



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: 23 April 2009
Original: English

IN TRIAL CHAMBER I

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

Acting Registrar: Mr. John Hocking

Decision of: 23 April 2009

PROSECUTOR

v.

MOMČILO PERIŠIĆ

PUBLIC

DECISION ON EXPERT REPORTS OF EWA TABEAU

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 the Prosecution’s “Submission of Expert Reports by Ewa Tabeau with Annexes A Through G” filed publicly on 3 April 2009 (“Motion”) and the “Notice Pursuant to Rule 94 *bis* Concerning Prosecution Experts Grujić, Kovacs, Poje, Higgs, Philips, Tabeau, and Zečević” filed by the Defence on 27 November 2006 (“Notice”) and hereby renders its Decision.

I. PROCEDURAL HISTORY AND SUBMISSIONS

1. In its Motion, the Prosecution moves the Trial Chamber to admit into evidence the following two expert reports authored by Ewa Tabeau:¹

- a) “Population Losses in the Siege of Sarajevo, 10 September 1992 to 10 August 1994”² with the following attachments: “Addendum to Expert Report of Ewa Tabeau P3731A and P3731A.1 IT-98-29”³, “Addendum to Expert Report of Ewa Tabeau P3731B IT-98-29”⁴, “Annex 1: List of Possible Duplicates in the List of Persons Killed and Wounded in Sarajevo During Indictment Period as Referred to in the Addendum to the Expert Report of Ewa Tabeau filed 06-Jun-02”⁵, “Annex 2: List of Possible Duplicates in the List of Persons Wounded in Sarajevo During Indictment Period as Referred to in the Addendum to the Expert Report of Ewa Tabeau filed 06-Jun-02”⁶ and “CD Containing List of Persons Killed and Wounded in Sarajevo Indictment Period”⁷ (collectively, “First Report”);
- b) “A Study of Mortality Based on Eight Large Data Sources” (“Second Report”).⁸

2. In support of its Motion, the Prosecution submits that Ms. Tabeau has ample expertise in the field of demographics and both Reports are “relevant and probative to the events that occurred in Sarajevo, as discussed in paragraphs 41, 42 and 45 and counts one through four of the indictment”.⁹ It further specifically points out that the First Report is relevant as it relates directly to one of the

¹ Motion, para. 7.

² Motion, Annex A.

³ Motion, Annex B.

⁴ Motion, Annex C.

⁵ Motion, Annex D.

⁶ Motion, Annex E.

⁷ Motion, Annex F.

⁸ Motion, Annex G.

⁹ Motion, para. 2.

adjudicated facts accepted by the Trial Chamber, which states that “between 1992 and August 1994, many hundreds of civilians were killed and thousands were injured in ABiH-controlled areas”.¹⁰

3. On 27 November 2006, the Defence filed its Notice. Although the Defence accepted the qualifications of Ms. Tabeau, it objected to the admission of the First Report on the ground of relevance and expressed its wish to cross-examine her.¹¹

4. In support of its objection, the Defence submits that portions of the First Report fall outside the temporal scope of the Indictment. Moreover, the Defence points out that the parts of the First Report that focus on the ethnicity of the victims are irrelevant since the Accused is not charged with “ethnic cleansing, forcible transfer, persecution on religious grounds or extermination in relation to Sarajevo portions of the indictment”.¹²

5. The Prosecution disclosed the Second Report to the Defence on 7 May 2007. The Defence has not filed a notice pursuant to Rule 94 *bis*(B) of the Rules of Procedure and Evidence (“Rules”) concerning the Second Report.¹³

II. APPLICABLE LAW

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.
- (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.

¹⁰ Motion, para. 5, referring to Decision on Prosecution’s Motion for Judicial Notice of Adjudicated Facts Concerning Sarajevo, 26 June 2008 (“Adjudicated Facts Decision”), para. 24 (Adjudicated Fact No. 130).

¹¹ Notice, para. 6; Motion, para. 3.

¹² Notice, para. 6.

¹³ Motion, para. 6.

7. 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.¹⁴

8. The term “expert” has been defined by the jurisprudence of the Tribunal as “a person whom [*sic*] by virtue of some specialised knowledge, skill or training can assist the trier of fact to understand or determine an issue in dispute”¹⁵. 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 *curriculum vitae* (“CV”) as well as the witness’s scholarly articles, other publications or any other pertinent information about the witness.¹⁶

9. The content of the statement or report must fall within the expert witness’s area of expertise.¹⁷ 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.¹⁸ 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.¹⁹

¹⁴ *Prosecutor v. Lukić and Lukić*, Case No. 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.

¹⁵ *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”), p. 2.

¹⁶ *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.

¹⁷ *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.

¹⁸ *Ibid.*

¹⁹ *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*, 18 March 2008, para. 12.

10. 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.²⁰

11. The evidence sought to be admitted into evidence pursuant to Rule 94 *bis* of the Rules must also fulfil the general requirements of admissibility. The proposed evidence must therefore be relevant and have probative value, and the probative value must not be substantially outweighed by the need to ensure a fair trial.²¹

III. DISCUSSION

A. Authorship of the Reports

12. At the outset, the Trial Chamber notes that both the First and Second Reports seem to have been authored jointly by three individuals.²² It appears, however, that Ms. Tabeau supervised the drafting of both reports with the assistance of the others. For the purposes of Rule 94(B), including the potential cross-examination of an expert, the Trial Chamber is therefore satisfied that Ms. Tabeau qualifies as the author of the First and Second Reports.²³

B. Qualification of Ewa Tabeau as an Expert Witness

13. An analysis of Ms. Tabeau's CV shows that she obtained a PhD degree in mathematical demography and a Master's degree in econometrics and statistics. She taught demography from 1983 to 1991 at the Warsaw School of Economics and subsequently worked for nine years at the National Demographic Institute of the Netherlands. She also authored numerous relevant publications.²⁴

14. Given Ms. Tabeau's professional experience and noting that her qualifications are not challenged by the Defence, the Trial Chamber is satisfied that she has gained specialised knowledge as an expert in the field of demography. The Trial Chamber is therefore of the view that Ms. Tabeau is qualified as an expert within the meaning of Rule 94 *bis* of the Rules.

C. Admissibility of the Reports

15. The First Report discusses population losses in the siege of Sarajevo. It was compiled mainly on the basis of a survey of households in Sarajevo and analyses data from the period of 10

²⁰ *Martić* Decision Expert Avramov, para. 10.

²¹ Rule 89(C) and (D) of the Rules.

²² These are Ewa Tabeau, Marcin Żółtkowski and Jakub Bijak for the First Report and Ewa Tabeau, Jakub Bijak and Neda Lončarić for the Second Report.

²³ *See* Motion, Annex B.

September 1992 through 10 August 1994. It contains numbers of killed and wounded persons, demographic rates of killings, wounding and natural deaths, as well as a list of the names of the actual casualties in Sarajevo during this period. The Second Report is an analysis of the overall death toll of the siege of Sarajevo during the whole conflict – *i.e.* from April 1992 through December 1995. As such, the Trial Chamber finds that both the First and the Second Reports fall within the field of Ms. Tabeau's expertise.

16. The Trial Chamber notes that both Reports, to the extent that they analyse data relevant to the time period from April 1992 to August 1993, fall outside the temporal scope of the Indictment. However, the Trial Chamber considers such information as relevant to the background of the case, which will allow the Chamber understand the charges in the Indictment in a broader context.²⁵

17. Overall, the Trial Chamber finds the First and the Second Reports relevant and of probative value. As a consequence, the First and Second Reports are admitted into evidence.

²⁴ Motion, Annex B.

²⁵ *See also* Adjudicated Facts Decision, para. 24 (Adjudicated Fact No. 130).

IV. DISPOSITION

18. **FOR THE FOREGOING REASONS** and **PURSUANT TO** Rules 54, 89 and 94 *bis* of the Rules, the Trial Chamber hereby

GRANTS the Motion;

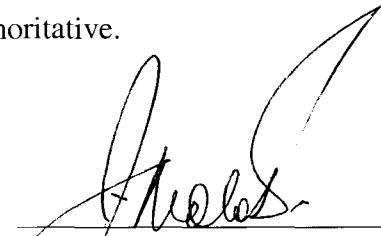
GRANTS the Defence Notice in Part;

ADMITS into evidence the First and Second Report under the condition that Ewa Tabeau appears before the Trial Chamber as an expert to be examined by the Parties and the Trial Chamber;

DISMISSES the Defence Notice in all other respects; and

REQUESTS the Registry to assign the exhibit numbers to the First and Second Reports.

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



Judge Bakone Justice Moloto
Presiding Judge

Dated this twenty-third day of April 2009

At The Hague

The Netherlands

[Seal of the Tribunal]