



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: 15 February 2007

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: 15 February 2007

PROSECUTOR

v.

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

**DECISION ON OJDANIĆ MOTION
TO EXCLUDE TESTIMONY OF PATRICK BALL**

Office of the Prosecutor

Mr. Thomas Hannis
Mr. Chester Stamp

Counsel for the Accused

Mr. Eugene O'Sullivan and Mr. Slobodan Zečević for Mr. Milan Milutinović
Mr. Toma Fila and Mr. Vladimir Petrović for Mr. Nikola Šainović
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 Exclude Testimony of Patrick Ball,” filed on 22 January 2007 (“Motion”). Milutinović and Pavković have joined the Motion.¹ The Prosecution filed its “Prosecution’s Response to General Ojdanić’s Motion to Exclude Testimony of Patrick Ball” on 5 February 2007 (“Response”). The Trial Chamber hereby renders its decision thereon.

Background

1. In the Motion, Ojdanić requests that the Trial Chamber exclude the proposed testimony of expert witness Patrick Ball on the grounds that it is unnecessary and will be counterproductive to a fair and expeditious trial.² Ojdanić submits that Patrick Ball’s evidence is cumulative to evidence already received and is prejudicial to the Defence,³ his methods are insufficiently established in the scientific community to be replied upon,⁴ he lacks objectivity,⁵ rebutting his questionable methods and objectivity will needlessly consume more trial time,⁶ and the Trial Chamber should, in the exercise its discretion, decline to hear Patrick Ball or to admit his report into evidence.⁷

2. The Prosecution submits that the Motion should be dismissed for the following reasons: his evidence is relevant;⁸ his methodology is “generally accepted as reliable”;⁹ the Defence will be able to cross-examine him¹⁰ and test his objectivity;¹¹ and issues relating to the validity and reliability of Mr. Ball’s evidence concern the weight of his evidence, not its admissibility.¹²

¹ Mr. Milutinović’s Motion to Join General Ojdanić’s Motion to Exclude Testimony of Patrick Ball, 26 January 2007; Pavković Joinder in General Ojdanić’s Motion to Exclude Testimony of Patrick Ball, 29 January 2007. Ojdanić had previously objected to the proposed testimony of Mr. Ball (*see* General Ojdanić’s Notice Pursuant to Rule 94*bis*, 26 August 2004, paras. 7–9), as had the Defences for the five remaining Accused: Pavković (7 October 2005); Lukić (20 October 2005); Šainović (26 August 2004); Milutinović (27 August 2004); and Lazarević (7 October 2005).

² Motion, para. 1.

³ Motion, para. 8(A). Ojdanić explains this prejudice as resulting from Mr. Ball’s generalisation of specific incidents already established to the situation in all of Kosovo.

⁴ Motion, para. 8(B).

⁵ Motion, para. 8(C).

⁶ Motion, para. 8(C).

⁷ Motion, para. 9.

⁸ The Prosecution describes Mr. Ball as a quantitative sociologist who applies statistical analysis to demographic issues, and it argues that his report is directly relevant to the allegations in the Indictment (specifically paras. 27–29, 72, and 75 of the Indictment) and to “the core issue of the case”, namely the cause of the migration from, and killings in, Kosovo between March and June 1999 (Response, paras. 3, 4).

⁹ Response, para. 5.

¹⁰ The Prosecution points out that it has provided the Defence with all the material supporting Mr. Ball’s report in order to enable the Defence to scrutinise the report effectively, and that the Defence will also be able to present their own evidence in rebuttal (Response, para. 7).

Discussion

3. The Trial Chamber has previously indicated that it would rule on the admissibility of evidence after hearing any relevant objections, with the weight to be ascribed to an admitted item of evidence to be determined by the Chamber during its final deliberations, in the context of the trial record as a whole.¹³ The Trial Chamber has also previously indicated that it would make determinations regarding the admission of expert witness reports in the period immediately before the relevant expert witness gives evidence.¹⁴ Mr. Ball's testimony being imminent, this is an appropriate time to make that determination.¹⁵

4. A Chamber enjoys the discretion to admit any relevant evidence which it deems to have probative value, but a Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.¹⁶

6. The basis for Ojdanić's objection to the relevance of Mr. Ball's evidence is that it is cumulative to the evidence of numerous witnesses who claim to have left Kosovo at the behest of "Serb forces."¹⁷ According to the Prosecution, however, Mr. Ball will give evidence that "goes to a core issue in the case, that of the cause of the migration and killings that occurred in Kosovo between March and June 1999," which is directly relevant to allegations in the Indictment.¹⁸ The Chamber considers that the evidence is relevant, as it goes to the cause of the alleged forcible displacement and killings, as well as to the fact that they occurred. The mere fact that the evidence may be prejudicial to the Defence, as Ojdanić argues,¹⁹ is in and of itself not a ground for the

¹¹ According to the Prosecution, "[t]hat Ball was objective in his analysis is evidenced by the fact that his sources regarding NATO activity are mainly Serb government sources" (Response, para. 6).

¹² Response, para. 2.

¹³ Order on Procedure and Evidence, 11 July 2006, para. 5. As a general rule regarding expert witness reports, the Trial Chamber has stated that it will only admit those parts of the report and further material that is put to the expert during his oral testimony; the sources used by an expert witness in compiling his or her report will not be admitted wholesale (Order on Procedure and Evidence, 11 July 2006, para. 7).

¹⁴ Decision on Ojdanić Motion to Preclude Parties from Calling an Expert Witness, 16 November 2006, para. 19.

¹⁵ (Partly Confidential) Prosecution witness notification for trial week commencing 19 January 2007 with confidential annex A, filed 14 February 2007.

¹⁶ Rules 89(C) and (D). Article 20(1) of the Statute mandates the Trial Chamber to ensure that a trial is fair and expeditious, which has been recognised as the purpose of the Rules (*Prosecutor v. Zlatko Aleksovski*, Case No: IT-95-14/1-AR73, Decision on Prosecutor's Appeal on Admissibility of Evidence, filed 16 February 1999, para. 19). See also *Prosecutor v. Théoneste Bagosora, Gratién Kabiligi, Aloys Ntabakuze, and Anatole Nsengiyumva*, Case No: ICTR-98-41-AR93 & ICT-98-41-AR93.2, Decision on Prosecutor's Interlocutory Appeals Regarding Exclusion of Evidence, filed 5 September 2000, para. 16.

¹⁷ Motion, para. 8(A).

¹⁸ The paragraphs of the Indictment to which the Prosecution refers in making this allegation concern the alleged displacement of the civilian Albanian population of Kosovo by forces of the FRY and Serbia (Indictment, paras 27–29, 72, 75)

¹⁹ Motion, para. 8(A).

exclusion of evidence; all Prosecution evidence that is probative is prejudicial to an accused.²⁰ The question is rather whether the evidence is unfairly prejudicial to the Defence. The Defence has not shown how Mr. Ball's conclusions, drawn from specific instances but relating to Kosovo generally, are unfairly prejudicial. The Chamber therefore also considers that the proposed evidence of the witness has the requisite probative value for admission under the Rules of the Tribunal. The other challenges to Mr. Ball's methods and expertise are matters for cross-examination, and in due course, evaluation by the Trial Chamber.

7. In his challenge to the probative value of Mr. Ball's evidence, Ojdanić's also refers to his purportedly questionable methods and lack of objectivity, which, when litigated, will consume more time than necessary. However, in the absence of any authority or material from Ojdanić to support this argument, the Trial Chamber is unable to conclude that the time that will be taken to hear Mr. Ball's evidence will render these proceedings either unfair or inefficient.²¹ The Trial Chamber will admit Mr. Ball's evidence, and will assess the weight to be ascribed to it during its final deliberations, in the context of the trial record as a whole. The Chamber will monitor and control the presentation of the evidence in order to avoid the needless consumption of time, pursuant to Rule 90(F)(ii), and in order to ensure that the Accused suffer no undue prejudice to their right to a fair and expeditious trial, pursuant to Article 20 of the Statute of the Tribunal.

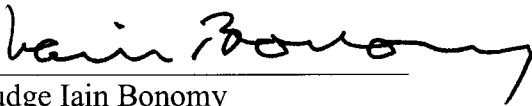
²⁰ See *Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze*, Case No: ICTR-99-52-A, *Décision sur les Appels Interlocutoires*, 5 September 2000, Separate Opinion of Judge Shahabuddeen, para. 19.

²¹ The Prosecution points out that Ojdanić's assertion regarding Mr. Ball's method is unsupported and argues in response that his methodology is generally accepted as reliable in his field of expertise, where he has been subjected to peer review (Response, para. 5). See also Partly confidential and *ex parte* Prosecution's Response to Defence notices pursuant to Rule 94bis(B), 10 November 2004, paras 48 – 55, where the Prosecution elaborated on Mr. Ball's expertise and methodology; and Exhibit 66 in Case No: IT-02-54-T (Mr. Ball's CV, which lists numerous publications detailing his work).

Disposition

8. Pursuant to Article 20 of the Statute and Rules 54, 89, and 94*bis*, the Trial Chamber hereby **DENIES** the Motion and **ORDERS** that Patrick Ball will be permitted to give evidence.

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



Judge Iain Bonomy
Presiding

Dated this 15th day of February 2007
At The Hague
The Netherlands

[Seal of the Tribunal]