UNITED
NATIONS

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: 9 November 2009

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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: **9 November 2009**

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

DECISION ON PROSECUTION'S MOTION FOR ADMISSION OF EVIDENCE OF EIGHT EXPERTS PURSUANT TO RULES 92 *BIS* AND 94 *BIS*

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused

Mr. Radovan Karadžić

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's Motion for Admission of the Evidence of Eight Experts Pursuant to Rule 94 *bis* and Rule 92 *bis*", filed on 29 May 2009 ("Experts Motion") and the Accused's "Motion for Extension of Time to Respond to Rule 92 *bis* Motion for Expert Witnesses and to Exclude the Reports of Kathryn Barr", filed on 31 August 2009 ("Kathryn Barr Motion"), and hereby renders its decision thereon.

I. Background and Submissions

1. The Experts Motion is concerned with the evidence of eight experts, namely, Thomas Parsons, Fredy Peccerelli, William Haglund, Christopher Lawrence, Jose Baraybar, Richard Wright, John Clark, and Kathryn Barr. With the exception of Barr, who is a handwriting expert, these experts are all forensic scientists, who participated in the exhumations of mass graves in Bosnia and Herzegovina, oversaw autopsies of the remains found therein, or oversaw their DNA identification. The Office of the Prosecutor ("Prosecution") requests that the evidence of the eight experts, consisting of their previous testimony in the *Popović* case and associated exhibits, as well as the reports they prepared, be admitted under Rules 92 *bis* and 94 *bis*, that is, without calling the experts for either examination-in-chief or cross-examination.[1]

2. Between 23 March and 1 April 2009, the Prosecution filed its Rule 94 *bis* notices notifying the Chamber that it had disclosed to the Accused the reports of these eight experts, and noting its intention to tender them for admission into evidence pursuant to Rule 94 *bis* (C).[2] At the Status Conference of 2 April 2009, there was some discussion of Rule 94 *bis* and the procedure to be followed regarding the expert witnesses in general. During that discussion, the former pre-trial Judge made inquiries as to whether there could be any agreement between the parties in relation to some of the expert evidence, having in mind in particular the forensic and pathology evidence, and noting that some of it may not be controversial. The Accused expressed a general view that he would not oppose any experts from appearing but would challenge their findings, either in their

[1] Experts Motion, para. 1.

[2] *See* Prosecution's Notice of Disclosure of Expert Reports by Dr. Kathryn Barr and her Curriculum Vitae, 23 March 2009; Prosecution's Notice of Disclosure of Expert Reports by William Haglund and his Curriculum Vitae, 1 April 2009; Prosecution's Notice of Disclosure of Expert Reports by Dr. Christopher Lawrence and his Curriculum Vitae, 1 April 2009; Prosecution's Notice of Disclosure of Expert Reports by Jose Baraybar and his Curriculum Vitae, 1 April 2009; Prosecution's Notice of Disclosure of Expert Reports by John Clark and his Curriculum Vitae, 1 April 2009; Prosecution's Notice of Disclosure of Expert Reports by Fredy Peccerelli and his Curriculum Vitae, 1 April 2009; Prosecution's Notice of Disclosure of Expert Reports by Thomas Parsons and his Curriculum Vitae, 1 April 2009; Prosecution's Notice of Disclosure of Expert Reports by Richard Wright and his Curriculum Vitae, 1 April 2009.

entirety or in part.[3] On 11 May 2009, the Accused filed his responses to the notices relating to the seven forensic science experts, also under Rule 94 *bis*.[4] His position is identical with respect to all seven, namely that he (i) does not accept their reports and/or statements; (ii) wishes to cross-examine them; and (iii) does not challenge the fact that they are experts and that their reports are relevant, but reserves the right to object at trial to opinions offered outside of the expertise of the witness or to the relevance of specific testimony by the witness. He thus requests that the Trial Chamber: (a) defer its decision on the admissibility of the reports until the trial; (b) require the experts to appear for cross-examination; and (c) rule on the scope and relevance of the testimony based upon the objections made at trial. With respect to Kathryn Barr, the Accused first filed a response identical to the responses for the other seven experts.[5] He then amended this response twice; first in order to notify the Chamber and the Prosecution that he would not contest Barr's report relating to Vujadin Popović,[6] and, second, noting that he would not contest Barr's reports pertaining to Drago Nikolić.[7] He continues to decline to accept the remainder of Barr's reports and maintains his request to cross-examine her on them.

3. Following on the former pre-trial Judge's suggestion that the parties should consider reaching an agreement on some of the expert evidence, the Prosecution filed the Experts Motion. Having been given an extension of time to respond to the Experts Motion on three different occasions,[8] the Accused filed the Kathryn Barr Motion asking for another extension of time, this time in relation to the seven forensic scientists alone, and seeking the exclusion of the contested parts of Barr's evidence. The Chamber granted a very limited further extension of time to the Accused to respond to the notices relating to the seven forensic experts,[9] and decided to expedite the Prosecution's response in relation to the Kathryn Barr Motion.[10] Thus, on 4 September, the Accused filed the "Response by Dr. Radovan Karadžić to the Prosecution's Motion Regarding the Proffered Evidence of Eight Experts Pursuant to Rules 94 *bis* and 92 *bis* of 29 May 2009" ("Experts

[3] Status Conference, T. 159–162 (2 April 2009).

[4] *See* Response to Rule 94 *bis* Notice: William Haglund, 11 May 2009; Response to Rule 94 *bis* Notice: Christopher Lawrence, 11 May 2009; Response to Rule 94 *bis* Notice: Jose Pablo Baraybar, 11 May 2009; Response to Rule 94 *bis* Notice: John Clark, 11 May 2009; Response to Rule 94 *bis* Notice: Fredy Peccerelli, 11 May 2009; Response to Rule 94 *bis* Notice: Thomas Parsons, 11 May 2009; Response to Rule 94 *bis* Notice: Richard Wright, 11 May 2009.

[5] Response to Rule 94 *bis* Notice: Kathryn Barr, 11 May 2009.

[6] Amended Response to Rule 94 *bis* Notice: Katherine [*sic*] Barr, 7 August 2009, para. 5.

[7] Second Amended Response to Rule 94 *bis* Notice: Kathryn Barr, 24 August 2009, para. 5.

[8] *See* Order Following upon Rule 65 *ter* Meeting and Decision on Motions for Extension of Time, 18 June 2009; Decision on Accused's Application for Certification to Appeal Decision on Motions for Extension of Time: Rule 92 *bis* and Response Schedule, 8 July 2009; Status Conference, T. 370 (23 July 2009).

[9] The Accused was ordered to file a response by 4 September 2009. On 4 September he filed his response in BCS, which was accepted by the Chamber on an exceptional basis. *See* Submission of Response to Prosecution Rule 92 *bis* Motion–Expert Witnesses, 7 September 2009; Status Conference, T. 441–445 (8 September 2009).

[10] Decision on Accused's Motion for Extension of Time to Respond to Rule 92 *bis* Motion for Expert Witnesses and to Exclude the Reports of Kathryn Barr, 2 September 2009, paras. 10–11.

Response"), while the Prosecution filed the "Prosecution Response to Motion Seeking to Exclude the Evidence of Dr. Kathryn Barr" ("Kathryn Barr Response").

4. The Chamber will, therefore, deal with the two issues raised by these filings – the Accused's request to exclude the evidence of Kathryn Barr, and the Prosecution's motion for the admission of the evidence of all eight expert witnesses pursuant to Rule 92 *bis* – in turn below.

A. Kathryn Barr Motion

5. The Prosecution's notice relating to Kathryn Barr provides that it has disclosed eight of her reports to the Accused, as well as her curriculum vitae.[11] In the reports, she assesses the authenticity of contemporaneous records, such as logbooks and vehicle logs, kept by the Zvornik Brigade and Drina Corps in 1995, during the alleged crimes in Srebrenica. She does so through the analysis of the handwriting of five individuals who were connected to the Zvornik Brigade and Drina Corps and who made entries in the logbooks and vehicle logs. Four of these reports relate to the handwriting of Dragan Jokić, while the remaining four relate to Vujadin Popović, Milorad Trbić, Drago Nikolić, and a collection of individuals (Milorad Trbić, Drago Nikolić, and Ljubislav Štrbac), respectively. In the Kathryn Barr Motion, the Accused notes that he has agreed to the admission of two of these reports, relating to Vujadin Popović and Drago Nikolić, as well as the portion of the report on Milorad Trbić, Drago Nikolić, and Ljubislav Štrbac, which relates to Drago Nikolić. This agreement stems from the Accused's contact with the defence counsel for Nikolić and Popović, who confirmed that the signatures of their clients in the relevant documentation were genuine. However, the Accused claims that he does not have similar access to the remaining three individuals, all of whom were connected to the Zvornik Brigade, and thus has to employ a handwriting expert of his own in order to determine whether he agrees with the remaining reports.[12] The Accused consulted with such an expert, Adrian Lecroix, who determined that he would need approximately 100 hours to review the accuracy of Barr's work. However, according to the Accused, the Registry has declined to pay for this number of hours, as well as the expert's travel expenses from Australia to The Hague. Thus, the Accused argues that, because he is unable to test it, the evidence of Kathryn Barr should be excluded under Rule 89 as its value is outweighed by the prejudicial effect of its admission.[13] In support, he claims that the probative value of Barr's

[11] Prosecution's Notice of Disclosure of Expert Reports by Dr. Kathryn Barr and her Curriculum Vitae, 23 March 2009.
[12] Kathryn Barr Motion, para. 4.
[13] Kathryn Barr Motion, paras. 5–7, 9.

evidence is low since the Chamber has already taken judicial notice of adjudicated facts to the effect that the Zvornik Brigade participated in the execution of prisoners at Srebrenica.[14]

6. In the Kathryn Barr Response, the Prosecution claims that the contested reports and evidence are relevant and probative, and that their admission is not unfairly prejudicial. According to the Prosecution, the Accused has been allocated a sufficient number of hours to engage his own experts for the purpose of responding to the Experts Motion and it is unlikely that the full 100 hours sought are necessary, at this stage, to respond to the limited issue of the admissibility of Barr's evidence.[15] The Prosecution also argues that Barr's evidence is highly probative as it is relevant not only to the participation of the Zvornik Brigade in the Srebrenica events, but also "bears on the authentication of critical Zvornik Brigade documents," and provides evidence of organisation, planning, and implementation of the charged crimes. Thus, the information found in the adjudicated facts does not obviate the need for the detail contained in the documents analysed by Barr.[16] The Prosecution notes further that the failure by the Accused to allocate any of the expert hours already granted to him by the Registry to the analysis of Barr's evidence does not constitute prejudice.[17] Finally, the Prosecution argues that the remedy sought by the Accused is extreme since alternative remedies, such as ordering the Accused to reassess the number of hours needed to respond to the Experts Motion, exist. In addition, according to the Prosecution, the Accused could retain a more local expert or could, in light of his acceptance of some of Barr's reports and given his view that the probative value of the remainder of Barr's evidence is "quite low", work towards a stipulation with the Prosecution.[18]

B. Experts Motion

7. In the Experts Motion, the Prosecution seeks to tender into evidence, "pursuant to Rules 94 *bis*, 92 *bis*, and 89(C)", the prior testimony, associated exhibits, and expert reports of the eight expert witnesses listed above.[19] The Prosecution argues that Rule 92 *bis* applies to the evidence of expert witnesses and that the Chamber, therefore, has the discretion to admit it without cross-

[14] Kathryn Barr Motion, paras. 8–10.
[15] Kathryn Barr Response, paras. 2–4.
[16] Kathryn Barr Response, para. 5.
[17] Kathryn Barr Response, paras. 6–7.
[18] Kathryn Barr Response, paras. 8–10.
[19] Experts Motion, paras. 1, 17, Appendix A.

examination.[20] According to the Prosecution, the proffered evidence satisfies the threshold requirements of Rule 92 *bis*, and none of the discretionary factors militate against admission.[21]

8. The Prosecution acknowledges that some of the expert reports listed in the Experts Motion as eligible for admission under the aforementioned Rules were not admitted into evidence in the *Popović* case but notes that they were disclosed to the defence in that case, and were either "intrinsically linked to the testimony and reports of the expert that was subject to cross-examination", or were of "the same character as the reports and testimony" that were subject of cross-examination.[22] The Prosecution submits in this context that, if the Chamber determines that further cross-examination is necessary, it should be limited to the substance of those parts of the reports and previous testimony that were not subjected to cross-examination in the *Popović* case.[23]

9. The Accused notes that his Expert Response concerns six forensic science experts, rather than seven, because his response relating to the Prosecution's DNA expert, Thomas Parsons, had to be delayed until his own expert, Oliver Stojković, is given access to documentation requested from the International Commission on Missing Persons by his team. He claims that this course of action was agreed upon by the parties and the pre-trial Judge during the Rule 65 *ter* meeting of 17 August 2009, and asks that his opportunity to respond be delayed until his expert is in possession of the underlying information.[24]

10. The Accused then reminds the Chamber that the materials of the forensic science experts are extensive and that, additionally, the Prosecution, at the request of the Accused, disclosed large numbers of documents underlying the work of the experts, all of which have to be reviewed by defence experts. Since the Accused's expert, Dušan Dunjić, did not have enough time to analyse all this material, the Accused points out that the Experts Response is incomplete. Nevertheless, Dunjić's preliminary views are attached to the Experts Response and they, according to the Accused, give "irrefutable reasons" to call the experts for cross-examination, the main reason being that the relevant reports, transcripts, and accompanying exhibits and sources are unreliable.[25] The Accused also notes that the fact that Dunjić assisted the defence teams in the *Popović* case, when these Prosecution experts gave evidence and were cross-examined, cannot be decisive as Dunjić

[20] Experts Motion, paras. 4–9.
[21] Experts Motion, paras. 10–12.
[22] Experts Motion, paras. 13–15.
[23] Experts Motion, para. 16.
[24] Experts Response, paras. 2–3.
[25] Experts Response, paras. 4–5, 7, Annex A.

was not at the time able to examine and analyse the documentation underlying the work of the six forensic science experts.[26]

II. Applicable Law

11. Rule 89(F) of the Rules provides that a Chamber may receive the evidence of a witness orally or, "where the interests of justice allow," in written form. Rule 92 *bis* is one of the Rules concerned with admission of written evidence in the proceedings before the Tribunal and provides as follows:

> **Rule 92 *bis***
> **Admission of Written Statements and Transcripts in Lieu of Oral Testimony**
>
> (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;
> (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.
>
> (B) If the Trial Chamber decides to dispense with the attendance of a witness, a written statement under this Rule shall be admissible if it attaches a declaration by the person making the written statement that the contents of the statement are true and correct to the best of that person's knowledge and belief and
>
> (i) the declaration is witnessed by:
>
> (a) a person authorised to witness such a declaration in accordance with the law and procedure of a State; or

[26] Experts Response, para. 8. The Accused makes a similar argument addressing the fact that some of the experts were cross-examined in the *Krstić* case. *See* Experts Response, para. 9.

(b) a Presiding Officer appointed by the Registrar of the Tribunal for that purpose; and

(ii) the person witnessing the declaration verifies in writing:

(a) that the person making the statement is the person identified in the said statement;
(b) that the person making the statement stated that the contents of the written statement are, to the best of that person's knowledge and belief, true and correct;
(c) that the person making the statement was informed that if the content of the written statement is not true then he or she may be subject to proceedings for giving false testimony; and
(d) the date and place of the declaration.

The declaration shall be attached to the written statement presented to the Trial Chamber.

(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.

12. Rule 92 *ter* also allows for admission of written evidence, in the form of a witness statement or transcript of evidence given in previous proceedings, under the condition that the witness is present in court and available for cross-examination. The main distinction between the two Rules, and the reason for their differing procedures for admission, is that, unlike the witnesses whose evidence is admitted under Rule 92 *bis*, the witnesses whose evidence is admitted using Rule 92 *ter* have to appear before the Tribunal in person for, at the very least, cross-examination by the other party. It is for this reason that the evidence admitted under Rule 92 *ter* can go to the acts and conduct of the Accused, whereas the evidence admitted under Rule 92 *bis* cannot.

13. Like Rules 92 *bis* and 92 *ter*, Rule 94 *bis* also deals with written evidence. However, it is concerned only with the evidence of expert witnesses. It provides 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.

14. All evidence, whether written or oral, must satisfy the fundamental requirements for the admission of evidence which are set out in Rule 89(C) and (D). Accordingly, regardless of the specific Rule under which the admission of evidence is sought, it must be relevant to the current case and have probative value. Furthermore, such probative value must not be substantially outweighed by the need to ensure a fair trial.[27] In addition, while applying Rules 92 *bis* and 94 *bis*, the Chamber must always bear in mind Article 21(4)(e) of the Statute, which states that an accused "shall be entitled" to examine, or have examined, the witnesses against him. However, as held by the Appeals Chamber, the accused's right to cross-examine witnesses is not absolute.[28]

15. As stated above, Rule 92 *bis* allows for admission of a witness's written statement and/or a transcript of his evidence, together with the accompanying exhibits that form an inseparable and indispensable part of his testimony.[29] In addition to meeting the requirements of Rule 89 of the Rules, the evidence must not relate to the acts and conduct of the accused,[30] and the formal requirements of Rule 92 *bis* (B) must be satisfied. If the foregoing requirements are met, the second step for a Chamber is to determine, bearing in mind the factors provided for in Rule 92 *bis* (A)(i)–(ii), whether to exercise its discretion to admit the evidence in written form.[31] In addition to the factors outlined in the Rule, the Chamber may also consider whether the written evidence in question: (i) relates to "live and important issue between the parties, as opposed to a peripheral or marginal issue",[32] and/or is "pivotal" to the Prosecution's case;[33] and (ii) goes to proof of the acts

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[27] *Prosecutor v. Galić*, Case No. IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92 *bis* (C), 7 June 2002 ("*Galić* Appeal Decision"), paras. 12, 31; *Prosecutor v. Milutinović*, Case No. IT-05-87-PT, Decision on Prosecution Rule 92 *bis* Motion, 4 July 2006 ("*Milutinović* Trial Decision"), para. 5; *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-T, Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 *bis*, 22 August 2008 ("*Lukić* Trial Decision"), para.15; *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-T, Decision on Confidential Prosecution Motion for the Admission of Prior Testimony With Associated Exhibits and Written Statements of Witnesses Pursuant to Rule 92 *ter*, 9 July 2008, page 7, para. 20 [*sic*]; *Prosecutor v. 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.

[28] *See, e.g., Prosecutor v. Milan Martić*, Case No. IT-95-11-AR73.2, Decision on Appeal Against the Trial Chamber's Decision on the Evidence of Witness Milan Babić, 14 September 2006, para. 12

[29] *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-T, Decision on Admission of Written Statements, Transcripts and Associated Exhibits Pursuant to Rule 92 *ter*, 22 February 2007, p. 3; *Prosecutor v. Perišić*, Case No. IT-04-81-T, Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 *bis*, 2 October 2008 ("*Perišić* Trial Decision"), para. 16; *Lukić* Trial Decision, para. 21.

[30] *Galić* Appeal Decision, paras. 9–10. *See also Milutinović* Trial Decision, para. 6; *Lukić* Trial Decision para. 17; *Perišić* Trial Decision, para. 11; both referring to the *Galić* Appeal Decision. Similarly, before the *Galić* Appeal Decision, *see Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Decision on Prosecution's Request to Have Written Statements Admitted under Rule 92 *bis*, 21 March 2002 ("*S. Milošević* Trial Decision"), para. 22.

[31] *Milutinović* Trial Decision, para. 7.

[32] *S. Milošević* Trial Decision, para. 24–25; *Martić* Trial Decision, para. 15.

and conduct of a subordinate of the accused or of some other person for whose acts and conduct the accused is charged with responsibility.[34] Even if all these factors militate in favour of admitting a witness statement or transcript under the Rule, the Trial Chamber may decide, pursuant to Rule 92 *bis* (C), that the witness should be called for cross-examination, under the conditions set out in Rule 92 *ter*. When exercising this discretionary power, the Chamber may take into account, *inter alia*, whether the evidence (i) forms a "critical" or "pivotal element" of the Prosecution's case;[35] (ii) describes the acts and conduct of a person for whose acts and conduct the accused is charged with responsibility (subordinate, co-perpetrator) and how proximate the acts and conduct of this person are to the accused;[36] and (iii) relates to the identity of victims, and methods and means of identification.[37] In addition, the Chamber must consider its obligation to ensure a fair trial under Articles 20 and 21 of the Statute.[38]

16. Rule 94 *bis* (C) allows for the admission of expert reports and/or written statements without cross-examination of the expert supplying them. While the Rule does not provide explicit guidelines, Trial Chambers have established the following criteria for admission of this type of evidence: (i) the proposed witness is classified as an expert; (ii) the expert statements or reports meet the minimum standards of reliability; (iii) the expert statements are relevant and of probative value; and (iv) the content of the expert reports or statements falls within the accepted expertise of the expert witness in question.[39] As provided for explicitly by Rule 94 *bis* (C), it is only if the opposing party accepts the expert report and/or statement, that these may be admitted into evidence without calling the expert to testify in person.[40]

17. It is immediately obvious that, unlike Rule 94 *bis*, Rule 92 *bis* does not appear to be limited to a particular type of witness and thus could be used for admission of expert evidence, including the admission of previously admitted expert reports and/or written statements as an inseparable and indispensable part of the experts' evidence in previous cases. Where the evidence of expert witnesses is offered under Rule 92 *bis* alone or, as in this case, through a combination of Rules 92

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[33] *Prosecutor v. Brđanin and Talić*, Cae No. IT-99-36-T, Decision on the Admission of Rule 92 *bis* Statements, 1 May 2002, para. 14; *Lukić* Trial Decision, para. 19.

[34] *Galić* Appeal Decision, para. 13; *cf. S. Milošević* Trial Decision, para. 22; *Milutinović* Trial Decision, para 7; *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-T, Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 *bis*, 3 April 2007, p. 4; *Lukić* Trial Decision, paras. 19–20.

[35] *S. Milošević* Trial Decision, para. 24.

[36] *Galić* Appeal Decision, para. 13.

[37] *Lukić* Trial Decision, para. 23.

[38] *Lukić* Trial Decision, para. 20.

[39] *Popović* Appeal Decision, para. 21.

[40] *See also Lukić* Trial Decision, para. 21; *Popović* Appeal Decision, para. 53; *Prosecutor v. Boškoski and Tarčulovski*, Case No. IT-04-82-T, Decision on Motion to Exclude the Prosecution's Proposed Evidence of Expert Burgess and His Report, 17 May 2007, para. 5.

bis and 94 *bis*, the question arises as to whether such evidence can or should be admitted under Rule 92 *bis*, that is, potentially without the cross-examination of the experts. One important distinction noted above is that Rule 94 *bis* allows for the admission of written statements and/or expert reports without cross-examination, but only if the other side does not object.[41] With Rule 92 *bis*, however, the Trial Chamber has an absolute discretion when deciding on the admission of witness statements, transcripts, and accompanying exhibits without for cross-examination. Thus, the main issue is one of cross-examination of expert witnesses, and whether the right to cross-examine them accorded under Rule 94 *bis* is somehow rendered ineffectual by admission of their expert reports and written statements pursuant to Rule 92 *bis*.

18. In *Galić*, the Appeals Chamber, dealing with a deceased expert under Rule 92 *bis* (prior to the introduction of Rule 92 *quater*), held that there is nothing in the Rules preventing the application of Rule 92 *bis* to the evidence of expert witnesses, including determining the other party's right to cross-examine those expert witnesses.[42] Subsequent jurisprudence has been divided, some Chambers being of the view that, unlike the admission of transcripts, the admission of expert reports and/or written statements can never be considered under Rule 92 *bis*. Instead, these should be admitted under Rule 94 *bis* alone, thereby entitling the opposing party to demand cross-examination of the witness in question.[43]

19. While the jurisprudence is divided on the issue of which Rule applies to the admission of expert reports and/or written statements, it has been generally accepted that the transcripts of prior oral testimony given by expert witnesses can be admitted through the use of Rule 92 *bis*.[44]

III. Discussion

A. Kathryn Barr Motion

20. As stated above, the Accused argues that a number of reports of Kathryn Barr, as well as her evidence in relation to them, should be excluded on the basis that their probative value is outweighed by the prejudice of admitting untested evidence. The Chamber is not persuaded by the prejudice argument. First, the fact that certain evidence is not tested through cross-examination

[41] *See above* para. 16.

[42] *See Galić* Appeal Decision, paras. 39–40.

[43] *Prosecutor v. Popović et al.*, Case No. 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* Trial Decision"), paras. 33–54 (listing a number of other decisions dealing with the issue of overlap). *Compare Popović* Trial Decision, Separate Opinion of Judge Kimberly Prost, paras. 1–6; *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, Decision on the Prosecution Motions for Admission of Evidence Pursuant to Rule 92 *bis* of the Rules, 8 December 2006, paras. 17–23, which sides with the *Galić* Appeal Decision.

[44] *Popović* Trial Decision, para. 43.

does not necessarily increase its prejudicial effect, as that is ultimately dependent on the quality of the cross-examination. Second, as pointed out by the Prosecution, the Accused's own failure to allocate to Lacroix, or to any other handwriting expert, some of the "expert hours" already granted to him by the Registry, is not a valid reason for excluding Barr's evidence in its entirety. The Registry has, as indicated in an earlier decision of the Chamber,[45] already been more than accommodating to the Accused in relation to his preferred experts, and has agreed to pay for a very significant number of hours of their work, much greater than in any other case at the Tribunal, including the large multi-accused cases.[46] Having been the beneficiary of this flexible approach by the Registry, and having failed to distribute some of the allocated "expert hours" to Lacroix, the Accused cannot now claim that he does not have the necessary resources to engage him. The Accused is under a duty to manage his own case and the resources granted to him, and cannot argue a prejudicial effect to his case when, ultimately, he is the cause of the resulting prejudice, if any.

21. The Chamber is nevertheless of the view that the evidence of Kathryn Barr should be excluded, without prejudice, on the basis that it does not appear to be probative to the present case, at least not at this stage of the proceedings. Indeed, the Accused himself hinted at this when he noted that the probative value of Barr's evidence is low.[47] The authenticity of certain entries in the Zvornik Brigade and Drina Corps' records has not been challenged by the Accused and may not be challenged by him in the future. In addition, while Barr's evidence was considered by that Trial Chamber to be probative and relevant to the *Popović* case for obvious reasons, namely that some of the entries were made by some of the accused in that case, the same relevance and probative value are not immediately obvious in the present case, especially since the Prosecution has other witnesses who can testify about the existence of the contemporaneous records and through whom they may be tendered into evidence. Accordingly, the Chamber sees no need to hear from Barr, unless and until the Accused challenges the authenticity of the contemporaneous records in question.

B. Experts Motion

22. Dealing first with the Accused's request that the Trial Chamber postpone his deadline for filing a response relating to Parsons, the Chamber is of the view that this request should be denied. The Chamber notes that in its decision of 2 September 2009, where the Accused was granted an

[45] Decision on Accused's Motion for Extension of Time to Respond to Rule 92 *bis* Motion for Expert Witnesses and to Exclude the Reports of Kathryn Barr, 2 September 2009 ("Decision on Extension of Time"), para. 8.

[46] For example, the Registry has so far allocated 600 "expert hours" to the Accused for the pre-trial phase of his case and another 150 hours for the trial phase. *See* Letter from Office of Legal Affairs and Defence to the Accused, 25 August 2009.

[47] Kathryn Barr Motion, para. 8.

extension of time to respond to the Experts Motion, he was instructed to direct his response to all seven forensic science experts, excluding only Kathryn Barr, whose evidence was subject to a request for exclusion. This order was in line with the view of the pre-trial Judge who stated at the Rule 65 *ter* meeting that, although he could see the value of postponing a decision in relation to the DNA expert, the Accused should nevertheless file his response to the entire Experts Motion so that the decision on the experts could be made as soon as possible.[48] In addition, more than two months have passed since that Rule 65 *ter* meeting, and yet, despite being told that he could do so,[49] the Accused has not filed a supplement to his Experts Response that deals with Parsons. In any event, in light of the Chamber's views on the admissibility of the evidence of seven forensic science experts pursuant to Rule 92 *bis*, as outlined below, the Chamber considers that this part of the Accused's request is now moot.

23. As for the applicability of Rule 92 *bis* to expert witnesses, while it may be argued that the Appeals Chamber in *Galić* has settled the matter, the Chamber is of the view that the facts of that case were exceptional since the expert in question was deceased and the decision was issued before Rule 92 *quater* was enacted. In addition, the Chamber considers that, when it comes to matters of expert opinion unfavourable to an accused, that accused should, in principle, be allowed to test the opinion in question through cross-examination, if he so chooses. For that reason, the Chamber is of the view that, in cases such as this, where the Prosecution has offered a number of expert reports pursuant to Rule 94 *bis* as well as Rule 92 *bis*, the applicable procedure should be that contained in Rule 94 *bis*.[50] Indeed, even if the expert reports were not offered under Rule 94 *bis*, the Chamber would have refused to admit them under Rule 92 *bis* alone as it is of the view that Rule 94 *bis*, being *lex specialis* of Rule 92 *bis*, should apply to expert reports and/or written statements of experts. Otherwise, the rights provided for in Rule 94 *bis* might be rendered ineffectual through the use of Rule 92 *bis*.[51]

24. Moving then to the criteria under Rule 94 *bis*,[52] the Chamber notes that, while these requirements have been met,[53] the Accused has indicated his refusal to accept the expert reports and his intention to cross-examine the experts. Accordingly, the Chamber has no discretion under Rule

[48] Rule 65 *ter* meeting, T. 156–157 (17 August 2009).

[49] Decision on Extension of Time, para. 9. *See also* Status Conference, T. 370 (23 July 2009).

[50] *Popović* Trial Decision, Separate Opinion of Judge Kimberly Prost, para. 2.

[51] *Popović* Trial Decision, paras. 51–52.

[52] The Chamber notes that, even if it decided that the approach used by Judge Prost, in her separate opinion in the *Popović* Trial Decision, was applicable to the Experts Motion, it would have been necessary to bring the experts for cross-examination. Indeed, Judge Prost opined, in paragraph two of her opinion, that the right to cross-examine experts will in fact arise in cases where the Rule 94 *bis* procedure is being followed by the relevant party. In this particular case, the Prosecution did follow the Rule 94 *bis* procedure.

[53] *See above* para. 16 for the relevant requirements.

94 *bis* to admit this evidence without calling the seven experts for cross-examination, nor would the Chamber, by majority, for all the reasons outlined below,[54] have done so had it possessed such a discretion. For that reason, the Chamber, noting that the Accused does not challenge the expertise of the seven experts, considers that the decision on the admission of the relevant reports and/or written statements should be postponed until such time as the seven witnesses are brought to give evidence in court.

25. Even if the Chamber is wrong in its approach regarding the applicability of Rule 92 *bis* to expert witnesses, the Chamber, by majority, considers that the evidence in question could not be admitted under Rule 92 *bis*, as it does not satisfy the relevant criteria. In other words, regardless of whether one applies Rule 92 *bis* or Rule 94 *bis* to the present situation, the outcome is the same, namely the experts will be required to appear in court. Even though the evidence of the seven experts (i) satisfies the requirements of Rule 89; (ii) does not go to the acts and conducts of the Accused; and (iii) satisfies the formal requirements of Rule 92 *bis* (B), the Chamber, by majority, is of the view that a number of factors militate against exercising its discretion to admit it under Rule 92 *bis*. None of the factors outlined in Rule 92 *bis* (A)(i) that favour admission of evidence pursuant to Rule 92 *bis*, seem to apply to this type of expert evidence which relates to forensic science analysis. In addition, the evidence of all seven experts forms a "critical" or "pivotal element" of the Prosecution's case and, as such, is too important to be admitted without being tested by this particular Accused.[55] The evidence of the forensic science experts is essentially the presentation of their opinions regarding numbers, types, and identities of victims, based on the forensic examinations they carried out, and the scientific methods and means they used to conduct those examinations. This, together with the fact that the Accused's expert, Dunjić, raises some important concerns relating to the reliability of the relevant reports,[56] militates against their admission without cross-examination.

26. Furthermore, several other factors specific to the particular circumstances of the Experts Motion militate against the admission of this evidence under Rule 92 *bis*.[57] First, the Accused has already expended a lot of effort and resources in employing his own experts and tasking them with reviewing the forensic science evidence now sought to be admitted by the Prosecution.[58] Second, the Accused has indicated from the very beginning his intention to challenge at least parts of the conclusions reached by all of the Prosecution's experts, including the eight covered by the Experts

[54] *See below* para. 26.
[55] *S. Milošević* Trial Decision, para. 24.
[56] *See* Experts Motion, Appendix A.
[57] *See* Rule 92 *bis* (A)(ii)(c).
[58] *See* Public Transcript of Rule 65 *ter* Meeting held on 17 August 2009.

Motion. Third, the former pre-trial Judge had earlier indicated to the parties that at least some of the experts covered by the Experts Motion were not likely to be accepted by the Chamber without any form of cross-examination, thereby raising an expectation of such an outcome on behalf of the Accused.[59] For all of these reasons, it would be unfair to the Accused if the Chamber now admitted this evidence without giving him an opportunity to challenge it. Accordingly, the Chamber is of the view that the evidence of the seven forensic science experts, including their expert reports, written statements, transcripts from the *Popović* case, and accompanying exhibits, should not be admitted pursuant to Rule 92 *bis*. The Chamber notes, however, that the Prosecution may still consider bringing some or all of the seven expert witnesses to give evidence in accordance with the provisions of Rule 92 *ter*.

IV. Disposition

27. Accordingly, the Trial Chamber, pursuant to Rules 54, 89, 92 *bis*, and 94 *bis* of the Rules, hereby:

(a) **GRANTS** the Kathryn Barr Motion, without prejudice;

(b) **DENIES** the Experts Motion;

(c) **POSTPONES** the admission into evidence of reports and/or written statements of seven forensic science experts, as well as their transcripts and associated exhibits, until such time as the witnesses are brought to give evidence before the Chamber.

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

Judge O-Gon Kwon, Presiding

Dated this ninth day of November 2009
At The Hague
The Netherlands

[Seal of the Tribunal]

[59] Rule 65 *ter* Meeting, T. 122–123 (17 August 2009).

Separate Declaration of Judge Kwon

1. I entirely agree with the conclusion of the Trial Chamber in denying the Experts Motion which seeks to tender the reports of seven forensic science expert witnesses without calling them for cross-examination pursuant to Rule 92 *bis* of the Rules. The sole reason for doing so on my part, as stated in paragraph 23 above, is that Rule 94 *bis* is, in my view, *lex specialis* of Rule 92 *bis* and, as such, is to be used whenever the admission of expert reports and/or written statements is at issue. This is particularly so when the tendering party is seeking admission of such evidence under both Rules *92 bis* and 94 *bis*.

2. However, I do not agree with the majority's additional reasoning in paragraphs 25 and 26, that, even if the Chamber is wrong in its approach regarding the applicability of Rule 92 *bis* to expert witnesses, the evidence of these seven experts does not satisfy the relevant criteria of Rule 92 *bis*. While I accept that the forensic evidence in this case relates to important or pivotal issues in the case, in this particular instance we are dealing with evidence that has been the subject of extensive cross-examination in the *Popović* case. In addition, unlike with fact-specific testimony, the approach to cross-examination of expert evidence, particularly forensic science evidence, is relatively independent of the specific allegations against an accused. In other words, the questions that may be posed on cross-examination are relatively limited and narrow in scope, and would be the same regardless of the identity of the accused or the theory of the Prosecution's case. Thus, I see no value in repeating them from one case to another.

3. Accordingly, it is my opinion that the evidence of the seven forensic science experts would in fact be very well suited for introduction under Rule 92 *bis*, if that Rule is considered applicable at all to reports and/or written statements produced by experts.

Judge O-Gon Kwon, Presiding

Dated this ninth day of November 2009
At The Hague
The Netherlands

[Seal of the Tribunal]