³ *Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21-A, Order on Motion of Esad Landžo to Admit as Additional Evidence the Opinion of Francisco Villalobos Brenes, 14 February 2000 ("*Delalić* Decision Expert Villalobos Brenes"), p. 3; *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Decision on Admissibility of Expert Report of Kosta Čavoški, 1 March 2006 ("*Slobodan Milošević* Decision Expert Čavoški"), pp. 2-3.

⁴ *Slobodan Milošević* Decision Expert Čavoški, p. 3.

⁵ *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-T, Decision on the Prosecution Motion for Reconsideration of the Admission of the Expert Report of Prof. Radinović, 21 February 2003 ("*Galić* Decision Expert Radinović"), para. 9.

⁶ *Martić* Decision Expert Avramov, para. 9.

⁷ *Galić* Decision Experts Tabeau and Philipps, p. 2; *Brdanin* Decision Expert Brown, p. 4; *Martić* Experts Decision, para. 39.

report pursuant to Rule 94 *bis* of the Rules of Procedure and Evidence (“Rules”), but affect the weight to be given to his or her evidence.⁸

9. Thirdly, the statement or report must be relevant and of probative value to the case. According to Rule 89(C) of the Rules, a Trial Chamber may admit any relevant evidence which it deems to have probative value. The Trial Chamber notes that Rule 94 *bis* of the Rules does not set a different or higher threshold for the admission of evidence by expert witnesses than the standard admissibility requirements enshrined in Rule 89(C) of the Rules.⁹

10. Fourthly, the content of the statement or report must fall within the expertise of the expert witness.¹⁰ 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 witness’ expertise will be treated as personal opinions of the witness and will be weighed accordingly. Generally, an expert witness shall not offer his or her opinion on the criminal liability of the accused. This is a matter that falls within the competence of the Chamber.¹¹

C. Discussion

1. Desimir Garović

11. The Defence intends to call Desimir Garović as its artillery expert. His report is entitled “Incidents of Mortar and Aircraft Bomb Shellings Cited in the Indictment against Dragomir Milošević in the Case before the International Criminal Tribunal for the Former Yugoslavia IT-98-29/1-T” (“Report of Desimir Garović”). Desimir Garović attached a biography to the Report, detailing his educational background and his military career.

12. The Trial Chamber reviewed the Report of Desimir Garović, as well as his biography. It is satisfied that Desimir Garović meets the requirements to be considered an expert in artillery. The Trial Chamber is also satisfied that the Report of Desimir Garović meets the requirements set out in the case law of the Tribunal to be accepted as an expert report, including that it is relevant and probative. Thus, the Report of Desimir Garović will be admitted. In light of the Prosecution’s submission that it wishes to cross-examine him, Desimir Garović must be called for cross-examination.

⁸ *Slobodan Milošević* Decision Expert Čavoški, p. 2; *Brdanin* Decision Expert Brown, p. 4.

⁹ *Brdanin* Decision Expert Brown, p. 4.

¹⁰ *Martić* Decision Expert Avramov, para. 12. See also *Delalić* Decision Expert Villalobos Brenes, p. 3.

¹¹ *Hadžihasanović* Decision Expert Reinhardt, p. 4; *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-T, Oral Decision of 22 July 2004, T. 12109-12111.

2. Ivica Milosavljević

13. The Defence intends to call Ivica Milosavljević as its medical expert. The report is entitled “Report by a Forensic Pathologist in Case IT-98-29/1, Prosecutor vs. Dragomir Milošević, before the International War Crimes Tribunal for the Former Yugoslavia” (“Report of Ivica Milosavljević”). The Trial Chamber has not received information pertaining to this witness’ educational background or professional career.

14. The Prosecution submits in the Prosecution First Motion that the Report of Ivica Milosavljević is so general and non-specific that it becomes “wholly irrelevant”.¹² It submits that it does not “discuss, much less give an opinion about any issues of fact in this case.”¹³ The report “is really nothing more than encyclopaedia article about forensic pathology”¹⁴ as highlighted, in particular by the two pages in the Report which discuss the exhumation process despite exhumation not being at issue in this case.¹⁵ It further submits that, insofar as the Defence intends to use the Report of Ivica Milosavljević to critique the investigations of Bosnian Muslim authorities, it is “surprised” that the Defence now seeks to introduce a report by a forensic pathologist, as it has not previously questioned the adequacy of the forensic autopsies in respect of which evidence has been presented.¹⁶ Finally, the Prosecution submits that Ivica Milosavljević does not specifically critique any of the investigations conducted and that, based on its content, the purpose of the Report of Ivica Milosavljević “could not be criticism of Bosnian law enforcement’s conduct of death investigations in this case”.¹⁷

15. The Defence submits in the Defence First Response that the goal of providing expert evidence is nothing other than to furnish the Trial Chamber with relevant facts in a particular field of science or technique, facts which the Trial Chamber does not possess, as well as allowing the parties to provide a foundation for their views on the same facts.¹⁸ The Defence submits that it is entitled to lead any evidence that could support its thesis and to introduce doubt as to the charges in the Indictment.¹⁹ Consequently, the Defence submits, it is not abnormal that it contests the investigations by the Bosnian Muslim authorities.²⁰ The Defence challenges the Prosecution submission that it has not raised this matter previously, saying that contesting the causal link

¹² Prosecution First Motion, para. 8.

¹³ Prosecution First Motion, para. 8.

¹⁴ Prosecution First Motion, para. 8.

¹⁵ Prosecution First Motion, paras 8, 12

¹⁶ Prosecution First Motion, paras 9, 11-12.

¹⁷ Prosecution First Motion, para. 12.

¹⁸ Defence First Response, para. 4.

¹⁹ Defence First Response, para. 6.

²⁰ Defence First Response, para. 6.

between the alleged incidents and the deaths or injuries is an integral part of the Defence case.²¹ Finally, the Defence submits that Ivica Milosavljević explains the process that allows a determination on a causal link between a victim and a crime, making the report and the testimony of the witness indispensable for the Trial Chamber in order to evaluate the evidence presented at trial.²²

16. The Trial Chamber has not been provided with the *curriculum vitae* for Ivica Milosavljević. As such, a determination as to the qualification of this witness as expert cannot be made. It will therefore defer a decision on the qualifications of the witness until such time it is provided with the proper material that will allow it to make that determination.

17. Irrespective of the absence of the curriculum vitae, the Trial Chamber notes that the report of Ivica Milosavljević only gives an explanation of the tasks of a forensic pathologist in relation to a criminal investigation. The Trial Chamber agrees with the Prosecution that the report of Ivica Milosavljević is very general and non-specific. The Trial Chamber notes that the information without a challenge relating to the material in evidence does not appear to be very relevant to the current case. The Trial Chamber is, however, not convinced that this renders the report wholly irrelevant. The Trial Chamber notes that Defence has previously challenged the link of alleged victims to specific incidents of shelling and sniping and that the Report of Ivica Milosavljević is apparently intended to bolster that challenge. However, the Trial Chamber finds that the objections of the Prosecution are not unreasonable and orders Ivica Milosavljević to appear for cross-examination.

3. Miloje Pršić

18. The Defence intends to call Miloje Pršić as the Defence expert on history. His report is entitled “Historical Background and the Political and Military Context of Events Mentioned in Indictment no. IT-98-29/1 of the ICTY, Prosecutor v. Dragomir Milošević” (“Report of Miloje Pršić”). A biography was provided with the Report.

19. The Prosecution, in the Prosecution Second Motion, challenges the qualifications of Miloje Pršić, submitting that approximately two-thirds of the report was not written by the witness but was copied from another document.²³ The Prosecution submits that the original document, from which Miloje Pršić allegedly copied forms part of a legal submission by the Federal Republic of

²¹ Defence First Response, paras 7-9.

²² Defence First Response, paras 12-14.

²³ Prosecution Second Motion, paras 1, 6.

Yugoslavia to the International Court of Justice (“Original Document”).²⁴ It submits that this “raises a presumption that he did so because he was not able to do his own original research, come to his own opinions and set forth those opinions together with his reasons for them”.²⁵ Alternatively, the Prosecution seeks exclusion of the report “as a sanction for attempting to portray as his own work which was in fact *not* his own.”²⁶

20. Furthermore, the Prosecution submits that the *curriculum vitae* of Miloje Pršić shows no expertise in demographics, and it therefore objects to the witness testifying as an expert on demographic on the grounds of lack of qualifications.²⁷ It notes that the witness goes “well beyond using demographics and statistics to inform historical research and engages in his own demographic interpretation of statistical population data.”²⁸ In the event the Prosecution Second Motion is denied in whole or in part, the Prosecution requests to be allowed to cross-examine Miloje Pršić.²⁹

21. In the Defence Second Response, it is conceded that the compilation of historical facts, taken from different sources and contained in the report by Miloje Pršić is in the Original Document too.³⁰ However, the Defence submits that the compilation was drawn from a document that was provided to the Defence by the Council of Ministers of Serbia and Montenegro in 2 March 2006.³¹ In addition, the Defence submits that it asked Mr Pršić to produce a quick account of the historical facts related to Bosnia and Herzegovina, in order to be able to immediately go to events taking place from the 1970s onwards.³² Miloje Pršić, in light of the question posed to him by the Defence and “the limited resources available to it”, used the document provided by the Defence.³³ According to the Defence, Miloje Pršić is familiar with the facts he included in the Report because of the positions he held during his career, according to the Defence.³⁴ Finally, the Defence submits that Miloje Pršić “had no intention of presenting an expert report on which he has worked no more than some hundred hours as his own original scientific work.”³⁵ Therefore, the Defence submits that

²⁴ In the case of *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*. The Prosecution notes that this document was also provided to the Prosecution through various other sources, including NATO, who found the document during a search of the home of the daughter of Radovan Karadžić in May 2005, Prosecution Second Motion, paras 7-8.

²⁵ Prosecution Second Motion, para. 1.

²⁶ Prosecution Second Motion, para. 1 (emphasis in original).

²⁷ Prosecution Second Motion, para. 1.

²⁸ Prosecution Second Motion, para. 16.

²⁹ Prosecution Second Motion, para. 5.

³⁰ Defence Second Response, para. 5.

³¹ Defence Second Response, paras 6-7.

³² Defence Second Response, para. 9.

³³ Defence Second Response, para. 10.

³⁴ Defence Second Response, para. 10.

³⁵ Defence Second Response, para. 11.

Miloje Pršić should not be sanctioned and that he should appear to testify before the Trial Chamber.³⁶

22. The Defence, during the hearing of 21 August 2007, argued that historical documents and historical facts cannot be interpreted and that “nobody can reinvent those historic facts in a new creative way.” The Defence noted that the part of the Report of Miloje Pršić which in the submission of the Prosecution is not the original work of Miloje Pršić is not “really that important.” At that same hearing, the Prosecution submitted that Miloje Pršić did not provide an overview of historical data, but provided an analysis of historical data and that this analysis was not his own. The Prosecution clarified that “wholesale lifting word for word from the work of another without attribution” forms “circumstantial evidence of a lack of expertise, notwithstanding academic credentials.”

23. The Trial Chamber reviewed the Report of Miloje Pršić and finds, as the Prosecution submits, that a substantial part of the Report is identical to the Original Document, although some parts of the Report contain some references not included in the Original Document, and some sentences have been altered. Miloje Pršić did not reflect in the Report on which document he based his compilation of historical facts. Even if the Report was not based on the Original Document, he did acknowledge that the compilation of historical facts was based on another document to which he did not refer in the Report. Limited resources and a limited amount of time spent on the Report can not be an excuse for improperly sourcing the Report and presenting that document as one’s own work. The Trial Chamber agrees with the Prosecution submission that the peculiar circumstances surrounding this Report, a substantial portion of which is taken from another source without acknowledgement, cast doubt not only on the probity of Miloje Pršić, but also on whether he possesses the requisite qualifications to produce an independent report. The Trial Chamber will not admit the report and finds that Miloje Pršić should not be called to testify before the Tribunal.

³⁶ Defence Second Response, para. 12.

D. Disposition

24. Pursuant to Rules 54 and 94*bis* of the Rules, the Trial Chamber finds Desimir Garović to be an expert in artillery and orders Desimir Garović and Ivica Milosavljević to appear for cross-examination. The Trial Chamber will decide on the qualification of Ivica Milosavljević as an expert when it is provided with the proper material that will allow it to make that determination.

25. The Trial Chamber further grants the Prosecution Second Motion and will not admit into evidence the Report of Miloje Pršić and finds that Miloje Pršić should not be called to testify before the Tribunal.

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



Judge Patrick Robinson
Presiding

Dated this twenty-first day of August 2007
At The Hague
The Netherlands

[Seal of the Tribunal]