

**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-04-81-T
Date: 27 October 2008
Original: English

IN TRIAL CHAMBER I

Before: Judge Bakone Justice Moloto, Presiding Judge
Judge Pedro David
Judge Michèle Picard

Registrar: Mr. Hans Holthuis

Decision of: 27 October 2008

PROSECUTOR

v.

MOMČILO PERIŠIĆ

PUBLIC

**DECISION ON THE DEFENCE MOTION TO EXCLUDE
THE EXPERT REPORTS OF ROBERT DONIA**

The Office of the Prosecutor

Mr. Mark Harmon
Mr. Daniel Saxon

Counsel for the Accused

Mr. Novak Lukić
Mr. Gregor Guy-Smith

TRIAL CHAMBER I (“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 seized of the “Notice Pursuant to Rule 94bis Concerning Prosecution Expert Robert Donia and Motion to Exclude”, filed publicly on 29 December 2006, (“Defence Motion”) whereby the Defence requests the Trial Chamber to refuse the admission of the following five reports of Dr. Robert J. Donia:¹

- i. “Origins of the Republika Srpska, 1990-1992, A Background Report” (“First Report”);²
- ii. “Thematic Excerpts from the Assembly of Republika Srpska 1991-1996” (“Second Report”);³
- iii. “From Elections to Stalemate: the Making of the Sarajevo Siege, 1990-1994” (“Third Report”);⁴
- iv. “The Assembly of Republika Srpska, 1992-1995 – Highlights and Excerpts” (“Fourth Report”);⁵ and
- v. “The Siege of Siege of Sarajevo: A Background Report” (“Fifth Report”) (collectively, “Reports”).⁶

The Trial Chamber hereby renders its decision.

I. SUBMISSIONS OF THE PARTIES

1. The First Report submitted by the Prosecution states that it “is a study of the origins of the entity known as Republika Srpska.”⁷ It states that the first part “summarizes the crisis and disintegration of the Yugoslav Federal State, with particular attention to developments in the republics of Serbia, Croatia and Slovenia”⁸ and that the second part “is devoted to developments in the Republic of Bosnia and Herzegovina [...], the context in which Bosnian Serb nationalists

¹ The five reports were contained in the “Submission of Expert Reports of Dr. Robert J. Donia”, filed confidentially by the Prosecution on 28 September 2008 (“Prosecution Submission”). However, four of these Reports were already disclosed to the Defence in 2006. During the Status Conference of 24 September 2008, the Defence clarified that in relation to all the Dr. Donia Reports, it stood by its submissions raised in the Defence Motion in December 2006, T. 313.

² Annex A to the Prosecution Submission.

³ Annex B to the Prosecution Submission.

⁴ Annex C to the Prosecution Submission.

⁵ Annex D to the Prosecution Submission.

⁶ Annex E to the Prosecution Submission.

⁷ Annex A to the Prosecution Submission, para. 1.

⁸ Annex A to the Prosecution Submission, para. 1.

created separate Serbian institutions in 1991 and 1992.”⁹ The Second Report states that it compiles selected excerpts from minutes and transcripts of the Assembly of the Republika Srpska relevant to the indictment of Jovica Stanišić and Franko Simatović.¹⁰ The Third Report states that it “provides historical background and political and military context for events alleged in the indictment in ICTY Case IT-98-29/1, the Prosecutor v. Dragomir Milošević”¹¹ and “centers on developments from November 1990 [...] to August 1994”.¹² The Fourth Report contains “highlights and excerpts from the Assembly of Republika Srpska”.¹³ The Fifth Report states that it is a “Background Report on the Siege of Sarajevo”.¹⁴

2. The Defence submits that it does not accept the Reports and advances the following arguments in support:

- a) The Prosecution has not identified a specific area of expertise of Dr. Donia and should be required to identify such area of expertise so that the Defence can make proper objections and the Trial Chamber can make its ruling.¹⁵
- b) The Reports are interspersed with conclusions drawn by Dr. Donia and “[s]uch opinions and conclusions are mixed with factual summary in a manner which makes it difficult, if not impossible for the reader to know which are summarised facts and which are opinions”.¹⁶ With regard to the Fourth Report, the Defence submits that it “contains selected excerpts of the minutes of the Assembly of Republika Srpska and Mr. Donia’s interpretations on the meaning and significance of such meetings”. Furthermore, the “criteria in which facts are chosen [by Dr. Donia] are unknown”.¹⁷ The First and the Fifth Reports are almost entirely referenced by citing newspaper articles and books and are “essentially the prosecution’s version of what happened in Sarajevo [and Republika Srpska] during the time alleged in the indictment”.¹⁸
- c) Dr. Donia, by virtue of his association with the Office of the Prosecutor (“OTP”) does not possess the necessary objectivity and independence required by an expert witness.¹⁹ Dr.

⁹ Annex A to the Prosecution Submission, para. 1.

¹⁰ Annex B to the Prosecution Submission, para. 1.

¹¹ Annex C to the Prosecution Submission, para. 1.

¹² Annex C to the Prosecution Submission, para. 1.

¹³ Annex D to the Prosecution Submission.

¹⁴ Annex E to the Prosecution Submission.

¹⁵ Defence Motion, para. 5.

¹⁶ Defence Motion, para. 12.

¹⁷ Defence Motion, para. 9.

¹⁸ Defence Motion, para. 8.

¹⁹ Defence Motion, para. 13.

Donia has testified as an employee of the Prosecution several times in the past and this may lead to the view that Dr. Donia is not independent.²⁰

- d) The Reports are in large part a “summarization” of material that Dr. Donia has read during his work for the Prosecution. They contain numerous facts which, if they are offered and admitted as exhibits the Trial Chamber is well suited to review and assess their proper weight and importance.²¹ Furthermore, “the process of summarizing facts which the Trial Chamber is obliged to consider does not require expertise beyond that which is within the capacity of any tribunal of fact”.²²
- e) The Reports purport to be a “historical” review of the evidence taken from various sources. Although historical evidence significantly predating the indictment period may be used to provide a general overview, in the Defence’s position, it is for the Tribunal to determine what occurred during the time period of the indictment.²³

3. In the “Prosecution’s Response to Defence Motion to Exclude Expert Reports of Donia, Theunens and Torkildsen”, filed publicly on 17 January 2007 (“Prosecution Response”), the Prosecution opposes the Defence submissions and advances the following arguments:

- a) Rule 94 *bis* of the Rules of Procedure and Evidence (“Rules”) does not invite a party to file a motion to exclude an expert report but allows only a party to challenge specific portions thereof. The Defence Motion fails to clearly identify those parts of the Reports which are challenged by the Defence. The Defence Motion therefore does not comply with Rule 94 *bis*.²⁴
- b) In respect of the issue of Dr. Donia’s area of expertise, the Prosecution submits that Dr. Donia is a historical expert and that his area of expertise is reasonably obvious from Dr. Donia’s Reports and curriculum vitae (“CV”).²⁵ In respect of the argument that Dr. Donia is not sufficiently qualified to be an expert witness, the Prosecution submits that Dr. Donia has already testified as an expert in other trials before the Tribunal and possesses a vast amount of specialised knowledge about matters within his area of expertise.²⁶

²⁰ Defence Motion, para. 16 citing *Prosecutor v. Milutinović et al.*, Case No. It-05-87-T, Decision on Prosecution Request for Certification of Interlocutory Appeal of Decision on Admission of Witness Philip Coo’s Expert Report, 30 August 2006 (“*Milutinović et al* Decision”).

²¹ Defence Motion, para. 19.

²² Defence Motion, para. 22.

²³ Defence Motion, para. 21.

²⁴ Prosecution Response, paras 3-4.

²⁵ Prosecution Response, para. 6.

²⁶ Prosecution Response, para. 11.

- c) In respect of the argument that Dr. Donia has been selective in compiling his reports, the Prosecution submits that any report by an expert who has reviewed a great quantity of material cannot be expected to include a comprehensive summary of every document consulted. A degree of selectivity is required. The relevant question is not whether the expert has been selective, but whether he has been “*unfairly* selective”.²⁷ Furthermore, in general, in the view of the Prosecution, “the proper vehicle” for addressing all concerns raised by the Defence on the methodology employed by Dr. Donia is cross-examination.²⁸
- d) In respect of the argument that Dr. Donia is not sufficiently independent, the Prosecution submits that it is the general practice of the Tribunal to admit the reports and hear the oral evidence of substantially qualified experts who are Tribunal employees, and to take the employment issue into account when determining the weight to be given to expert evidence. In addition, the Defence is “at liberty to nominate its own expert witness”²⁹ or “submit evidence during the Defence case to counter those assertions in the reports of the Prosecution’s experts which it contests”.³⁰ Dr. Donia has never been employed by the OTP but has testified as an expert witness in cases before the Tribunal.³¹ The extent to which the expert witness has been “tainted” by his dealing with the OTP can be explored in cross-examination.³²

II. APPLICABLE LAW

4. Rule 94 *bis* of the Rules of Evidence and Procedure (“the Rules”) reads as follows:

Rule 94 *bis* Testimony of Expert Witnesses

- (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.

²⁷ Prosecution Response, para. 12.

²⁸ Prosecution Response, para. 13.

²⁹ Prosecution Response, para. 14.

³⁰ Prosecution Response, para. 15.

³¹ Prosecution Response, para. 18.

³² Prosecution Response, para. 27.

- (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.

5. The jurisprudence of the Tribunal has established a number of requirements which must be met before an expert statement or report is admissible in evidence. They include:

- i) the proposed witness is classified as an expert;
- ii) the expert statements or reports meet the minimum standard of reliability;
- iii) the expert statements or reports are relevant and of probative value; and
- iv) the content of the expert statements or reports falls within the accepted expertise of the witness.³³

6. The term “expert” has been defined by the jurisprudence of the Tribunal as “a person whom by virtue of some specialised knowledge, skill or training can assist the trier of fact to understand or determine an issue in dispute”³⁴. In determining whether a particular witness meets these criteria, the Trial Chamber should take into account the witness’s former and present positions and professional experience through reference to the witness’s CV as well as the witness’ scholarly articles, other publications or any other pertinent information about the witness.³⁵

7. 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 unreliable.³⁶ Concerns relating to the witness’s independence or impartiality do not necessarily affect the admissibility of the witness’ statement or report pursuant to Rule 94 *bis* of the Rules, but may affect the weight to be given to that witness’s evidence.³⁷

³³ *Prosecutor v. Lukić and Lukić*, IT-98-32/1-T, Decision on Second Prosecution Motion for the Admission of Evidence Pursuant to Rule 92*bis* (Two Expert Witnesses), 23 July 2008, para. 15.

³⁴ *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-T, Decision Concerning the Expert Witnesses Ewa Tabeau and Richard Philipps, 3 July 2002, p. 2. (“*Galić Decision Experts Tabeau and Philipps*”).

³⁵ *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, Decision on Expert Status of Reynaud Theunens, 12 February 2008, para. 28, with further references; *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-T, Decision on Defence Expert Witnesses, 21 August 2007, para. 6, with further references.

³⁶ *Galić Decision Experts Tabeau and Philipps* pp 2-3.

³⁷ *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Decision on Admissibility of Expert Report of Kosta Čavoški, 1 March 2006 p. 2; *but see Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Oral Ruling of 13 July 2006.

8. The content of the statement or report must fall within the expert witness's area of expertise.³⁸ 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 area of expertise will be treated as personal opinions of the witness and will be weighted accordingly.³⁹ Generally, an expert witness should 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.⁴⁰

9. Experts may express their opinion within the confines of their expertise on the facts established in evidence if the opinion is relevant to the case.⁴¹

III. DISCUSSION

A. Qualification of Dr. Donia as Expert Witness

10. An analysis of Dr. Donia's CV shows that he obtained a Ph. D. in history, published extensively on the history of the former Yugoslavia and possesses numerous years of academic experience at several universities of the United States.

11. The Trial Chamber is of the view that as a historian, Dr. Donia can be qualified as an expert within the meaning of Rule 94 *bis* of the Rules. However, the Trial Chamber is doubtful that Dr. Donia's expertise can assist the Trial Chamber to understand or determine issues which are *in dispute* in this case.

12. Nevertheless, the Trial Chamber notes that Dr. Donia has already testified as an expert witness in numerous cases before the Tribunal.⁴² The Trial Chamber is satisfied that, by virtue of his expertise, Dr. Donia can generally assist the Trial Chamber in understanding the historical background against which the facts relevant to this case occurred and in analysing the relevant documents in their historical context.

13. The Trial Chamber finally dismisses the Defence submission that, by virtue of his association with the Prosecution, Dr. Donia does not possess the objectivity and independence required by an expert witness. The Trial Chamber recalls that concerns affecting the impartiality or

³⁸ *Prosecutor v Milan Martić*, Case No. IT-95-11-T, Decision on Defence's Submission of the Expert Report of Professor Smilja Avramov Pursuant to Rule 94*bis*, 9 November 2006, ("*Martić*, Decision Expert Avramov") para. 12.

³⁹ *Ibid.*, para. 12.

⁴⁰ *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*, para. 12.

⁴¹ *Martić*, Decision Expert Avramov, para. 10.

⁴² See Annex F to Prosecution Submission, p. 5 where it is reported that Mr. Donia testified in ten cases before the Tribunal.

credibility of an expert witness should not necessarily result in exclusion, but may affect the weight accorded to that evidence.⁴³

B. Defence Objections to the Reports

14. The Trial Chamber is satisfied that the Reports contain *prima facie* relevant and reliable information to the case. In particular, the First, Third and Fifth Reports contain information on the political and military developments in Bosnia and Herzegovina with a focus on the origins of the Republika Srpska and the siege of Sarajevo. The Second and Fourth Reports are different in nature as they contain a compilation of excerpts from minutes and transcripts of the Assembly of the Republika Srpska.

15. Notwithstanding their relevance and probative value, the Trial Chamber cannot fail to note that the Second and Fourth Reports appear to be a mere selection of excerpts of documents, which the Prosecution intends, in any case, to tender into evidence during the trial. The Prosecution has not demonstrated to the Trial Chamber's satisfaction the nature of the "expertise", within the meaning of Rule 94 *bis*, which is required for selecting and compiling excerpts of these documents. Hence, the Trial Chamber finds it justified that the Second and Fourth Reports be stricken at this stage of the proceedings.

16. As regards Dr. Donia's First, Third and Fifth Reports, the Trial Chamber notes that they appear to offer a historical analysis of events relevant to the Indictment and are based on documents taken from different sources. These Reports also contain information as to the sources used and detailed references to these sources. At the end of each Report, conclusions are also drawn by Dr. Donia based on his expertise. The Trial Chamber finds that the concerns advanced by the Defence concerning the fact that Dr. Donia's opinions and conclusions are mixed with factual summaries and that his Reports are "essentially the prosecution's version of what happened in Sarajevo [and Republika Srpska] during the time alleged in the indictment" might have an impact on the weight given to such Reports. Such concerns can therefore be properly addressed by calling the expert witness for cross-examination, before the decision on the admissibility of these Reports is made by the Trial Chamber.

17. In conclusion, the Defence will have the opportunity to test the expertise of the witness as well as the reliability of the First, Third and Fifth Reports through cross-examination. Any

⁴³ *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, Decision on Expert Status of Reynaud Theunens, 12 February 2008, para. 28, with further references also in respect of the *Milutinović et al* Decision cited by the Defence.

shortcomings of those Reports might have an impact on the weight given to them at a later stage, but do not justify them being stricken at this stage of the proceedings.

IV. DISPOSITION

18. **FOR THE FOREGOING REASONS** and **PURSUANT TO** Rules 54 and 94 *bis* of the Rules, the Trial Chamber

GRANTS the Defence Motion **IN PART**;

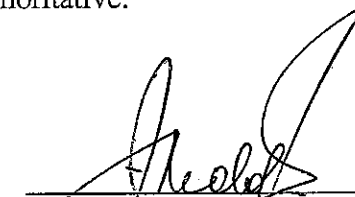
STRIKES the Second and Fourth Reports;

DENIES the remainder of the Defence Motion;

ORDERS that Dr. Robert Donia shall appear before the Chamber as an expert to be examined by the Parties and the Chamber with respect to the First, Third and Fifth Reports; and

DEFERS the decision on the admissibility of the First, Third and Fifth Reports until the conclusion of Dr. Robert Donia's testimony.

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



Judge Bakone Justice Moloto
Presiding Judge

Dated this twenty-seven day of October 2008

At The Hague

The Netherlands

[Seal of the Tribunal]