



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: 16 March 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: 16 March 2007

PROSECUTOR

v.

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

DECISION ON EVIDENCE TENDERED THROUGH DR. ERIC BACCARD

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 the “Sreten Lukić’s Submission Relating to Objections to Exhibits Tendered Through Dr. Baccard,” filed 2 March 2007 (“Motion”), and the “Prosecution’s Response to General Lukić’s Submission Relating to Objections to Exhibits Tendered Through Dr Baccard,” filed on 6 March 2007 (“Response”), and hereby renders its decision thereon. The Chamber must also determine the admissibility of a number of exhibits marked for identification during the evidence of Dr. Baccard.

Background

1. Dr. Eric Baccard was an expert witness who reviewed the findings contained within various forensic reports in relation to bodies recovered from a number of sites. During his testimony, the Prosecution tendered certain exhibits, some of which were admitted and some marked for identification, pending further decision of the Chamber. Some of the exhibits were objected to, either in their entirety or in part, by the Lukić Defence (“Defence”) upon the grounds that they went beyond the scope of the Indictment and the knowledge and scope of the witness’s expertise.¹ The Trial Chamber asked the Defence to liaise with the Prosecution to identify the material to which objection was taken and to come to an agreement as to those passages that were to be excluded from consideration by the Chamber, and to apply to the Chamber if no such agreement could be reached. The Chamber notes that the parties have agreed to exclude several portions of the material, as detailed in an email sent from the Prosecution to the Defence on 23 February 2007 (“23 February material”).² There was however material about which the parties could not reach any agreement, which is contained within exhibits P206, P210, P249, and P333.³

2. The Chamber has considered the authenticity, probative value, and relevance of each of the documents tendered through Dr. Baccard and is satisfied that, where no objection has been taken, they should be admitted.

¹ T. 10097–10098 (19 February 2007); Motion, para. 2.

² Motion, e-mail from Prosecution to Defence, 23 February 2007, pp. 10369–10368.

³ Motion, para. 7.

Arguments of parties

3. The Defence submits in its Motion that the objectionable material contained within exhibits P206, P210, P249, and P333 does not have probative value and is extremely prejudicial to the rights of the Accused to be able to challenge all the evidence presented against him.

4. P206 is a French Forensic Team Exhumation Report including grid references of the locus of each of three alleged killing sites and conclusions as to the number of victims and the mode of execution of the victims whose clothing was discovered. The Defence contends that the contested material within exhibit P206 consists of hearsay recitation of information from the Prosecution investigators and also that it contains legal and factual conclusions (about ballistics) beyond the knowledge and expertise of the witness, as well as conclusions which are based on conjecture. The Defence also seeks to clarify in relation to P206 that the material already agreed to be excluded by the parties runs from paragraphs 5–7 and again from paragraphs 7–9 of page 4 of exhibit P206.

5. Exhibit P210 is a French Forensic Team Ballistic Report providing weapons and ballistics analysis of evidence gathered in order to assist the investigation of forensic scientists Professor Dominique Lecompte and Doctor Walter Vorhauer. The Defence contends that the contested material within exhibit P210 consists of conjecture and conclusions which go beyond the expertise of the declarant. Furthermore, the Defence contends that a ballistics expert would need to be cross-examined on this report in order to validate the information within it.

6. Exhibit P249 consists of Forensic Reports on investigations in Kosovo from 24–29 June 1999 conducted by William C. Rodriguez III, the chief medical examiner of the United States ground forces. The Defence contends that pages 19–28 were intended to be excluded by the parties, but that due to an oversight have not in fact been excluded by the Prosecution. The Defence therefore seek to exclude pages 19–28 of exhibit P249.

7. Exhibit P333 consists of French Forensic and autopsy Reports from “Cemetery L1” of Gornja Sudimlja/Studime e Epërme, Vuçitrn/Vushtrri gravesite. The Defence objects to four paragraphs included within exhibit P333 on the basis that they contain conclusions and allegations (by Prosecution investigators) which are prejudicial to the Accused.

8. The Prosecution, in its Response, addresses each of the issues raised by the Defence. With regard to exhibit P206, the Prosecution submits that the objectionable material provides the contextual background on which the exhumations and examinations proceeded and that the

contested material identified by the Defence in the last paragraph of page 18⁴ is admissible since it is well within the scope of the witness's expertise. The Prosecution further clarifies that lines 5–7 and paragraphs 5–10 of page 4 of exhibit P206 was the agreed material to be excluded from consideration by the Chamber.

9. As far as P210 is concerned, the Prosecution submits that it is admissible since it is an integral part of the report of the French Forensic team. The Prosecution does not however object to the exclusion of the specific items identified in the Motion relating to exhibit 210.

10. In relation to exhibit P249, the Prosecution agrees with the Defence that pages 19–28 should be excluded from consideration by the Trial Chamber.

11. Finally, the Prosecution submits that the material objected to by the Defence in exhibit P333 is admissible since it provides the contextual background on which exhumations and examinations proceeded.

Applicable law

12. Dr. Baccard gave evidence before the Trial Chamber as an expert witness pursuant to Rule 94 *bis*. This Rule does not provide an explicit definition of an expert witness; however, the jurisprudence has developed the following definition: “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.”⁵

13. The Trial Chamber has the discretionary power to assess the evidentiary value of the statement and the testimony of an expert witness, and to determine the weight to be given to expert evidence.⁶ One of the distinctions between an expert witness and a fact witness is that due to the qualifications of an expert, he or she can give opinions and draw conclusions and present them to the Trial Chamber.⁷ The party calling the expert witness should satisfy the Trial Chamber that the

⁴ P206, page 18, final paragraph: “In most cases the caliber of the projectiles ... military weapons were used.”

⁵ *Prosecutor v. Galić*, Case No. IT-98-29-T, Decision Concerning the Expert Witnesses Eva Tabeau and Richard Philipps, 3 July 2002, p. 2; *Prosecutor v. Galić*, Case No. IT-98-92-T, Decision on the Expert Witness Statements Submitted by the Defence, 27 January 2003, p. 3.

⁶ *Prosecutor v. Strugar*, Case No. IT-99-36-T, Decision on Prosecution's Submission of Statement of Expert Witness Ewan Brown, 3 June 2003, p. 4.

⁷ *Prosecutor v. Blaškić*, Case No. IT-02-60-T, Decision on Prosecution's Motion for Admission of Expert Statements, 7 November 2003, para. 19.

expert witness has at his disposal the specialised knowledge, experience, or skills needed to potentially assist the Trial Chamber in its understanding or determination of issues in dispute.⁸

14. Rule 89(C) and (D) provides the requirements for the admission of evidence and states as follows:

(C) A Chamber may admit any relevant evidence which it deems to have probative value.

(D) A Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.

15. Rule 94 *bis* does not add to the provisions of Rule 89(C) a condition of admissibility which is not expressly prescribed by that provision, and therefore does not set a higher threshold for the admission of the evidence of an expert witness than the standard admissibility requirements enshrined in Rule 89(C). Accordingly, it is Rule 89(C), in conjunction with Rule 89(D), that governs the admission of these particular exhibits. The ultimate question for the Chamber thus is whether this evidence is relevant and has probative value and, if so, whether this value is substantially outweighed by the need to ensure a fair trial.

Discussion

16. The Prosecution clarified in its Response that, as far as the material already agreed to is concerned, lines 5–7 and paragraphs 5–10 of page 4 of exhibit P206 should be excluded from consideration. The Chamber notes that these passages go beyond the material sought to be excluded by the Defence in paragraph 4 of its Motion. With regard to the remainder of the contested material, the Chamber finds that some of it contains statements of background history made by an investigator in order to identify the nature of the inquiry. The Chamber has already indicated that it is capable of distinguishing such statements from any forensic findings contained in the report and that it will give weight to such evidence accordingly.⁹ The rest of the material objected to is contained within a report compiled by professionals who are qualified to make the statements therein. The Chamber considers the witness's review to be an appropriate way to confirm the authenticity of the report, which is relevant to issues in the trial and plainly has probative value.

⁸ *Prosecutor v. Galić*, Case No. IT-98-29-T, Decision Concerning the Expert Witnesses Eva Tabeau and Richard Philipps, 3 July 2002, p. 3; *Prosecutor v. Galić*, Case No. IT-98-92-T, Decision on the Expert Witness Statements Submitted by the Defence, 27 January 2003, p. 3.

⁹ T. 10100 (19 February 2007).

17. With regard to exhibit P210, the Chamber notes that the Prosecution does not object to the exclusion of specific material identified by the Defence in its Motion. In addition, the Chamber is of the view that, apart from these specific objections, the report contains relevant evidence which has probative value.

18. The Prosecution agrees with the Defence that pages 19–28 of exhibit P249 relating to Ymer Grezda Street should be excluded from consideration by the Chamber. The Chamber notes the agreement of the parties with respect to the material to be excluded from exhibit P249 and is of the opinion that the remainder of exhibit P249 contains evidence which is relevant and has probative value. The Chamber therefore finds that the remainder of exhibit P249 is admissible.

19. With respect to exhibit P333, the Chamber finds that the material objected to by the Defence clearly contains statements of background history made by an investigator in order to identify the nature of the inquiry. For the same reasons given in paragraph 16, the Chamber decides that the parts of exhibit P333 objected to are also admissible.

20. In opposing the actual admission of some of the passages, the Defence also stressed that it had not had an opportunity to cross-examine the persons who had compiled the exhibits. The Chamber is of the view that the absence of the opportunity to cross-examine goes to weight and not, in this case, to admissibility, and this will be borne in mind by the Chamber in its final deliberations in light of the submissions of the parties. The Trial Chamber accordingly considers that to admit the various parts of the four exhibits to which objection has been taken would not be unduly prejudicial to the Accused and thus will admit them.

21. Finally, the Chamber notes that the following exhibits have already been admitted into evidence: P97, P110, P232, P361, P383, P384, and P2784.

Disposition

22. For the foregoing reasons and pursuant to Rules 54, 89(C), 89(D), and 94 *bis*, the Trial Chamber hereby GRANTS the Motion in part and ORDERS as follows:

- a. The following exhibits shall be admitted into evidence: P129, P130, P134, P136, P137, P207, P208, P209, P331, P332, P334, P363, P364, P368, P370, P371, P372, P373, P374, P375, P376, P377, P378, P379, P2682, and P2683.

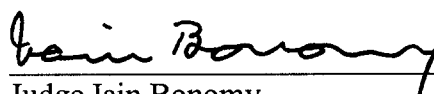
- b. Exhibits P1809 (expert report)¹⁰ and P2747 (*Milošević* transcript),¹¹ having previously been marked for identification, shall be admitted into evidence, except the parts pertaining to (i) the portions contained in the 23 February material (referred to above in paragraph 1 of this decision) and (ii) the portions excluded by this decision in (c)–(f) below.
- c. Exhibit P206 shall be admitted into evidence. However, the material in lines 5–7 and paragraphs 5–10 of page 4 shall not be admitted into evidence and will be excluded from consideration by the Chamber. Moreover, the following portions detailed in the 23 February material shall also not be admitted into evidence and will be excluded from consideration by the Chamber:
- i. pages 19–38;
 - ii. page 39, the references Donja Sudumilja, Brusnik, Nevoljane, Srbija and Mitrovica in the first paragraph; the number “394” in the second paragraph; the fifth paragraph;
 - iii. page 40, the first four paragraphs from the top of the page with site names: Brusnik, Nevoljane, Skenderaj Srbica and Mitrovica Suvido;
 - iv. page 41, the parts relating to Donja Sudumilja, Brusnik, Nevoljane, Skenderaj Srbica and Mitrovica Suvido; and
 - v. page 43, the section headed “Miscellaneous”.
- d. Exhibit P210 shall be admitted into evidence, but the following material identified by the Defence shall not be admitted into evidence and will be excluded from consideration by the Chamber:
- i. page 4, the line, “Its small size and ... operating in plain clothes.”
 - ii. page 5, the line, “This Yugoslav produced weapon was widely used by the armed forces in Kosovo.”

¹⁰ Marked for identification at T. 10105 (19 February 2007).

¹¹ Marked for identification at T. 10110 (19 February 2007).

- iii. page 7, the line, “The weapon was issued to officers and was also used as a back-up weapon.”
 - iv. page 13, the line, “Nonetheless, the large number ... used in theatre of operations.”
 - v. page 18, the line, “It is virtually never standard issue ... supply any paramilitary unit.”
 - vi. page 43, the paragraph, “All the bullet fragments ... have been used in a theatre of war.”
- e. Moreover, in respect of exhibit P210, pages 38–42 relating to Brusnik, Nevoljane, Skenderaj Srbica and Mitrovica Suvido, as set forth in the 23 February material, shall also not be admitted into evidence and will be excluded from consideration by the Chamber.
- f. Exhibit P249 shall be admitted into evidence. However pages 19–28 shall not be admitted into evidence and will be excluded from consideration by the Chamber. Moreover, pages 12–18—except (i) the last paragraph on page 18 beginning: “All previously...” and (ii) Dr. Rodriguez’s signature—as set forth in the 23 February material, shall also not be admitted into evidence and will be excluded from consideration by the Chamber.
- g. Exhibit P333 shall be admitted into evidence.

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


Judge Iain Bony
Presiding

Dated this sixteenth day of March 2007
At The Hague
The Netherlands

[Seal of the Tribunal]