

IN TRIAL CHAMBER I

Before:

Judge Bakone Moloto, Presiding

Judge Janet Nosworthy

Judge Frank Höpfel

Registrar:

Mr. Hans Holthuis

Decision:

13 January 2006

PROSECUTOR

v.

MILAN MARTIC

**DECISION ON PROSECUTION'S MOTIONS FOR ADMISSION OF
TRANSCRIPTS PURSUANT TO RULE 92 *BIS* (D) AND OF
EXPERT REPORTS PURSUANT TO RULE 94 *BIS***

The Office of the Prosecutor:

Ms. Hildegard Uertz-Retzlaff

Mr. Alex Whiting

Counsel for the Accused:

Mr. Predrag Milovancevic

1. **TRIAL CHAMBER I** 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 ("Trial Chamber") is seised of five submissions by the Prosecution for the admission of five expert reports under Rule 94 *bis* of the Rules of Procedure and Evidence ("Rules") and the transcripts of evidence given by four expert

witnesses under Rule 92 *bis* (D). The present decision deals with both the admission under Rule 94 *bis* and under Rule 92 *bis*.

I. THE PROSECUTION'S MOTIONS

2. The Prosecution has filed the following submissions:

(1) Prosecution's Submission of the Expert Report of Dr. Mladen Loncar pursuant to Rule 94 *bis* and Motion for the Admission of Transcripts Pursuant to Rule 92 *bis* (D), filed on 25 February 2005 ("Dr. Mladen Loncar Motion"),

(2) Prosecution's Submission of the Expert Report of Military Analyst Renaud Theunens pursuant to Rule 94 *bis* and Motion for the Admission of Transcripts pursuant to Rule 92 *bis* (D), filed on 25 February 2005 with confidential and *ex parte* Annexes ("Renaud Theunens Motion").^{[1](#)}

(3) Prosecution's Submission of the Expert Report of Colonel Ivan Grujic Pursuant to Rule 94 *bis* and Motion for the Admission of Transcripts Pursuant to Rule 92 *bis* (D), filed on 28 February 2005 ("Colonel Ivan Grujic Motion"),

(4) Prosecution's Submission of the Expert Report of Lieutenant Colonel Jo'ef Poje pursuant to Rule 94 *bis*, filed on 28 February 2005 ("Lieutenant Colonel Jo 'ef Poje Motion"),

(5) Prosecution's Submission of the expert report Dr. Davor Strinovic pursuant to Rule 94 *bis* and Motion for the Admission of Transcripts pursuant to Rule 92 *bis* (D), filed on 28 February 2005 ("Dr. Davor Strinovic Motion").

3. On 29 March 2005, the Defence for Milan Martić ("Defence") filed the "Defence's Objection to Prosecution's Motion for the Admission of Transcripts of Dr. Mladen Loncar's Evidence Pursuant to Rule 92 *bis* (D)", the "Defence's Objection to Prosecution's Motion for the Admission of Transcripts of Dr. Davor Strinovic's Evidence Pursuant to Rule 92 *bis* (D)" and the "Defence's Objection to Prosecution's Motion for the Admission of Transcripts of Colonel Ivan Grujic's Evidence Pursuant to Rule 92 *bis* (D)", ("Responses"), whereby the Defence objects to the admission of the transcripts of the testimony given by Dr. Mladen Loncar, Dr. Davor Strinovic and Colonel Ivan Grujic in the *Prosecution v. Slobodan Milosevic*,^{[2](#)} and alternatively, in the event that these transcripts are admitted into evidence, requests that

the expert witnesses be called for cross-examination pursuant to Rule 92bis (E).

4. In its Responses, the Defence further complains that alongside of its motions under Rule 92 bis (D), the Prosecution seeks the admission of expert reports under Rule 94 bis prepared by the same expert witnesses. It argues that it is “completely improper” to combine two procedures, respectively pursuant to Rule 92 bis (D) and Rule 94bis.³
5. Also on 29 March 2005, the Defence filed the “Defence’s Motion for Recognizing as Validly Done the Filing of Objections to Prosecution’s Motions for the Admission of Transcripts Pursuant to Rule 92 bis (D)” and two corrigenda to this motion,⁴ whereby it seeks the three Responses to be recognised as validly done.
6. On 5 April 2005, the Prosecution filed the “Prosecution Response to Defence Motion to Recognize as Validly Done the Filing of Objections to Prosecution’s Motions for Admission of Transcripts; Request for Leave to File Consolidated Reply to Defence Objections; and Consolidated Reply to Defence Objections to Prosecution’s Motion for Admission of Transcripts of Grujic, Loncar and Strinovic” (“Consolidated Reply ”), whereby the Prosecution firstly requests the Chamber to deny the Defence’s motion for recognizing as validity done their filings, and in the event that the Trial Chamber grants the motion it seeks leave to file a reply to the objections. In the Consolidated Reply, the Prosecution submits that it does not oppose the cross-examination of Dr. Mladen Loncar pursuant to the line of inquiry identified by the Defence, but further cross-examination of Colonel Grujic and Dr. Davor Strinovic should not be allowed.⁵ Furthermore, the Prosecution submits that the Defence’s objection to combining the procedures pursuant to Rule 92 bis and Rule 94 bis is misconceived and ill-founded.⁶
7. On 14 April 2005, the Defence filed the “Defence’s Objection to Prosecution’s Motion for the Admission of Transcripts of Reynaud Theunens’s Evidence Pursuant to Rule 92 bis (D)”,⁷ whereby it objects to the proposed admission, and, alternatively, if the transcript is admitted into evidence, it seeks to cross-examine Reynaud Theunens.⁸

II. THE DEFENCE’S NOTICES

8. The Defence filed its Notices on 31 March and 14 April 2005,^{[9](#)} whereby it opposes the admission into evidence of the Prosecution's expert reports, and requests that, if the reports are admitted into evidence, the Prosecution's experts be called to appear for cross-examination.
9. In relation to the Expert Report of Lieutenant Colonel Jozef Poje, the Defence submits, *inter alia*, that (i) the findings contained in the Expert Report are based on incomplete and unreliable evidence, and (ii) the expert's impartiality is in question because, according to his biography, in 1991, he deserted the JNA to assist the secessionist Slovenian government in its struggle against the JNA. The fact that he "took sides" in the conflict between Slovenia and JNA during that period suggests that he is not neutral in relation to the conflict between Croatia and the JNA, an armed force alleged by the Prosecution to be part of the joint criminal enterprise of which the Accused was, allegedly, also a member.
10. The Defence challenges the reliability of Dr. Mladen Loncar's report on the grounds that the purpose of the report was to determine the effect of Mr. Babic's admission of guilt on victims and on both the Croatian and the Serbian population. The Defence also challenges the impartiality of Dr. Mladen Loncar because "he is obviously strongly influenced in his work by his two-month detention in the Serb concentration camp 'Begejci in Vojvodina'".^{[10](#)}
11. Regarding the report of Colonel Ivan Grujic, the Defence argues, *inter alia*, that: (i) the report is not a "full report" because it primarily deals with the way in which the Office for Detainees and Missing Persons of the Government of the Republic of Croatia worked, an organisation which Colonel Ivan Grujic is still heading. The Defence also submits that the data on casualties is presented summarily. Moreover, the Defence argues that Colonel Ivan Grujic stated that this data is not the result of the work of himself or of his office. It is also submitted that, in view of his biography, Colonel Ivan Grujic cannot be properly qualified as an expert, as he is a policeman by profession and not an expert on statistics or exhumations. Lastly, the Defence submits that the impartiality of Colonel Ivan Grujic is in question because, during the time period covered in the Indictment, he was a high-ranking official of the Croatian government, which, it alleges, may be considered as a party contrary to the Accused.

12. Regarding the expert report of Dr. Davor Strinovic, the Defence submits that also this report is not a "full report" because it deals with the manner in which the Office for Detainees and Missing Persons of the Government of the Republic of Croatia worked and presents unreliable data on casualties through charts which are incomprehensible.¹¹ The Defence also questions the impartiality of Dr. Davor Strinovic because during the time period covered in the Indictment he was a member of a body created by the Croatian government, which, it alleges, may be considered as a party contrary to the Accused.
13. Concerning the military analyst Reynaud Theunens, the Defence submits, *inter alia*, (i) that the report was disclosed to the Defence only in English, which has seriously diminished the capacity of the Defence to review it properly, (ii) that the report repeatedly refers to certain documents as "exhibits" which do not match with the Prosecution's exhibit list, (iii) that Renaud Theunens does not have sufficient military experience to be an expert on such a large and complicated subject, and (iv) that Renaud Theunens's impartiality as an expert is in question because he is an employee of the Office of the Prosecutor and as such interested in the success of one party to these proceedings.

III. APPLICABLE LAW

A. Admission of transcripts under Rule 92 *bis* (D)

14. Rule 92 *bis* relates to the proof of facts *other than* by oral evidence, namely written statements (Rule 92 *bis* (A)), and transcripts of evidence provided by witnesses in other Tribunal proceedings (Rule 92 *bis* (D)).
15. With regard to Rule 92 *bis* (D), the test to be applied is whether the transcripts sought to be admitted into evidence go to proof of a matter other than the acts and conduct of the accused as charged in the indictment. This test is identical to that provided for by Rule 92 *bis* (A) and therefore the sub-provisions of Rule 92 *bis* (A)(i) and Rule 92 *bis* (A)(ii) apply accordingly.¹² Rule 92 *bis* (A)(i) gives a non-exhaustive list of factors, which purport to establish that a written statement should be admitted in lieu of oral evidence ¹³ and Rule 92 *bis*(A)(ii) gives a non-exhaustive list of factors, which play against the admission into evidence of a written statement.

16. The Appeals Chamber in *Prosecutor v. Stanislav Galic* elaborated on the test under Rule 92 *bis* (A) and stated that this Rule excludes the admission of written statements which go to proof of any act or conduct of the accused upon which the prosecution relies to establish the accused's guilt.¹⁴ The Appeals Chamber has further elaborated that where an accused allegedly participated in a joint criminal enterprise,¹⁵ and is therefore held liable for the acts of others in that joint criminal enterprise, Rule 92 *bis* excludes any written statements which go to proof of any acts or conduct of the accused upon which the Prosecution relies to establish that he had participated in the joint criminal enterprise, or that he shared with the person who actually did commit the crimes charged the requisite intent for those crimes.¹⁶
17. As a general rule, the Appeals Chamber has pointed out that there is a distinction between (a) the acts and conduct of *those others* who commit the crimes for which the indictment alleges that the accused is individually responsible, which are capable of admission, and (b) the acts and conduct of *the accused* as charged in the indictment which establish his responsibility for the acts and conduct of those others, which are excluded from the procedure laid down in the Rule 92 *bis*.¹⁷
18. In relation to factors listed in Rule 92 *bis* (A)(ii) as factors against admission, the Appeals Chamber has stated that *proximity* to the accused of the acts and conduct which are described in the written evidence is relevant to the exercise of the Trial Chamber's discretion in deciding whether the evidence should be admitted in written form at all.¹⁸ The Appeals Chamber recalled that "Rule 92 *bis* was primarily intended to be used to establish what has now become known as "crime-base" evidence, rather than the acts and conduct of what may be described as the accused's immediately proximate subordinates – that is, subordinates of the accused of whose conduct it would be easy to infer that he knew or had reason to know."¹⁹ The Appeals Chamber added that "SwChere the evidence is so pivotal to the prosecution case, and where the person whose acts and conduct the written statement describes is so proximate to the accused," a Chamber may decide not to admit the proposed evidence in written form in accordance to Rule 92 *bis* (A)(ii).²⁰

B. Cross-examination of witnesses pursuant to Rule 92 *bis*

19. Rule 92 *bis* (E) provides that the Trial Chamber may decide to require a witness providing evidence pursuant to this Rule to appear for cross-examination. As with the test of admission, proximity is the core of also the test of necessity of a further cross-examination.²¹
20. In accordance with the jurisprudence of the Tribunal, *proximity* is the core of both the test of admission and the test of necessity of cross-examination.²² However, proximity does not necessarily lead to exclusion of evidence. As mentioned above, where the individual, whose acts and conduct are described in the statement is so proximate to the accused and where the evidence is so pivotal to the Prosecution case, the Trial Chamber may decide : (i) not to admit the statement at all, or (ii) to require the witness to appear for cross-examination.²³ In general, only when the prejudicial effect cannot be counter-balanced by allowing the accused the opportunity to cross-examine the witness, will the Trial Chamber decide to exclude the evidence.
21. Moreover, the Trial Chamber in the case *Prosecutor v. Sikirica et al.* ([footnote 24](#)) stated that among the matters for consideration of a renewed cross-examination are whether the transcript goes to proof of a critical element of the Prosecution's case against the accused and whether the cross-examination in the other proceedings deals adequately with the issues relevant to the defence in the current proceedings.²⁵ In the *Milosevic* case, another factor was considered, namely whether the evidence in question relates to "live and important issue between the parties, as opposed to a peripheral or marginally relevant issue".²⁶ In the case *Prosecutor v. Aleksovski*²⁷ (a decision made before the introduction of Rule 92 *bis*), the Appeals Chamber found that a ground for admitting the transcript without cross-examination was extensive cross-examination by an accused *with a common interest*.²⁸ This position was reaffirmed in another decision in the *Milosevic* case after Rule 92 *bis* took effect.²⁹

C. The admission of expert report under Rule 94 *bis*

22. Rule 94 *bis* does not provide a definition of what is an expert witness. However, the Trial Chamber in the case *Prosecutor v. Stanislav Galic* defined an expert witness as "(a) person whom by

virtue of some specialized knowledge, skill or training can assist the trier of fact to understand or determine an issue in dispute". The Trial Chamber in *Prosecutor v. Vidoje Blagojevic and Dragan Jokic*, found that "Rule 94 *bis* (C) is a specific provision regarding the admission of expert statements, and that its application cannot be avoided simply by tendering the statements under Rule 92 *bis*, where more discretion exists for the Trial Chamber".³⁰ The Trial Chamber determined that the *argumentum e contrario* of the provision of Rule 94 *bis* (C) is that in case where the opposing party does not accept the statement of the expert witness on grounds not to be considered unreasonable, the statement can only be admitted into evidence after the expert had been called and has testified in person.³¹

IV. DISCUSSION

A. Interplay between Rule 92 *bis* (D) and Rule 94 *bis*

23. As a preliminary matter, the Trial Chamber examines the issue on the interplay between Rule 92 *bis* (D) and Rule 94 *bis* raised by the Defence in its Responses. In particular, the question before the Trial Chamber is whether Rule 92 *bis* also applies to expert witnesses or whether Rule 94 *bis* is an exclusive provision dealing with expert witnesses. The Trial Chamber recalls the jurisprudence of the Tribunal in this regard. The Trial Chamber concurs with the conclusion reached in the *Galic* case according to which "StChere is nothing in either Rule (92 *bis* (D) and Rule 94 *bis* (which would debar (... (the transcript of the expert's evidence in proceedings before the Tribunal, being accepted in lieu of his oral testimony where the interests of justice would allow that course in order to save time, with the rights of the other party to cross-examine the expert being determined in accordance with Rule 92 *bis*." ³². Accordingly, it was not improper for the Prosecution to activate for the expert witnesses the said two procedures.

B. Do the transcripts of the four expert witnesses Mladen Loncar, Reynaud Theunens, Davor Strinovic and Ivan Grujic go to proof of the acts or conduct of the Accused?

24. The Prosecution submits that the evidence given by witnesses Mladen Loncar, Reynaud Theunens, Ivan Grujic and Davor Strinovic in previous proceedings before the Tribunal, where they testified as expert witnesses, does not address the acts or

conduct of the Accused.³³ The Defence accepts that all the transcripts of the expert testimonies, other than part of the testimony of Renaud Theunens, do not address the acts and conduct of the Accused and thus are capable of admission.³⁴ With respect to Renaud Theunens, the Defence alleges that pages 31486, 31496, 31574, 31575, 31577, 31589 and 31678 of the transcript pertain to the acts and conduct of the Accused.³⁵

25. The Trial Chamber observes that, as is agreed by the parties, Dr. Mladen Loncar's previous testimony relates to the impact of war traumas on the physical and mental well-being of victims and their relatives,³⁶ that Renaud Theunens's previous testimony concerns the military situation in Croatia and Bosnia during the conflict,³⁷ that Dr. Davor Strinovic's previous testimony relates to the number, the identity and the cause of death of the victims specified in his expert report,³⁸ and that Colonel Ivan Grujic's previous testimony relates to the number of killed, expelled and missing persons as a result of the crimes charged in the Indictment.³⁹
26. The Trial Chamber is satisfied that the transcripts of Dr. Mladen Loncar, Colonel Ivan Grujic and Dr. Davor Strinovic do not relate to the acts or conduct of the Accused. In relation to the challenged transcript pages of the testimony of Renaud Theunens, the Trial Chamber recalls that the Indictment alleges that the Accused participated in a joint criminal enterprise as a co-perpetrator.⁴⁰ The Trial Chamber observes that in page 31486 Renaud Theunens testified to "individuals ...engaged by the Ministry of Interior of Serbia into the training of local Serb police unit also known as Martić's Police or Milicija in the area of Knin". In page 31496, Renaud Theunens gave evidence about "the daily or regular combat reports that were sent from the SVK to... President Martić at that time". In pages 31574, 31575, 31577 and 31589, Renaud Theunens referred to an instruction from Mr. Slobodan Milošević which was released to the Accused via the then Chief of the General Staff of the VJ. Mr. Renaud Theunens added that "as an analyst it showed to me the relationship, or it clarified or it gave some insight on the relationship that existed between Mr. Milošević and Mr. Martić".⁴¹ The Trial Chamber finds that pages 31486, 31496, 31574, 31575, 31577 and 31589 of the transcript of the testimony of Mr. Renaud Theunens go to proof of the role the Accused played in the alleged joint criminal

enterprise and that the Prosecution relies upon those pages to establish the Accused's participation in the alleged joint criminal enterprise. As a result, the said pages are not capable of admission under Rule 92 *bis* (D).

27. In sum, the Trial Chamber finds that the transcripts and the related exhibits of Mladen Loncar, Ivan Grujic, Davor Strinovic and Reynaud Theunens, with the exception of pages 31486, 31496, 31574, 31575, 31577 and 31589 of the transcript of Mr. Renaud Theunens testimony, are capable of admission pursuant to Rule 92 *bis* (D).

C. Are there any discretionary factors which militate against the admission of the statements or transcripts which have passed the admissibility test?

28. The Prosecution emphasises that there are no discretionary factors which could play against the admission of transcripts which do not go to the acts or conduct of the Accused.⁴² It explains that there are no reasons to believe that the evidence submitted is either unreliable, or that its prejudicial effect outweighs its probative value.⁴³ The Prosecution submits that there is no overriding public interest in having the evidence presented orally since the Accused had access to the previous oral testimony ⁴⁴ or will have access to the expert reports submitted in this present case.⁴⁵ The Defence argues that all the other discretionary factors listed in Rule 92 *bis* (A) other than the absence of overriding public interest go against the admission of the transcripts.⁴⁶ The Prosecution claims in its Consolidated Reply that the Defence fails to substantiate its allegations and that the objecting party is obliged to demonstrate that the nature and source of the proposed evidence render it unreliable, or that its prejudicial effect outweighs its probative value. ⁴⁷
29. The Trial Chamber observes that the testimony given by Dr. Mladen Loncar relates to the impact of war traumas on victims of the crimes charged, which pursuant to Rule 92 *bis* (A)(i)(d) is a factor in favour of admission. The Trial Chamber also notes that the testimony of Mr. Renaud Theunens addresses relevant military background of the crimes charged in the Indictment, which is also a favouring factor under Rule 92 *bis* (A)(i)(b), and that the evidence given by Colonel Ivan Grujic relating to the number of killed, expelled and missing persons, as well as the

evidence given by Dr. Davor Strinovic relating to the number, cause and identity of the victims of the crimes charged in the Indictment, are factors to be taken into account in determining a sentence, which is again a factor in favour of the admission pursuant to Rule 92 *bis* (A)(i)(f).

30. The Defence does not substantiate its claim that there exist factors against the admission of the transcripts proposed for admission into evidence. The Trial Chamber sees no factors which would play against the admission of the transcripts. Accordingly, the Trial Chamber finds that the transcripts of the previous testimonies given by Mladen Loncar, Reynaud Theunens, Ivan Grujic, Davor Strinovic, with the exception of the portions mentioned above, are admissible pursuant to Rule 92 *bis* (D) of the Rules.

D. Should the expert witnesses be called for cross-examination pursuant to 92 *bis* (E)?

31. The Prosecution seeks to admit the transcripts of the witnesses Mladen Loncar, Reynaud Theunens, Davor Strinovic, Ivan Grujic, without cross-examination.⁴⁸ The Prosecution requests that, “in the absence of a specific, admissible and relevant additional line of enquiry being identified by the Accused, the witnesses should not be required to attend for further cross-examination” ⁴⁹ since they already testified and were effectively and extensively cross-examined in the previous proceedings by an accused with a substantially similar interest as this Accused in opposing and contesting their evidence.⁵⁰
32. The Defence submits that in case the Trial Chamber decides that the evidence is admissible all witnesses should attend for cross-examination on all aspects of the testimonies contained in the transcripts and related exhibits.⁵¹ It argues that the transcripts go to proof of important issues which are in dispute between the parties.⁵² In addition, the Defence submits that Dr. Mladen Loncar was not cross-examined at all in the previous case because he was called to testify on request of both parties during the sentencing proceedings after a plea agreement had been reached between the prosecution and the accused in the *Babic* case.⁵³
33. In relation to the testimonies of Reynaud Theunens, Davor

Strinovic, Ivan Grujic previously given in the *Milosevic* case, the Defence submits that the previous cross-examinations do not adequately cover the issues in dispute because (a) Mr. Milosevic chose to defend himself instead of being represented by a professional lawyer, which resulted in his failing to always prepare the cross-examination “in the best possible way”, (b) the relevance of issues he raised were often contested by the Judges and the Prosecution, (c) the specific approach Mr. Milosevic has taken with respect to the Tribunal and the proceedings against him had a strong influence on the manner in which he led the cross-examination, and (d) Mr. Milosevic’s defence is widely considered to be more political than legal. In sum, “?ggiven the rather particular circumstances of the *Milosevic* case, the introduction of Mr. Milosevic’s cross-examination instead of the one conducted by the Defence in this case would most certainly result in the breach of the Accused’s rights set out in Article 21 of the Statute.”⁵⁴

34. In its reply, the Prosecution concedes that it does not oppose the cross-examination of Dr. Mladen Loncar “pursuant to the line of inquiry identified by the Defence”.⁵⁵ As regards to the other expert witnesses, the Prosecution maintains that the previous cross-examination covered the issues identified by the Defence in the present case.⁵⁶ It further argues that the identity of interests between the accused in the case in which the testimony was given, and the present case, “is not the real issue for consideration in the determination as to whether the witness should be cross-examined under Rule 92bis”.⁵⁷
35. With regard to Dr. Mladen Loncar, the Trial Chamber is of the opinion that he should be called for cross-examination, as he was not cross-examined during his testimony in the *Babic* case. As to the remaining three expert witnesses, Reynaud Theunens, Davor Strinovic, Ivan Grujic, the Trial Chamber is convinced that they were extensively and lengthily cross-examined in the previous proceedings and that the important and live issues in the present case alleged by the Defence have been adequately addressed in their previous testimony. Furthermore, the Trial Chamber is satisfied that it is neither so pivotal to the Prosecution case nor so proximate to the Accused to the extent that it would be unfair to the accused not to call the witnesses for cross-examination.
36. In sum, the Trial Chamber will require the attendance for cross-

examination of Dr. Mladen Loncar on the evidence he gave in the *Babic* case. The other transcripts which have been admitted into evidence are not subject to further cross-examination.

E. Analysis of the proposed 94 *bis* expert reports

1. Qualification of experts

37. As recalled by the Trial Chamber in the *Galic* case an expert witness is accepted “to be a person whom by virtue of some specialized knowledge, skill or training can assist the trier of fact to understand or determine an issue in dispute (and to that end testifies)”.⁵⁸ In this role an expert witness “is expected to give his or her expert opinion in full transparency of the established or assumed facts he or she relies upon and of the methods used when applying his or her knowledge, experience or skills to form his or her expert opinion; and that the mere fact that the expert witness was employed by or paid by a party-related agency does not disqualify him or her to be called and testify as an expert witness”.⁵⁹
38. The Trial Chamber, after having examined the curriculum vitae of each expert witness attached to their respective reports, is satisfied that the authors of the reports qualify as experts, as they show that the authors have specialised knowledge, skill or training to provide the information contained therein.

2. Impartiality of experts

39. The Defence claims that Mr. Reynaud Theunens might not be impartial and objective as he is an employee of the Office of the Prosecutor. In light of the Trial Chamber’s holding in the *Galic* case, quoted above, the Trial Chamber rejects this argument. The same conclusion is reached by the Trial Chamber in relation to the Defence’s challenge to the impartiality of Dr. Strinovic because he is a member of the Government Commission for Detainees and Missing Persons. The Trial Chamber is of the view that being a member of the Government Commission for Detainees and Missing persons is not, by itself, a reason for partiality and does not disqualify him as expert. Accordingly, the Defence’s challenge is rejected.
40. Similarly, regarding the objection of the Defence to the impartiality of Ivan Grujic, the Trial Chamber deems that being a

high-ranking official of the Croatian Government during the time period covered in the Indictment and the promotion to the rank of Colonel of the Croatian Army, do not constitute, by themselves a logical basis to prove the partiality of Colonel Ivan Grujic. Nonetheless, the Trial Chamber will take into account all relevant factors of this witness when it assesses the evidentiary value of his report.⁶⁰

41. For the same reason, the Trial Chamber rejects the objection of the Defence concerning the impartiality of Lieutenant Colonel Jozef Poje.

42. Finally, the Trial Chamber is not convinced that Dr. Mladen Loncar is “obviously influenced in his work by his two month detention in the Serb concentration camp Begejci in Vojvodina”.⁶¹ There is no evidence which would permit the Trial Chamber to make such conclusion on Dr. Loncar’s impartiality.

3. Reliability of the reports

43. The aim of Mr. Reynaud Theunens’s report is to provide an analysis of the role of the “*SAO Krajina*”, the TO and the SVK during the conflict in Croatia 1991 -1995, and the relations between the Accused and these organisations throughout the conflict. The Trial Chamber finds this report to be highly relevant to the case and admissible under Rule 89 of the Rules.

44. Dr. Davor Strinovic’s report concerns forensic medicine and mainly deals with the exhumation and identification of bodies and the cause of death during the war in Croatia. The expert report of Ivan Grujic deals with the issues of detainees and missing persons. The work of his office is connected with establishing the sites of mass and individual graves, their exhumation and the identification of exhumed remains. It derives that both reports are relevant to the instant case.

45. In his report, Dr. Mladen Loncar analyses the impact of war-time traumas of different witness groups, which occurred during or after the war in Croatia. His work is focused on the victims of incarceration, displacement, victims whose homes were destroyed, and victims whose relatives were killed or were missing. The Trial Chamber finds that Dr. Mladen Loncar’s report is relevant to the present case.

46. The main purpose of Lieutenant Colonel Jozef Poje’s report is to

provide an expert opinion on the use of M-87 Orkan multiple rocket launchers during the attack on Zagreb on 2 and 3 May 1995. The Trial Chamber finds that the matters dealt with in this report are relevant to the Trial Chamber's consideration of the Indictment's allegations concerning the attack on Zagreb on 2 and 3 May 1995.

F. The question of the admission of the exhibits associated with the transcripts and with the expert report and to the transcripts

47. The Prosecution in its motions pursuant to Rule 94 *bis* and Rule 92 *bis* requested not only the admission of expert reports and transcripts of previous proceedings but also of other *associated exhibits* as identified in annexes to the motions.⁶² The Trial Chamber is of the view that both Rule 92 *bis* (E) and Rule 94 *bis* should not be interpreted to the effect to include documents other than "transcripts" and "expert reports" respectively. It is more appropriate – to the Trial Chamber view – that the Prosecution separately seeks the admission of documents supporting the transcripts and the expert reports under examination in court, pursuant to the general principles regulating the admissibility of evidence before this Tribunal.

V. DISPOSITION

PURSUANT TO Rule 92 *bis* (D) of the Rules, the Trial Chamber,

ADMITS into evidence the transcripts of the expert witnesses Dr. Mladen Loncar given in the *Babic* case, and Dr. Davor Strinovic and Colonel Ivan Grujic given in the *Milosevic* case,

REQUIRES Dr. Mladen Loncar to appear for cross-examination,

ADMITS IN PART into evidence the transcript of Reynaud Theunens' testimony given in the *Milosevic* case,

REQUIRES Reynaud Theunens to be heard *viva voce* with respect to the acts and conduct of the Accused described in pages 31486, 31496, 31574, 31575, 31577 and 31589 of the transcript, which pages are not admitted into evidence

PURSUANT TO Rule 94*bis* of the Rules, the Trial Chamber,

ADMITS into evidence the five expert reports of Dr. Mladen

Loncar, Renaud Theunens, Colonel Ivan Grujic, Lieutenant Colonel Jo'ef Poje and Dr. Davor Strinovic,

GRANTS the Defence's request for cross-examination of these experts, and

REQUESTS the Registry to assign an exhibit number to the expert reports referred to in this Decision in due time.

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

Judge Bakone Justice Moloto
Presiding

Dated this thirteenth day of January 2006
At The Hague
The Netherlands

[Seal of the Tribunal]

1 - On 21 March 2005 the Prosecution also filed a corrigendum to its submission of the expert report of Reynaud Theunens (Prosecution's Corrigendum to the Prosecution's Submission of the Expert Report of Military Analyst Reynaud Theunens pursuant to Rule 94 *bis* and Motion for the Admission of Transcripts pursuant to Rule 92 *bis* (D) of 21 March 2005). On 23 March the Prosecution filed a revised corrigendum requesting that part of the Annex C be filed as Confidential and ex parte (Prosecution's Corrigendum to the Prosecution's Submission of the Expert Report of Military Analyst Reynaud Theunens pursuant to Rule 94 bis and Motion for the Admission of Transcripts pursuant to Rule 92 *bis* (D) of 23 march 2005).

2 - *Prosecution v. Slobodan Milosevic*, Case No. IT-02-54-T.

3 - *See, e.g.*, "Defence's Objection to Prosecution's Motion for the Admission of Transcripts of Dr. Mladen Loncar's Evidence Pursuant to Rule 92 *bis* (D)", 29 March 2005, para 7. The Defence reiterates this argument in its other objections.

4 - Defence's Corrigendum to motion for Recognizing as Validly Done the Filing of Objections to Prosecution's Motions for the Admission of Transcripts Pursuant to Rule 92bis (D), 29 March 2005, where it requests the word "September" at page 4 of the Motion to be read as "March"; Defence's Second Corrigendum to Motion for Recognizing as Validly Done the Filing of Objection to Prosecution's Motions for the Admission of Transcripts Pursuant to Rule 92 bis (D), 29 March 2005, where it requests that "25 February 2005" in paragraph 11 of the Motion be read as "29 March 2005".

5 - Consolidated Reply to Defence Objections to Prosecution's Motion for Admission of Transcripts of Grujic, Loncar and Strinovic ("Consolidated Reply"), 5 April 2005, para. 18.

6 - Consolidated Reply of 5 April 2005, para. 10.

7 - Defence's Objection to Prosecution's Motion for the Admission of Transcripts of Reynaud Theunens' Evidence Pursuant to Rule 92 bis (D), 14 April 2005.

8 - The same day, the Defence filed the “Defence’s Motion for Recognizing as Validly Done the filing of Defence’s Submissions concerning the evidence of Prosecution’s expert witness Reynaud Theunens”. On 18 April 2005, the Prosecution filed the “Prosecution Response to Defence Motion for Recognizing as Validly Done the Filing of Defence’s Submissions Concerning the Evidence of Prosecution’s Expert Witness Reynaud Theunens; Request for Leave to Reply to Defence Notice Pursuant to Rule 94 *bis* (B) of 14 April 2005”, whereby it requests the Trial Chamber to deny the Defence’s motion; in the event that the Trial Chamber grants the motion it seeks leave to file a reply to the submissions. The Trial Chamber by oral decision granted the Defence Motions to recognize its filings as validly done. *See* Status Conference 19 May 2005, T. 181-182.

9 - On 18 March 2005, the Defence filed confidentially a “Motion for Extension of Time to File a Notice pursuant to Rule 94 *bis*(B)” requesting an extension of the time-limit to file a notice pursuant to Rule 94 *bis* (B). On 24 March 2005 the Prosecution filed a “Response to Defence Motion for Extension of Time to File a Notice pursuant to Rule 94 *bis* (B)”, opposing the Motion in part. The Trial Chamber denied the Motion on 30 March 2005 on the grounds “that no good cause has been shown to warrant a further extension of time for the Defence to file the notice pursuant to Rule 94 *bis* (B)”. Finally, on 31 March and 14 April 2005 the Defence filed the following Notices: 1) “Defence’s Notice Pursuant to Rule 94 *bis*(B) regarding the Expert Report of Lieutenant Colonel Jozef Poje”, filed on 31 March 2005, 2) “Defence’s Notice Pursuant to Rule 94 *bis* (B) regarding the Expert Report of Dr. Mladen Loncar”, filed on 31 March 2005, 3) “Defence’s Notice Pursuant to Rule 94 *bis* (B) Regarding the Expert Report of Colonel Ivan Grujic”, filed on 31 March 2005, 4) “Defence’s Notice Pursuant To Rule 94 *bis* (B) Regarding the Expert Report of Dr. Davor Strinovic”, filed on 31 March 2005, and 5) “Defence’s Notice Pursuant to Rule 94 *bis* (B) Regarding the Expert Report of Military Analyst Reynaud Theunens”, filed on 14 April 2005.

10 - *Ibid.*, para. 9.

11 - The Defence submits that there is substantial difference between the number of killed as alleged in the Indictment and the number presented by Dr. Davor Strinovic and the data are unreliable because Dr. Davor Strinovic neither supervised the work of the identification teams nor examined their reports.

12 - *Prosecutor v. Slobodan Milosevic*, “Decision on Prosecution Motion for the Admission of Transcripts in Lieu of *Viva Voce* Testimony Pursuant to 92*bis* (D)-Foca Transcripts”. Case No. IT-02-54-T, 30 June 2003 (“Milosevic Decision”), para. 10.

13 - *Prosecutor v. Stanislav Galic*, “Decision on Interlocutory Appeal Concerning Rule 92 *bis*(C)”, Case No. IT-98-29-AR73.2, 7 June 2002 (“*Galic* Decision”), para. 9, which refers to the admission of witness statements under Rule 92 *bis* (A), but the same principle is applicable to the admission of transcripts of evidence under Rule 92 *bis* (D). *See also* Milosevic Decision, para. 10.

14 - *Galic* Decision, para. 10.

15 - Indictment, paras 3-4.

16 - *Galic* Decision, para. 10.

17 - *Galic* Decision, para. 9, which refers to the admission of witness statements under Rule 92 *bis* (A), but the same principle is applicable to the admission of transcripts of evidence under Rule 92 *bis* (D).

18 - *Ibid.*, para. 13.

19 - *Ibid.*, para. 16.

20 - *Ibid.*

21 - *Galic* Decision, para 13.

22 - *Galic* Decision, para 13.

23 - *Galic* Decision, paras 13-15: “there is often but a short step from a finding that the accused knew or had reason to know that those crimes were about to be or had been committed by his subordinates.” (para. 14).

24 - *Prosecutor v. Sikirica et al.*, “Decision on Prosecutor’s Application to Admit Transcripts Under Rule 92 *bis*”, Case No. IT-95-8-T, 23 May 2001 (“*Sikirica* Decision”).

25 - *Sikirica* Decision, para. 4.

26 - *Prosecutor v. Milosevic*, Case No.IT-02-54-T, “Decision on Prosecution’s Request to Have Written Statements Admitted Under Rule 92 *bis*”, 21 March 2002, paras 24-5.

27 - *Prosecutor v. Aleksovski*, Case No.IT-95-95-14/1-AR73, 16 February 1999.

28 - *Ibid.*, para. 25.

29 - *Prosecutor v. Milosevic*, Case No.IT-02-54-T, “Decision on Prosecution Motion for the Admission of Transcripts in lieu of viva voce Testimony Pursuant to 92bis (D) -Fo~a Transcripts”, 30 June 2003, para. 38.

30 - *Prosecutor v. Blagojevic and Jokic*, Case No. IT-02-60-T, Decision on Prosecution’s Motions for Admission of Expert Statements, 7 November 2003, para. 27.

31 - *Ibid.*, para. 27

32 - *Galic* Decision, para. 40. *See also Prosecutor v. Blagojevic and Jokic*, Case No. IT-02-60-T, Decision on Prosecution’s Motions for Admission of Expert Statements, 7 November 2003, para. 21 et seq.

33 - Strinovic Motion, para. 11. The other three motions relating to Dr. Mladen Loncar, Military Analyst Reynaud Theunens and Colonel Ivan Grujic explicitly refer to “the same arguments advanced in Strinovic Motion in order to avoid duplication”.

34 - Defence’s Objection to Prosecution’s Motion for the Admission of Transcripts of Reynaud Theunens’ Evidence Pursuant to Rule 92*bis* (D), 14 April 2005, para. 11 and fn 7.

35 - *Ibid.* The Trial Chamber notes that page 31678 of the transcript cited by the Defence relates to the testimony given by another expert witness, Ferenc Vegh, whose testimony is not sought to be admitted into evidence by the Prosecution in its motion. Therefore this page will not be taken into account by the Trial Chamber.

36 - *See* Dr. Mladen Loncar Motion, 25 February 2005, para. 4; also see Defence’s Objection to Prosecution’s Motion for the Admission of Transcripts of Dr. Mladen Loncar’s Evidence Pursuant to Rule 92 *bis* (D), para. 16.

37 - *See* Renaud Theunens Motion, 25 February 2005, para. 4; also see Defence’s Objection to Prosecution’s Motion for the Admission of Transcripts of Reynaud Theunens’s Evidence Pursuant to Rule 92 bis D), para. 15.

38 - *See* Dr. Davor Strinovic Motion, 28 February 2005, para. 5; also see Defence’s Objection to Prosecution’s Motion for the Admission of Transcripts of Dr. Davor Strinovic’s Evidence Pursuant to Rule 92 bis (D), para. 16.

39 - *See* Colonel Ivan Grujic Motion, 28 February 2005, para. 5; also see Defence’s Objection to Prosecution’s Motion for the Admission of Transcripts of Colonel Ivan Grujic’s Evidence Pursuant to Rule 92 bis (D), para 16.

40 - Indictment, 9 September 2003, para. 6.

41 - *Prosecution v. Slobodan Milosevic*, Case No. IT-02-54-T, T. 31589.

42 - Transcripts and Written Statements Motion, 28 February 2005, para. 21.

43 - *Ibid.*

44 - *Ibid.* Also see Davor Strinovic Motion, 28 February 2005, para. 12.

45 - Davor Strinovic Motion, 28 February 2005, para. 12.

46 - *See*, for instance, Defence's Objection to Prosecution's Motion for the Admission of Transcripts of Dr. Mladen Loncar's Evidence Pursuant to Rule 92*bis*(D), para. 14.

47 - Consolidated Reply, 5 April 2005, para. 12.

48 - Transcripts and Written Statements Motion, 29 February 2005, para. 14.

49 - Davor Strinovic Motion, 28 February 2005, para. 13.

50 - Transcripts and Written Statements Motion, 29 February 2005, para. 14.

51 - Response of 21 April 2005, paras 13, 15.

52 - *Ibid.*, fn. 99.

53 - Mladen Loncar Objection, 29 March 2005, para. 16.

54 - *See*, for instance, the argument in Response of 21 April 2005, para 17.

55 - Consolidated Reply, 5 April 2005, para 17.

56 - *Ibid.*, paras 15-16,

57 - *Ibid.*, para. 15. The determining consideration is, according to the Prosecution, whether the cross-examination in the other proceedings dealt adequately with the issues relevant to the Defence in the present proceedings. Since the proposed transcripts dealt effectively and extensively with the issue identified by the Defence, the Prosecution insists that further cross-examination should not be required.

58 - Prosecutor v. Stanislav Galic, Decision Concerning the Expert Witnesses Ewa Tabeau and Richard Philipps of 3 July 2002. *See also Prosecutor v. Blagojevic and Jokic*, Case No. IT-02-60-T, Decision on Prosecution's Motions for Admission of Expert Statements, 7 November 2003, para. 19 *et seq.*

59 - *Ibid.*

60 - *Ibid.*

61 - Defence's Objection to Prosecution's Motion for the Admission of Transcripts of Dr. Mladen Loncar's Evidence Pursuant to Rule 92 bis (D)", 29 March 2005, para. 9.

62 - *See* for instance Renaud Theunens Motion, para. 8.