

UNITED
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-05-87/1-T
Date: 5 March 2009
Original: English

IN TRIAL CHAMBER II

Before: Judge Kevin Parker, Presiding
Judge Christoph Flügge
Judge Melville Baird

Registrar: Mr John Hocking, Acting Registrar

Decision: 5 March 2009

PROSECUTOR

v.

VLASTIMIR ĐORĐEVIĆ

PUBLIC

DECISION ON DEFENCE NOTICE UNDER RULE 94bis

The Office of the Prosecutor:

Mr Chester Stamp
Ms Daniela Kravetz
Mr Matthias Neuner

Counsel for the Accused:

Mr Dragoljub Đorđević
Mr Veljko Đurđić

1. Background

1. Trial Chamber II (“Chamber”) of the International Criminal 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 seized of “Vladimir Đorđević’s Notice Pursuant to Rule 94bis(B)”, filed on 30 May 2008 (“Notice”), whereby the Defence indicates, pursuant to Rule 94bis(B) of the Rules of Procedure and Evidence (“Rules”), that it does not accept any of the seven expert witnesses proposed by the Prosecution and wishes to cross-examine them, and that it challenges the qualifications of two of them, Patrick Ball and Philip Coo, as experts and the relevance of their reports. The expert reports and curriculum vitae of the seven proposed experts had been disclosed to the Defence by 23 April 2008.¹ On 16 June 2008, the Prosecution filed the “Prosecution’s Response to Đorđević’s Notice Pursuant to Rule 94bis(B)” (“First Response”), whereby it opposed the Notice in so far as the Defence sought the preclusion of the expert testimony and reports of Patrick Ball and Philip Coo. The Prosecution also requested that the Parties be allowed to present their arguments regarding this matter at a later time before the Trial Chamber that would conduct the trial.²

2. On 16 December 2008, at the Pre-Trial Conference, the Chamber instructed the Prosecution to file a response to the Notice in so far as it concerns the qualifications of Patrick Ball and Philip Coo by 12 January 2009. The Chamber also indicated that in view of the Notice, the Prosecution would have to prepare its case on the basis that each of its proposed experts must be present to give evidence orally.³ On 12 January 2009, in compliance with the oral order of the Chamber, the Prosecution filed the “Prosecution’s Response to Defence’s Notice Pursuant to Rule 92bis(B)” (“Response”), setting out its objections to the Notice. On 19 January 2009, the Defence filed, with the Chamber’s leave,⁴ “Vlastimir Đorđević’s Reply to Prosecution’s Response to Defence’s Notice Pursuant to Rule 94bis(B)” (“Reply”).

2. Parties’ submissions

3. The Defence indicates that it wishes to cross-examine all the expert witnesses whose reports the Prosecution had disclosed to it, that is: Antonio Alonso, Eric Baccard, Patrick Ball, Jose Pablo Baraybar, Helge Brunborg, Philip Coo and Andreas Riedlmayer, should they be called to testify.⁵

¹ *Prosecutor v. Vlastimir Đorđević*, Case No.: IT-05-87/1-PT, “Prosecution’s Notice of Compliance with the Pre-Trial Judge’s Order of 16 April 2008”, 28 April 2008.

² First Response, para 8.

³ Transcript of hearing, pp 96-97.

⁴ *Prosecutor v. Vlastimir Đorđević*, Case No.: IT-05-87/1-PT, “Order Regarding the Defence’s Request for Leave to Reply”, 19 January 2009.

⁵ Notice, para 8.

The Defence also challenges the qualifications of Patrick Ball and Philip Coo as experts and the relevance of their reports. In particular, it contends that the research methods of Patrick Ball are unreliable.⁶ The Defence submits that Patrick Ball has shown bias against the Yugoslav forces.⁷ It challenges the qualifications of Philip Coo as an expert, arguing that he lacks objectivity and independence.⁸ In addition, the Defence submits that Philip Coo is a military expert whereas the present case will require expertise in the structure of the Serb Ministry of Interior.⁹

4. The Prosecution contends that the methodology of Patrick Ball is accepted and considered as reliable in his field of expertise.¹⁰ It submits that Ball showed his objectivity by relying, *inter alia*, on Serb government sources.¹¹ The Prosecution contends that the objectivity and reliability of his findings are matters that go to weight, and not to the admissibility of the proposed expert evidence.¹²

3. Law

5. Rule 94 of the Rules reads as follows:

- (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.

6. It was held by the Tribunal that an expert witness is a person who “by virtue of some specialised knowledge, skill or training can assist the trier of fact to understand or determine an issue in dispute.”¹³ In determining whether a particular witness meets these criteria, the Trial

⁶ Notice, paras 14-16; Reply, para 3.

⁷ Notice, para 17.

⁸ Notice, paras 19-24; Reply, paras 8-9.

⁹ Reply, para 10.

¹⁰ Response, para 7.

¹¹ Response, para 8.

¹² Response, paras 9-10.

¹³ *Prosecutor v. Stanislav Galić*, Case No.: IT-98-29-T, “Decision Concerning the Expert Witnesses Ewa Tabeau and Richard Philipps”, 3 July 2002 (“*Galić Decision*”), p 2.

Chamber may take into account the witness's former and present positions and professional experience through reference to the witness's curriculum vitae as well as the witness's scholarly articles, other publications or any other pertinent information about the witness.¹⁴ The content of the expert witness's statement or report must fall within his or her area of expertise.¹⁵

7. The fact that a 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 unreliable.¹⁶ Concerns relating to the independence and impartiality of an expert witness are ordinarily matters of weight rather than admissibility.¹⁷ They can be appropriately dealt with in cross-examination of the witness.¹⁸

8. Like any evidence, expert evidence is subject to the provisions contained in Rule 89(C) and (D). The expert statement or report must therefore meet the minimum standards of reliability.¹⁹ A piece of evidence may be so lacking in terms of the indicia of reliability that it is not probative and therefore inadmissible. Therefore, *prima facie* proof of reliability on the basis of sufficient indicia should be demonstrated at the admissibility stage.²⁰

4. Discussion

9. The Chamber takes note of the Defence's wish to cross-examine the seven expert witnesses proposed by the Prosecution. The Defence also challenges the qualifications of two of these witnesses as experts. This Decision is in respect of these challenges by the Defence. As indicated at the Pre-Trial Conference, the remaining expert witnesses, Antonio Alonso, Eric Baccard, Jose Pablo Baraybar, Helge Brunborg and Andreas Riedlmayer, shall be called to testify and be available for cross-examination by the Defence.

¹⁴ *Prosecutor v. Vojislav Šešelj*, Case No.: IT-03-67-T, "Decision on Expert Status of Reynaud Theunens", 12 February 2008 ("Šešelj Decision"), para 28.

¹⁵ *Prosecutor v. Milan Martić*, Case No.: IT-95-11-T, "Decision on Defence's Submission of the Expert Report of Professor Silja Avramov Pursuant to Rule 94 bis", 9 November 2006, para 12.

¹⁶ *Prosecutor v. Momčilo Perišić*, Case No.: IT-04-91-T, "Decision on Defence Motion to Exclude the Expert Report of Morten Torkildsen", 30 October 2008, para 9; see also *Galić* Decision, pp 2-3; *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, p 4.

¹⁷ *Prosecutor v. Vujadin Popović et al.*, Case No.: IT-05-88-AR73.2, "Decision on Joint Defence Interlocutory Appeal Concerning the Status of Richard Butler as an Expert Witness", 30 January 2008 ("Popović Appeals Decision"), para 22; see also *Prosecutor v. Slobodan Milošević*, Case No.: IT-02-54-T, 9 September 2002, Transcript of hearing, pp 9965-9966.

¹⁸ *Prosecutor v. Ljube Bošković and Johan Tarčulovski*, Case No.: IT-04-82-T, "Decision on Motion to Exclude the Prosecution's Proposed Evidence of Expert Bezruchenko and His Report", 17 May 2007 ("Bošković Decision"), para 8; see also Šešelj Decision, para 29.

¹⁹ *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No.: IT-03-69-PT, "Decision on Prosecution's Submission of the Expert Report of Nena Tromp and Christian Nielsen Pursuant to Rule 94 bis", 18 March 2008, para 9.

²⁰ *Popović* Appeals Decision, para 22.

(a) Patrick Ball

10. The Prosecution disclosed to the Defence a report of the proposed Prosecution's expert witness Patrick Ball, entitled "Killings and Refugee Flow in Kosovo March – June 1999", dated 2 January 2002, as well as an addendum and a corrigendum to it.²¹ There is also an additional report, prepared in 2007, whereby findings made in the original report are revisited in view of additional data and with the use of a different method.²² The report provides an analysis of patterns of refugee flow and killings in Kosovo in the period March-June 1999. Conclusions are made as to the possible causes of such patterns.²³ The report appears to be relevant to the issues in the Indictment and in particular to the charge of deportations and the issue of existence of an armed conflict. The Prosecution submits that Patrick Ball is a "quantitative scientist who applies statistical analysis to demographic issues."²⁴ He has educational background in sociology and professional experience in human rights information management.²⁵

11. The Defence contends that the methods of Patrick Ball are speculative and misleading. It submits that in another trial before the Tribunal it was suggested that other factors, not discussed in the report, could have caused the flight of refugees.²⁶ The Prosecution submits that the report was submitted for peer review.²⁷ The Chamber notes that the conclusions made in the report are based on statistical data relating to the alleged flow of refugees and killings in the entire territory of Kosovo, rather than on data concerning specific incidents. Due to the use of such methodology, the conclusions made in the report of Patrick Ball are not specifically directed to one or more of the alleged crimes, but, rather, are more generalised. Even so, they may well prove to be of value to the factual assessment of the Chamber of the evidence adduced at trial. The Chamber is, however, of the view that these limitations themselves do not render the report so unreliable that it should be excluded at this stage. Further, the report appears to have been reviewed by specialists in the field, which lends support to the view that the methodology used by Patrick Ball is an accepted research tool.²⁸ Having reviewed Patrick Ball's curriculum vitae, the Chamber is satisfied that the content of his report falls within his expertise.

²¹ Rule 65ter nos. P01506; P01391; P01394.

²² Rule 65ter no. P02678.

²³ Rule 65ter no. P01506.

²⁴ Response, para 5.

²⁵ Curriculum vitae of Patrick Ball, Rule 65ter no. P01392.

²⁶ Notice, para 15, referring to *Prosecutor v. Slobodan Milošević*, Case No.: IT-02-54-T, 14 March 2002, Transcript of hearing, p 2272.

²⁷ Response, para 7.

²⁸ Rule 65ter no. P01506, p 76.

12. The Defence refers to a report prepared by another expert in which the report of Patrick Ball is criticised for relying on incomplete data.²⁹ The report of Patrick Ball indicates that it relies on the following sources of information: Albanian border guard registries, interviews conducted by the American Bar Association Central and Eastern European Law Initiative and its partners, interviews conducted by Human Rights Watch, interviews conducted by the Organisation for Security and Cooperation in Europe, and records of exhumations conducted by international teams on behalf of the Tribunal.³⁰ The report thus appears to be based on numerous and varied sources of information. There is nothing to suggest that these sources are unreliable or that other reliable sources exist, of which the use would have led to materially different conclusions. The Chamber thus does not agree that the mere incompleteness of underlying data, if demonstrated, should result in the report being precluded from admission as an expert report.

13. The Defence contends that Patrick Ball showed bias against Slobodan Milošević by having made a disparaging comment about him at a conference in 2001.³¹ The Chamber accepts that the remark attributed to Patrick Ball may be indicative of bias against Slobodan Milošević. However, the Defence has not specified how the alleged bias against Slobodan Milošević affected the work of Patrick Ball on his report. Nor has it been demonstrated that Patrick Ball is biased to a degree that makes him generally unreliable and disqualifies him as an expert witness. The Chamber is of the view that, in the circumstances, the issue of the alleged bias of Patrick Ball can be properly explored by the Defence in cross-examination.

14. It has not been demonstrated that the report of Patrick Ball should be excluded and that he should not testify as an expert witness. Patrick Ball shall appear to testify and be available for cross-examination.

(b) Philip Coo

15. The Prosecution disclosed to the Defence a report prepared by Philip Coo. The report relates to the organisation of forces of the Federal Republic of Yugoslavia and Republic of Serbia operating in Kosovo in 1998 and 1999. Part I of the report focuses on the structure of these forces, including the Ministry of Interior (“MUP”), and the means by which superiors exercised command and control. Part II discusses the structures and methods described in Part I in the context of the events in Kosovo in 1998 and 1999.³² The report of Philip Coo appears to be relevant to the issue of alleged individual criminal responsibility of the Accused. Philip Coo is a former officer of the

²⁹ Notice, para 16.

³⁰ Rule 65ter no. P01506, p 6.

³¹ Notice, para 17.

³² “Forces of the FRY & Serbia in Kosovo”, report by Philip Coo, parts I and II.

Canadian Army and the former head of the Military Analysis Team of the Office of the Prosecutor.³³ During his career in the Canadian army, including deployment in Bosnia and Herzegovina, he produced intelligence reports covering, *inter alia*, the structure and activities of armed organisations.³⁴

16. The Defence submits that Philip Coo was involved in investigations conducted for the purposes of the case of *Prosecutor v. Milan Milutinović et al.* and the present case, and that he participated in interviews of witnesses for the Prosecution.³⁵ The Defence contends that on account of his proximity to the Prosecution team and involvement in the preparation of its case Philip Coo lacks objectivity.³⁶ The Prosecution does not deny that Philip Coo was its employee and worked with investigators on the present case.³⁷ It submits, however, that Coo did not rely on any witness interviews to prepare his report and that his involvement in any interview is independent of his expert report.³⁸

17. The Defence makes reference to Philip Coo's involvement in investigations relating to the *Milan Milutinović et al.* case. It is to be noted that between 8 July 2005 and 26 June 2006, the Vlastimir Đorđević was amongst the accused in that case³⁹ and thus at least part of the investigations conducted for the purposes of that case focused on issues of direct relevance to the criminal responsibility of the Accused. The involvement of Coo in that case is thus of relevance to the matter dealt with by the Chamber. The issue of Coo's independence was raised before the Trial Chamber hearing the case of *Prosecutor v. Milan Milutinović et al.* and discussed in detail. It appears that Philip Coo participated in the preparation of the Prosecution case in *Milan Milutinović et al.* by assisting in interviews with suspects, witnesses and some of the accused, but not the Accused Đorđević. The Prosecution submitted that Coo himself did not interview the witnesses.⁴⁰

18. The Chamber notes that Philip Coo assisted in interviews with some of the accused in the *Milutinović et al.* They are alleged to have been members of the joint criminal enterprise involving

³³ Response, para 11; Curriculum vitae of Philip Coo.

³⁴ Curriculum vitae of Philip Coo.

³⁵ Notice, paras 22-23.

³⁶ Notice, paras 20-22.

³⁷ Response, paras 13, 16.

³⁸ Response, para 17.

³⁹ On 8 July 2005, the initial indictment against the Accused, Nebojša Pavković, Vladimir Lazarević and Sreten Lukić (Case No.: IT-03-70-I; The indictment was confirmed on 2 October 2003) was joined with another, against Milan Milutinović, Dragoljub Ojdanić and Nikola Šainović (*Prosecutor v. Milan Milutinović, Nikola Šainović and Dragoljub Ojdanić*, Case No.: IT-99-37-PT, and *Prosecutor v. Nebojša Pavković, Vladimir Lazarević, Vlastimir Đorđević and Sreten Lukić*, Case No.: IT-03-70-PT, "Decision on Prosecution Motion for Joinder", 8 July 2005). On 26 June 2006, the Accused was severed from the joint indictment against *Milan Milutinović et al.* to be tried separately. (*Prosecutor v. Milan Milutinović et al.*, Case No.: IT-05-87-PT, "Order replacing Third Amended Joinder Indictment and Severing Vlastimir Đorđević from the Trial", 26 June 2006)

⁴⁰ *Prosecutor v. Milan Milutinović et al.*, Case No.: IT-05-87-T, 7 July 2006, Transcript of hearing, p 311; Reply, para 9.

the Accused Đorđević, which is a matter of great significance to the Accused's alleged individual criminal responsibility under Article 7(1) of the Statute of the Tribunal.⁴¹ The Chamber also notes that some witnesses, who recently gave evidence in the present case, testified that Philip Coo had been present at their interviews.⁴²

19. Philip Coo's involvement in the preparation of the Prosecution case was substantial. He seems to have had influence on the conduct of interviews with witnesses and members of the joint criminal enterprise alleged in the Indictment, and thus on the process of gathering of evidence in support of the allegations in the Indictment. His active participation in the formation of foundations of the Prosecution case may have influenced his views on the issues in the case. In addition, at the relevant time Philip Coo was an employee of the Office of the Prosecutor.⁴³ There is thus a risk that his opinions are also influenced by a wish to be of assistance to his employer by providing support to the allegations in the Indictment. While concerns relating to an expert witness' independence are usually considered as matters of weight rather than admissibility, the involvement in a particular case may be such that the reliability of the opinions of the expert must be questioned.⁴⁴ The Chamber is of the view that such is the case in issue. The involvement of Philip Coo in the case may have affected the reliability of his opinions to such an extent that the Chamber would be unable to rely on them in making its findings on the issues in the case.⁴⁵

20. The Chamber finds that Philip Coo, although possessing the requisite qualifications of an expert witness, should not give evidence as an expert because the extent of his involvement in the preparation of the Prosecution case is such that the Chamber is not able to be confident of the impartiality of his opinions. Therefore, it will not accept Coo as an expert witness and will not admit his report into evidence. The Chamber finds it preferable that, if the Prosecution wishes to call Philip Coo, he should testify as a witness of fact.

5. Disposition

21. For the foregoing reasons, pursuant to Rules 89 and 94*bis*, the Chamber:

⁴¹ Indictment, paras 20-21.

⁴² Transcript of hearing, pp 1546, 1632.

⁴³ *Prosecutor v. Milan Milutinović et al.*, Case No.: IT-05-87-T, 7 July 2006, Transcript of hearing, pp 311-312.

⁴⁴ *Bošković* Decision, para 12.

⁴⁵ The Chamber takes note of an oral ruling given on 13 July 2006 in the case of *Prosecutor v. Milan Milutinović et al.*, which concerned the same proposed expert witness. The *Milutinović* Trial Chamber found Philip Coo to be "far closer to the case than would be appropriate for an expert who can express opinions on which the Chamber might rely"; *Prosecutor v. Milan Milutinović et al.*, Case No.: IT-05-87-T, 13 July 2006, Transcript of hearing, p 840.

- **REITERATES** that the expert witnesses: Antonio Alonso, Eric Baccard, Jose Pablo Baraybar, Helge Brunborg and Andreas Riedlmayer shall appear to testify and be available for cross-examination;
- **DENIES** the Defence's request for the exclusion of the expert report of Patrick Ball and precluding him from testifying as an expert witness;
- **GRANTS** the Defence's request for the exclusion of the expert report of Philip Coo and precluding him from testifying as an expert witness;
- **ORDERS** that Patrick Ball shall appear to testify as an expert witness and be available for cross-examination; and
- **DEFERS** its decision on the admission of the reports of the six accepted expert witnesses until the time of their testimony.

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

Dated this fifth day of March 2009
At The Hague
The Netherlands



Judge Kevin Parker
Presiding