



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: 23 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: 23 March 2007

PROSECUTOR

v.

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

**DECISION ON PROSECUTION MOTION FOR ADMISSION OF EVIDENCE
IN CONNECTION WITH PHILIP COO**

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 “Prosecution’s Submission of Exhibits for Admission Into Evidence (Coo-Related Documents)”, filed on 21 March 2007 (“Submission”), and hereby renders its decision thereon.

1. The Prosecution originally proposed Philip Coo, a military analyst employed by the Prosecution, as an expert witness on matters relating to the structure and roles of the FRY and Serb forces during the conflict in Kosovo, underlying the Indictment in this case.¹ On 13 July 2006, the Trial Chamber issued an oral decision regarding proposed expert witness Philip Coo, in which the Trial Chamber “rule[d] him out as an expert” and decided that his report would “not be received as an expert report.”² The Trial Chamber held that “he is too close to the team, in other words to the Prosecution presenting the case, to be regarded as an expert.”³

2. In its “Decision on Prosecution Request for Certification of Interlocutory Appeal of Decision on Admission of Witness Philip Coo’s Expert Report”, issued 30 August 2006 (“Certification Decision”), the Trial Chamber reiterated that it “did not rule Mr Coo out as a fact witness”.⁴ It noted that “[t]he bulk of his report dealing with factual matters, including the results of his investigations, may therefore form a part of the evidence, if the Trial Chamber is willing to allow Mr. Coo to testify about the facts, but not his opinions. Accordingly, the Trial Chamber has yet to decide which portions of the report will be admitted and which will be excluded. Only then will the full extent to which his proposed evidence will be excluded be clear.”⁵

¹ The Prosecution disclosed Philip Coo’s report to the Defence on 1 September 2005, and the Defence of all six Accused filed their notices pursuant to Rule 94 *bis*. The English version of Philip Coo’s report was disclosed on 28 July 2005. The Defence submitted their notices in the following order: Ojdanić’s Defence on 29 September 2005 and an additional notice on 31 October 2005, Lazarević’s Defence on 4 October 2005, Šainović’s Defence on 5 October 2005, Pavković’s Defence on 6 October 2005, Milutinović’s Defence on 17 October 2005, and Lukić’s Defence on 18 October 2005. The Prosecution filed its submission regarding the expert witness Philip Coo on 28 June 2006 after being invited by the Senior Legal Officer to submit its responses to the objections made by the Defence with respect of expert witness Philip Coo at the Rule 65 *ter* Conference, held on 21 June 2006.

² T. 840–844 (13 July 2006).

³ T. 840 (13 July 2006).

⁴ See *Prosecutor v Milutinović, et al.*, Case No. IT-05-87-T, Decision on Prosecution Request for Certification of Interlocutory Appeal on Decision on Admission of Witness Philip Coo’s Expert Report, 30 August 2006, para. 11. In its Oral Ruling of 13 July 2006, the Trial Chamber held the following:

On the other hand, we are entirely satisfied that it [is] appropriate for [Mr. Coo] as an investigator to give evidence on matters of fact, and indeed we will be greatly assisted ... by his evidence in relation to matters of fact, identifying what document he found. And we [will] strike ... the right balance in eliminating from our consideration matters ... of his opinion and concentrating exclusively on matters of fact. T. 840 (13 July 2006).

⁵ *Ibid.*

3. In its Certification Decision, the Trial Chamber also noted that a hearing would have to be held prior to the projected date of Philip Coo's testimony in order to determine which portions of the report would be admitted and which would be excluded.⁶ During the hearing on 7 February 2007, the Trial Chamber noted that the proposed hearing needed to be "triggered ... by the Prosecution telling us how they see our decision as having impacted on the way they propose to present the evidence."⁷

4. On 19 February 2007, the Prosecution filed the "Prosecution's Notice of Proposed Mode of Testimony for Witness Philip Coo" ("Notice"), in which it requested that the Trial Chamber schedule a hearing to address the proposed manner of leading the evidence of Mr. Coo.⁸ The Prosecution submitted that it would modify Philip Coo's report to redact and delete those sections or portions that were in the nature of broad conclusions or expert opinion.⁹ The Prosecution expressed its intention to lead evidence of Mr. Coo pursuant to both Rule 92 *ter* and as *viva voce* witness and submitted that the proposed modified and/or redacted versions of his original report, his provenance report, and the updated Rule 65 *ter* summary would be provided to the Trial Chamber and Defence counsel prior to the hearing.¹⁰

5. On 20 February 2007, the Defence filed the "Preliminary Joint Defence Response to Prosecution's Notice of Proposed Mode of Testimony for Witness Philip Coo" ("Response"), in which it requested that it be provided the material enumerated in the Prosecution Notice.¹¹ In addition, the Defence requested that the Trial Chamber schedule a hearing only after having given a reasonable amount of time to the Defence to review the materials disclosed in relation to Philip Coo.¹²

6. On 27 February the Prosecution filed a redacted version of Philip Coo's report as his proposed Rule 92 *ter* statement. On 28 February 2007, the Trial Chamber conducted a hearing with respect to Philip Coo's evidence. After considering all the arguments of the parties, the Trial Chamber issued an oral ruling on 9 March 2007, in which it rejected the statement in its submitted form because it was an unsuitable way of presenting his evidence.¹³ In the Trial Chamber's view,

⁶ *Ibid.*

⁷ T. 9739 (7 February 2007).

⁸ Notice, para. 6.

⁹ *Ibid.*, para. 4.

¹⁰ *Ibid.*, paras. 5–6.

¹¹ Response, para. 2.

¹² *Ibid.*, para. 3.

¹³ T. 11297 (9 March 2007).

the redacted version of the statement remained essentially the same as the version originally prepared by him as an expert witness.¹⁴

7. On 14 March 2007, the Prosecution submitted a third, revised statement of Philip Coo. The Defence for Lazarević, Pavković, Milutinović, and Šainović objected to the revised report and submitted challenges in writing.¹⁵ The Trial Chamber heard additional oral submissions by the parties during the hearing held on 20 March 2007. On the morning of 21 March 2007, the Defence for Lukić filed its “Additional Submission Objecting to Introduction of Coo Documents from the Bar Table.”

8. On 21 March 2007, after having considered all the submissions of the parties, the Trial Chamber issued an oral ruling in which it denied the admission of the revised statement as part of Philip Coo’s evidence.¹⁶ The Trial Chamber invited the Prosecution to file the revised statement as a motion, or part of a motion, for admission of documents and to lead Philip Coo as a *viva voce* witness.¹⁷ Following the Trial Chamber’s guidance, the Prosecution called Philip Coo as a *viva voce* witness and filed its Submission.

9. Having considered all the oral and written submissions and objections of the parties referred to in paragraph 7 above and based upon the Trial Chamber’s review of the documents tendered by the Prosecution in connection with the Submission, the Trial Chamber, pursuant to Rules 54 and 89 of the Rules, hereby **DECIDES** as follows:

a. The Trial Chamber is satisfied that the following documents bear sufficient indicia of reliability, have probative value, and bear to be relevant to issues in the trial and that they therefore should be admitted into evidence: P922, P925, P933, P982, P987, P998, P1007, P1011, P1018, P1041, P1049, P1060, P1065, P1067, P1074, P1078, P1081, P1086, P1092, P1093, P1099, P1138, P1146, P1148, P1162, P1182, P1188, P1191, P 1192, P1193, P1197, P1200, P1208, P1210, P1213, P1216, P1221, P1222, P1224, P1225, P1228, P1239, P1246, P1247, P1252, P1259, P1267, P1268, P1269, P1281, P1294, P1302, P1307, P1309, P1368, P1384, P1386, P1387, P1388, P1419, P1422, P1423, P1426, P1439, P1446, P1465, P1479,

¹⁴ The Trial Chamber further held that the redacted report was riddled with expressions of opinion that would be appropriate only for an expert to express. In addition, the redacted version contained expressions of conclusions that are for the Chamber, and not a witness of fact, to draw. T. 11297-11298 (9 March 2007).

¹⁵ On 18 March 2007, the Defence for Šainović filed a “Defence Request Regarding Prosecution Witness Philip Coo”. On 19 March 2007, the Defence for Pavković filed an “Additional Defence Submission Regarding the Report and Testimony of Philip Coo”, which was joined by the Defence for Milutinović and Lazarević. On 21 March 2007, the Defence for Lukić filed an “Additional Submission Objecting to Introduction of Coo Documents from the Bar Table.”

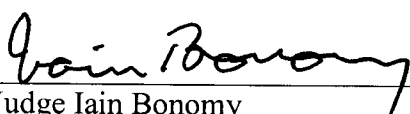
¹⁶ T. 12055 (21 March 2007).

¹⁷ T. 12056 (21 March 2007).

P1480, P1489, P1505, P1508, P1548, P1573, P1574, P1575, P1576, P1577, P1578, P1579, P1581, P1582, P1613, P1614, P1615, P1738, P1739, P1811, P1878, P1880, P1881, P1882, P1883, P1884, P1885, P1886, P1888, P1889, P1891, P1892, P1898, P1899, P1902, P1905, P1906, P1907, P1911, P1917, P1918, P1922, P1926, P1927, P1929, P1930, P1932, P1934, P1937, P1938, P1944, P1945, P1946, P1948, P1950, P1951, P1957, P1970, P1971, P1972, P1973, P1974, P1975, P1976, P1977, P1978, P1982, P1991, P1993, P1996, P1997, P1998, P1999, P2000, P2002, P2003, P2004, P2005, P2006, P2007, P2008, P2009, P2011, P2012, P2013, P2016, P2017, P2021, P2022, P2023, P2024, P2029, P2031, P2033, P2035, P2039, P2042, P2043, P2045, P2046, P2049, P2056, P2086, P2591, P2603, P2615, P2616, P2617, P2618, P2619, P2620, P2622, P2623, P2635, P2636, P2689, P2801, P2802, P2803, P2804, P2805, P2806, P2807, P2808, P2809, P2810, P2811, P2812, P2813, P2845, and 2861. These documents shall therefore be ADMITTED into evidence.

b. The Trial Chamber is not satisfied of the authenticity and reliability of the documents exhibited under P1022, P1024, P1046, P1287, P1322, P1530, P1609, and P2621, because they are not available in the original BCS version. Due to the lack of sufficient indicia of authenticity and reliability, the Trial Chamber does not consider these documents as having probative value as required under Rule 89(C). These documents shall therefore be DENIED admission into evidence.

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


Judge Iain Bonomy
Presiding

Dated this twenty-third day of March 2007
At The Hague
The Netherlands

[Seal of the Tribunal]