



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 November 2008
Original: English

IN TRIAL CHAMBER I

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

Registrar: Mr. Hans Holthuis

Decision of: 27 November 2008

PROSECUTOR

v.

MOMČILO PERIŠIĆ

PUBLIC

**DECISION ON ADMISSIBILITY OF EXPERT REPORT
OF PATRICK TREANOR**

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 seised of an oral request by the Prosecution to admit into evidence an expert report authored by Mr. Patrick Treanor entitled “The Belgrade Leadership and the Serbs in Croatia and Bosnia, 1990-1995” (“Report”)¹ pursuant to Rule 94 *bis* of the Rules of Procedure and Evidence (“Rules”) and hereby renders its Decision.

I. PROCEDURAL HISTORY

1. On 27 October 2008, the Trial Chamber rendered its “Decision on Defence Motions to Exclude the Expert Reports of Mr. Patrick J. Treanor” (“Decision of 27 October 2008”), ordering that Mr. Patrick Treanor appear before the Trial Chamber as an expert witness to be examined by the Parties and the Trial Chamber with respect to his Report.² In the Decision of 27 October 2008, the Trial Chamber denied the Defence’s motion to strike the Report and deferred a decision on its admissibility until after the conclusion of the witness’s testimony.³

2. Mr. Treanor gave evidence between 3 and 12 November 2008. On 12 November 2008, following cross-examination of Mr. Treanor, the Prosecution sought to tender the Report into evidence.⁴ The Defence objected to the admission of the Report.⁵

II. SUBMISSIONS OF THE PARTIES

3. In support of its objection, the Defence refers to what it submits are several deficiencies in the Report that disqualify it from being admitted in evidence, and submits as follows:

- a) Mr. Treanor has not demonstrated the methodology he used to draft the Report;⁶
- b) Mr. Treanor used no objective criteria to determine what documents to present as relevant to the Trial Chamber;⁷
- c) Mr. Treanor is merely rendering an opinion on what is relevant in the same way that a non-expert would;⁸

¹ T. 1399.

² Decision of 27 October 2008, para. 30.

³ Decision of 27 October 2008, para. 30.

⁴ T. 1399.

⁵ T. 1399.

⁶ T. 1400.

⁷ T. 1400.

⁸ T. 1400.

- d) Mr. Treanor has given the Trial Chamber no guidance as to why he deemed certain information to be important and why he chose to exclude other evidence;⁹ and
- e) Mr. Treanor is basically a “summary witness” who has only summarised various documents which he deems to be important, in an arbitrary manner.¹⁰
4. In support of admission of the Report, the Prosecution makes the following arguments:
- f) The Defence has had the opportunity to address concerns relating to bias and the unreliability of the Report during its cross-examination of the witness;¹¹
- g) The Report will assist the Trial Chamber in reviewing the underlying documentation referred to in the Report;¹²
- h) The methodology used for selecting and reviewing documents is outlined in the introduction of the Report, which states that “the report is based primarily on available records of the Serbian entities concerned and international organisations, especially important sources are Official Gazettes and the minutes or transcripts of sessions of the Serbian official bodies”;¹³
- i) Although Mr. Treanor has used his personal judgement in selecting and reviewing documents, this judgement is based on experience from 14 years of working with large collections of documents.¹⁴

III. APPLICABLE LAW

5. Rule 89 (C) and (D) of the Rules sets the requirements for admissibility of evidence:
- (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.

⁹ T. 1400.

¹⁰ T. 1401.

¹¹ T. 1402.

¹² T. 1403.

¹³ T. 1406-1407.

¹⁴ T. 1407.

6. Rule 94 *bis* of 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.

7. Rule 94 *bis* of the Rules “does not provide specific guidelines on the admissibility of testimony given by expert witnesses, or criteria for the admission of their report”.¹⁵ The Trial Chamber in *Brđanin* noted that:

Rule 94 *bis* of the Rules does not add to the provision of 89(C) of the Rules 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) of the Rules.¹⁶

8. 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.¹⁷

¹⁵ *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-Ar73.2, Decision On Joint Defence Interlocutory Appeal Concerning The Status Of Richard Butler As An Expert Witness, 30 January 2008, (“*Popović et al.* Appeal Decision”), para. 21.

¹⁶ *Prosecutor v. Radoslav Brđanin*, Case no. IT-99-36-I, Decision on Prosecution’s Submission of Statement of Expert Witness Ewan Brown, 3 June 2003, p. 4.

¹⁷ *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; *Popović et al.* Appeal Decision, para. 21.

9. The requirements relating to minimum standards of reliability of an expert statement or report were clarified by the Trial Chamber in *Stanišić and Simatović*:

[T]he 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. 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.¹⁸

10. Evidence is not to be admitted if it is “so lacking in terms of the indicia of reliability that it is not probative and therefore inadmissible.”¹⁹

IV. DISCUSSION

11. The Trial Chamber recalls the Decision of 27 October 2008 whereby it was recognised that as a historian and a political expert, Mr. Treanor is qualified as an expert within the meaning of Rule 94 *bis* of the Rules.²⁰ On that occasion the Trial Chamber also found that it was “satisfied that, by virtue of his expertise, Mr. Treanor 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.”²¹ The Trial Chamber further recalls its earlier determination that the contents of the Report cover a wide range of issues which fall within the area of expertise of the expert witness.²²

12. The greater part of the Defence objections concerns Mr. Treanor’s methodology in drafting the Report, particularly in relation to Mr. Treanor’s selection of relevant documents. In this context, the Trial Chamber recalls its earlier finding that

in the absence of an indication in the [...] Report of a clear methodology and criteria which were used by Mr. Treanor to select those documents, the ‘fairness’ of this reviewing and selection cannot be determined. However, this deficiency does not invalidate the Report and can be cured by calling Mr. Treanor for questioning by the Defence and, possibly, the Trial Chamber.²³

13. Judges David and Picard (“Majority”), with Judge Moloto appending a separate opinion on the matter, find that those concerns relating to deficiency in methodology were sufficiently dispelled by the answers given by Mr. Treanor during his testimony. It appears that the Report is based upon documents which were selected on the basis of Mr. Treanor’s professional opinion,

¹⁸ *Prosecutor v. Stanišić and Simatović*, Decision on Prosecution’s Submission of the Expert Report of Nena Tromp and Christian Nielsen Pursuant to Rule 94 *bis*, 18 March 2008, para. 9.

¹⁹ *Popović et al.* Appeal Decision, para. 22.

²⁰ Decision of 27 October 2008, para. 18.

²¹ Decision of 27 October 2008, para. 19.

²² Decision of 27 October 2008, para. 22.

²³ Decision of 27 October 2008, para. 23.

guided by personal judgement which is unavoidable in writing historical accounts with a given purpose. In this respect, the concern that there is, to a certain degree, a lack of objective and systematic criteria in selecting documents has been dispelled by Mr. Treanor's answers to questions put to him during cross-examination and by the Trial Chamber.²⁴ Having heard testimony of Mr. Treanor, the Majority remains satisfied that he is qualified as an expert, and is satisfied that the Report is relevant and of probative value.

14. Moreover, the Majority finds that any possible defects relating to methodology do not justify the Report being disqualified from admission. The Majority recalls that whereas a piece of evidence may be so lacking in terms of the indicia of reliability that it is not probative and therefore inadmissible, the jurisprudence of the Tribunal has also held that questionable methodology used in drafting an expert report is a matter that may go to the weight given to the evidence, rather than its admissibility.²⁵

15. The Majority does not consider the Report to be so lacking in terms of the indicia of reliability that it is not probative and therefore inadmissible. Although the Report does not explicitly state the methodology and criteria used for selecting documents, a certain methodology can nonetheless be inferred from it. The Majority notes that the Report clearly states that it is concerned with identifying in a factual manner the goals of the Serbian leadership and as such is a piece of descriptive factual research; the selection of documents was therefore based on their relevance to that specific objective. In order to produce the Report, Mr. Treanor analysed documents on the goals of the Serb leadership including primary documents relating to the

²⁴ T. 917-919:

JUDGE DAVID: Mr. Treanor, are there any objective structures in the report constituted by the historical and factual data, and have you used a course of discretion in selecting certain facts from others? Because I imagine that there is no historical work without at least some hypothetical presumptions that later on are verified on the facts, which is to say that there is no history without some degree of subjectivity, but at the same time that history should not be purely arbitrarily impersonal. Is the subjectivity based on the selection of the most relevant facts in relation to some hypothetical lines of thinking that are expressed in the conclusions of the report? [...]

THE WITNESS: [...] As a general matter, I would say that that is the case. As you've stated, there is always an element of subjectivity or even ideological approach that each person is imbued with when they approach particular material and seek to analyse it. [...] In tracing the developments of the various entities that I mentioned, I sought to do that - again, I sought to do that; perhaps I didn't succeed - in a uniform fashion by picking the same types of documents from each entity which chronicle their development from the beginning of some sort of declaration to the establishment of an autonomous area to the establishment of a republic. What does the constitution say about what the organs of that power will be? Who occupied the offices? Again, I attempted to do that for each of the entities that I was describing.

²⁵ *Prosecutor v Slobodan Milosević*, Decision on Admissibility of Expert Report of Vasilije Krestic, 7 December 2005, para. 5; *Prosecutor v Stanislav Galic*, Decision on Admission of Documents Tendered During the Testimony of Radoslav Radinović, Dusan Dunjić and Svetlana Radovanović and on "Motion Regarding Document of 14.05.1992", 11 April 2003, paras 14-15.

highest policy-making bodies in the Serb leadership, such as transcripts, minutes and official gazettes.²⁶

16. Furthermore, the Majority notes that the absence of more objective and systematic criteria to select and analyse documents in no way demonstrates that the Report lacks reliability. A historian is required to use his knowledge and experience in historical research to select documents relevant to a specific issue. In this instance, the ability to identify documents relevant to a specific issue is part of the skill and expertise of the expert witness used to assist the trier of fact.

17. The Majority therefore finds that the supposed deficiencies in the methodology of the Report referred to by the Defence do not justify its exclusion from admission. As a result, the Majority finds that the Report meets the minimum standards of reliability for admission. The Trial Chamber will therefore consider the concerns raised by the Defence in cross-examination and in its oral submission when determining the weight to be given to the Report.

²⁶ "The Belgrade Leadership and the Serbs in Croatia and Bosnia, 1990-1995" Annex A to the Prosecution's "Submission of Expert Reports by Mr. Patrick J. Treanor", filed confidentially by the Prosecution on 19 September 2008, p. 5.

V. DISPOSITION

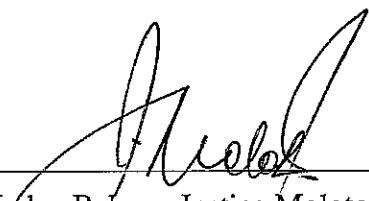
18. **FOR THE FOREGOING REASONS** and **PURSUANT TO** Rules 54 and 94 *bis* of the Rules, the Trial Chamber,

DECIDES that the Report of Mr. Treanor is admitted into evidence and

INSTRUCTS the Registry to assign an exhibit number to it.

Judge Moloto appends a Separate Opinion.

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



Judge Bakone Justice Moloto
Presiding Judge

Dated this twenty-seventh day of November 2008

At The Hague

The Netherlands

[Seal of the Tribunal]

SEPARATE OPINION OF JUDGE MOLOTO

1. I agree with my colleagues that the Report of Mr. Treanor should be admitted into evidence because it is relevant and of probative value for the instant case. However, with respect to the concerns articulated in the Trial Chamber's Decision of 27 October 2008 about the methodology used by Mr. Treanor in his Report,²⁷ I find that those concerns were not sufficiently dispelled by the answers given by the witness before the Trial Chamber. On the contrary, Mr. Treanor confirmed that his Report is based upon documents which were selected on the basis of his personal judgement, rather than his professional opinion. I therefore uphold the initial concern that there is a lack of objective and systematic criteria in selecting documents. In this context, I cannot but agree with the Defence that Mr. Treanor has failed to provide the Trial Chamber with guidance as to why he deemed certain information to be important, whereas he chose to exclude other material.

2. According to the jurisprudence of the Tribunal, an expert is "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"²⁸. Unlike fact witnesses, experts are called to give opinion evidence based on their expertise and proper professional criteria. In my view, the existence of *opinion evidence*—rather than a mere summarisation of facts—should be the first and foremost of the requirements which must be met before an expert statement or report is admissible in evidence. However, upon examining his Report, I must agree with the Defence that Mr. Treanor has not provided the Trial Chamber with such opinion evidence and that he is akin to a "summary witness" who is summing up information in a similar way as a non-expert would.²⁹

3. The deficiencies in Mr. Treanor's methodology became apparent from his answers to questions put to him by the Trial Chamber, as well as during cross-examination.³⁰ In my view, Mr. Treanor's acknowledgement that the selection of documents for his Report is based on his "personal judgement" tellingly indicates the lack of a systematic approach to the issue at stake, i.e., an examination of the political agenda of the Serbian leadership vis-à-vis the Serbs in Bosnia and Herzegovina as well as in Croatia. Cross-examined on whether he had taken into account events which would appear to be favourable for the Defence, Mr. Treanor confirmed that he did not "get

²⁷ Decision of 27 October 2008, para. 23.

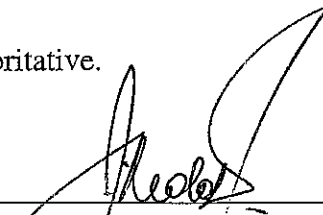
²⁸ Decision on Defence Motion to Exclude the Expert Reports of Mr. Patrick J. Treanor, 27 October 2008, citing to *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-T, Decision Concerning the Expert Witnesses Ewa Tabeau and Richard Philipps, 3 July 2002, p. 2.

²⁹ T. 1400.

³⁰ E.g., T. 912-917, 1276, 1282, 1323.

into issues of causality".³¹ I find all of this indicative of flaws in methodology, making his expertise in relation to the issues covered in his Report questionable.

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



Judge Bakone Justice Moloto
Presiding Judge

Dated this twenty-seventh day of November 2008

At The Hague

The Netherlands

[Seal of the Tribunal]

³¹ T. 1314-1315.