

5898  
5/

IT-98-32/1-T  
05898-05881  
12 November 2008

**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-98-32/1-T  
Date: 12 November 2008  
Original: English

**IN TRIAL CHAMBER III**

**Before:** Judge Patrick Robinson, Presiding  
Judge Christine Van den Wyngaert  
Judge Pedro David

**Registrar:** Mr. Hans Holthuis

**Decision of:** 12 November 2008

**PROSECUTOR**

**v.**

**MILAN LUKIĆ  
SREDOJE LUKIĆ**

***PUBLIC***

---

**DECISION ON THE MOTION TO BAR THE  
TESTIMONY AND STATEMENT OF AMOR MAŠOVIĆ**

---

**The Office of the Prosecutor**

- Mr. Dermot Groome
- Mr. Frédéric Ossogo
- Ms. Laurie Sartorio
- Mr. Stevan Cole
- Ms. Francesca Mazzocco

**Counsel for the Accused**

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

**TRIAL CHAMBER III** (“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 “Milan Lukić’s motion to bar the Prosecution from the introduction into evidence of the proffered exhibit ‘statement of Amor Mašović’ and related testimony”, filed on 30 October 2008 (“Motion”), in which the Defence of Milan Lukić (“Defence”) requests to bar portions of the statement of Amor Mašović and any testimony that purports to present conclusions which are based on statements of third parties.

#### **A. Procedural history**

1. Amor Mašović was the President of the State Commission for Missing Persons of Bosnia and Herzegovina and worked in other commissions dealing with missing persons. The Prosecution originally listed Amor Mašović as a witness pursuant to Rule 92 *bis* of the Rules of Procedure and Evidence (“Rules”).<sup>1</sup>
2. On 22 August 2008 the Trial Chamber granted the Prosecution motion to admit the transcript of Amor Mašović in the *Vasiljević* case and associated exhibits into evidence pursuant to Rule 92 *bis*, but required Mašović to appear for cross-examination and ordered that the transcript and the associated exhibits will be admitted upon fulfilment of the requirements of Rule 92 *ter*.<sup>2</sup>
3. On 22 September 2008 the Prosecution filed a motion to add an updated statement of Mašović (“Statement”) and updated tables.<sup>3</sup> On 23 October 2008 the Trial Chamber admitted the Statement and updated tables into evidence upon fulfilment of the requirements of Rule 92 *ter*.<sup>4</sup>
4. On 30 October 2008 the Defence filed the Motion, just before Mašović was about to testify. After having heard oral submissions of the parties, the Trial Chamber decided to hear the testimony of Mašović and decide on the admissibility of his testimony and the exclusion of the Statement thereafter.<sup>5</sup> It ordered the Prosecution to file written submissions on the issue by 3 November 2008.<sup>6</sup> The Prosecution filed its written submissions on 3 November 2008.<sup>7</sup>

<sup>1</sup> Confidential Prosecution motion for admission of evidence pursuant to Rule 92 *bis* with confidential Annexes A and B, and confidential and *ex parte* Annexes C and D, 15 February 2008; Prosecution list of witnesses pursuant to Rule 65 *ter* (E)(II), 15 March 2008.

<sup>2</sup> Decision on Prosecution motion for admission of evidence pursuant to Rule 92 *bis*, 22 August 2008, para. 30.

<sup>3</sup> A curriculum vitae of Amor Mašović was not attached in a working language of the Tribunal. An English version of the curriculum vitae was filed on 27 October 2008.

<sup>4</sup> Decision on Prosecution motion to add updated statement of Amor Mašović and tables, 23 October 2008.

<sup>5</sup> Trial hearing, 30 October 2008, T. 3159; Amor Mašović testified on 30 October 2008; the transcript of his testimony in the *Vasiljević* case was admitted as P173 and the associated exhibits as P174-P182; the Statement was admitted as P183 and the updated tables as P184; the curriculum vitae was admitted as P185, T. 3161-3168.

<sup>6</sup> Order, 31 October 2008.

## B. Submissions

5. The Defence submits that the Statement is “re-telling the testimony of unavailable non-witnesses” and that it draws conclusions on such basis.<sup>8</sup> It specifically refers to six portions of the Statement in that regard.<sup>9</sup> In support of the request to bar such portions of the Statement and similar testimony of Mašović, the Defence cites a decision by the Trial Chamber in the *Milutinović* case that barred excerpts of two reports which were based upon a number of interviews and statements from known and unknown sources.<sup>10</sup>

6. The Defence further submits that Mašović’s evidence takes the form of expert evidence for which Rule 94 *bis* applies.<sup>11</sup> At the same time, the Defence argues that Mašović’s evidence would not be admissible under Rule 94 *bis* because he was “predisposed to a party of the conflict” and “biased”.<sup>12</sup> In that regard, the Defence cites another decision of the Trial Chamber in the *Milutinović* case that disallowed a witness to appear as an expert because that witness was considered to be too close to a party of the proceedings.<sup>13</sup>

7. In addition, the Defence submits that the “re-labeling” of Mašović, who was originally a Rule 92 *bis* witness, as a Rule 92 *ter* witness “cannot cure the improper nature of the testimony”.<sup>14</sup> In the Defence submission, Mašović’s conclusions directly relate to alleged acts and conduct of the Accused.<sup>15</sup> The Defence avers that Rule 92 *ter* may not be used to tender evidence which would otherwise not be admissible.<sup>16</sup>

8. The Prosecution submits that the Defence mischaracterises the nature of Mašović’s testimony and Statement.<sup>17</sup> According to the Prosecution, the Statement is not based on statements of third parties; references to statements by other individuals were only provided to explain the course of Mašović’s investigation and search for grave locations and do not provide the primary

---

<sup>7</sup> Prosecution’s response to “Milan Lukić’s motion seeking to bar the Prosecution from the introduction into evidence of the proffered exhibit ‘statement of Amor Mašović’ and related testimony[sic]”, 3 November 2008 (“Prosecution submission”).

<sup>8</sup> Motion, paras 8, 11.

<sup>9</sup> Motion, para. 11 a)-f).

<sup>10</sup> Motion, paras 7 referring to *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, Decision on evidence tendered through Sandra Mitchell and Frederick Abrahams, 1 September 2006 (“*Milutinović* Decision”). Certification was denied, Decision denying Prosecution’s request for certification of ruling on proposed exhibits P438 and P473, 17 October 2008.

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

<sup>12</sup> Motion, paras 7, 12.

<sup>13</sup> Motion, paras 7, 12 referring to the oral decision in *Prosecutor v. Milutinović et al.* case, Trial hearing, 13 July 2003, T. 839-844 excluding Phillip Coe as an expert witness for the Prosecution.

<sup>14</sup> Motion, para. 9.

<sup>15</sup> Motion, para 8.

<sup>16</sup> Motion, paras 9, 14.

<sup>17</sup> Prosecution submission, paras 15, 16.

basis for any of his conclusions.<sup>18</sup> The Prosecution specifically discusses the six portions of the Statement referred to in the Motion and rejects the Defence allegation that they are based on third person's statements.<sup>19</sup> The Trial Chamber will discuss those portions in more detail below.<sup>20</sup>

9. As far as the decisions in the *Milutinović* case are concerned, the Prosecution avers that, unlike the excerpts of the two reports in the *Milutinović* case, the Statement does not relate directly to evidence of the crimes charged in the indictment, with the exception of the references to the Pionirska Street and Bikavac houses.<sup>21</sup> The Prosecution further emphasises that, unlike the excerpts of the two reports, the Statement was specifically prepared for the purposes of litigation in the present case.<sup>22</sup> It also points to the admission of a written statement by the Trial Chamber in the *Milutinović* case, which was similar to the Statement.<sup>23</sup>

10. With regard to the *Milutinović* decision disallowing a witness to appear as an expert, the Prosecution submits that Mašović was never an employee of the Prosecution.<sup>24</sup> The Prosecution avers that Mašović is not an expert but a person who investigates and collects information relating to the identification of missing persons based on his own findings and the methodology of the commission which he is a member of.<sup>25</sup> Further, the Statement does not contain conclusions relating to acts and conducts of the accused.<sup>26</sup> In the Prosecution submission, the Statement was properly admitted pursuant to Rule 92 *ter*.<sup>27</sup>

11. Further, the Prosecution submits that the Motion is untimely because the Defence did not raise any such objections, which are the substance of the Motion, during the last eight months of litigation concerning Mašović, although it had adequate opportunity to do so.<sup>28</sup> It adds that the Defence has not shown good cause for the untimeliness of the Motion as required by Rule 127.<sup>29</sup>

<sup>18</sup> Prosecution submission, para. 17.

<sup>19</sup> Prosecution submission, para. 17 a)-e).

<sup>20</sup> *Infra*, paras 43 et seq.

<sup>21</sup> Prosecution submission, paras 22, 24.

<sup>22</sup> Prosecution submission, paras 22, 24.

<sup>23</sup> Prosecution submission, paras 23, 24. The statement admitted was given by Sandra Mitchell.

<sup>24</sup> Prosecution submission, para. 25.

<sup>25</sup> Prosecution submission, paras 15, 16, 20, 25.

<sup>26</sup> Prosecution submission, para. 18.

<sup>27</sup> Prosecution submission, paras 19, 20.

<sup>28</sup> Prosecution submission, para. 13; Trial hearing 30 October 2008, T. 3147-3149.

<sup>29</sup> Prosecution submission, para. 13.

### C. Law

12. The Rules of Evidence and Procedure allow for witness evidence to be received and admitted in written form. The case-law of the Tribunal has delineated different categories which are governed by Rules 89, 92 *bis* and 92 *ter*.<sup>30</sup> The admission of expert evidence is governed by Rule 94 *bis*. These Rules provide, in relevant part:<sup>31</sup>

#### Rule 89

##### General Provisions

[...]

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

[...]

(F) A Chamber may receive the evidence of a witness orally or, where the interests of justice allow, in written form.

#### Rule 92 *bis*

##### Admission of Written Statements and Transcripts in Lieu of Oral Testimony

(A) A Trial Chamber may dispense with the attendance of a witness in person, and instead admit, in whole or in part, the evidence of a witness in the form of a written statement or a transcript of evidence, which was given by a witness in proceedings before the Tribunal, in lieu of oral testimony which goes to proof of a matter other than the acts and conduct of the accused as charged in the indictment.

(i) Factors in favour of admitting evidence in the form of a written statement or transcript include but are not limited to circumstances in which the evidence in question:

[...]

(ii) Factors against admitting evidence in the form of a written statement or transcript include but are not limited to whether:

[...]

(B) If the Trial Chamber decides to dispense with the attendance of a witness, a written statement under this Rule shall be admissible if it attaches a declaration by the person making the written statement that the contents of the statement are true and correct to the best of that person's knowledge and belief and

(i) the declaration is witnessed by:

(a) a person authorised to witness such a declaration in accordance with the law and procedure of a State; or

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

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

(a) that the person making the statement is the person identified in the said statement;

(b) that the person making the statement stated that the contents of the written statement are, to the best of that person's knowledge and belief, true and correct;

(c) that the person making the statement was informed that if the content of the written statement is not true then he or she may be subject to proceedings for giving false testimony; and

(d) the date and place of the declaration.

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

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

**Rule 92 ter****Other Admission of Written Statements and Transcripts**

- (A) A Trial Chamber may admit, in whole or in part, the evidence of a witness in the form of a written statement or transcript of evidence given by a witness in proceedings before the Tribunal, under the following conditions:
- (i) the witness is present in court;
  - (ii) the witness is available for cross-examination and any questioning by the Judges; and
  - (iii) the witness attests that the written statement or transcript accurately reflects that witness' declaration and what the witness would say if examined.
- (B) Evidence admitted under paragraph (A) may include evidence that goes to proof of the acts and conduct of the accused as charged in the indictment.

**Rule 94 bis****Testimony of Expert Witnesses**

- (A) The full statement and/or report of any expert witness to be called by a party shall be disclosed within the time-limit prescribed by the Trial Chamber or by the pre-trial Judge.
- (B) Within thirty days of disclosure of the statement and/or report of the expert witness, or such other time prescribed by the Trial Chamber or pre-trial Judge, the opposing party shall file a notice indicating whether:
- (i) it accepts the expert witness statement and/or report; or
  - (ii) it wishes to cross-examine the expert witness; and
  - (iii) it challenges the qualifications of the witness as an expert or the relevance of all or parts of the statement and/or report and, if so, which parts.
- (C) If the opposing party accepts the statement and/or report of the expert witness, the statement and/or report may be admitted into evidence by the Trial Chamber without calling the witness to testify in person.

13. The *Milutinović* Trial Chamber distinguished four categories of witness evidence in written form, namely (1) witness statements given to parties for the purposes of litigation before the Tribunal, (2) summaries of statements by potential witnesses, (3) statements given to non-parties, and (4) summaries/reports, authored by non-parties, of statements by persons who are neither witnesses nor potential witnesses.<sup>32</sup>

14. Rules 92 *bis* and 92 *ter* deal with witness statements given to parties by potential witnesses for the purposes of litigation before the Tribunal (category 1). Those statements may also be admissible pursuant to Rule 89 (F), if the interests of justice allow.<sup>33</sup>

15. While Rule 92 *bis* does not require the presence of the witness, Rule 92 *ter* requires that the witness is present in court, available for cross-examination, and that the witness attests that the written statement or transcript accurately reflects the witness' declaration and what the witness would testify if examined. Witness evidence that goes to proof of the acts and conduct of the

<sup>30</sup> See in particular *Milutinović* Decision, paras 10 and 12.

<sup>31</sup> The Trial Chamber notes that Rule 92 *quater* also deals with the admission of witness evidence in a written form.

<sup>32</sup> *Milutinović* decision, para. 12.

<sup>33</sup> *Milutinović* decision, para. 13. See also *Prosecutor v. Galić*, Case No. IT-98-29-AR73.2, Decision on interlocutory appeal concerning Rule 92 *bis* (C), 7 June 2002 ("*Galić* Appeal Decision"), para. 12.

accused as charged in the indictment is inadmissible pursuant to Rule 92 *bis*, but admissible pursuant to Rule 92 *ter*. The reason is that a Rule 92 *ter* witness is available for cross-examination.

16. The Trial Chamber notes that Rules 92 *bis* and 92 *ter* are intertwined. Pursuant to Rule 92 *bis* (C), a Trial Chamber decides, after hearing the parties, whether to require the witness to appear for cross-examination. If it does so decide, Rule 92 *bis* (C) stipulates that the provisions of Rule 92 *ter* apply.

17. Rule 92 *bis* and Rule 92 *ter* are *leges speciales* vis-à-vis the general Rule 89, as far as written statements and transcripts of witness witnesses are concerned.<sup>34</sup> However, the general propositions in Rule 89 (C) – that evidence is admissible only if it is relevant and that is is relevant only if it has probative value – remain applicable to Rule 92 *bis* and to Rule 92 *ter*.<sup>35</sup>

18. In contrast to written statements given by witnesses for the purposes of litigation, witness statements given to non-parties (category 3), i.e. domestic law enforcement agencies or other entities, are admissible under Rule 89 (C).<sup>36</sup>

19. The case-law of the Tribunal further distinguishes summaries of written statements by potential witnesses and summaries of written statements by persons who are neither witnesses nor potential witnesses (categories 2 and 4). The Appeals Chamber held that, in principle, summarising evidence is admissible, provided that the material being summarised would itself be admissible.<sup>37</sup>

20. Summaries of the statements of potential witnesses (category 2) are by definition not witness statements within the meaning of Rule 92 *bis* and are, therefore, not admissible under Rule 92 *bis*. The requirements of Rule 92 *bis*, namely those laid down in Rule 92 *bis* (B), must not be circumvented.<sup>38</sup> Because of the *lex specialis* character of Rule 92 *bis*, those summaries are not admissible under Rule 89 (C).<sup>39</sup>

21. No conflict with the requirements of Rule 92 *bis* arises in relation to summaries, created by non-parties, of written statements by persons who are neither witnesses nor potential witnesses (category 4). Summaries of that kind are admissible under Rule 89 (C).<sup>40</sup> However, as summaries of statements of third persons constitute hearsay evidence, the reliability of those summaries is

<sup>34</sup> *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Decision on admissibility of Prosecution investigator's evidence, 30 September 2002 ("Milošević Appeal Decision"), para. 18; *Milutinović* Decision, para. 14; *Prosecutor v. Prlić et al.*, Decision on request for admission of the statement of Jadranko Prlić, 22 August 2007, paras 24, 25.

<sup>35</sup> *Galić* Appeal Decision, para. 31.

<sup>36</sup> *Milutinović* Decision, para. 13.

<sup>37</sup> *Milošević* Appeal Decision, para. 21.

<sup>38</sup> *Galić* Appeal Decision, para. 31; *Milutinović* Decision, para. 14.

<sup>39</sup> *Milošević* Appeal Decision, para. 18; *Galić* Appeal Decision, para. 31; *Milutinović* Decision, para. 14.

<sup>40</sup> *Milošević* Appeal Decision, para. 22; *Milutinović* Decision, paras. 15, 16.

crucial.<sup>41</sup> It must be considered whether the summary is “first-hand” hearsay and whether the absence of the opportunity to cross-examine the persons affects the reliability of the statements summarised.<sup>42</sup> The Appeals Chamber further held that not only the statements summarised must be reliable but also the method by which those statements are summarised.<sup>43</sup> The Appeals Chamber further held that the fact that a summary was prepared for the purposes of litigation does not render it *ipso facto* unreliable.<sup>44</sup>

22. Written statements or reports of expert witnesses are admissible pursuant to Rule 94 *bis* and may be considered as a fifth category of written witness evidence. Expert reports must be properly filed under Rule 94 *bis* in accordance with the specific procedures envisaged by that provision, but it is permissible for transcripts of evidence of an expert witness to be admitted *in lieu* of oral testimony pursuant to Rule 92 *bis* (A).<sup>45</sup>

23. The Tribunal’s case law has established several requirements for the admissibility of expert statements or reports, namely that i) the proposed witness is classified as an expert; ii) the expert statements or reports meet the minimum standards of reliability; iii) the expert statements or reports are relevant and of probative value; iv) the content of the expert statements or reports fall within the accepted expertise of the expert witness.<sup>46</sup>

24. In the Trial Chamber’s view it is conceivable that expert reports rely on and summarise statements of third persons who are neither witnesses nor prospective witnesses. Those expert reports are admissible pursuant to Rule 94 *bis* provided that the requirements of that Rule are met. As for the reliability of expert reports, the Trial Chamber refers to its decision of 23 July 2008.<sup>47</sup>

---

<sup>41</sup> *Milutinović* Decision, para. 15.

<sup>42</sup> *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-AR73, Decision on Prosecutor’s appeal on admissibility of evidence, 16 February 1999, para. 15.

<sup>43</sup> *Milošević* Appeal Decision, paras 22, 23.

<sup>44</sup> *Milošević* Appeal Decision, para. 23.

<sup>45</sup> Decision on second Prosecution motion for the admission of evidence pursuant to Rule 92 *bis* (two expert witnesses), 23 July 2008, para. 25.

<sup>46</sup> See Decision on second Prosecution motion for the admission of evidence pursuant to Rule 92 *bis* (two expert witnesses), 23 July 2008 with further references.

<sup>47</sup> Decision on second Prosecution motion for the admission of evidence pursuant to Rule 92 *bis* (two expert witnesses), 23 July 2008, para. 17.



## D. Discussion

25. The Trial Chamber considers that the questions raised in the Motion and in the submissions of the parties touch upon substantive legal issues in relation to the admissibility of witness evidence in written form. In the exceptional circumstances, it will consider the Motion applying Rule 127.<sup>48</sup>

### 1. The admissibility of Amor Mašović's evidence pursuant to Rule 92 bis/ter

26. The Prosecution did not list Amor Mašović as an expert, but as a Rule 92 bis witness. In its decision to admit the evidence, the Trial Chamber considered that Mašović's evidence does not go to proof of the acts and conduct of the accused.<sup>49</sup> It nevertheless decided that Amor Mašović would appear for cross-examination and consequently ordered pursuant to Rule 92 bis (C) that the transcript of his previous testimony and associated exhibits be admitted upon fulfilment of the requirements of Rule 92 ter.<sup>50</sup> Amor Mašović thus became a witness to whom Rule 92 ter was applicable. The Trial Chamber notes that this conversion was effected by the Trial Chamber's decision and Rule 92 bis (C) and not by any "re-labeling" of the witness by the Prosecution, as suggested by the Defence.

27. The Trial Chamber rejects the Defence argument that Amor Mašović was an expert or should have been properly considered as an expert. The Trial Chamber recalls that the term "expert" has been defined as a person who "by virtue of some specialised knowledge, skills or training can assist the trier of fact to understand or determine an issue in dispute".<sup>51</sup>

28. Amor Mašović is a lawyer by profession.<sup>52</sup> Currently he is a member of the Federal Parliament of Bosnia and Herzegovina.<sup>53</sup> From 1992 to 1996 Amor Mašović worked in the State Commission for the Exchange of Prisoners of War in the Republic of Bosnia and Herzegovina and was also in charge of the Central Records System of persons killed, wounded and missing during armed conflicts on the territory of the Republic of Bosnian and Herzegovina.<sup>54</sup> From 1996 to 2006 he was President of the State Commission for the Search of Missing Persons in the Republic of Bosnia and Herzegovina.<sup>55</sup> Simultaneously, he was performing the duty of the President/Vice-President of the Federal Commission for Missing Persons in the Republic of Bosnia and

<sup>48</sup> See also Trial hearing, 30 October 2008, T. 3159.

<sup>49</sup> Decision on Prosecution motion for admission of evidence pursuant to Rule 92 bis, 22 August 2008, para. 25.

<sup>50</sup> Decision on Prosecution motion for admission of evidence pursuant to Rule 92 bis, 22 August 2008, para. 25.

<sup>51</sup> Decision on second Prosecution motion for the admission of evidence pursuant to Rule 92 bis (two expert witnesses), 23 July 2008, para. 16 with further references.

<sup>52</sup> Amor Mašović, Trial hearing, 30 October 2008, T. 3160, 3169; P185, Curriculum vitae of Amor Mašović filed in "Submission pursuant to 'Decision on Prosecution motion to add updated statement of Amor Mašović and tables' of 23 October 2008", 27 October 2008 ("Curriculum vitae").

<sup>53</sup> P185, Curriculum vitae; Amor Mašović, Trial hearing, 30 October 2008, T. 3160, 3169.

<sup>54</sup> P185, Curriculum vitae; P183, Statement, p. 1.

<sup>55</sup> P185, Curriculum vitae; P183, Statement, p. 2.

Herzegovina.<sup>56</sup> In March 2006 he was appointed acting member of the Collegium of Directors of the Missing Persons Institute of Bosnia and Herzegovina, and from March 2008 he was appointed President of that institution.<sup>57</sup>

29. Amor Mašović describes his functions in the various commissions in his Statement. He was in charge of teams which were tasked to register all events involving missing persons, to trace, keep records and inform the competent judicial bodies to participate in the processes of exhumations, clear-up operations, identification autopsy of victims. His task was to coordinate the activities between the local teams in the field and courts, prosecution offices, forensic experts, international organisations, and other institutions.<sup>58</sup> Mašović stated that he also directly took part in many exhumations.<sup>59</sup>

30. The curriculum vitae of Amor Mašović and the Statement shows that Mašović possesses professional experience based on 16 years of occupation in various commissions dealing with missing persons. However, this does not render him an expert. Amor Mašović was not called to assist the Trial Chamber to understand or determine a particular issue. He was called to give evidence about the number of missing persons in Višegrad and about the exhumations of human remains in the Višegrad municipality based on the data collected by the commissions he worked in. Amor Mašović stated that he does not have any academic knowledge in the sphere of statistics and or in forensic science.<sup>60</sup> The Trial Chamber finds very apt the Prosecution description that Mašović is a person who investigates and collects information relating to the identification of missing persons based on his own findings and the methodology of the commission which he is a member of.<sup>61</sup>

31. The Trial Chamber also fails to see that the Statement constitutes or takes the form of an expert report, as alleged by the Defence. As Mašović stated, the Statement is not a statistical report and not based on a particular scientific methodology.<sup>62</sup> The Statement is not an expert report but rather a summary of Mašović's functions in the various commissions and information collected by the commissions about missing persons and exhumations conducted in the Višegrad municipality.<sup>63</sup>

32. The Defence argues that Mašović's evidence should have been considered as expert evidence, but it submits at the same time that Mašović could not have been an expert because he

<sup>56</sup> P185, Curriculum vitae; P183, Statement, p. 2.

<sup>57</sup> P185, Curriculum vitae; P183, Statement, p. 2.

<sup>58</sup> P183, Statement, p. 2.

<sup>59</sup> P183, Statement, p. 2.

<sup>60</sup> Amor Mašović, Trial hearing, 30 October 2008, T. 3169, 3171, 3182, 3184.

<sup>61</sup> Prosecution submission, para. 15.

<sup>62</sup> Amor Mašović, Trial hearing, 30 October 2008, T. 3171, 3182.

<sup>63</sup> See detailed analysis of the Statement *infra*, paras 34 et seq.

lacks impartiality. On the basis of the foregoing, the Trial Chamber need not decide on the issue of impartiality. The Trial Chamber considers that the situation in the present case is different from the one in the cited decision in the *Milutinović* case disallowing a Prosecution witness presented as an expert. Amor Mašović was not presented as an expert.

## 2. The admissibility of the Statement

33. The main argument of the Defence is that the Statement is inadmissible in so far as it relies on and summarises statements of third persons that are not available to the Defence, and that any relevant testimony of Mašović should also be suppressed for the same reason.<sup>64</sup>

34. The Trial Chamber notes that the first part of the Statement outlines the functions Mašović occupied in the various commissions and his tasks therein as well as the establishment of a missing persons database.<sup>65</sup> The second part of the Statement deals with exhumations carried out by the Commission for Missing Persons in the Višegrad area and gives details about several gravesites.<sup>66</sup> A third part of the Statement explains the procedures followed and methods applied when exhumations were carried out.<sup>67</sup> The fourth part of the Statement can be described as a statistical part. In that part Mašović compares figures relating to missing children, women and elderly persons in the whole of Bosnia and Herzegovina and in the Višegrad municipality and concludes that the Višegrad municipality occupies a “negative leading position”.<sup>68</sup> Mašović further states that the percentage of missing persons found in Višegrad is below the average of the whole of Bosnia and Herzegovina.<sup>69</sup> Finally, Mašović lists the tables that are attached to the Statement.<sup>70</sup>

35. The first part and the third part of the Statement, which describe the functions of Mašović and the operation of the various commissions, do not rely on or summarise statements of third persons. The Trial Chamber notes in that regard that the Defence of Milan Lukić does not object to the Statement in so far as it relates to the operation of the State Commission, the location of gravesites and the number of mortal remains that were recovered.<sup>71</sup> The Trial Chamber notes that the six contentious portions are all taken from the second and the fourth part of the Statement.

<sup>64</sup> See also submissions of the Defence of Milan Lukić in court, Trial hearing, 30 October 2008, T. 3150-3161, 3153.

<sup>65</sup> P183, Statement, pp. 1-4.

<sup>66</sup> P183, Statement, pp. 4-6.

<sup>67</sup> P183, Statement, pp. 6-7.

<sup>68</sup> P183, Statement, pp. 7-8.

<sup>69</sup> P183, Statement, pp. 8, 9.

<sup>70</sup> P183, Statement, p. 10.

<sup>71</sup> Trial hearing, 30 October 2008, T. 3152: “the operation of the commission, his attendance at exhumations, the locations of exhumations, the number of human remains that were recovered, that all is unobjectionable.”

(a) Statistical fourth part of the Statement

36. As for the statistical fourth part of the Statement and the attached tables, Amor Masović stated during his testimony that they are based upon the official records and the database of the Commission for Missing Persons.<sup>72</sup> As Mašović described it, he merely “conveyed” the content of the records.<sup>73</sup>

37. The Trial Chamber considers that the records of the Commission for Missing Persons are, to a substantial extent, based on information provided by third persons. However, the information does not consist of witness statements given for the purposes of litigation. Thus, their compatibility with Rule 92 *bis* is not an issue. As Mašović testified, in most cases, relatives of missing persons submitted requests to the Commission for Missing Persons. The Commission then entered the names and details into their database.<sup>74</sup> The statistical fourth part of the Statement is, therefore, admissible under Rule 89 (C), provided that it is reliable.

38. Mašović stated that the Commission did not take statements under oath suggesting that it was not necessary for the purposes of the work of the Commission.<sup>75</sup> He explained that the Commission, acting on the information provided in the requests or other statements, could and did verify the locations where missing persons were allegedly buried. He also stated that 13 years after the war, more and more persons reported missing were found to be dead, and that it became clear that “all those or most of those that are listed” in the records are no longer alive.<sup>76</sup>

39. The Trial Chamber has also considered Mašović’s testimony in relation to the allegations of improprieties in the operation of the Commission for Missing Persons.<sup>77</sup> Mašović clarified that the allegations were related to an old method of identification applied by the Commission, and that as of 2001 all identifications were conducted with the more reliable DNA method.<sup>78</sup> He testified that with regard to several witnesses in the gravesite “Slap 1” in Višegrad municipality, who had been identified through the old “classical” method, a DNA analysis was carried out which confirmed the

<sup>72</sup> Amor Mašović, Trial hearing, 30 October 2008, T. 3172-3173, 3175, 3177.

<sup>73</sup> Amor Mašović, Trial hearing, 30 October 2008, T. 3175.

<sup>74</sup> Amor Mašović, Trial hearing, 30 October 2008, T. 3174-3175.

<sup>75</sup> Amor Mašović, Trial hearing, 30 October 2008, T. 3173, 3176.

<sup>76</sup> Amor Mašović, Trial hearing, 30 October 2008, T. 3187. He stated that the institute has more than 13.000 anti-mortem reports in its possession. *See also* P183, Statement, p. 9: 38 % of the missing persons in Višegrad have been found.

<sup>77</sup> Amor Mašović, Trial hearing, 30 October 2008, T. 3189-3192, 3195-3198.

<sup>78</sup> Amor Mašović, Trial hearing, 30 October 2008, T. 3191, 3196.

prior results.<sup>79</sup> Mašović also stated that none of the mistakes that allegedly occurred in the identification of victims related to exhumations in the Višegrad area.<sup>80</sup>

40. The Trial Chamber is, therefore, satisfied that the records of the Commission are sufficiently reliable, in so far as they 1) record the status of persons as missing, 2) record the death of persons and 3) identify the persons exhumed. However, the Trial Chamber considers that the information about the events, which allegedly resulted in persons becoming missing or being killed, and information about the origin of the bodies that ended up in the gravesites is not sufficiently reliable.

41. The Trial Chamber, therefore, finds that the fourth statistical part of the Statement is admissible pursuant to Rule 89 (C), with the exception of the references on page 9 of the Statement referring to the events that allegedly occurred in the houses on Pionirska Street and in Bikavac. These portions will be discussed in more detail below, together with other contentious portions in the second part of the Statement relating to the Pionirska Street and Bikavac houses.<sup>81</sup>

(b) Second part of the Statement

(i) Pionirska Street and Bikavac houses

42. The Defence submits that Mašović's assertion on page 4, paragraphs 4-7, that the Pionirska Street and Bikavac houses were primary gravesites where dozens of victims were executed and burnt and later moved to secondary locations, was improper as it was based on "unknown, undisclosed statements of out-of-court party declarants".<sup>82</sup>

43. The Prosecution submits that Mašović was led to the Pionirsksa Street and Bikavac houses through statements made to the Commission in the context of its continued search for gravesites, and that his conclusion that mortal remains from Pionirska Street and Bikavac houses were moved to secondary locations was based on his own independent observations.<sup>83</sup>

44. The Trial Chamber notes that Mašović testified that he had no direct knowledge of prior events at the Pionirska Street and Bikavac houses.<sup>84</sup> He stated that in case of Pionirska Street he relied, *inter alia*, on the statement of a surviving victim.<sup>85</sup> Mašović further conceded that, based on

<sup>79</sup> Amor Mašović, Trial hearing, 30 October 2008, T. 3191-3192.

<sup>80</sup> Amor Mašović, Trial hearing, 30 October 2008, T. 3197-3198.

<sup>81</sup> See *infra*, paras 42 et seq.

<sup>82</sup> Motion, paras 11(a) and (b).

<sup>83</sup> Prosecution submission, para. 17(a).

<sup>84</sup> Amor Mašović, Trial hearing, 30 October 2008, T. 3174, 3183.

<sup>85</sup> Amor Mašović, Trial hearing, 30 October 2008, T. 3177.

forensic evidence, it was also possible to conclude that no crime had occurred at these two locations.<sup>86</sup>

45. As the discussed portions of the Statement reproduce information and statements of third persons, they are admissible under Rule 89 (C), only if they are reliable. The Trial Chamber notes that the persons who provided the information are not identified in the Statement, nor did Mašović give sufficient evidence in court in that regard. Mašović mentioned the statement of a survivor, but also relied on other “second hand”-hearsay. It is not possible for the Trial Chamber to evaluate whether the information provided to Mašović was reliable. The Trial Chamber also considers that the conclusion that mortal remains from the Pionirska Street and Bikavac houses were moved to secondary gravesites cannot be separated from the third party statements that victims were executed and burnt at these locations. The Trial Chamber finds, therefore, that paragraphs 4-7 on page 4 of the Statement are not sufficiently reliable in so far as they give Mašović’s conclusions relating to the events that allegedly occurred in the Pionirska Street and Bikavac houses.

46. The Trial Chamber notes that paragraphs 2, 3, 5 and 7 on page 9 of the Statement also contain assertions in relation to the killing and burning of persons in the Pionirska Street and Bikavac houses, which are based on statements of third persons. The Trial Chamber finds that those paragraphs must, therefore, be disregarded in that respect. In the Trial Chamber’s view, Mašović’s conclusions as to the reasons for Višegrad holding a negative leading position when compared with the whole of Bosnia and Herzegovina are not reliable in so far as they are based on information provided in relation to the alleged events in the Pionirska Street and Bikavac houses.

(ii) “Slap” gravesites

47. The Defence submits that on page 5, paragraphs 1-2 of the Statement, Mašović gave “factual testimony derived from statements and interviews of persons [...] not before the court”, regarding the manner in which bodies were sent downriver until removed and buried at “Slap”.<sup>87</sup>

48. The Prosecution submits that Mašović did not directly refer to third party statements in this portion of the Statement, and previously testified in the *Vasiljević* case regarding his personal observations and knowledge of the “Slap” gravesites, which were located through third party statements given to the Commission in the context of its work locating mass grave locations.<sup>88</sup>

---

<sup>86</sup> Amor Mašović, Trial hearing, 30 October 2008, T. 3185.

<sup>87</sup> Motion, para. 11(c).

<sup>88</sup> Prosecution submission, para. 17(b).

49. The Trial Chamber observes that Mašović does not specify in the Statement whether he relied on third party statements or his own personal observations of the “Slap” gravesite to arrive at the conclusion that the bodies found at the “Slap” gravesite had floated downstream from the town of Višegrad.<sup>89</sup> During his testimony in the *Vasiljević* case, Mašović stated that the “Slap” gravesites were found with the assistance of “second-hand” witnesses and also eye-witnesses who had pulled out bodies from the Drina river themselves or were present when this was done by others.<sup>90</sup> The Trial Chamber considers that the portion of the Statement that relies on information provided by the eye-witnesses is “first-hand hearsay” which led the Commission to the location of the “Slap” gravesites and is reliable as to the exhumed dead persons. However, the portion of the Statement that the bodies, which were buried in the gravesite, had been floating downstream from the town of Višegrad is not sufficiently reliable.

(iii) Kalimanići gravesite

50. The Defence submits that on page 5, paragraphs 1-2, Mašović draws a conclusion as to the manner of the demise of bodies recovered near Kalimanići that is based exclusively on “uncited” information provided by Ferid Spahić.<sup>91</sup>

51. The Prosecution submits that Mašović and his Commission located the mass gravesite near Kalimanići based on information provided by Ferid Spahić, a witness in this case who appeared for cross-examination, and that Mašović has previously testified about the identification of exhumations at the same gravesite in the *Vasiljević* case.<sup>92</sup>

52. The Trial Chamber notes that in his Statement Mašović describes the information provided to him by Ferid Spahić that led him and his Commission to the location of the gravesite in Kalimanići.<sup>93</sup> The Trial Chamber notes that in paragraph 3 on page 5 Mašović states that Ferid Spahić “had survived the execution before the firing squad of about fifty Bosniak residents of Višegrad”. In paragraph 4 on the same page, Mašović states that 67 of the 73 victims exhumed could be identified. During his testimony in the *Vasiljević* case, Mašović explained that the Commission carried out the identification of the victims on the basis of names provided by Ferid Spahić who was allegedly in a bus with those persons before they were executed.<sup>94</sup>

<sup>89</sup> P183, Statement, p. 5.

<sup>90</sup> Amor Mašović, P173, T. 938-941.

<sup>91</sup> Motion, para. 11(d).

<sup>92</sup> Prosecution submission, para. 17(c).

<sup>93</sup> P183, Statement, p. 5.

<sup>94</sup> Amor Mašović, P173, T. 991-992.

53. The Trial Chamber is satisfied that the information about the bodies exhumed and the identification of the victims in the pit is sufficiently reliable. It further considers that the information as to the execution of about 50 men whose bodies were found in the pit is also reliable. Mašović explained that the information in his Statement in that regard is "first-hand hearsay" provided by Ferid Spahić. The Trial Chamber further notes that Ferid Spahić gave evidence in court and was cross-examined on 26 August 2008. Notably, he testified to the same events, namely that on 14 June 1992 he was on a bus that departed Višegrad and that he survived the execution of Muslim men from that bus on 15 June 1992.<sup>95</sup>

(iv) Kurtalići gravesite

54. The Defence submits that Mašović is not qualified to characterize the Kurtalići gravesite as a primary gravesite on page 6, paragraph 1, of the Statement, as he is not qualified as an expert, and refers to an unknown "we" who may not be available for cross-examination.<sup>96</sup>

55. The Prosecution submits that Mašović's observation regarding the nature of the Kurtalići gravesite is based on his experience visiting 370 mass gravesites, and that "we" clearly refers to the Commission and members of his team.<sup>97</sup>

56. The Trial Chamber considers that in the Statement, Mašović specified that he relied on his own personal observations to conclude the Kurtalići gravesite was a primary one. The Statement is clear that "we" refers to Amor Mašović and members of his team or commission. The Trial Chamber also considers that Mašović's experience of visiting 370 mass gravesites is a sufficient basis for the conclusion, based on the large number of empty shells found at the site, that the gravesite was a primary one.

(v) Statistical findings

57. The Defence submits that in Mašović's comparison of missing persons data between Bosnia and Herzegovina and Višegrad municipality he makes expert findings that he is unqualified to make, based on material that is not identified and has not been provided to the Defence, and presents conclusions drawn from the same material regarding specific crimes charged in the indictment to prejudice the Chamber as to the situation in Višegrad.<sup>98</sup>

<sup>95</sup> Ferid Spahić, Trial hearing, 26 August 2008, T. 527-532, 551-552.

<sup>96</sup> Motion, para. 11(e).

<sup>97</sup> Prosecution submission, para. 17(d).

<sup>98</sup> Motion, para. 11(f).



58. The Prosecution submits that Mašović's data is not the product of complicated statistical analysis and that the tables listing the missing persons in Višegrad, which represent the underlying basis for his calculations, were provided with the Statement.<sup>99</sup>

59. The Trial Chamber recalls its findings that Mašović is not an expert in statistical analysis. It further considers that his statistical conclusions are basic in nature and do not require any special expertise. The Trial Chamber also refers to its findings in relation to the fourth part of the Statement and the findings in relation to the Pionirska Street and Bikavac houses.<sup>100</sup>

### 3. Testimony of Amor Mašović

60. In the Motion, the Defence not only requested that the Statement be excluded in so far as it relies on and summarises statements of third persons, but also that any relevant testimony of Mašović be disregarded.<sup>101</sup>

61. The testimony of Amor Mašović will be considered in light of the Trial Chamber's findings in relation to the Statement.

---

<sup>99</sup> Prosecution submission, para. 17(e).

<sup>100</sup> See *supra* paras 43 et seq.

<sup>101</sup> See also submissions of the Defence of Milan Lukić in court, Trial hearing, 30 October 2008, T. 3150-3161, 3153.

**E. Disposition**

**FOR THE FOREGOING REASONS;**

**PURSUANT TO** Rules 54, 89(C), 92 *bis*, 92 *ter*, and 127;

**ALLOWS** the filing of the Motion;

**GRANTS** the Prosecution leave to exceed the word limit;

**GRANTS** the Motion **IN PART**;

**EXCLUDES** the following portions of the Statement (tendered exhibit P183):

- 1) page 4, paragraphs 4-7, in so far as they refer to events that allegedly occurred in the Pionirska Street and Bikavac houses;
- 2) page 5, paragraphs 1 and 2, in so far as they refer to bodies taken out of the Drina river that were floating downstream from the town of Višegrad;
- 3) page 9, paragraphs 2, 3, 5 and 7, in so far as they refer to events that allegedly occurred in the Pionirska Street and Bikavac houses; and

**ORDERS** the Prosecution to file an amended version of the Statement (tendered exhibit P183) to correspond to this decision.

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



---

Judge Patrick Robinson  
Presiding

Dated this twelfth day of November 2008

At The Hague

The Netherlands

**[Seal of the Tribunal]**