



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-98-29/1-T

Date: 15 February 2007

Original: English

IN TRIAL CHAMBER III

Before: Judge Patrick Robinson, Presiding
Judge Antoine Kesia-Mbe Mindua
Judge Frederik Harhoff

Registrar: Mr. Hans Holthuis

Decision of: 15 February 2007

PROSECUTOR

v.

DRAGOMIR MILOŠEVIĆ

**DECISION ON ADMISSION OF EXPERT REPORT OF
ROBERT DONIA**

The Office of the Prosecutor:

Mr. Alex Whiting
Mr. Stefan Waespi
Ms. Carolyn Edgerton
Mr. John Docherty

Counsel for the Accused:

Mr. Branislav Tapušković
Ms. Branislava Isailović

A. Procedural Background

1. Trial Chamber III ("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 Notice of Rule 94 *bis* Disclosure of Expert Report of Robert Donia", filed by the Office of the Prosecutor ("Prosecution") on 5 January 2007 ("Report"). The *curriculum vitae* of Robert Donia is provided as Appendix A.
2. The Defence responded to the Prosecution's notice on 2 February 2007 ("Response") and declared that it wished to cross-examine Robert Donia.
3. As the Report is the first expert report tendered for admission into evidence pursuant to Rule 94 *bis* of the Rules of Procedure and Evidence ("Rules") in the instant case, the Trial Chamber takes the opportunity to give an overview of the applicable law and the requirements for the admissibility of expert statements.

B. Admissibility of Expert Statements

4. Rule 94 *bis* of the Rules provides:

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.

(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. According to Rule 94 *bis* (B) of the Rules, the opposing party is required to react to the expert statement or report tendered by the other party.¹ It shall indicate whether it accepts the expert statement or report, whether it wishes to cross-examine the expert witness and whether it challenges the qualifications of the expert witness or the relevance of all or parts of the statement or report. In any case, in order to be admissible, the expert statement or report has to meet several requirements.

6. The Tribunal's jurisprudence has established the following requirements for the admissibility of expert statements or reports:²

- (1) the witness is an expert;
- (2) the statement/report is reliable;
- (3) the statement/report is relevant and of probative value; and
- (4) the contents of the statement/report fall within the accepted expertise of the witness.

7. As a first requirement, the witness has to be an "expert". The term "expert" has been defined as "a person whom by virtue of some specialized knowledge, skills or training can assist the trier of fact to understand or determine an issue in dispute".³ For the purposes of determining whether a witness meets this requirement, the witness' former and present positions and professional experience are important.⁴ The qualifications and expertise of a witness can be determined by utilising the witness' *curriculum vitae*, but also with the help of scholarly articles, other publications or any other information.⁵

¹ *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92 *bis* (C), 7 June 2002, para. 39; *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-T, Decision on Prosecution's Motion for Admission of Expert Statements, 7 November 2003.

² *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") and Decision on Defence's Submission of the Expert Report of Milisav Sekulić Pursuant to Rule 94 *bis*, and on Prosecution's Motion to Exclude Certain Sections of the Military Expert Report of Milisav Selukić, and on Prosecution Motion to Reconsider Order of 7 November 2006, 13 November 2006; *Prosecutor v. Enver Hadžihasanović and Amir Kubura*, Case No. IT-01-47-T, Decision on Report of Prosecution Expert Klaus Reinhardt, 11 February 2004 ("*Hadžihasanović* Decision Expert Reinhardt"); *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 Experts Tabeau and Philipps").

³ *Galić* Decision Experts Tabeau and Philipps, p. 2. See also *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 ("*Brdanin* Decision Expert Brown"), p. 4; *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-PT, Decision on the Defence Motions to Oppose Admission of Prosecution Expert Reports Pursuant to Rule 94 *bis*, 1 April 2004, p. 4; *Prosecutor v. Milan Martić*, Case No. IT-95-11-T, Decision on Prosecution's Motions for Admission of Transcripts Pursuant to Rule 92 *bis* (D) and of Expert Reports Pursuant to Rule 94 *bis*, 13 January 2006 ("*Martić* Experts Decision"), para. 37.

⁴ *Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21-A, Order on Motion of Esad Landžo to Admit as Additional Evidence the Opinion of Francisco Villalobos Brenes, 14 February 2000 ("*Delalić* Decision Expert Villalobos Brenes"), p. 3; *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Decision on Admissibility of Expert Report of Kosta Čavoški, 1 March 2006 ("*Slobodan Milošević* Decision Expert Čavoški"), pp. 2-3.

⁵ *Slobodan Milošević* Decision Expert Čavoški, p. 3.

8. Secondly, the expert statement or report must meet the minimum standards of reliability. There must be sufficient information as to the sources used in support of the statements. The sources must be clearly indicated and accessible in order to allow the other party or the Trial Chamber to test or challenge the basis on which the expert witness reached his or her conclusions.⁶ In the absence of clear references or accessible sources, the Trial Chamber will not treat such a statement or report as an expert opinion, but as the personal opinion of the witness, and weigh the evidence accordingly.⁷

9. 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 or report unreliable.⁸ Concerns relating to the witness' independence or impartiality do not affect the admissibility of the witness' statement or report pursuant to Rule 94 *bis* of the Rules, but affect the weight to be given to the witness' evidence.⁹

10. Thirdly, the statement or report must be relevant and of probative value to the case. According to Rule 89(C) of the Rules, a Trial Chamber may admit any relevant evidence which it deems to have probative value. The Trial Chamber notes that Rule 94 *bis* of the Rules does not set a different or higher threshold for the admission of evidence by expert witnesses than the standard admissibility requirements enshrined in Rule 89(C) of the Rules.¹⁰

11. Fourthly, the content of the statement or report must fall within the expertise of the expert witness.¹¹ This requirement ensures that the statements or reports of an expert witness will only be treated as expert evidence, in so far as they are based on the expert's specialized knowledge, skills or training. Statements that fall outside the witness' expertise will be treated as personal opinions of the witness and will be weighed accordingly. Generally, an expert witness shall 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.¹²

⁶ *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-T, Decision on the Prosecution Motion for Reconsideration of the Admission of the Expert Report of Prof. Radinovij, 21 February 2003 ("*Galić* Decision Expert Radinovij"), para. 9.

⁷ *Martić* Decision Expert Avramov, para. 9.

⁸ *Galić* Decision Experts Tabeau and Philipps, p. 2; *Brdanin* Decision Expert Brown, p. 4; *Martić* Experts Decision, para. 39.

⁹ *Slobodan Milošević* Decision Expert Čavoški, p. 2; *Brdanin* Decision Expert Brown, p. 4.

¹⁰ *Brdanin* Decision Expert Brown, p. 4.

¹¹ *Martić* Decision Expert Avramov, para. 12. See also *Delalić* Decision Expert Villalobos Brenes, p. 3.

¹² *Hadžihasanović* Decision Expert Reinhardt, p. 4; *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-T, Oral Decision of 22 July 2004, T. 12109-12111.

C. Discussion

12. The Report is entitled “From Elections to Stalemate: The Making of the Sarajevo Siege, 1990-1994”. Attached to the Report are the *curriculum vitae* of Robert Donia (Appendix A), two tables (Appendix B) and three maps (Appendix C). The Report contains information as to the sources used and detailed references to these sources.¹³

13. In its Response, the Defence does not challenge the qualifications and expertise of Robert Donia as an expert on the history of Bosnia and Herzegovina or the reliability, relevance or probative value of the Report. It only indicated that it wishes to cross-examine the witness.

14. Having examined the *curriculum vitae* of Robert Donia and the Report, the Trial Chamber is satisfied that Robert Donia is an expert within the meaning of Rule 94 *bis* of the Rules and that the Report is reliable and its contents fall within the expertise of the expert witness.

15. The Trial Chamber is also satisfied that the Report contains relevant information and has probative value. The Report provides information on the historical background and on the political and military developments in Bosnia and Herzegovina and in particular in Sarajevo,¹⁴ beginning with the multi-party elections in 1990 and ending with the Washington peace agreement of March 1994 and the formation of the Contact Group thereafter.¹⁵ In particular, the Report deals with the role and the strategic importance of the city of Sarajevo, with the siege and isolation of the city that began at the end of April 1992. It does, however, not provide detailed information on the period covered by the indictment in the instant case.¹⁶

¹³ Introduction to the Report and endnotes.

¹⁴ The Report is divided into nine sections: Introduction; Peoples and Nationalism: Sarajevo and the Multiparty Elections of 1990; The SDS Campaign for Regionalization; Military Preparations; The Road to Bosnian Independence, Serb Secession, and War; Serb Visions of Sarajevo; Tightening the Siege; Sarajevo and its Siege in the International Spotlight; Conclusion.

¹⁵ In very general terms, it provides information about the Contact Group and the peace negotiations until November 1995, Report, pp. 35, 36.

¹⁶ The period in the indictment is on or about 10 August 1994 until on or about 21 November 1995.

D. Disposition

16. For the foregoing reasons and pursuant to Rules 89(C) and 94 *bis* of the Rules, the Trial Chamber **ORDERS** as follows:

1. The expert report of Robert Donia is admitted into evidence pursuant to Rule 94 *bis* of the Rules;
2. Robert Donia is permitted to appear as an expert witness for the Prosecution;
3. If the Prosecution wishes to lead evidence from Robert Donia during examination-in-chief, such examination shall not exceed one hour;
4. Should the Prosecution not wish to lead evidence-in-chief from Robert Donia, the Prosecution shall ensure that Robert Donia is available to the Defence for cross-examination;
4. The cross-examination of Robert Donia shall not exceed two and a half hours.

The Trial Chamber requests the Registry to assign an exhibit number to the Report.

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



Judge Patrick Robinson
Presiding

Dated this fifteenth day of February 2007
At The Hague
The Netherlands

[Seal of the Tribunal]