



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-98-32/1-T  
Date: 23 July 2008  
Original: English

**IN TRIAL CHAMBER III**

**Before:** Judge Patrick Robinson  
Judge Christine van den Wyngaert  
Judge Pedro David

**Registrar:** Mr. Hans Holthuis

**Decision of:** 23 July 2008

**PROSECUTOR**

v.

**MILAN LUKIĆ  
SREDOJE LUKIĆ**

**PUBLIC**

**DECISION ON SECOND PROSECUTION MOTION FOR THE  
ADMISSION OF EVIDENCE PURSUANT TO RULE 92BIS  
(TWO EXPERT WITNESSES)**

**The Office of the Prosecutor:**

Dermot Groome  
Frédéric Ossogo  
Laurie Sartorio  
Stevan Cole

**Counsel for the Accused:**

Mr. Jason Alarid for Milan Lukić  
Mr. Đuro Čepić and Mr. Jens Dieckmann for Sredoje Lukić

1. Trial Chamber III (“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 “Confidential Second Prosecution Motion for the Admission of Evidence Pursuant to Rule 92 *bis* with Confidential Annexes A and B” (“Motion”) filed on 15 February 2008.<sup>1</sup>

#### A. Submissions of the Parties

2. In its Motion, the Prosecution moves for the admission into evidence of transcripts of John Clark and Ewa Tabeau (“Expert Witnesses”) and associated exhibits from the case of *the Prosecutor v. Mitar Vasiljević* (“*Vasiljević*”).<sup>2</sup> The Prosecution submits that the Motion “is appropriately filed pursuant to Rule 92*bis* rather than pursuant to Rule 94*bis*” of the Rules of Procedure and Evidence (“Rules”).<sup>3</sup>

3. The Prosecution contends that the tendered evidence which are the transcripts and associated exhibits of a Senior Forensic Pathologist relating to the exhumation of human remains and of a Mathematical Demographer relating to a statistical analysis of changes in ethnic composition in the population<sup>4</sup> do not go to proof of the “acts and conduct of the Accused as charged in the Indictment”.<sup>5</sup> In addition the Prosecution contends that none of the factors enumerated in Rule 92 *bis*(A)(ii) of the Rules which would weigh against the admission of evidence in written form were applicable in this case.<sup>6</sup> The Prosecution also notes the “compelling interest in conducting the trial expeditiously” and how that interest would be served by “[a]dmitting the evidence identified in the Annexes, in lieu of *viva voce* testimony”.<sup>7</sup>

4. According to the Prosecution, the Expert Witnesses should not be required to appear for cross-examination.<sup>8</sup> The Prosecution draws attention to the purpose of Rule 92 *bis* which includes reducing the length of trials by alleviating the need for witnesses to re-appear multiple times to present similar testimony.<sup>9</sup> It points out that the Expert Witnesses’ qualifications and the reliability of their testimony have already been assessed in the *Vasiljević* case where “they were deemed

<sup>1</sup> Note that the Motion is dated 14 February 2008.

<sup>2</sup> Motion, para. 1.

<sup>3</sup> Motion, para. 5. In support of this submission the Motion cites the decision of the Trial Chamber in *the Prosecutor v. Jadranko Prlić et al.*, IT-04-74-T, Decision on the Prosecution Motions for Admission of Evidence Pursuant to Rule 92 *bis* of the Rules, 8 December 2006 (“*Prlić* Decision”) paras., 23, 25 and 27.

<sup>4</sup> Motion, para. 11.

<sup>5</sup> Motion, para. 10. The Prosecution notes that the evidence “does not address or draw any conclusions as to the identity of the perpetrators of any crimes, nor does it refer to either Accused”, Motion, para. 10.

<sup>6</sup> Motion, para. 13.

<sup>7</sup> Motion, para 14.

<sup>8</sup> Motion, paras. 15-19.

<sup>9</sup> Motion, para. 15.

competent to provide expert testimony” by the Trial Chamber and “were fully cross-examined by a competent defence counsel with similar interests to counsel for the Accused in the present case”.<sup>10</sup>

5. The Defence for Sredoje Lukić filed its response to the Motion confidentially on 28 February 2008 (“Sredoje Lukić Response”)<sup>11</sup> and the Defence for Milan Lukić confidentially filed its response on 28 March 2008 (“Milan Lukić Response”).<sup>12</sup> The Defence for both Accused argue that the Motion “should have been filed pursuant to Rule 94 *bis*” and stress that “by choosing Rule 92 *bis*(A) to present expert statements and reports instead of full testimony, the Prosecution tries to circumvent the Accused’s right to cross-examination of these witnesses through the ‘backdoor’ of Rule 92 *bis*(A)”.<sup>13</sup> Of particular concern is the circumvention of the right of the Accused under Rule 94 *bis*(B)(ii) to file a notice indicating a desire to cross-examine the expert witness.<sup>14</sup>

6. The Defence for both Accused submit that none of the proposed evidence of the Expert Witnesses should be admitted into evidence given that it would have “a clear prejudicial effect in the meaning of Rule 92 *bis*(A)(ii)(b)”<sup>15</sup> as the transcripts contain “descriptions of criminal acts and their outcomes that occurred during the period in which the crimes have allegedly been committed”<sup>16</sup> and together with the reports “give the impression as if the Accused has been involved in those criminal acts described”.<sup>17</sup> The Defence for Milan Lukić supports these submissions in arguing that the “transcripts and reports, by innuendo, definitely give the impression as if both the Accused have been involved in those criminal acts described”<sup>18</sup> which has a prejudicial effect that outweighs the probative value of the evidence, given that the involvement of the Accused was “clearly rejected by the Accused by pleading not guilty”.<sup>19</sup>

7. In the alternative, the Defence for both Accused submit that if the evidence is admitted pursuant to Rule 92 *bis*(A) of the Rules, the Accused should be allowed within the discretion of the Trial Chamber to cross-examine each witness.<sup>20</sup> The Prosecution’s interpretation that Rule 92 *bis*(C) requires the Defence to specifically show that cross-examination is necessary and appropriate in relation to the particular witness is also refuted by both Accused.<sup>21</sup> In response to the

<sup>10</sup> Motion, para. 16.

<sup>11</sup> Response of Defence Counsel for Sredoje Lukić to “Confidential Second Prosecution Motion for the Admission of Evidence Pursuant to Rule 92*bis* with Confidential Annexes A and B”, filed confidentially on 28 February 2008.

<sup>12</sup> Response of Defence Counsel for Milan Lukić to “Confidential Second Prosecution Motion for the Admission of Evidence Pursuant to Rule 92*bis* with Confidential Annexes A and B”, confidential, 28 March 2008.

<sup>13</sup> Sredoje Lukić Response, para. 7 and analogous submissions in Milan Lukić Response, para. 7.

<sup>14</sup> *Id.*

<sup>15</sup> Sredoje Lukić Response, para. 8 and Milan Lukić Response, para. 8.

<sup>16</sup> Sredoje Lukić Response, para. 8 and analogous submissions in Milan Lukić Response, para. 8.

<sup>17</sup> Sredoje Lukić Response, para. 8.

<sup>18</sup> Milan Lukić Response, para. 8.

<sup>19</sup> Sredoje Lukić Response, para. 8 and Milan Lukić Response, para. 8.

<sup>20</sup> Sredoje Lukić Response, para. 11 and Milan Lukić Response, para. 12.

<sup>21</sup> Sredoje Lukić Response, para. 12 and Milan Lukić Response, paras. 13-14.

Prosecution's submission that the Expert Witnesses had been fully cross-examined during their prior testimony, the Defence for Milan Lukić argues that the defence counsel in the *Vasiljević* Case sought to shift the blame towards the co-accused and to avoid "direct association with the co-accused" and thus "defense counsel for Vasiljević in no way protected the rights of [the] co-accused, Milan Lukić and Sredoje Lukić".<sup>22</sup>

8. The Defence for both Accused stress that "the right to confrontation of a witness [...] is a fundamental right guaranteed to an accused person [...] under the 'fair trial' provisions of Articles 20 and 21(4)(e) of the Statute".<sup>23</sup> It is argued that the transcripts and associated exhibits refer to acts allegedly committed by the "White Eagles" and given that both Accused challenge the truth, accuracy or reliability of the information contained in the material and the credibility of the expert witnesses, they would therefore need to cross-examine them.<sup>24</sup> In this regard the Defence for both Accused argue that the "Trial Chamber will gain valuable information for its assessment of the witnesses' credibility by observing their courtroom demeanour".<sup>25</sup>

9. On 6 March 2008<sup>26</sup> and 4 April 2008,<sup>27</sup> the Prosecution filed two motions for leave to reply and replied to the Sredoje Lukić Response and Milan Lukić Response. Leave is hereby granted to the Prosecution to file its reply to the Sredoje Lukić Response and Milan Lukić Response respectively.

## **B. APPLICABLE LAW**

10. Rule 92 *bis* of the Rules provides, in relevant part:

- (A) A Trial Chamber may dispense with the attendance of a witness in person, and instead admit, in whole or in part, the evidence of a witness in the form of a written statement or a transcript of evidence, which was given by a witness in proceedings before the Tribunal, in lieu of oral testimony which goes to proof of a matter other than the acts and conduct of the accused as charged in the indictment.
- (i) Factors in favour of admitting evidence in the form of a written statement or transcript include but are not limited to circumstances in which the evidence in question:
- (a) is of a cumulative nature, in that other witnesses will give or have given oral testimony of similar facts;
- (b) relates to relevant historical, political or military background;

<sup>22</sup> Milan Lukić Response, para. 9.

<sup>23</sup> Milan Lukić Response, para. 15 and Sredoje Lukić Response, paras. 13-14.

<sup>24</sup> Sredoje Lukić Response, para. 17 and Milan Lukić Response, para. 20.

<sup>25</sup> Sredoje Lukić Response, para. 17 and Milan Lukić Response, para. 20.

<sup>26</sup> Prosecution Motion for Leave to Reply to the "Response of Defence Counsel for Sredoje Lukić to 'Confidential Second Prosecution Motion for the Admission of Evidence pursuant to Rule 92 *bis* with Confidential Annexes A and B' and Reply, 6 March 2008.

<sup>27</sup> Prosecution Motion for Leave to Reply to the "Response of Defence Counsel for Milan Lukić to 'Confidential Second Prosecution Motion for the Admission of Evidence pursuant to Rule 92 *bis* with Confidential Annexes A and B' and Reply, 4 April 2008.

- (c) consists of a general or statistical analysis of the ethnic composition of the population in the places to which the indictment relates;
  - (d) concerns the impact of crimes upon victims;
  - (e) relates to issues of the character of the accused; or
  - (f) relates to factors to be taken into account in determining sentence.
- (ii) Factors against admitting evidence in the form of a written statement or transcript include but are not limited to whether :
- (a) there is an overriding public interest in the evidence in question being presented orally;
  - (b) a party objecting can demonstrate that its nature and source renders it unreliable, or that its prejudicial effect outweighs its probative value; or
  - (c) there are any other factors which make it appropriate for the witness to attend for cross-examination.
- [...]

(C) The Trial Chamber shall decide, after hearing the parties, whether to require the witness to appear for cross-examination; if it does so decide, the provisions of Rule 92 *ter* shall apply.

11. Evidence to be admitted pursuant to Rule 92 *bis* must meet the requirements of relevance and probative value set out in Rule 89(C) and (D) of the Rules.<sup>28</sup> In addition the evidence must go to proof of a matter other than the acts and conduct of the accused as charged in the indictment. For that purpose, Rule 92 *bis* excludes any written statement that the Prosecution relies on to establish:

that the accused committed (that is, that he personally physically perpetrated) any of the crimes charged himself, or

that he planned, instigated or ordered the crimes charged, or

that he otherwise aided and abetted those who actually did commit the crimes in their planning, perpetration or execution of those crimes, or

that he was superior to those who actually did commit the crimes, or

that he knew or had reason to know that those crimes were about to be or had been committed by his subordinates, or

that he failed to take reasonable steps to prevent such acts or to punish those who carried out those acts.<sup>29</sup>

12. The Trial Chamber must then decide whether admission of the evidence is appropriate having considered the factors in favour of and against the admission of evidence in written form.<sup>30</sup>

<sup>28</sup> *Prosecutor v. Dragomir Milošević*, IT-98-29/1-T, Decision on Prosecution Motion for Admission of Written Statements Pursuant to Rules 92 *bis* and *ter* of the Rules of Procedure and Evidence with Confidential Annex A, 27 February 2007 (“*Dragomir Milošević* Decision”), para. 7.

If the written evidence could be admitted pursuant to Rule 92 *bis*, the Trial Chamber should determine whether that witness should be required to appear for cross-examination. In making that assessment the Trial Chamber will, *inter alia*, consider the overriding obligation to ensure that an accused is afforded a fair trial under Articles 20 and 21 of the Statute of the Tribunal, how critical the evidence is to the Prosecution case,<sup>31</sup> and the proximity of the acts and conduct described in the written statement to the accused.<sup>32</sup>

13 Rule 94 *bis* of the Rules provides:

(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.

14 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.<sup>33</sup> 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.

15 The Tribunal's case law has established the following requirements for the admissibility of expert statements or reports:<sup>34</sup>

- i) the proposed witness is classified as an expert;
- ii) the expert statements or reports meet the minimum standards of reliability;

<sup>29</sup> *Prosecutor v. Stanislav Galić*, IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92 *bis*(C), 7 June 2002 (“*Galić Appeals Decision*”), para. 10.

<sup>30</sup> *Dragomir Milošević Decision*, para. 7.

<sup>31</sup> *Dragomir Milošević Decision*, para. 11.

<sup>32</sup> *Galić Appeals Decision*, para. 13.

<sup>33</sup> *Galić Appeals Decision*, 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, (“*Blagojević Decision*”) para. 19.

<sup>34</sup> *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 Appeals Decision*”), para. 21; *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. 5..

iii) the expert statements or reports are relevant and of probative value;

iv) the content of the expert statements or reports fall within the accepted expertise of the expert witness.

16. The term “expert” has been defined as a person who “by virtue of some specialised knowledge, skills or training can assist the trier of fact to understand or determine an issue in dispute”.<sup>35</sup> For the purposes of determining whether a witness meets this requirement, the witness’ former and present positions and professional experience are important.<sup>36</sup> 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.<sup>37</sup>

17. Secondly, the expert statement or report must meet the minimum standards of reliability which involves proof or *prima facie* reliability.<sup>38</sup> 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.<sup>39</sup> 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.<sup>40</sup>

18. 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.<sup>41</sup> Concerns relating to the witness’ independence or impartiality do not affect the admissibility of the witness’ statement or

<sup>35</sup> *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. *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.

<sup>36</sup> *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.

<sup>37</sup> *Slobodan Milošević* Decision Expert Čavoški, p. 3.

<sup>38</sup> *Popović* Appeals Decision, para 22.

<sup>39</sup> *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, para. 9.

<sup>40</sup> *Martić* Decision Expert Avramov, para. 9.

<sup>41</sup> *Galić* Decision Experts Tabeau and Philipps, pp. 2-3; *Brdanin* Decision Expert Brown, p. 4; *Martić* Experts Decision, para. 39.

report pursuant to Rule 94 *bis* of the Rules, but affect the weight to be given to the witness' evidence.<sup>42</sup>

19. 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.<sup>43</sup>

20. Fourthly, the content of the statement or report must fall within the expertise of the expert witness.<sup>44</sup> 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 specialised 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.<sup>45</sup>

## **C. DISCUSSION**

### *1. Application of Rule 92 bis to Expert Witnesses in Light of Rule 94 bis*

21. Rule 94 *bis* already existed when Rule 92 *bis* was introduced. This creates the possibility of overlap. Rule 94 *bis* of the Rules governs the disclosure of expert witness statements or reports and "provides for a strict procedure for the tendering of expert witness statements".<sup>46</sup> Several Trial Chambers have found or implied that the standard practice within the Tribunal has been for expert reports to be tendered and admitted through this Rule.<sup>47</sup> However, the Trial Chamber in *Prlić* pointed out that the "case law of the Tribunal is not consistent in respect of the application of Rules 92 *bis* and 94 *bis* to the evidence of expert witnesses".<sup>48</sup>

22. The Appeals Chamber addressed the applicability of Rule 92 *bis* to expert witnesses in the case of *the Prosecutor v. Stanislav Galić* ("*Galić*"); it held that

<sup>42</sup> *Slobodan Milošević* Decision Expert Čavoški, p. 2; *Brdanin* Decision Expert Brown, p. 4.

<sup>43</sup> *Brdanin* Decision Expert Brown, p. 4.

<sup>44</sup> *Martić* Decision Expert Avramov, para. 12.

<sup>45</sup> *Prosecutor v. Enver Hadžihasanović and Amir Kubura*, Case No. IT-01-47-T, Decision on Report of Prosecution Expert Klaus Reinhardt, 11 February 2004, p. 4.

<sup>46</sup> *Blagojević* Decision, para. 21.

<sup>47</sup> *Blagojević* Decision, paras. 19-20 and *Prosecutor v. Slobodan Milošević*, IT-02-54-T, Decision on Prosecution's Application for Admission of Written Statement of Dr. Berko Zečević Pursuant to Rule 92 *bis* (A), 9 September 2003, page 2.

<sup>48</sup> *Prlić* Decision, para. 17.



Rule 94 *bis* contains nothing which is inconsistent with the application of Rule 92 *bis* to an expert witness [...] There is nothing in either Rule which would debar the written statement of an expert witness, or the transcript of the expert's evidence in proceedings before the Tribunal, being accepted in lieu of his oral testimony where the interests of justice would allow that course in order to save time, with the rights of the other party to cross-examine the expert being determined in accordance with Rule 92 *bis*.<sup>49</sup>

23. However, the obligations and procedures under Article 94 *bis*(C) are specific to the evidence tendered by expert witnesses. In the case of *the Prosecutor v. Vidoje Blagojević and Dragan Jokić* (“*Blagojević*”), the Trial Chamber held that these obligations and procedures “cannot be avoided simply by tendering the statements under Rule 92 *bis*, where more discretion exists for the Trial Chamber”.<sup>50</sup> The Trial Chamber in that case considered “Rule 92 *bis* as *lex generalis* for the admission of witness statements and Rule 94 *bis* as *lex specialis* for expert witness statements.”<sup>51</sup> It specified that it would “decide on the admission of the expert reports exclusively submitted under Rule 94 *bis* only pursuant to Rule 94 *bis* and on the admission of transcripts of former witness testimony submitted exclusively under Rule 92 *bis*(D).”<sup>52</sup> This means that, when the Prosecution seeks the admission of *transcripts* of expert witnesses’ testimony, that transcript can appropriately be admitted pursuant to Rule 92 *bis*.<sup>53</sup>

24. While the Trial Chamber in the case of *the Prosecutor v. Vujadin Popović* (“*Popović*”) indicates that the Trial Chamber has the discretion to admit transcripts of expert testimony pursuant to Rule 92 *bis*, it should exercise its discretion to allow cross-examination in light of the right to request cross-examination pursuant to Rule 94 *bis*.<sup>54</sup> With regard to expert reports themselves, the Trial Chamber was “of the view that Rule 94 *bis* is the rule applicable to their admission” and that it should not “in principle” be possible to admit “expert reports, not under Rule 94 *bis*, but as an ‘integral part’ of the transcripts admitted pursuant to Rule 92 *bis*(D).”<sup>55</sup>

<sup>49</sup> *Galić* Appeals Decision, para. 40. The Appeals Chamber in *Galić* specifically addressed the admissibility of the written statement of a deceased expert under Rule 92 *bis*(C) - a provision which has since become Rule 92 *quater*.

<sup>50</sup> *Blagojević* Decision, para. 27 which has been cited in the *Martić* Experts Decision, para. 22. While it is true that, as submitted by the Prosecution Rule 92 *bis*(C) does make provision for the cross-examination of witnesses, whether such cross-examination is required is a determination made by the Trial Chamber in the exercise of its discretion. In contrast, pursuant to Rule 94 *bis*(B)(ii), the Accused has a right to provide notice of their wish to cross-examine the expert witness.

<sup>51</sup> *Blagojević* Decision, para. 28.

<sup>52</sup> *Blagojević* Decision, para. 28, footnote 55. Note that Rule 92 *bis* (D) has now been deleted but has been incorporated into 92 *bis* (A).

<sup>53</sup> See *Prosecutor v. Vujadin Popović et al.*, IT-05-88-T, Decision on Prosecution’s Confidential Motion for Admission of Written Evidence in Lieu of Viva Voce Testimony Pursuant to Rule 92*bis*, 12 September 2006 (*Popović* Decision) para. 45, in which the Trial Chamber rejected Nikolić’s assertion that transcripts of prior expert testimony cannot be admitted pursuant to Rule 92 *bis*(D) unless the Prosecution first moves for the admission of the expert’s report under Rule 94 *bis* and the Defence accepts the reports without cross-examination.

<sup>54</sup> *Popović* Decision, para. 52.

<sup>55</sup> *Popović* Decision, paras. 53-54. Note that despite this principle the Trial Chamber was willing to admit the reports on the basis that the “experts will appear at trial and the Accused will have the same opportunity to cross-examine the experts regarding any aspects of these reports as they would be accorded by the direct application of rule 94 *bis*.” (*Popović* Decision, para. 54).

25. The Trial Chamber is convinced that even though Rule 94 *bis* creates a specific procedure for the admission of the testimony of expert witnesses, it is not an exclusive provision. In the Trial Chamber's view, it is permissible for transcripts of evidence of an expert witness to be admitted *in lieu* of oral testimony pursuant to Rule 92 *bis*(A). However, the Trial Chamber finds that expert reports may not be admitted under Rule 92 *bis* on the basis that they are associated to the expert's prior testimony. Rather, the Trial Chamber agrees with several Trial Chambers that have held that expert reports should be properly filed under Rule 94 *bis* in accordance with the specific procedures envisaged by that provision for the testimony of expert witnesses.<sup>56</sup>

26. Moreover, the Trial Chamber concurs with the Trial Chamber's view in *Popović* that if an expert report has "not been accepted by the Accused, the reports may not be admitted against the Accused without permitting the Defence to cross-examine the experts at trial pursuant to Rule 94 *bis*(C)".<sup>57</sup>

27. Although the Motion for the admission of expert reports was filed under Rule 92 *bis* as associated exhibits to the transcripts of the Expert Witnesses, that motion should have properly been filed under Rule 94 *bis*. In the interests of justice, the Trial Chamber will examine whether the reports can be admitted under Rule 94 *bis* and will examine whether the transcripts can be admitted under Rule 92 *bis*.

## 2. Analysis of the Proposed Witnesses' Evidence

### (a) The reports

28. The Trial Chamber is satisfied, on the basis of the curriculum vitae provided in the confidential annex to the Motion, that Dr. John Clark qualifies as an expert. His curriculum vitae demonstrates specialised knowledge, as well as skill or training in the field of pathology. The Trial Chamber is satisfied that this report falls within the accepted expertise of the witness and satisfies the minimum standards of reliability. Dr. Clark's report details the findings of autopsies carried out on 131 bodies that were recovered from two grave-sites at Slap, near Žepa in Bosnia and Herzegovina which "were alleged to be the bodies of people killed in or around Višegrad in the summer of 1992"<sup>58</sup> which includes analysis of the likely cause of death and evidence of other injuries. The report is *prima facie* relevant to the case and has probative value.

<sup>56</sup> This distinction is supported by the decision to admit expert reports pursuant to Rule 94 *bis* and transcripts of evidence pursuant to Rule 92 *bis* in the *Martić* Experts Decision, paras. 23, 30, 47.

<sup>57</sup> *Popović* Decision, para. 53.

<sup>58</sup> Motion, Confidential Annex B.

29. The Trial Chamber is also satisfied by the summary of professional qualifications of Ewa Tabeau, provided in the confidential annex to the Motion, that she qualifies as an expert, as it demonstrates specialised knowledge, skill or training with regard to the ethnicity of the populations in Bosnia and Herzegovina. The Trial Chamber is satisfied that her report falls within the accepted expertise of the witness and satisfies the minimum standards of reliability. The report summarises changes in the ethnic composition of the municipality of Višegrad from 1991 to 1997.<sup>59</sup> The report also provides an analysis of the timing, location and identity of missing persons in the municipality. The report is *prima facie* relevant to the case and has probative value.

30. The Defence for both Accused have asserted their right to cross-examine the Expert Witnesses. This will be taken as an indication of a desire to cross-examine the Expert Witnesses for the purposes of Rule 94 *bis*(B)(ii). In light of these submissions they will appear in court for cross-examination.

31. The Trial Chamber will defer its decision on admissibility of the expert reports until the Expert Witnesses appear for cross-examination.

(b) The transcripts

32. Finally, the Trial Chamber is satisfied that the evidence in the transcripts does not go to proof of the acts and conduct of the Accused. The evidence does not demonstrate that the Accused committed the alleged crimes, nor does it demonstrate that the Accused aided or abetted the commission of those crimes. The Trial Chamber is not convinced that the purported prejudicial effect of the evidence outweighs its probative value or that there are any other factors against the admission of the evidence. Therefore, the transcripts of the Expert Witnesses are admitted pursuant to Rule 92 *bis* in lieu of oral testimony.

33. The Trial Chamber need not make an assessment of whether each expert should be required to appear for cross-examination pursuant to Rule 92 *bis*(C) given that the Expert Witnesses will be required to appear for cross-examination.

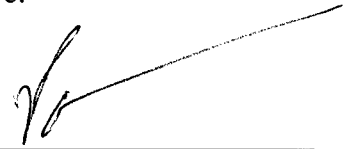
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<sup>59</sup> Motion, Confidential Annex B.

## II. DISPOSITION

34. For the foregoing reasons, the Trial Chamber, pursuant to Rule 94 *bis* of the Rules, **DEFERS** its decision on the admission into evidence of the reports of John Clark and Ewa Tabeau; **ORDERS** the Prosecution to call John Clark and Ewa Tabeau to appear for cross-examination; and pursuant to Rule 92 *bis* of the Rules, **ADMITS** the transcripts of John Clark and Ewa Tabeau, as attached to the Motion.

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



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Judge Patrick Robinson  
Presiding

Dated this 23<sup>rd</sup> day of July 2008,  
At The Hague  
The Netherlands

[Seal of the Tribunal]