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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-05-88/2-T

Date: 22 March 2012

Original: English

IN TRIAL CHAMBER II

Before: **Judge Christoph Flügge, Presiding**
Judge Antoine Kesia-Mbe Mindua
Judge Prisca Matimba Nyambe

Registrar: **Mr. John Hocking**

Decision of: **22 March 2012**

PROSECUTOR

v.

ZDRAVKO TOLIMIR

PUBLIC

DECISION ON ADMISSION OF EXPERT REPORT OF RATKO ŠKRBIĆ WITH SEPARATE OPINION OF JUDGE MINDUA AND DISSENTING OPINION OF JUDGE NYAMBE

Office of the Prosecutor
Mr. Peter McCloskey

The Accused
Zdravko Tolimir

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 oral request by the Prosecution submitted during the proceedings of 14 February 2012 to exclude the expert report titled "Movement of the Srebrenica Population" ("First Report") written by the Defence expert witness Ratko Škrbić ("the witness"), and hereby renders its decision.

I. PROCEDURAL BACKGROUND

1. On 1 December 2011, the Accused Zdravko Tolimir ("the Accused") submitted the "Defence Notice of Disclosure of Expert Witness Reports Pursuant to Rule 94 *bis* With Annexes" ("Defence Notice") in BCS, disclosing the *curriculum vitae* and two reports[1] of the Defence expert witness Ratko Škrbić. The English version of the Defence Notice was filed confidentially on 3 January 2012.[2]

2. The "Prosecution Notice Pursuant to Rule 94 *bis* Concerning Defence Military Expert Reports" ("Prosecution Notice") was filed on 20 January 2012. The Prosecution submitted that it (1) did not accept the expert reports of the witness; (2) wished to cross-examine the witness if the reports were admitted; and (3) challenged the witness's qualification as an expert.[3]

3. The witness testified before the Chamber on 6, 7, 8, 9, 13 and 14 February 2012.[4] On 8 February 2012, after the conclusion of his examination-in-chief, the Accused sought the admission of the two expert reports into evidence.[5] Referring to the Prosecution Notice, the Chamber invited the Prosecution to make a submission, whereupon it submitted that it did not have any objection "at least preliminarily".[6] The Chamber subsequently marked the two expert reports for identification, pending further submissions by the Prosecution at the end of the witness's testimony.[7]

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1 The second report written by the witness is titled "Srebrenica and Žepa".
2 The Defence Notice was initially filed publicly but later made confidential upon the request of the Accused. *See* Request for Change of Status of Submission "Defence Notice Pursuant To Rule 94 *bis*", submitted in BCS on 1 February 2012, filed in English on 2 February 2012.
3 Prosecution Notice, para 1.
4 Ratko Škrbić, T. 18813 (6 February 2012)–T. 19249 (14 February 2012).
5 T. 19014–19015 (8 February 2012).
6 T. 19015–19016 (8 February 2012).
7 T. 19016–19017 (8 February 2012). The First Report was marked for identification as Ex. D00368 (public version) and Ex. D00369 (confidential version), respectively.

4. On 14 February 2012, following the conclusion of the witness's testimony, the Chamber instructed the Prosecution to clarify its final position regarding the two expert reports.[8] With regard to the First Report, both parties made oral submissions, as indicated below.[9]

II. SUBMISSIONS OF THE PARTIES

A. Submissions by the Prosecution

5. The Prosecution objects to the admission of the First Report into evidence, challenging the qualifications of the witness as an expert as well as the methodology and the sources used.[10] To the extent that the Chamber might be inclined to receive the report in evidence, however, the Prosecution submits that it should not be received as expert evidence and should only be used to put the testimony of the witness in context.[11]

6. Challenging the qualifications of the witness, the Prosecution submits that the First Report is "fundamentally and in its essence a demographic study of the population of Srebrenica", for which the witness lacks the necessary expertise.[12] In particular, it submits that the witness does not have any substantial publications in this area, nor does he have an advanced degree in a discipline related to the subject matter of the report.[13] Furthermore, it argues that the witness testified that any such trained knowledge is not required for the purpose of his report.[14] According to the Prosecution, this undermines the status of the witness as an expert since such a witness should by definition be able to assist a Trial Chamber in its understanding and analysis of issues in dispute based upon his specific training, knowledge or expertise.[15]

7. With respect to the methodology and sources, the Prosecution submits that the witness relied on a "methodology of convenience" that supported a conclusion that he had already drawn before he began his study and that clearly is in conflict with the evidence that he had at his disposal.[16] In this regard, the Prosecution points to a paper and a book that the witness wrote, which formed the basis for his report.[17] The Prosecution further contends that the witness had a "very clear agenda in

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8 T. 19248 (14 February 2012).
9 T. 19249–19257 (14 February 2012). In the absence of an objection by the Prosecution to the admission of the second report, both public and confidential versions of it were admitted into evidence as Ex. D00366 (public version) and Ex. D00367 (confidential version), respectively. T. 19258 (14 February 2012).
10 T. 19253–19254 (14 February 2012).
11 T. 19253 (14 February 2012).
12 T. 19249 (14 February 2012).
13 T. 19250 (14 February 2012).
14 T. 19250–19251 (14 February 2012).
15 T. 19251 (14 February 2012) ("In effect, General Tolimir could have simply put in the documents that this witness testified about and relied on the Trial Chamber to draw [its own] inference").
16 T. 19251, 19253 (14 February 2012).
17 T. 19251–19252 (14 February 2012).

mind" since "he could not accept that officers in arms [...] would engage in the kinds of acts that are alleged in the indictment" and "he was essentially tired of being bombarded with this so-called official version of what happened in Srebrenica 'without anybody proving it'".[18] The Prosecution argues that "by engaging in a pattern of systematically excluding relevant evidence",[19] the witness renders the report "utterly worthless and unreliable as expert evidence" before this Tribunal.[20] It lastly claims that the First Report is "an affront to the victims of these crimes [and] to the integrity of these proceedings".[21]

B. Submissions by the Accused

8. In response, the Accused argues that the First Report should be admitted into evidence and that any issues with regard to its reliability should be weighed by the Chamber in its judgement.[22] According to the Accused, the report does not reflect an "entire analysis of those killed or executed after the fall of Srebrenica" but rather a "partial analysis that deserves to be taken into consideration".[23]

9. The Accused submits that the significance of the First Report is not diminished simply because it is based on a paper and a book previously written by the witness.[24] More specifically, he argues that the witness has spent time conducting his analysis by studying military documents pertaining to the movement of survivors and has reached his conclusions based on a calculation, as reflected in the report.[25] In his view, the value of the analysis conducted by the witness is not necessarily diminished simply because he did not rely on documents relating to prisoners and executions.[26] The Accused contends that in fact the witness only used "established and confirmed" facts to support his conclusions, relying solely on documentation of relevant organs and institutions within the public domain.[27]

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18 T. 19252 (14 February 2012).
19 The Prosecution submits that the witness has failed to account for all the prisoners held in VRS custody in terms of tallying the total of the population of Srebrenica. T. 19252 (14 February 2012).
20 T. 19252–19253 (14 February 2012).
21 T. 19253 (14 February 2012).
22 T. 19256–19257 (14 February 2012).
23 T. 19257 (14 February 2012).
24 T. 19256 (14 February 2012).
25 T. 19256 (14 February 2012).
26 T. 19256 (14 February 2012).
27 T. 19257 (14 February 2012).

10. With regard to the qualifications of the witness, the Accused submits that the witness has studied "the methodology of establishing the number of losses in a war" and therefore is educated and skilled enough to produce the report in question.[28]

11. Finally, concerning the claim of the witness being biased, the Accused avers that the witness never denied that crimes were committed and he advanced his view without preferring any conclusion about the number of those who were killed or executed.[29]

III. APPLICABLE LAW

12. Rule 94 *bis*, which is a general Rule concerning expert witnesses, reads 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.
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> (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:
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> (i) it accepts the expert witness statement and/or report; or
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> (ii) it wishes to cross-examine the expert witness; and
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> (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.
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> (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.

This Rule, however, does not provide specific guidelines on the admissibility of testimony given by expert witnesses or criteria for the admission of their report.[30] Like any evidence, expert reports are subject to the general standards of admissibility set forth in Rule 89 (C) and (D),[31] which reads as follows:

> (C) A Chamber may admit any relevant evidence which it deems to have probative value.

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28 T. 19256 (14 February 2012).

29 T. 19257 (14 February 2012).

30 *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 ("*Popović et al.* Appeal Chamber Decision"), 30 January 2008, para. 21.

31 *Popović et al.* Appeal Chamber Decision, para. 22. *See also Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-T, Decision on Prosecution's Submission of Statement of Expert Witness Ewan Brown, 3 June 2003 ("*Brđanin* Decision of 3 June 2003"), p. 3; *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Decision on Defence Rule 94 *bis* Notice Regarding Prosecution Expert Witness Richard Butler, 19 September 2007 ("*Popović et al.* Decision of 19 September 2007"), para. 23; *Prosecutor v. Gotovina et. al.*, Case No. IT-06-90-T, Decision and Guidance with Regard to the Expert Report, Addendum, and Testimony of Reynaud Theunens, 17 November 2008 ("*Gotovina et. al* Decision of 17 November 2008"), para. 14 and the sources cited therein; *Prosecutor v. Gotovina et. al.*, Case No. IT-06-90-T, Decision on the Expert Report and Addendum of Konings, 18 December 2008 ("*Gotovina et. al* Decision of 8 December 2008"), para. 9.

(D) A Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.

13. The jurisprudence of the Tribunal has established the following requirements for the admissibility of expert reports:

(1) the witness who drafted a report is considered an expert by the Chamber;

(2) the expert report meets the minimum standard of reliability;

(3) the expert report is relevant and has probative value; and

(4) the content of the expert report falls within the accepted expertise of the expert witness.[32]

14. First, 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.[33] 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 *curriculum vitae* as well as the witness's scholarly articles, other publications or any other pertinent information about the witness.[34] 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.[35]

15. Second, the expert report must meet the minimum standards of reliability. A piece of evidence may be so lacking in terms of the indicia of reliability because of lack of impartiality and independence or appearance of bias that it is not probative and therefore inadmissible.[36] This should not be interpreted to mean that definite proof of reliability must necessarily be shown for evidence to be admissible and thus *prima facie* proof of reliability on the basis of sufficient indicia is enough

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[32] *Popović et al.* Appeal Chamber Decision, para. 21; *Prosecutor v. Momčilo Perišić*, Case No. IT-04-81-T, Decision on Admissibility of Expert Report of Patrick Treanor, 27 November 2008 ("*Perišić* Decision of 27 November 2008"), para. 8; *Prosecutor v. Milan Martić*, Case No. IT-95-11-T, Decision on Defence's Submission on the Expert Report of Professor Smilja Avramov Pursuant to Rule 94 *Bis*, 9 November 2006 ("*Martić* Decision"), paras. 5–12.

[33] *Brdanin*,Decision of 3 June 2003, p. 3; *Popović et al.* Decision of 19 September 2007, para. 23; *Gotovina et. al* Decision of 17 November 2008, para. 14; *Gotovina et. al* Decision of 8 December 2008, para. 9.

[34] *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T Decision on Expert Status of Reynaud Theunens, 12 February 2008; *Prosecutor v. Vlastimir Đorđević*, Case No. IT-05-87/1-T, Decision on Defence Notice Under Rule 94*bis*, 5 March 2009, para. 6.

[35] *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, para. 19; *Popović et al.* Decision of 19 September 2007, para. 23.

at the admissibility stage.[37] In establishing reliability, there must be sufficient information as to the sources used in support of statements, which must be clearly indicated so as to allow the other party or the Chamber to test the basis on which the witness reached his or her conclusions.[38] In the absence of clear references or accessible sources, the Chamber will treat such statements as the personal opinion of the witness and weigh the evidence accordingly.[39]

16. Third, as stated above, pursuant to Rule 89(C), the Chamber may admit any relevant evidence which it deems to have probative value. A determination of the relevance and probative value of the report will be made through an examination of its content.

17. Lastly, the content of the report must fall within the expert witness's area of expertise. This requirement ensures that the report of the expert witness will only be treated as expert evidence, insofar as they are based on the expert's specialised knowledge, skills or training.[40]

1. Qualifications of the witness as an expert

18. The First Report purports to provide an analysis of the "movement of the Bosnian Muslim population from Srebrenica in July and August 1995" with the goal of verifying whether "the figure of over 7,000 killed military able-bodied men who belonged to the 28th Division is correct or not".[41] It comprises two chapters, one on the "Movement of Prisoners", a chapter of five pages of textual analysis and two corresponding tables, and the other on "Srebrenica population movements", ranging from pages 8 to 36. The overall conclusion of the First Report is that "the losses of the 28th Division in July and August 1995 could certainly not be expressed in thousands, and the sustainability of the OTP position that over 7.000 men were killed is out of the question [...] because it cannot be proven in a reliable manner".[42]

19. The Chamber has reviewed the witness's *curriculum vitae*, together with his testimony of 6 February 2012, in which the witness testified about his professional background in more detail.[43] The witness attended the military academy of the land forces specialising in atomic, biological and chemical defence, finished the command staff technical training school, and completed a course at a

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36 *Popović et al.* Appeal Chamber Decision, para. 22; *Prosecutor v. Vlastimir Đorđević*, Case No. IT-05-87/1-T, Decision on Prosecutor's Notice re Defence Expert Witnesses Radomir Milašinović, Aleksandar Pavić, and Zoran Stanković, 24 March 2010 ("*Đorđević* Decision of 24 March 2010"), para. 7.
37 *Popović et al.* Appeal Chamber Decision, para. 22 and the sources cited in fn. 86.
38 *Đorđević* Decision of 24 March 2010, para. 7; *Martić* Decision, para. 9.
39 *Ibid.*
40 *Martić* Decision, para. 12.
41 Ratko Škrbić, T. 18827 (6 February 2012).
42 Ratko Škrbić, T. 18827 (6 February 2012).
43 Ratko Škrbić, T. 18816–18823 (6 February 2012); Ex. D00351.

war college.[44] After his education he held various military positions, such as Chief of Staff of the 17th Kljuc Brigade in the 2nd Krajina Corps of the Army of Republika Srpska ("VRS") until 1993.[45] He was further assigned to the sector for moral guidance, religious affairs, and legal affairs of the VRS Main Staff in 1996, and in 1997 transferred to the Army of Yugoslavia, where he was appointed as the chief of the nuclear, automatic and chemical defence sector.[46] From 2001 until his retirement in July 2005, the witness was a senior lecturer in the school for national defence of the military academy, where he taught courses in military strategy and warfare.[47] In 2005, the witness started working as an investigator for the defence team of Radivoje Miletić, one of the accused in the case of *Prosecutor v. Popović et al.*[48] In terms of publications, the witness published a conference paper in 2009 on the "Analysis of the Srebrenica Population", which he presented at an international conference held at the Russian Academy of Science in Moscow.[49] This paper then formed the basis for his book titled "Srebrenica - Genocide Committed Against the Truth", which was published in 2011.[50] He has never testified as an expert in any other proceedings before the Tribunal or in domestic courts, nor has he written any expert reports other than for this case.[51]

20. Questioned by the Accused whether military experts are also qualified to deal with the movement of populations during wartime, the witness answered that this subject is studied in military schools, "although as a minor subject" and that "the purpose of studying this particular issue is to explore the possibility of recruitment".[52] However, in the view of the Majority, Judge Nyambe dissenting and Judge Mindua appending a separate opinion, exploring such possibilities of recruitment is absolutely unrelated to the study that should have been undergone for the purposes of the First Report, namely the study of a demographic movement of a population, or more specifically the movement of refugees. The witness also testified that he does not have any advanced degree or special training besides his military education and confirmed that the First Report did not require any such degree or training because "the calculations were very simple because [he] had at [his] disposal finalised facts and information, and anyone who know [*sic*] the basics of mathematics would be able to do that, provided they invest some effort into it".[53]

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44 Ratko Škrbić, T. 18817 (6 February 2012); Ex. D00351.
45 Ratko Škrbić, T. 18819 (6 February 2012); Ex. D00351.
46 Ratko Škrbić, T. 18819–18820 (6 February 2012); Ex. D00351.
47 Ratko Škrbić, T. 18821–18822 (6 February 2012); Ex. D00351.
48 Ratko Škrbić, T. 18823 (6 February 2012); Ex. D00351.
49 Ratko Škrbić, T. 19036 (9 February 2012).
50 Ratko Škrbić, T. 19055, 19068 (9 February 2012). The book is Rule 65 *ter* number 07602.
51 Ratko Škrbić, T. 18816 (6 February 2012), T. 19035 (9 February 2012).
52 Ratko Škrbić, T. 18825 (6 February 2012). The witness further testified that he had studied "mathematics 1 and mathematics 2" at the military academy, as well as in high school. Ratko Škrbić, T. 19035 (9 February 2012).
53 Ratko Škrbić, T. 19036 (9 February 2012).

21. It is established in the jurisprudence of the Tribunal that an expert witness "offers a view based on his or her specialised knowledge regarding a technical, scientific, or otherwise discrete set of ideas or concepts that is expected to lie outside the lay person's ken".[54] The Majority considers that the First Report is essentially an analysis of the demographic movement of a population, a subject that in the view of the Majority, Judge Nyambe dissenting and Judge Mindua appending a separate opinion, requires experienced skills such as mathematical demography, population statistics, or sociology. During the course of the proceedings in this case, the Chamber has heard evidence from two demographic expert witnesses, namely Ewa Tabeau and Helge Brunborg whose areas of testimony pertained precisely to the compilation of a list of missing persons after the fall of Srebrenica.[55] In addition to possessing extensive working experience as demographers and having multiple publications in this subject area, both experts hold various degrees in econometrics, statistics and mathematical demography.[56] However, the witness does not possess any specialised knowledge in these fields.

22. In light of the above and taking into consideration the military career and education of the witness, the Majority, Judge Nyambe dissenting and Judge Mindua appending a separate opinion, considers that while the witness was deemed to be qualified as a military expert, he patently lacks expertise in the very issue he attempted to address in his First Report, namely, the demographic movement of the population from Srebrenica. The subject matter of the First Report clearly falls outside the scope of the witness's expertise as a military expert.

2. Methodology

23. The witness testified that for his analysis he used the following documents for the preparation of the First Report: (1) reports of Army of the Republic of Bosnia and Herzegovina ("ABiH"); (2) reports of the local political authorities of Srebrenica; (3) United Nations reports, including the Secretary-General Report attached to various UN Security Council resolutions and reports of commanders and assistant commanders of UNPROFOR units stationed in Zagreb; and (4) reports of international humanitarian organizations, such as ICRC, UNHCR, and others.[57] The witness compared the figures contained in these documents with the numbers of refugees from

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[54] *Popović et al.* Appeal Chamber Decision, para. 27 quoting *Laurent Semanza v. Prosecutor*, Case No. ICTR-97-20-A, Appeal Judgement, 20 May 2005 ("*Semanza* Appeal Judgement"), para. 303; *Prosecutor v. Ferdinand Nahimana et al.*, Case No. ICTR-99-52-A, Appeal Judgement, 28 November 2007, para. 198.

[55] *E.g.*, Ex. P01781, "Report by Helge Brunborg on the Number of Missing and Dead from Srebrenica"; Ex P01790, "Addendum to the Report on the Number of Missing and Dead from Srebrenica"; Ex. P01793, "Updated Report by Helge Brunborg on the Number of Missing and Dead from Srebrenica"; Ex. P02075, "Progress Report of Ewa Tabeau on the DNA based Identification by ICMP"; Ex. P02586 (confidential). "Report by Ewa Tabeau on 58 Allegedly Unjustified Srebrenica Cases".

[56] Ex. P02074, "*Curriculum vitae* of Ewa Tabeau", p. 1; Ex. P01799, "Updated *Curriculum vitae* of Helge Brunborg".

[57] Ratko Škrbić, T. 18824 (6 February 2012); Ex. D00368 (public version), pp. 9–10.

Srebrenica after July 1995.[58] The number of the refugees after July 1995 he used—"35,632"—was mainly based on a debriefing from the Ministry of Defence of the Netherlands dated 20 October 2005 ("Dutch Debriefing").[59]

24. The witness applied what he calls a "methodology of following the survivors", namely, "to follow the movement of surviving Muslims, *i.e.*, people who lived there before the operation and who survived after the operation".[60] He confirmed that the outcome of his analysis was, as stated above,[61] that the potential victims of the alleged crimes in Srebrenica would be far less than thousands.[62]

25. The Majority has serious concerns with regard to the methodology he adopted for the preparation of the First Report.

26. First, contrary to what the witness initially claimed, his analysis is not confined to the "the movement of prisoners and population". He in fact testified that "he wanted to verify whether the figure of over 7.000 killed military able-bodied men who belonged to the 28th Division is correct or not".[63] The First Report also claims that:

> What is to be concluded at the end of this analysis? It is correct and justifiable to conclude that the results of this analysis have demonstrated that the number of Muslim men from Srebrenica allegedly executed after 11 July and in August 1995, as set out by the Prosecution in the indictment, cannot possibly be expressed in the thousands. It does not accord with the facts and does not correspond to reality. In other words, that number is incorrect. After this analysis, the Prosecution will be unable to prove it convincingly.[64]

This demonstrates that the witness clearly contradicts himself as there is no clear connection between the hypothesis and the conclusion he reached in his analysis.

27. Second, the accuracy of the number of 35,632 refugees—the number the witness relied upon—is highly questionable. During cross-examination, the Prosecution showed the witness a

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58 Ratko Škrbić, T. 18849–18852 (6 February 2012), T. 19025 (8 February 2012).

59 Ratko Škrbić, T. 19029 (8 February 2012); Ex. P02873.

60 Ratko Škrbić, T. 19075 (9 February 2012), T. 19094 (9 February 2012) ("I followed the movement of Muslims who were alive from Potočari and from Srebrenica, their movement in two columns in the direction of Tuzla; one was breaking through, the other was evacuated."). *See also* Ratko Škrbić, T. 19070 (9 February 2012) ("[As I said at the beginning of this trial] I opted to apply a research methodology that involves following the movement of Muslim survivors in Srebrenica prior and after Krivaja 95 operation because I had quite sufficient information about the number of the inhabitants before and after the operation. In addition to that, I can say that I did not have any particular need to delve into other researches that applied different methodologies. I opted for this particular methodology.").

61 *Supra* para. 18.

62 Ratko Škrbić, T. 18886–18887 (6 February 2012), T. 19069–19070 (9 February 2012) ("I have no reason to doubt it, because I used the information that came from relevant sources. And not a single piece of information was made up by me. Each and every bit of information that I use for my calculations can be found in a relevant document.").

63 Ratko Škrbić, T. 18827 (6 February 2012). *See also* Ratko Skrbić, T. 19120 (13 February 2012) ("I wanted to check, as I said, whether it is correct that over 7.000 able-bodied men had been executed.").

64 Ex. D00368, p. 36.

cover letter accompanying the Dutch Debriefing, which stated, *inter alia*, that the registration of "*approximately* 35,632 refugees from Srebrenica" might be inaccurate since it is only an estimation.[65] When asked by the Prosecution if this estimation had any impact on his conclusion about the reliability of the number as he found and used it in his report, the witness stated that, together with another source, an article titled "The Srebrenica Icon" in which the same number was mentioned,[66] he "had no reason to have any doubts about the reliability of that number".[67] But, his account later became ambiguous, stating that "[...] the conclusion that I reached *isn't in fact, that precise.* [...] All I did was draw a certain conclusion on the basis of the information that was imprecise."[68] The unreliable characteristic of the number became more evident in the witness's response to the Chamber's question whether he had considered that "amongst those survivors there were some people who were not taken into account in January and in July [1995] and who may have come from somewhere else [...] and that are now amongst [the] survivors".[69] The witness stated that "there may have been refugees", maintaining, however, that the Dutch Debriefing "clearly said that 35,632 were refugees from Srebrenica".[70] In the Majority's view, the fact that the figure he relied upon for his analysis was also used in other sources and that he had consulted those as corroborative information does not establish that the methodology used was reliable. Moreover, this approach rather confirms the witness's own lack of methodological expertise.

28. Third, it became patently clear during cross-examination that no other documents but the four types of documents[71] were taken into account for the witness's analysis. The witness testified that he did not ask the Accused's defence team for any particular documents as he thought it was

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65 Ratko Škrbić, T. 19027, 19029 (8 February 2012); Ex. P02873, p. 1 (stating that: "Herewith I sent a document that was received during the debriefing of DutchBat about the registration of *approximately* 35,632 refugees from Srebrenica. If this number is correct, which is not sure, it can help to examine the number of missing and executed men from Srebrenica.") (emphasis added). Škrbić had not seen this letter prior to his testimony. Ratko Škrbić, T. 19029–19030 (8 February 2012), T. 19038 (9 February 2012).

66 Ex. P02874 (MFI). Admission of this article is currently pending the Chamber's Decision on the "Fifth Request by the Defence for Admission of Documents from the Bar Table" submitted in BCS on 5 March 2012 and filed in English on 7 March 2012.

67 Ratko Škrbić, T. 19041 (9 February 2012). *See also* Ratko Škrbić, T. 19031–19032 (8 February 2012), T. 19047–19048 (9 February 2012). Later, the witness again claimed that because three sources speak about the same number—the BiH Government, with the assistance of the World Health Organization, came up with the same figure, 35,632, in August 1995, which was included in the debriefing report and also "confirmed by Jonathan Rooper"—he took it to be correct. Ratko Škrbić, T. 19042 (9 February 2012). The article "The Srebrenica Icon" reads in part: "Rooper points out that the figure of 40,000 inhabitants which the UN used in July 1995, before the capture of Srebrenica, roughly matches the number of former residents accounted for in the aftermath. A commander of the Muslim-dominated Army of B-H later confirmed to parliament in Sarajevo that 5,000 B-H troops escaped largely intact to Tuzla while the UN registered some 35,632 civilian survivors." Ex. P02874 (MFI), pp. 7–8. The Chamber understands that the witness meant that the number was confirmed by the article in which a former BBC journalist Jonathan Rooper was referred to. The witness later stated that "the only thing" he did with this article was to use the figure as his "calculation basis". Ratko Škrbić, T. 19046 (9 February 2012).

68 Ratko Škrbić, T. 19032 (8 February 2012) (italics added).

69 Ratko Škrbić, T. 19176 (13 February 2012).

70 Ratko Škrbić, T. 19177 (13 February 2012).

71 *Supra* para. 23.

their duty to provide him with the documents in order to enable him to perform his task.[72] He did not review any forensic evidence, such as exhumation reports, pathology reports, autopsy reports, or ICRC missing persons lists because "[he does not] know almost anything about forensics"[73] and "that would actually go beyond the scope of my methodology".[74] The witness also acknowledged that while he was aware of it, he did not take into account the fact that there were prisoners in the VRS custody around 13 July 1995.[75] In the Majority's opinion, these omissions constitute a serious deficiency in his analysis.

29. The Majority also considers that the selection of materials is based on his "idea and proposition". The witness stated:

> I asked to be supplied and provided with all the documents that [the legal adviser for the Accused] can offer that might be useful *and which would fit with the idea of the report.*[76]
>
> [...]
>
> I have received a lot of documents, as I already said. Then I made a kind of preliminary review of the documents by opening each folder and each file, and for all those documents that at first glance [...] *I decided that they cannot be of any use for preparing my expert report according to my idea and according to my proposition of how it should look like.* I did not mark such documents.[77]
>
> [...]
>
> My idea was [...] to follow the fate of the Muslim survivors and thereby establish whether there are any differences in the period before and after the VRS action. All the documents that could not fit or serve the application of such methodology I discarded, such as for example, photographs because I didn't need them in order to verify the facts and [they] were not able to provide me with any specific evidence that would help me to check the actual number of potentially missing number of Muslims as compared to the number that existed before the VRS operation. [...] My thesis was that this methodology that I had chosen and the method of conducting research that I adhered to, can, in a very convincing manner, demonstrate whether there were fewer inhabitants of Srebrenica in the aftermath of Krivaja 95 operation as opposed to the number that existed in Srebrenica before the operation. So my proposition was that this is a proper method that would help me to prove whether there were such enormous numbers of victims or not.[78]

30. Fourth, the witness readily admitted that his method did not require any specific expertise. He stated that: "I had at my disposal finalised facts and information, and *anyone who know* [*sic*] *the*

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72 Ratko Škrbić, T. 19021 (8 February 2012), T. 19071 (9 February 2012).
73 Ratko Škrbić, T. 19071, 19077 (9 February 2012).
74 Ratko Škrbić, T. 19071 (9 February 2012).
75 Ratko Škrbić, T. 19079–19094 (9 February 2012), T. 19127–19034, 19137–19138 (13 February 2012). Škrbić maintained that it was not because the information about the prisoners was irrelevant, but he did not take it into consideration when he made his calculation. Ratko Škrbić, T. 19097 (9 February 2012). He also stated that he did not read testimony of VRS members but took from the indictment information in respect to the number of prisoners executed, captured, or transferred and used them in his calculations in the manner he explained. Ratko Škrbić, T. 19134 (13 February 2012).
76 Ratko Škrbić, T. 19021 (8 February 2012) (italics added).
77 Ratko Škrbić, T. 19115 (13 February 2012 (italics added).
78 Ratko Škrbić, T. 19118–19119 (13 February 2012).

basics of mathematics would be able to do that, provided they invest some effort into it".[79] Later during re-examination by the Accused, the witness claimed that his methodology was "reliable and even more reliable than the methodology which implies looking for victims", noting that:

> It's very difficult to research victims. It is *much easier* to follow the movement of the surviving population and in that way establish any possible differences. However, it was not up to me to provide the final evaluation. The final evaluation is in the hands of the Trial Chamber and the Honourable Judges.[80]

31. The witness went on to criticise evidence of the Prosecution witness Investigator Dušan Janc, even though he did not take it into consideration for the First Report.[81] With regard to the fact that in his report[82] Janc explained which surface remains he considered to be associated with the events of Srebrenica and which he considered not to be associated with those events, the witness testified that:

> I think that it can be claimed for all the victims that they were executed and that they were crime victims only *if it has been established really precisely what the cause of their death was*, whether the death was forcible death after they were disarmed and captured or in some other way. Before those details are revealed, in my view, it is not possible to claim that crimes were committed.
>
> Unless proper identification is carried out commensurate with the applicable standards, primarily by conducting a DNA-analysis—although I said I'm not very familiar with it—it is impossible to claim that the cause of death has been established. *Only after the cause of death was established, then one can say whether the death was caused by a criminal act or some other act.*[83]

The witness, who has neither seen Janc's report nor heard about the testimony of the director of the IMCP before, is not in the position to make this kind of claim, and clearly contradicts himself, by applying a more rigid interpretation to Janc's report, while claiming that his "imprecise" methodology is acceptable.

32. Turning to his personal motive, the witness acknowledged that his book is nearly identical in every aspect to the First Report he prepared for the Accused, with the exception of some additions and amendments to it.[84] This book indicates his personal motive as follows:

> Why did I choose to commit the **truth** and research it? There are several reasons for this. I shall only state those which are most important.
>
> **First**: Simply, I doubted the possibility that any of my colleagues, professional officers and non-commissioned officers, could line up several hundred or several thousand enemy soldiers and civilians and order that they be executed, or take part in this misdeed. In my opinion and according

79 Ratko Škrbić, T. 19036 (9 February 2012) (italics added).
80 Ratko Škrbić, T. 19182 (13 February 2012) (italics added).
81 In this regard, he testified that: "Of course I would love to look at all the existing documents; however, it wouldn't mean much to me if I didn't understand the area of expertise that such reports cover." Ratko Škrbić, T. 19077–19079 (9 February 2012) (quotation at T. 19079).
82 Ex. P00170, "Update to the Summary of Forensic Evidence—Exhumation of the Graves and Surface Remains Recoveries Related to Srebrenica and Žepa—April 2010, by Dušan Janc, dated 21 April 2010".
83 Ratko Škrbić, T. 19200–19201 (14 February 2012) (italics added).
84 Ratko Škrbić, T. 19059 (9 February 2012). *See also* Ratko Škrbić, T. 19150–19052 (13 February 2012).

> to my knowledge of military professionals who went to the same military schools with me, or before or after me, their education, training and professionalism are simply **incongruent** with the abovementioned possibility. Professional soldiers are thoroughly familiar with the provisions of the international humanitarian law and law of war and the graveness of the sanctions for failing to comply with or violating them.[85]
>
> [...]
>
> My internal rebellion and instinct, as well as my internal resistance and dissatisfaction with almost daily perennial media bombardment with the alleged facts that the VRS and its members, supported by Serbian forces, committed an alleged genocide against the Srebrenica Muslims, without anybody proving it, but where at the same time it was to be unconditionally accepted as truth, kept adding fuel and strengthening my will to research the Muslim losses in Srebrenica during and after Operation *Krivaja-95* and find out whether the official version of these losses is consistent with the **truth or not**.[86]
>
> [...]
>
> When I reached the first tangible data and results proving that the Muslim victims from Srebrenica cannot be expressed in thousands and that all or almost all Muslims left Srebrenica in various ways during and after Operation Krivaja-95 for Tuzla and its surroundings, where they registered as refugees from Srebrenica **alive—I** immediately offered these results to the leading electronic and printed media in Serbia, news agencies and some political parties, including those in power, expecting them to publish this data, without asking for anything in return. As I said, the findings and the results I reached in this research of the events in and around Srebrenica were absolutely ignored by the media. This is why I believe we should admit that a large part of the Serbian public simply does not want to hear the truth, having chosen to believe in the official version of the Muslim losses in Srebrenica for reasons known only to them.[87]

These passages unequivocally show that the witness did not prepare the First Report for the current proceedings in order to assist the Chamber, but rather for his self-imposed objective as explained in his book titled "Srebrenica - Genocide committed against the truth". The witness's following account as to the meaning of the title also proves that he did not prepare the First Report for this case:

> What I meant by [the title of the book] was the genocide was committed against truth, the truth about all the events surrounding Srebrenica, and that *I based on the results of the analysis that I carried out*.[88]

The Majority's concern for the subjectivity of the First Report is further aggravated by the following response of the witness in court as to who committed genocide:

> In my view, genocide [against the truth] was committed by the Muslim side. The extreme elements of the Muslim policy and politics in Sarajevo. [...] The official politics in Sarajevo."[89]

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85 Rule 65 *ter* number 07602, p. 12.

86 Rule 65 *ter* number 07602, p. 14. Škrbić went on to testify in this respect: "Nobody proved that [...] more than 7,000 Muslim men fit for military service had been killed." Ratko Škrbić, T. 19061–19062 (9 February 2012).

87 Rule 65 *ter* number 07602, p. 14. Škrbić testified that he offered his research to all political parties because "it's a matter of public research, and my research didn't tally with the official version". Ratko Škrbić, T. 19063 (9 February 2012).

88 Ratko Škrbić, T. 19170 (13 February 2012) (italics added).

89 Ratko Škrbić, T. 19171 (13 February 2012).

33. Lastly, the Majority observes various problematic features in the First Report. It first lacks any clear structure and does not provide a summary of the findings. There are only two footnotes contained in the report, referencing the military reports prepared by the Prosecution expert witness Richard Butler.[90] Other citations simply refer to the numbers of exhibits proffered in this case. The language used is also of abnormality. For example, in rebutting the expert reports of Butler in the first chapter, it reads:

> I trust that there is no question that this situation violates the laws of nature and the law of logic. In a nutshell, it violates the laws and methods of science. [...] It is also reasonable to conclude that this is a case of manufacturing information and manipulating it, something which is, of course, inappropriate to the legal arts. It better suits the art of war.[91]

In the second chapter, the witness states:

> Whenever I used the upper limit of the range (5,000) in the calculations, it was shown that after 11 July 1995, a larger number of Muslim men fit for military service were registered among living refugees than that found in Srebrenica before that date, which is, you will admit, simply impossible to believe. But what then? Facts are facts.[92]
>
> I trust you have observed that the journey towards **the truth** has so far been correct, and that we are close to the **truth** itself.[93]
>
> You would not believe me. But facts are facts. (Contra factum non datur argumentum – against facts there are no arguments, as the old saying goes.)[94]

34. Moreover, throughout the First Report, the witness uses a conclusive tone, such as "of course", "it is absolutely clear", "beyond the shadow of a doubt", and "unambiguously and beyond doubt".[95] These are, in the Majority's view, another indication of the inadequate quality of the First Report as an expert report.

35. The Majority notes that, as previously stated, expert evidence is expected to provide some specialised knowledge that may assist the fact finder in understanding the evidence or determining an issue in dispute, and that the particularity of this specialised knowledge is that it lies beyond the knowledge of a lay person.[96] In the Majority's opinion, whether more than 7,000 Bosnian Muslim able-bodied men went missing or were killed after the fall of Srebrenica is one of the central issues, which the Chamber must evaluate its judgement.

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90 Ex. D00368 (public version), pp. 2, 5.
91 Ex. D00368 (public version), pp. 7–8.
92 Ex. D00368 (public version), p. 16. *See also ibid.*, p. 26.
93 Ex. D00368 (public version), p. 20. In other parts, the First Report uses terms, such as "Interesting", "Simply incredible, yet inarguable", "Incredible!", "Interesting, is it not?" *Ibid.*, pp. 19, 25, 28, 36.
94 Ex. D00368 (public version), p. 28.
95 Ex. D00368 (public version), pp. 8, 22.
96 *Semanza* Appeal Judgement, para. 303; *Popović et al.* Appeal Decision, para. 27.

36. Having considered the First Report and the witness's testimony as discussed above, the Majority, Judge Nyambe dissenting, is not persuaded that there is full transparency in the methodology and sources used by the witness. In fact, the methodology used is fundamentally flawed in that while attempting to challenge the Prosecution case that more than 7,000 Bosnian Muslim able-bodied men went missing or were killed after the fall of Srebrenica, it utterly disregards relevant materials, such as forensic evidence, on which the Prosecution case is premised. The so-called "methodology of following the survivors" is, in short, a simple calculation merely based on the two distinct figures—the number of inhabitants before and after the fall of Srebrenica. This "easy and imprecise" methodology is clearly in conflict with the expected standard of work required for an expert witness, whose purpose is to render valuable assistance to the Chamber in adjudicating disputed issues in this case. Last but not least, the Majority has serious doubts as to the witness's objectivity and believes that he had a specific agenda—an "idea and proposition"—when applying his methodology to his analysis.

3. Conclusion

37. The Majority reemphasises that the number of missing or dead Bosnian Muslims from Srebrenica is one of the crucial issues, upon which it has to make a finding in light of evidence proffered in this case. The Accused's Pre-Trial Brief is also indicative of the importance of this allegation.[97] In establishing this allegation beyond reasonable doubt, the Prosecution is required to proffer evidence based on professional analysis produced by professional experts in relevant fields. Conversely, to rebut and cast reasonable doubt on the Prosecution case in this respect equivalent expertise and unequivocal analysis is required. This is, in the Majority's opinion, Judge Nyambe dissenting and Judge Mindua appending a separate opinion, flagrantly lacking in the witness's qualifications and his report. The First Report is based on insufficient sources, and the selection of the materials used for his analysis is obviously partial. In fact, the calculations contained in the First Report could be made by a lay person, using the documents that are already in evidence in this case. The Majority considers that the First Report will not be of any assistance to it in making a finding of the number of missing and dead people from Srebrenica.

38. In this respect, the Chamber is mindful of the jurisprudence of the Tribunal, which dictates that incompleteness, obsolescence, insufficiency of sources, or the selectivity of materials are generally matters for weight, not for admissibility.[98] Yet, in the Majority's opinion, the severity of the deficiencies in the methodology used by the witness, who does not have relevant expertise,

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[97] The Accused Pre-Trial Brief, "Zdravko Tolimir's Submission With a Pre-Trial Brief Pursuant to Rule 65 *ter* (F) And Notification of the Defence of Alibi in Respect of Some Charges", public version of 30 September 2009, paras. 104–127.

coupled with the tangible personal motive behind it, leads the Majority, Judge Nyambe dissenting and Judge Mindua appending a separate opinion, to conclude that the First Report patently fails to meet the minimum standard of reliability such that it is not probative and therefore inadmissible pursuant to Rule 89(C).

39. The Chamber is now to decide whether the First Report should be excluded pursuant to Rule 89(D). The Rule provides that evidence may be excluded "if its probative value is substantially outweighed by the need to ensure a fair trial". Under this provision, the Chamber is also required to ensure the integrity of the administration of justice and of the proceedings. As already found above, the First Report contains fundamental flaws in various aspects such that it will in no way assist the Chamber in making a finding on one of the disputed matters in this case. Furthermore, the Majority considers that the witness challenged the evidence not only in the current proceedings but in all other trials on the number of victims in relation to the fall of Srebrenica. The First Report's probative value is, in the Majority's opinion, Judge Nyambe dissenting, manifestly unreasonable and outweighed by its prejudicial effect to the case. In conclusion, pursuant to Rule 89(D), the Majority finds that the First Report shall be excluded from evidence.

IV. DISPOSITION

For these reasons, pursuant to Rules 89(C), 89(D), and 94*bis* of the Rules, the Chamber by majority, Judge Nyambe dissenting and Judge Mindua appending a separate opinion hereby **DENIES** the admission of the First Report.

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

Judge Christoph Flügge
Presiding Judge

Dated this twenty-second day of March 2012
At The Hague
The Netherlands

[Seal of the Tribunal]

[98] *See Supra* para. 15.

SEPARATE OPINION OF JUDGE ANTOINE KESIA-MBE MINDUA

1. I concur with the conclusion reached by Majority in the Decision that, pursuant to Rule 89 (D), the First Report shall be excluded from evidence. Its probative value is manifestly unreasonable and outweighed by its prejudicial effect to the case. As outlined in detail in the Decision, the First Report contains fundamental deficiencies in various aspects such as in the methodology and sources used, and therefore will not assist the Chamber in making a finding of the number of missing and dead people from Srebrenica.

2. However, in the application of the first requirement for the admissibility of expert reports to this instance, I am of the opinion that Mr. Ratko Škrbić is well qualified to testify as an expert witness in the current proceedings. His *curriculum vitae* and his testimony in court show that he studied relevant fields, including "mathematics 1 and 2", the movement of populations, as well as the number of losses incurred in war. He is a well trained and educated military officer and was a senior lecturer at the Military Academy, where he taught subjects such as military strategy and warfare. In addition to his accomplished education, he wrote a conference paper on an "Analysis of the Srebrenica Population", which he presented at the Russian Academy of Sciences in Moscow in 2009. This paper then formed the basis for his book entitled "Srebrenica – Genocide committed against the truth", which was published in 2011. Indeed, Colonel (retired) Škrbić does not have a lengthy list of publications. But what he has achieved in terms of education, professional qualifications, and research experience leads me to consider him as an expert in the area of the movement of populations.

3. I should, however, reiterate that while the witness could be considered as an expert witness, his First Report is of no assistance to the Chamber due to the many flaws in it, as outlined in the Decision. In this regard, I would like to reemphasise that the question on the number of missing and dead Bosnian Muslims from Srebrenica is one of the crucial issues of the case. Thus, even though the Chamber will not be using the First Report in order to make a final finding on it, it will take into account the underlying documents Mr. Škrbić used in preparation of his First Report and give due weight in view of the totality of the evidence proffered in this case, including the oral testimony of this expert witness.

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

Judge Antoine Kesia-Mbe Mindua

Dated this twenty-second day of March 2012
At The Hague
The Netherlands

[Seal of the Tribunal]

DISSENTING OPINION OF JUDGE PRISCA MATIMBA NYAMBE

1. I respectfully dissent from the Majority's finding that the First Report is inadmissible pursuant to Rule 89 (C) and should be excluded from evidence pursuant to Rule 89 (D). My divergence rests on the Majority's assessments regarding (1) the qualifications of the witness as an expert and (2) the methodology used.

2. Before explaining my departure from the Majority, I must first stress every Chamber's duty to ensure that a trial is fair and that the proceedings are conducted in accordance with the Rules of Procedure and Evidence with full respect of the rights of each accused.[99]

1. Qualification

3. Contrary to the Majority, I am of the view that the witness's education and professional experience qualify him as an expert on the very issue of the First Report, namely the movement of a population during a war. I reach this conclusion based on the following facts. Not only did the witness attend the military academy and completed a course at the highest military college that existed in the army at that time,[100] but he also studied "mathematics 1 and mathematics 2".[101] Questioned by the Accused whether the witness studied the methodology of the movement of populations and losses incurred in a war, the witness answered:

> Yes. When I was at the school of All People's Defence, I even remember that one of my colleagues prepared his thesis entitled: The Assessment of Losses in an Armed Conflict and the Possibility of Strain Imposed on the Population With a View to Making up for the Losses Incurred by Units.[102]

In response to the Accused's question if he studied "demographic issues as well or, rather, why a soldier or military analyst deals with issue [*sic*] pertaining to demographic problems", the witness answered that: "The issue of demographic is very important for the defence system, and that is precisely why it is being studied."[103] In light of these answers, I am of the view that the witness had ample opportunity to study the methodology of establishing the number of losses incurred in a war during his education and training. He used this knowledge in his analysis to study the military documents that pertain to the movement of survivors and derived at a mathematical answer.

4. As outlined in the Majority Decision, the witness held various high-ranking military positions after completing his military education. He even worked as a senior lecturer in the school

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99 Articles 20(1) and 21(2) of the Statue of the Tribunal. *See also* Article 21(4)(e).
100 Ratko Škrbić, T. 18817 (6 February 2012); Ex. D00351.
101 Ratko Škrbić, T. 18825 (6 February 2012), T. 19035 (9 February 2012).
102 Ratko Škrbić, T. 18826 (6 February 2012).
103 *Ibid.*

for national defence of the military academy, where he taught courses in military strategy and warfare.[104] He testified that:

> In 2001, I was appointed to a new position in the department of strategy of the school for national defence within the military academy as the head of the teacher's group for command staff training, and I also provided instruction in the course of that position until I was appointed senior instructor in the next year, which is the position I held until 30th of July 2005, when I retired.[105]

In addition, he published a conference paper in 2009 on the "Analysis of the Srebrenica Population", which he presented at an international conference held at the Russian Academy of Science in Moscow.[106] This paper formed the basis for his book titled "Srebrenica - Genocide committed against the truth", published in 2011.[107]

5. The witness stated that his First Report did not require "any advanced degree or special training" in population statistics, statistics, mathematical demography or sociology because "the calculations were very simple" and "anyone who know [*sic*] the basics of mathematics would be able to do that, provided they invest some effort into it."[108] I fail to see why this statement should be considered as a factor against his qualifications. Unlike the Majority, I consider that it does not undermine his status as an expert, but rather strengthen it, as only an expert in mathematics can appreciate such difficult calculations as simple.

6. The Majority further disapproves the fact that the witness disregarded forensic evidence that was available to him. However, during his testimony, the witness clearly stated that he excluded it from his analysis because he does not consider himself to be a forensic expert and rather focused his research on the "movement of the Srebrenica population".[109] In my view, this should not be deemed as a disadvantage, as the witness confined himself to matters solely within his expertise and did not jeopardise the report by including issues that fall outside his acknowledged skills.

7. Moreover, the First Report was compiled on information and data from statements on the events in Srebrenica based on the expert report of Prosecution Witness Richard Butler. It was further based on information found in the Indictment in this case as well as the indictment in the Popović *et al.* case before this Tribunal.[110] The report is therefore relevant and of probative value. Moreover the Chamber has already admitted into evidence the witness's Second Report on

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[104] Ratko Škrbić, T. 18819–18822 (6 February 2012); Ex. D00351.
[105] Ratko Škrbić, T. 18821 (6 February 2012).
[106] Ratko Škrbić, T. 19036 (9 February 2012).
[107] Ratko Škrbić, T. 19055, 19068 (9 February 2012).
[108] Ratko Škrbić, T. 19036 (9 February 2012).
[109] Ratko Škrbić, T. 19071 (9 February 2012), T. 19122 (13 February 2012).
[110] Ratko Škrbić, T. 18828 (6 February 2012).

"Srebrenica and Žepa" as expert report.[111] In this regard I note that the First Report that is subject to this Decision is based on the same sources as those that the witness used in his Second Report. The only difference is that in the Second Report the witness used a narrative methodology whereas in the First Report he used a mathematical calculation to analyse the same documents, data and information.

8. In light of the above, I am therefore of the opinion that through his training and all-encompassing military education, including "mathematics 1 and 2" and his experience as a high ranking military soldier in the JNA as well the VRS, the witness gained sufficient knowledge, training, skills, experience and expertise in the "movement of populations during war", and therefore he is qualified as an expert in this area. I concur with the Accused's position that the witness being a military person who has attended and studied in the highest Military Academy of the land does not need to attend civilian schools or universities to be considered an expert in the area of his specialisation.

2. Methodology

9. Turning to the analysis of the methodology I, contrary to the Majority, consider that the full transparency of the sources and methodology used by the witness satisfy the minimum standard of reliability. The Concise Oxford Dictionary defines the term "methodology" as "a particular procedure for accomplishing or approaching something".[112] The witness's self-imposed methodology, goal or thesis was "to follow the movement of surviving Muslims, *i.e.*, people who lived there before the [VRS] operation and who survived after the operation".[113] In order to achieve this goal, he used all documents that could "fit or serve the application of such methodology" and disregarded others.[114]

10. An expert's ability to identify the documents relevant to a specific issue forms part of the skill and expertise of the expert.[115] Therefore, I do not subscribe to the view that the witness's methodology in terms of the selection of documents makes the First Report inadmissible. When an expert crosses the threshold of possessing sufficient knowledge, training and expertise to qualify as an expert and his or her report is relevant to the issues in dispute at trial, the jurisprudence of the Tribunal has held that a questionable methodology used in drafting an expert report is a matter that may go to the weight to be attached to the evidence rather than its admissibility.[116] Further, the fact

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111 Ratko Škrbić, T. 19258 (14 February 2012).
112 Judy Pearsall (ed.), Oxford Concise English Dictionary, 10th ed., published by Oxford University Press.
113 Ratko Škrbić, T. 19075 (9 February 2012).
114 Ratko Škrbić, T. 19118 (13 February 2012).
115 *E.g.*, *Perišić* Decision of 27 November 2008, para. 16.
116 *Perišić* Decision of 27 November 2008, para. 14 and references therein.

that the witness did not use any other documents than those mentioned in the Majority Decision in the preparation of the First Report, does not, in my view, constitute "a pattern of systematically excluding relevant evidence",[117] rendering the document unreliable or inadmissible at this stage of the proceedings. In this regard I would like to emphasise the jurisprudence of the Tribunal:

> For purposes of admissibility, the Trial Chamber must be satisfied globally on the basis of the evidence of the expert report and the expert report itself, as to the minimum standard of reliability **in terms of the transparency of sources and methods used**. While it is necessary for the expert to outline generally the methods as well as sources used, it is equally clear that this need not involve detailed references for each and every statement. It is in fact the very nature of such opinion evidence that in addition to specific sources, the expert will apply his or her general knowledge and information gained as a result of the development of expertise in the formation of his or her opinion. Such conclusions and opinions, based on the knowledge and know-how an expert may have gathered over the years, are inherent to the evidence of an expert witness.[118]

As already outlined in the Majority Decision, an expert is a person who by virtue of some specialized knowledge, skill or training can assist the trier of facts to understand or determine an issue in dispute.[119] To this extent I agree with Judge Mindua in his Separate Opinion and the Majority that the question on the number of missing and dead Bosnian Muslims from Srebrenica is one of the crucial issues in this case. I however differ from the Majority Decision regarding the non-admission of the First Report. In my view the First Report should be admitted into evidence because it is relevant as it relates to Srebrenica and the events surrounding the fall of Srebrenica in July 1995, which is the subject of the Indictment against the Accused. The Chamber can at the time of its judgment decide, after consideration of all relevant evidence before it, what weight, if any, to attribute to the First Report of the witness.

11. I further consider that the First Report sufficiently indicates the sources used for the analysis, thereby enabling the Prosecution to test the basis on which he reached his conclusions during his testimony. In this regard the witness testified that:

> In my report, wherever I made reference to any number, I put the reference number of the documents that I was relying upon, and in the event of using tables or charts about the population, then under each of such graphics I provided an explanation about the sources from which these specific number [*sic*] of inhabitants were taken. So I didn't include footnotes or endnotes in a standard manner but, instead, quite simply, whenever I used a number taken from any document, I would insert in brackets the number of the document that I used as an outsourcing tool or made reference to it in some other way.[120]

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117 *Supra* Majority Decision, para. 7.
118 *Popović et al.* Decision of 19 September 2007, para. 14 (emphasis added).
119 *Supra* Majority Decision, para. 14.
120 Ratko Škrbić, T. 19119 (13 February 2012).

The witness further plainly explained how he selected documents in light of his methodology and the reason for not considering other documents, including, *inter alia*, any forensic evidence adduced in this case,[121] such as exhumation reports, pathology reports, or autopsy reports, as follows:

> I opted to apply a research methodology that involves following the movement of Muslim survivors in Srebrenica prior and after Krivaja 95 operation because I had quite sufficient information about the number of the inhabitants before and after the operation. In addition to that, I can say that I did not have any particular need to delve into other researches that applied different methodologies. I opted for this particular methodology.[122]

I disagree with the Majority that the cause of death of the Bosnian Muslims is the purported aim of the First Report. Rather, the aim was, as explained by the witness above, to follow the movement of the population of Srebrenica during the relevant period. Therefore, the fact that he did not take into consideration the aforementioned forensic evidence should clearly not go against the admission of the First Report. After all, even if his methodology might be questionable, this matter may only go to the weight to be attached to the evidence and should clearly not be considered at the admissibility stage.[123]

12. During cross-examination, the Prosecution extensively challenged the First Report in terms of an alleged deficient methodology, referring, *inter alia*, to a "methodology of convenience", the selective sources used, the number that the witness relied upon for his calculation from the Dutch Debriefing, and his bias.[124] In this regard I once more note that any supposed deficiencies related to methodology, about which the Prosecution was after all entitled to cross-examine the witness, are matters that may go to the weight given to the evidence, rather than its admissibility.[125] It remains the Chamber's sole province and duty to draw inferences, reach conclusions and find facts in rendering its judgment.[126] The decision to admit the First Report into evidence at the admissibility stage does not in any way constitute a binding determination on the question of weight to be

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[121] The witness also stated that while he was aware of it, he did not take into account any documentary evidence originating from the VRS as he did not want to be seen as biased. Ratko Škrbić, T. 19079–19094 (9 February 2012), T. 19127 (13 February 2012). Ratko Škrbić, T. 19085 (9 February 2012), T. 19127–19034, 19137–19138 (13 February 2012). The witness maintained that it was not because the information about the prisoners was irrelevant, but he did not take it into consideration when he made his calculation. Ratko Škrbić, T. 19097 (9 February 2012). He also stated that he did not read testimony of VRS members but took from the indictment information in respect to the number of prisoners executed, captured, or transferred and used them in his calculations in the manner he explained. Ratko Škrbić, T. 19134 (13 February 2012). He also testified that he "did not try to cover up anything. On the contrary. I copied word for word all the information from the documents that I referred to. I did not skip a single piece of information, a single number. [...] I did not attempt to cover up anything. Ratko Škrbić, T. 19213 (14 February 2012).

[122] Ratko Škrbić, T. 19070 (9 February 2012). *See also* Ratko Škrbić, T. 19094 (9 February 2012).

[123] *E.g., Perišić* Decision of 27 November 2008, para. 14 and references therein.

[124] Ratko Škrbić, T. 19019–19033 (8 February 2012), 19034–19112 (9 February 2012), 19119–19170 (13 February 2012).

[125] *E.g., Perišić* Decision of 27 November 2008, para. 14.

[126] *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Decision on the Admissibility of the Narratives of Expert Witness Richard Butler, 27 March 2008 ("*Popović et al* Decision of 27 March 2008"), para. 19.

attached to the First Report.[127] Finally, with regard to the Prosecution's allegation that the witness is biased, I recall that "concerns relating to the witness's independency or impartiality do not necessarily affect the admissibility of [his] expert report" but may again, affect the weight to be given to the evidence at a latter stage.[128]

3. Conclusions

13. Reiterating my starting premise that it is every Chamber's duty to ensure a fair trial with full protection of the rights of each accused, I specifically want to refer to Articles 20(1), 21(2) and 21(4)(e) of the Statute, which provide that:

> Article 20(1): The Trial Chamber shall ensure that a **trial is fair** and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, **with full respect for the rights of the accused** and due regard for the protection of victim and witnesses.
>
> Article 21(2): In determination of charges against him, the accused shall be entitled to a **fair** and public **hearing** subject to article 22 of the Statute.
>
> Article 21(4): In the determination of any charges against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, **in full equality**:
>
> e) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf **under the same conditions** as witnesses against him .[129]

It is this Chamber's practice to admit evidence within the perimeters of Rule 89 (C) that is "any relevant evidence which it deems to have probative value". My concern with regard to the Majority Disposition to deny admission of the First Report is that all evidence called in relation to this report will not form part of the evidence which the Chamber will be using to determine the issues in dispute since the First Report, as well as the relevant testimony in this regard, are simply excluded from the record. In my view, not admitting the First Report, which is relevant and of probative value, amounts to modifying the practice thus far applied in this case; meaning that the conditions under which the defence evidence can be admitted are thereby modified and are not the same as those which were applied during the Prosecution case. This runs counter to the interests of a fair trial as well as to the letter and spirit of Articles 20 and 21 of the Statute, as just outlined above.

14. For all aforementioned reasons, I therefore would have held the First Report to be admissible as expert evidence as it is *prima facie* relevant to the issues in this case and of *prima facie* probative value. I reemphasise that once the Chamber reaches the stage of rendering its

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[127] *E.g., Popović et al* Decision of 27 March 2008, para. 21.
[128] *Prosecutor v. Momčilo Perišić*, Case No. IT-04-81-T, Decision on Defence Motion to Exclude the Expert Report of Mr. Patrick J. Treanor, 27 October 2008, para. 12.
[129] Emphasises added.

judgment, in my view, is when all other potential deficiencies should be discussed and thus appropriate weight be accorded to the First Report.

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

Judge Prisca Matimba Nyambe

Dated this twenty-second day of March 2012
At The Hague
The Netherlands

[Seal of the Tribunal]