



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-95-5/18-T

Date: 5 April 2013

Original: English

IN THE TRIAL CHAMBER

Before: Judge O-Gon Kwon, Presiding
Judge Howard Morrison
Judge Melville Baird
Judge Flavia Lattanzi, Reserve Judge

Registrar: Mr. John Hocking

Decision of: 5 April 2013

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON PROSECUTION MOTION TO EXCLUDE THE EXPERT REPORT OF
KOSTA ČAVOŠKI**

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused

Mr. Radovan Karadžić

Standby Counsel

Mr. Richard Harvey

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 Motion to Exclude the Expert Report of Kosta Čavoški”, filed by the Office of the Prosecutor (“Prosecution”) on 15 March 2013 (“Motion”), and hereby renders its decision thereon.

I. Background

1. On 26 April 2012, the Accused was instructed by the Chamber to file the list of expert witnesses he intends to call during his case and to serve upon the Chamber and the Prosecution copies of the *curriculum vitae* and reports of these expert witnesses by no later than 27 August 2012.¹ On 29 May 2012, the Accused requested that the deadline for the submission of the expert report of Kosta Čavoški (“Witness”) be extended until 31 December 2012.² On 11 June 2012, the Chamber granted the Accused’s request and ordered that the Witness’s expert report be filed no later than 31 December 2012.³

2. On 11 December 2012, the Accused filed a notice (“Notice”) regarding the disclosure of the *curriculum vitae* (“CV”) and the original version of the Witness’s expert report entitled “Critical Analysis of the Works of Robert J. Donia and Patrick J. Treanor and Secession within the Former Yugoslavia and Bosnia and Herzegovina” (“Report”).⁴ In the Notice, the Accused submits that the Witness is an expert on the legal and political history of the former Yugoslavia and was recognised as an expert in the case of *Prosecutor v. Slobodan Milošević*.⁵ The Accused further notes that he asked the Witness to study the reports of the Prosecution’s political experts, Robert Donia and Patrick Treanor (“Prosecution Expert Witnesses”), and to refute any incorrect submissions they may have made.⁶

3. On 12 December 2012, the Prosecution filed the “Prosecution’s Response to “Disclosure of Report of Expert Witness: Kosta Čavoški””, in which it submits that it reserves the right to make submissions pursuant to Rule 94 *bis* (B) of the Tribunal’s Rules of Procedure and Evidence

¹ Scheduling Order on Close of the Prosecution Case, Rule 98 *bis* Submissions, and Start of the Defence Case, 26 April 2012, para. 24.

² Motion for Extension of Time: Expert Report of Professor Kosta Cavoski, 29 May 2012.

³ T. 28626 (11 June 2012).

⁴ Disclosure of Report of Expert Witness: Dr Kosta Cavoski, 11 December 2012 (“Notice”), para. 5.

⁵ Notice, para. 5, referring to *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Decision on Admissibility of Expert Report of Kosta Čavoški, 1 March 2006.

⁶ Notice, para. 3.

(“Rules”) pending the English translation of the Report.⁷ The Prosecution did not challenge the Witness’s qualifications as an expert.⁸

4. On 18 February 2013, the English translation of the Report was disclosed to the Chamber and Prosecution *via* e-mail.

5. On 15 March 2013, the Prosecution filed the Motion. On 21 March 2013, the Accused filed the “Response to Motion to Exclude the Expert Report of Kosta Čavoški” (“Response”).

II. Submissions

6. The Prosecution seeks the exclusion of the Report arguing that it fails to meet the minimum requirements for admission of expert evidence pursuant to Rules 89 and 94 *bis*(B)(iii) of the Rules and that it adopts a fundamentally flawed structure.⁹ The Prosecution argues that “the Report is an *ad hominem* attack on Prosecution witnesses Dr Robert Donia and Dr Patrick Treanor” based on the Witness’s beliefs, motivations and intentions.¹⁰ In the Motion, the Prosecution further submits that personal attacks are not the proper subject of an expert report and such opinions are inadmissible for the following reasons: (1) the assessment of witness credibility is exclusively the function of the Chamber; (2) the purpose of an expert report is to provide the Chamber with specific information of a technical nature that is outside its ordinary experience and knowledge; and (3) the Witness’s opinions on the beliefs, motivations and intentions of other expert witnesses are speculative and outside his expertise as a political and constitutional expert.¹¹ The Prosecution further argues that the submission of the Report is unfairly prejudicial given that while it was generally put to the Prosecution Expert Witnesses during cross-examination that they were biased, “neither [witness] was confronted with the dozens of pejorative opinions about their motivations and integrity”.¹²

7. The Prosecution further argues that the Report is not sufficiently transparent to be admitted because “virtually no sources” are provided for the factual assertions therein.¹³ It further submits that for an expert report to be admissible it must comply with a minimum degree of transparency which requires that the sources upon which the expert based his opinion are provided and that these

⁷ Prosecution’s Response to “Disclosure of Report of Expert Witness: Kosta Čavoški”, 12 December 2012 (“Prosecution First Response”), paras. 3, 5.

⁸ Prosecution First Response, paras. 4–5.

⁹ Motion, paras. 1, 3.

¹⁰ Motion, paras. 2, 9–13.

¹¹ Motion, paras. 2–3, 10–11, 14.

¹² Motion, para. 12.

¹³ Motion, paras. 2, 5–8.

sources have *prima facie* indicia of reliability.¹⁴ In the Motion, the Prosecution argues that without any indication of the nature or existence of the Witness's sources, the accuracy and reliability of the assertions and opinions in the Report cannot be properly tested.¹⁵

8. The Prosecution further submits that parts of the Report also attack material written by the Prosecution Expert Witnesses which are not before the Chamber and consequently, "the Chamber has no evidentiary basis from which to assess the parts of the Report dealing with these materials".¹⁶

9. Finally, the Prosecution contends that the section entitled "Secession of Member States within the Former Yugoslavia, in particular of Bosnia and Herzegovina" is the only part of the Report falling within the expertise of the Witness but is irrelevant to the charges against the Accused. It is therefore inadmissible.¹⁷

10. In the Response, the Accused submits that the Motion should be dismissed because the matters contained in the Motion can be raised during cross-examination.¹⁸ The Accused further argues that the objections contained in the Motion go to the weight, and not admissibility, of the Report and the Witness's testimony.¹⁹

II. Applicable Law

11. Rule 94 *bis*, which is a general rule concerning expert witnesses, provides as follows:

- (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.

¹⁴ Motion, paras. 5–7.

¹⁵ Motion, para. 8.

¹⁶ Motion, para. 15.

¹⁷ Motion, para. 16. *See*, Report, pp. 96–100.

¹⁸ Response, para. 3.

¹⁹ Response, para. 1.

- (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.

12. The general standards of admissibility which are set forth in Rule 89 apply to expert reports.²⁰ Rule 89(C) provides that a Chamber may admit any relevant evidence which it deems to have probative value. A minimum degree of transparency in the sources and methods used in an expert report is required at the stage of admission into evidence in order for the Chamber to determine the report's probative value.²¹ Furthermore, pursuant to Rule 89(D), such probative value must not be substantially outweighed by the need to ensure a fair trial.²²

13. In addition, in relation to the admission of expert evidence, the jurisprudence of the Tribunal has established that the proposed witness must be qualified as an expert and the content of the expert reports or statements must fall within the accepted expertise of the expert witness in question.²³ The Chamber notes that an expert witness is a person who, by virtue of some specialised knowledge, skill, or training, can assist the Chamber to understand or determine an issue in dispute.²⁴ In determining whether a particular witness meets this standard, a Chamber may take into account the witness's former and present positions and professional expertise by means of reference to the witness's CV as well as the witness's scholarly articles, other publications, or any other pertinent information about the witness.²⁵ One of the distinctions between an expert witness and a fact witness is that due to the qualifications of the expert, he or she can give opinions and draw conclusions, within the confines of his or her expertise, and present them to the Chamber.²⁶ Only those parts of the evidence which are based on the expert's specialised knowledge, skills or training will be treated as expert evidence.²⁷

²⁰ Decision on Prosecution's Motion for Admission of Evidence of Eight Experts Pursuant to Rule 92 *bis* and 94 *bis*, 9 November 2009 ("Decision of 9 November 2009"), para. 14; *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* Appeal Decision"), para. 22; *Prosecutor v. Zdravko Tolimir*, Case No. IT-05-88/2-T, Decision on Admission of Expert Report of Ratko Škrbić with Separate Opinion of Judge Mindua and Dissenting Opinion of Judge Nyambe, 22 March 2012 ("*Tolimir* Decision"), para. 12.

²¹ *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-T, Decision on Admission of Expert Report of Geoffery Corn, 22 September 2009 ("*Gotovina* Decision"), para. 5.

²² Decision of 9 November 2009, para. 14.

²³ *Popović* Appeal Decision, para. 21; *Gotovina* Decision, para. 5.

²⁴ *Popović* Appeal Decision, para. 27; *Gotovina* Decision, para. 5.

²⁵ *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, Decision on Expert Status of Reynaud Theunens, 19 February 2008, para. 28; *Prosecutor v. Vlastimir Đorđević*, Case No. IT-05-87/1-T, Decision on Defence Notice Under Rule 94 *bis*, 5 March 2009, para. 6; *Tolimir* Decision, para. 14.

²⁶ *Tolimir* Decision, para. 14.

²⁷ *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"), para. 12.

III. Discussion

14. The Prosecution did not challenge the Witness's qualifications as an expert under Rule 94 *bis*.²⁸ On the basis of the information contained in the Witness's CV, the Chamber is satisfied that the Witness is qualified as an expert on the legal and political history of the former Yugoslavia within the meaning of Rule 94 *bis* and thus can be called to testify as such.

15. The Report purports to provide a comparative critical analysis of the expert reports of Donia²⁹ and Treanor³⁰ expert evidence before the Chamber, which pertained, *inter alia*, to the establishment, structure and functioning of the Serbian Democratic Party, the policy and implementation of Bosnian Serb regionalisation and the establishment, structure and functioning of Republika Srpska. As such, the Chamber considers that the Report is generally relevant to the Third Amended Indictment ("Indictment").

16. The Chamber will now turn to the specific challenges raised by the Prosecution in the Motion in which it requests that certain sections of the Report should be redacted.

A. Subject-matter outside the expertise of the Witness

17. The Chamber recalls that an expert witness is intended to provide the Chamber with specialised knowledge that can assist the trier of fact to understand or determine an issue in dispute.³¹ Throughout the Report, the Witness extensively comments upon the credibility of the Prosecution Expert Witnesses.³² In the view of the Chamber, this falls outside the scope of the Witness's expertise. It is for the Chamber, and for the Chamber alone, to assess and determine the credibility of a witness. As such, the following sections should be excluded from the Report:

- a. Page 3, starting from "Robert Donia wrote all these papers" up to and including the word, "Conversely," on page 4 in paragraph 3;

²⁸ Prosecution First Response, paras. 4–5.

²⁹ Three expert reports authored by Robert Donia were admitted into evidence: "The Origins of Republika Srpska, 1990-1992: A Background Report" (Exhibit P971); "Thematic Excerpts from the Assembly of Republika Srpska, 1991-1996" (Exhibit P00972); and "Bosnian Serb Leadership and the Siege of Sarajevo, 1990-1995" (Exhibit P00973).

³⁰ Three expert reports authored by Patrick Treanor were admitted into evidence: "The Bosnian Serb Leadership 1990-1992" (Exhibit P02536); "The Bosnian Serb Leadership 1993-1995" (Exhibit P02537); and "Radovan Karadžić and the Serbian Leadership 1990-1995" (Exhibit P02538).

³¹ *Popović* Appeal Decision, para 27; *Tolimir* Decision, para. 35; *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; *Prosecutor v. 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.

³² The Chamber also notes that throughout the Report the Witness has used language that is inappropriate for an expert report, *see*, the last sentence of para. 5 on p. 12; the last sentence of para. 5 on p. 24; the last sentence on p. 31 going onto p. 32; and the last two sentences in para. 4 on p. 52.

- b. Page 4, starting from the final paragraph “In addition to this, Donia’s”, until the end of the first paragraph on page 5 ending with, “of conception and intention”;
- c. Page 5, starting from the final paragraph “Finally, with the excuse” until the heading “II Evident Mistakes” on page 6;
- d. Page 14, starting from “p. 37” until page 16, the sentence ending “Donia’s sleight of hand!”;
- e. Page 26, starting from “p. 81 An unknown number of Serbs”, until the end of the sentence ending, “he did not need any legal training for that”;
- f. Page 29, starting from “p. 98”, until the next heading on page 29, “p. 105”;
- g. Page 58, starting from “V Conclusion”, until the heading on page 62, “A Critical Analysis of the Works of Patrick J. Treanor”;
- h. Page 63, starting from “Patrick J. Treanor wrote all these reports”, until the end of the first sentence in paragraph 4 on page 66 ending, “citing data in support of his claims”;
- i. Page 68, starting from the fourth paragraph “What merits special explanation”, until the end of the fourth paragraph on page 70 ending, “nor are we sure that we shall live to see that”;
- j. Page 71, starting from the third paragraph “As a highly educated American”, until the end of the fourth paragraph on that page ending, “Treanor’s following account indicates that:”;
- k. Page 82, starting from the third paragraph “Being a brilliant intelligence agent”, until the end of the third paragraph on page 83 ending, “much better instead of him?”;
- l. The entire page 90;
- m. Page 92, paragraph 3 starting “In addition to”, until the end of paragraph 5 of that same page, “Serbs dims common sense”;
- n. Page 95, starting from the “VII Conclusion”, until the end of the third paragraph on page 96 ending, “”Mother of Truth”.

The Chamber notes that where it is impractical to exclude certain parts of the Report that comment on the credibility of the Prosecution Expert Witnesses, these have been left in.³³ The appropriate weight will be ascribed to these portions of the Report by the Chamber.

18. Furthermore, as a legal and political history expert on the former Yugoslavia, the Chamber finds that legal and political issues related to the United States of America (“U.S.”) do not reflect the Witness’s specialised knowledge, skills or training, or “discrete set of ideas or concepts that is expected to lie outside the lay person’s ken”,³⁴ and are in any event not relevant to the Indictment. In several places in the Report, the Chamber notes that it is impractical to redact information related to the U.S. As such, and in light of the fact that the remaining references to the U.S. are not numerous, the Chamber will not order that these be redacted.³⁵ Nevertheless, the appropriate weight will be ascribed to these portions of the Report by the Chamber.

B. Issues not relevant to the Indictment

19. First, the Chamber recalls that it has consistently held that the admissibility of an intercept into evidence does not depend on whether it was obtained in violation of applicable domestic law.³⁶ As such, discussions related to the legality of wiretapping prior to the Indictment period are not relevant. Accordingly, the Chamber considers that the following section should be excluded from the Report: Page 67, starting the second sentence of the sixth paragraph, “The question first arises”, until the end of the third paragraph on page 68 that ends with, “obtained from that service”.

20. The Chamber also notes that detailed comments on subject matters outside the temporal jurisdiction of the Indictment have no bearing on the charges contained therein, and as such, are not relevant. This includes discussions related to: (1) 1918;³⁷ (2) the Constitution of the Federative People’s Republic of Yugoslavia of 1946; (3) the Constitution of the Socialist Federal Republic of Yugoslavia of 1963; and (4) the Constitution of Bosnia and Herzegovina of 1974. As such, the Chamber orders that from the heading “Secession of Member States” on page 96, until the end of page 100, should be excluded from the Report.

³³ See para. 2 on p. 76, starting with “However, he did not do that”; para. 4 on p. 76, starting with “History Scholars know well”; para. 5 on p. 84, starting with, “Deliberate avoidance to say”.

³⁴ *Popović* Appeal Decision, para. 27.

³⁵ See, para. 3 on p. 12; para 2 on p. 22; para. 3 on p. 41.

³⁶ See, e.g., Decision on the Prosecution’s First Motion for Judicial Notice of Documentary Evidence Related to the Sarajevo Component, 31 March 2010, para. 10; Decision on the Accused’s Motion to Exclude Intercepted Conversations, 30 September 2010, paras. 9–12; Decision on Accused’s Motion for Reconsideration of Chamber’s Decision on Motion to Exclude Intercepted Communications, 18 April 2012, paras. 5–6.

³⁷ As stated above, (see, para. 18), in several places it is impractical to redact certain portions of the Report. As such, the third paragraph of p. 19 of the Report, will not be excluded. The appropriate weight will be ascribed to these portions of the Report by the Chamber.

C. Commentary on material not before the Chamber

21. The Chamber has held that the analysis of material that is not in evidence should be excluded from an expert report because “there is no evidentiary basis against which to assess the analysis”.³⁸ Several reports referred to by the Witness were not tendered into evidence during the testimony of the Prosecution Expert Witnesses or through any other witness, and therefore do not form part of the trial record. As such, there is not a sufficient basis to admit the parts of the Report in which the Witness comments on material not before the Chamber.³⁹ The following portions should therefore be excluded from the Report:

- a. Page 3, bullet points number 3, 5 and 6;
- b. Page 7, starting from the heading “Bosnian Krajina in the History of Bosnia and Herzegovina”, until the heading on page 12 “The Origins of Republika Srpska, 1990/1992. A Background Report”;
- c. Page 16, starting from the heading “Cross-examination of Robert Donia by the defence in previous cases”, until the heading on page 18 “Hiding and Withholding relevant facts”;
- d. Page 30, starting from the heading “Bosnia Krajina in the History of Bosnia and Herzegovina”, until the heading on the same page “The Origins of Republika Srpska, 1990/1992. A Background Report”;
- e. Page 34, starting from the heading, “Sarajevo: A biography”, until the heading on page 40, “Erroneous, Biased and Malevolent Characterisation”;
- f. Page 49, starting from the heading “Bosnia Krajina in the History of Bosnia and Herzegovina”, until the heading on page 51, “The Origins of Republika Srpska, 1990/1992. A Background Report”;
- g. Page 55, starting from the heading, “Sarajevo: A biography”, until the end of page 57;
- h. Page 63, bullet points number 2, 4 and 5;

³⁸ Decision on Prosecution’s Request to Exclude Portions of Reports of Mile Poparić, 12 March 2013, (“Poparić Decision”), paras. 26–28

³⁹ Poparić Decision, paras. 26–28.

- i. The second last paragraph of page 71;
- j. Page 72, starting from the second last paragraph “Patrick J. Treanor”, until the end of the first paragraph on page 75, “Patrick J. Treanor did not mention it”;
- k. Page 76, starting from the last paragraph “On 8 and 22 April 1990”, until the end of the third paragraph on page 77, “should be characterized as such”;
- l. Page 79, starting from the second paragraph “Patrick J. Treanor’s disinclination”, until the end of the third paragraph on that page, “recent past”;
- m. All of pages 87–89;
- n. Page 94, starting from the second paragraph “Patrick J. Treanor’s position”, until the heading on page 95 “VI Conclusion”.

D. Lack of sources

22. The Chamber recalls that it has previously held that to satisfy the minimum standard of reliability, an expert witness is expected to provide sufficient information as to the sources used in support of the conclusions in his report and these sources must be clearly indicated and accessible to allow the opposing party to challenge the basis upon which the expert reached those conclusions.⁴⁰ While the Chamber notes that the Witness provides limited references for the many views and opinions in the remaining parts of the Report,⁴¹ the Chamber does not find that the limited extent to which these portions are sourced warrants their exclusion pursuant to Rule 89 (C) of the Rules.

23. Nevertheless, the Chamber also recalls that a proper determination of the relevance and probative value of an expert report, including its reliability, will be made once the expert witness is brought to testify and cross-examined by the other party.⁴² The Chamber further notes that the limited references in the Report will go to the weight that the Chamber will ultimately ascribe to this material according to the purview of the Witness’s expertise, and in light of the totality of the evidence.

⁴⁰ Decision on Evidence of Robert Donia, 19 February 2010 (“Donia Decision”), para. 5; See also, *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. Radinović, 21 February 2003 (“Galić Decision”), para. 9; *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.

IV. Disposition

Accordingly, the Chamber, pursuant to Rules 89 and 94 *bis* of the Rules, hereby

- a) **GRANTS** the Motion in part;
- b) **ORDERS** the redactions outlined in paragraphs 17, 19, 20 and 21; and
- c) **DENIES** the remainder of the Motion.

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



Judge O-Gon Kwon
Presiding Judge

Dated this fifth day of April 2013
At The Hague
The Netherlands

[Seal of the Tribunal]

⁴¹ For example, see, Report, paras. 3–6 on p. 6; paras. 3–6 on p. 13; paras. 2–5 on p. 16; paras. 4–6 on p. 47; paras. 2–5 on p. 53; para. 1 on p. 55; para. 5 on p. 66; and paras. 5–6 on p. 70 continuing on to paras. 1–2 on p. 71.

⁴² See Donia Decision, para. 7; Poparić Decision, para. 30; *see also* Galić Decision, para. 11.