Commentary

1. Introduction

This commentary concerns two decisions on ICTY rules of evidence.[1] Each decision addresses a variety of topics within that broader category, a selection of which is dealt with here. As the decisions each deal with a different array of topics, they are dealt with separately.

2. The Krajišnik decision

On 30 March 2006, Trial Chamber I of the ICTY (Trial Chamber) announced that it would call a number of witnesses pursuant to Rule 98 of the ICTY RPE (chamber witnesses). On 11 July 2006, upon conclusion of chamber witness Biljana Plavšić's evidence and immediately prior to chamber witness Branko Đerić's evidence, counsel for the accused Momčilo Krajišnik filed a motion for all of Biljana Plavšić's evidence to be excluded and for Branko Đerić not to be called at all (Krajišnik motion).[2] On the same day, the Trial Chamber orally denied the Krajišnik motion. On 14 August 2006, the Trial Chamber filed written reasons for its oral decision (Krajišnik decision),[3] some aspects of which will be considered below. Before doing so, however, a general overview of the power of trial chambers to summon witnesses will be provided.

The power of ICTY Trial Chambers to summon (their own) witnesses is provided for in Rule 98 of the ICTY RPE, pursuant to which a trial chamber "may *proprio motu* summon witnesses and order their attendance".[4] As to the character of such power, Rule 98 of the ICTY RPE is best viewed as a "deviation" from the largely adversarial mode of presentation of evidence prescribed at the ICTY, since "normally, in the adversarial system, the court must be content with the evidence produced by the parties".[5] Such "deviation" was adopted on the grounds that "in the international sphere, the interests of justice are best served by such a provision and that diminution, if any, of the parties' rights is minimal by comparison".[6]

The power of trial chambers to summon witnesses has been exercised in a number of cases before the ICTY. While the rationale behind such power may generally be defined in terms of the ICTY judges' truth-finding objective,[7] the (more) immediate purpose for exercising such power has varied from case to case. In a number of cases, it was exercised for the purpose of allowing parties to (cross-) examine a witness,[8] while in another it was exercised for the purpose of resolving conflicting opinions of the parties' expert witnesses.[9] In another still, it appears to have been exercised with a view to repairing what the trial chamber considered to be shortcomings in the prosecution's presentation of evidence.[10] In any case, parties do not appear to have

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1 As listed in Section 3 of the ICTY Rules of Procedure and Evidence (ICTY RPE).

2 ICTY, Defence Motion to Exclude All Evidence of Chamber Witness Biljana Plavšić and for Prospective Witness Branko Djeric Not to Be Called as a Witness, *Prosecutor v. Krajišnik*, Case No. IT-00-39-T, T. Ch. I, 11 July 2006.

3 ICTY, Reasons for Decision Denying Defence Motion Regarding Chamber Witnesses Biljana Plavšić and Branko Đerić and Decision on Admission into Evidence of Biljana Plavšić's Statement and Book Extracts, *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-T, T. Ch. I, 14 August 2006.

4 The power is also explicitly provided for in Rule 98 of the ICTR Rules of Procedure and Evidence. It is not explicitly provided for in the SCSL Rules of Procedure and Evidence, although it would appear that Trial Chambers may nonetheless exercise such power as a matter of discretion. See SCSL, Ruling on Defence Oral Application to Call OTP Investigators Who Took Down in Writing Statements of Prosecution Witness TF2-021, *Prosecutor v. Sam Hinga Norman, Moinina Fofana and Allieu Kondewa*, Case No. SCSL-04-14-PT, T. Ch. I, 7 December 2004, par. 3. Nor is the power explicitly provided for at the ICC, although it would appear that such power exists under Article 64, paragraph 6 (d) of the ICC Statute.

5 Report 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, UN Doc, S/1007 (1994), par. 73.

6 *Ibid*.

7 As invoked in, among other decisions, ICTY, Decision of Trial Chamber I in respect of the Appearance of General Enver Hadžihasanović, *Prosecutor v. Blaškić*, Case No. IT-95-14, T. Ch. I, 25 March 1999 and ICTY, Order Summoning Dr. Biljana Plavšić *Proprio Motu* to Appear as a Witness of the Trial Chamber Pursuant to Rule 98, *Prosecutor v. Stakić*, Case No. IT-97-24-T, T. Ch. II, 9 January 2003.

8 See, for example, ICTY, Order Concerning the Testimony of Lord Owen, *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, T. Ch. III, 17 October 2003. See further P.L. Robinson, Rough Edges in the Alignment of Legal Systems in the Proceedings at the ICTY, 3 Journal of International Criminal Justice 2005, p. 1049-1050.

9 See, for example, ICTY, *Proprio Motu* Order to Call a Handwriting Expert, *Prosecutor v. Orić*, Case No. IT-03-68-T, T. Ch. II, 25 January 2006.

10 See, for example, ICTY, Judgment, *Prosecutor v. Stakić*, Case No. IT-97-24-T, T. Ch. II, 31 July 2003, Klip/ Sluiter, ALC-XIV-545. The dangers inherent in such an approach are discussed below.

any standing under Rule 98 of the ICTY RPE to move a trial chamber to summon witnesses as chamber witnesses, with trial chambers having complete discretion as to whether or not to call witnesses and on which conditions.[11] In addition, trial chambers appear to have complete discretion as to whether to name a particular person as a chamber witness.[12]

In principle, any evidence ordered by the trial chamber pursuant to Rule 98 of the ICTY RPE should be presented following the close of both the prosecution and defence cases.[13] As to the order in which the examination may be conducted, common practice has been for the judges to examine the witness first, followed by the prosecution and the defence (although the order of examination will depend on the purpose for calling the witness). The mode of examination pursuant to Rule 98 of the ICTY RPE has varied, with some trial chambers ordering that the chamber witness first make a "spontaneous statement" before answering questions by the judges and the parties,[14] while others have prescribed examination on the basis of a prior written statement (obtained by the trial chamber for that purpose).[15] In short, a trial chamber's discretion to determine the procedure on calling and examining witnesses is broad. Finally, it is worth noting that the power to summon witnesses includes the power to admit exhibits.[16]

Turning back now to the matter at hand, the Krajišnik decision raises a number of questions as to (the scope of) the power of trial chambers to summon witnesses. The first is whether there are any limitations on such power. Two (interconnected) structural features of the ICTY are worth noting in this regard. Firstly, the powers of investigation and adjudication are separate at the ICTY. Thus, while the ICTY prosecutor is (solely) responsible for the investigation,[17] the judges are (solely) responsible for adjudication.[18] Secondly, the mode of presentation of evidence at the ICTY is largely adversarial, i.e. parties have the primary role of presenting evidence, while the prosecution bears the burden of proof.[19] Against this backdrop, Keen argues that "[if] the judges believed, for example, that the Prosecutor had not proved its case, they could not call, or order to be called, a list of witnesses in an effort to see whether the case could be proved", because "[s]uch an order would be tantamount to ordering an in-court investigation of the facts…".[20] Similarly, Judge Robinson notes that "it would, of course, be an improper use of [the power to summon witnesses] for [an ICTY trial chamber], on a defence submission of 'no case to answer' under Rule 98 *bis* [of the ICTY RPE], to seek additional evidence to make up for deficiencies in the case for the prosecution".[21] In other words, the

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[11] ICTY, Decision on Šainović Defence Motion for Trial Chamber to Summon Christopher Hill and Boris Mayorski, *Prosecutor v. Šainović et al.,* Case. No. IT-05-87, T. Ch. III, 3 July 2008, par. 2 and 3. See also K. Khan and R. Dixon, Archbold International Criminal Courts Practice, Procedure and Evidence, Sweet & Maxwell, London 2009, par. 9-223. Please note that following the acquittal of Milan Milutinović, the name of the case was changed from *Milutinović et al*. to *Šainović et al*.

[12] ICTY, Judgment, *Prosecutor v. Kupreškić, Kupreškić, Kupreškić, Josipović and Santić*, Case No. IT-95-16-A, A. Ch., 23 October 2001, Klip/ Sluiter, ALC-VIII-429, par. 171.

[13] Rule 85 of the ICTY RPE provides for the order of presentation of evidence, pursuant to which any evidence ordered by a trial chamber pursuant to Rule 98 of the ICTY RPE is to be presented following the close of both the prosecution and defence cases, "unless otherwise directed by the [t]rial [c]hamber in the interests of justice."

[14] See, for example, ICTY, Decision of Trial Chamber I in respect of the Appearance of General Enver Hadžihasanović, *Prosecutor v. Blaškić*, Case No. IT-95-14, T. Ch. I, 25 March 1999 and ICTY, Order Summoning Dr. Biljana Plavšić *Proprio Motu* to Appear as a Witness of the Trial Chamber Pursuant to Rule 98, *Prosecutor v. Stakić*, Case No. IT-97-24-T, T. Ch. II, 9 January 2003.

[15] Reasons for Decision Denying Defence Motion Regarding Chamber Witnesses Biljana Plavšić and Branko Đerić and Decision on Admission into Evidence of Biljana Plavšić's Statement and Book Extracts, *Prosecutor v. Momčilo Krajišnik*, *supra* note 3, par. 16.

[16] ICTY, Judgment, *Prosecutor v. Hadžihasanović and Kubura*, Case No. IT-01-47-A, A. Ch., 22 April 2008, par. 115.

[17] ICTY judges have no powers to direct the ICTY prosecutor's investigations. It is the ICTY prosecutor who initiates investigations and gathers evidence. See Article 16, paragraphs (1) and (2) of the ICTY Statute. For a detailed overview of the judicial role in the international criminal tribunals, see P.C. Keen, Tempered Adversariality: The Judicial Role and Trial Theory in the International Criminal Tribunals, 17 Leiden Journal of International Law 2004, p. 767-814.

[18] See Rule 87 of the ICTY RPE.

[19] See Rule 87, paragraph (A) of the ICTY RPE. See further C.J.M. Safferling, Towards an International Criminal Procedure, Oxford University Press, New York 2003, p. 262 and Keen, *supra* note 17, p. 791.

[20] Keen, *supra* note 17, p. 793.

[21] Robinson, *supra* note 8, p. 1049. Another potential "hazard" with the power of trial chambers to summon their own witnesses "is that a witness who the [trial chamber] feels should testify may not have been called by the [p]rosecution because he is under investigation and due to be indicted". According to Wald, this perhaps "should have been a clue that the [p]rosecution chose not to question them at all while they were testifying". See P.M. Wald, Dealing with Witnesses in War Crime Trials: Lessons from the Yugoslav Tribunal, 5 Yale Human Rights & Development Law Journal 2002, p. 217-239, p. 238.

calling of witnesses for the purpose of "seeing whether the case could be proved" might "relieve the Prosecutor of the burden of proof".[22] According to Keen, therefore, "the power to call witnesses is intended to allow judges to clarify the case before them" and should "not be used to call witnesses who might implicate the accused on matters that have not yet been covered".[23] Where the witness being called by the trial chamber is an insider of "high potential significance" (as both Biljana Plavšić and Branko Đerić were acknowledged to be by the Trial Chamber in the Krajišnik decision),[24] there may be a serious risk of this occurring. Finally, aside from the purpose of "seeing whether the case could be proved" not sitting well with the allocation of powers and burden of proof at the ICTY, it may also give rise to the appearance of bias on the part of the trial chamber. This is particularly so in adversarial, party-led systems. In this context, Karnavas has noted that, despite their power to call their own witness, judges in the federal system of the United States (and in states that have adopted the Federal Rules of Evidence) have rarely exercised such power, "in part so as not to give the appearance of bias".[25] All of the aforementioned (structural) features may be construed as placing limitations on the power of ICTY trial chambers to call witnesses and, in particular, on the purpose for which such power may be exercised (which should, arguably, be limited to clarification of certain matters already before the trial chamber).

A further (related) question is to what extent ICTY trial chambers may tailor the scope of a chamber witness' evidence to suit their own needs (above those of the parties) and whether the fact that such witness was originally going to be called by (one of) the parties (but was subsequently "dropped") has any bearing on such "tailoring". According to the Trial Chamber, in deciding not to call Biljana Plavšić or Branko Đerić, the defence "relinquished a certain amount of control over [their] testimony leaving it to the [Trial Chamber] to focus on what it considered to be the most relevant issues" and that this was "an inevitable procedural consequence of the priorities the parties have set for the presentation of their cases".[26] The Trial Chamber was, therefore, of the view that it was for the Trial Chamber to "decide the topics of [Biljana Plavšić's] evidence in line with what it considered important".[27] It is worth recalling that at the ICTY, where the mode of presentation of evidence is largely adversarial, the parties have the primary role of presenting evidence. An ICTY trial chamber (which is not a party to the proceedings), may, nonetheless, put questions to prosecution or defence witnesses, order the production of additional evidence and summon their own witnesses. In determining the extent to which ICTY trial chambers may tailor a chamber witness's evidence to their own needs, therefore, a balance must be struck between the parties' right to determine the parameters of the case (and the defence's duty to protect the interests of the accused) and the judges' right to clarify matters before them. Such a balance might be struck by requiring the extent of such tailoring to depend on the purpose for which the witness is being called. For example, where the purpose is to resolve conflicting evidence, the trial chamber should be entitled to limit the parties' examination of the chamber witness to that particular issue. By contrast, where the purpose is to elicit "fresh", hitherto uncovered evidence (from an "insider"), the parties should be able to have a say in the determination of the scope of the chamber witness' evidence. In other words, the scope of such evidence should reflect not only what the trial chamber considers to be important issues, but also what the parties consider these to be. This is particularly so where the witness being called by the trial chamber had previously been listed as a prosecution or defence witness, but was dropped for strategic (or other) reasons. In such circumstances, parties must be afforded the opportunity to present evidence in support of their cases through the chamber witness.

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22 Keen, *supra* note 17, p. 793.

23 *Ibid*.

24 Reasons for Decision Denying Defence Motion Regarding Chamber Witnesses Biljana Plavšić and Branko Đerić and Decision on Admission into Evidence of Biljana Plavšić's Statement and Book Extracts, *Prosecutor v. Momčilo Krajišnik*, *supra* note 3, par. 13.

25 M.G. Karnavas, Gathering Evidence in International Criminal Trials – The View of the Defence Lawyer, in M. Bohlander (ed.), International Criminal Justice: A Critical Analysis of Institutions and Procedures, Cameron May, London 2007, p. 82.

26 Reasons for Decision Denying Defence Motion Regarding Chamber Witnesses Biljana Plavšić and Branko Đerić and Decision on Admission into Evidence of Biljana Plavšić's Statement and Book Extracts, *Prosecutor v. Momčilo Krajišnik*, *supra* note 3, par. 14.

27 *Ibid*., par. 15. The Trial Chamber made such finding in response to the defence assertion that the witness statement prepared in respect of Biljana Plavšić was "unreasonably short and bare in relation to the length of the interview…and [to] the range of matters which must have been actually or potentially within Mrs Plavšić's knowledge". See Defence Motion to Exclude All Evidence of Chamber Witness Biljana Plavšić and for Prospective Witness Branko Djeric Not to Be Called as a Witness, *Prosecutor v. Krajišnik*, *supra* note 2, par. 6.

The final question arising from the Krajišnik decision in connection with the power of trial chambers to summon witnesses, is to what extent such trial chambers are obliged to give notice of the scope and content of their examination of the witness to the parties. According to the Trial Chamber, "while it is correct that [chamber witness Branko Đerić] did not give the [Trial Chamber] a statement in advance of his testimony, the parties knew that the [Trial Chamber's] examination-in-chief would be based on material already in evidence" and accordingly that "the parties could anticipate the topics on which the [Trial Chamber] would examine [that chamber witness]". The Trial Chamber further implied that because that chamber witness had previously been listed as a defence witness (but was later "dropped"), the defence was on sufficient notice as to the scope and content of the examination by the Trial Chamber. As mentioned above, the ICTY RPE is silent on the procedure surrounding ICTY trial chambers' power to summon witnesses and it is essentially for ICTY trial chambers to decide on such procedure. In assessing whether ICTY trial chambers are under any obligation to give notice of the scope of the examination, it may therefore be worth noting the rules applicable to parties in summoning witnesses. While it may be true that the prosecution (and by extension, an ICTY trial chamber) is not obliged to take witness statements,[28] pursuant to Rule 65*ter*, paragraph E (Rule 65*ter* (E)) of the ICTY RPE, it must provide a summary of the facts on which the witness will give evidence. The purpose of such provision is to put the defence "on notice of the main facts upon which a witness is expected to testify with a view to allowing the [defence] to prepare for its cross-examination".[29] In other words, the purpose of requiring the prosecution to provide a summary of facts is fairness and while Rule 65*ter* (E) does not apply to ICTY trial chambers, the underlying principle of fairness does. Arguably, therefore, ICTY trial chambers should (at least) be required to provide an indication of the proposed scope of the evidence, particularly where the proposed chamber witness is an important "insider". In such circumstances, referring to "material already in evidence", without any further specification, is unlikely to be sufficient.

3. The Popović *et al.* decision

On 12 May 2006, the prosecution in the case of Popović *et al.*[30] filed a motion for the admission of written evidence in lieu of *viva voce* testimony, pursuant to Rule 92*bis* of the ICTY RPE (Popović *et al.* motion). On 12 September 2006, Trial Chamber II of the ICTY rendered its decision (Trial Chamber and Popović *et al.* decision, respectively).[31]

Much has been written on the provisions governing the admission of written statements and transcripts (from other trials) in lieu of oral testimony.[32] As such, this part of the commentary does not include a general discussion on Rule 92*bis* of the ICTY RPE, but highlights selected findings in the Popović *et al.* decision. It is worth noting here that Rule 92*bis* of the ICTY RPE was amended on 13 September 2006 (i.e. after the Popović *et al.* decision was rendered) to merge paragraphs A, which governed the admission of written statements, and D, which governed the admission of transcripts of testimony, into one paragraph (paragraph A), which now governs both.

a. Scope of Rule 92*bis* of the ICTY RPE

The Popović *et al.* decision confirms that the procedure for determining whether a statement or transcript of testimony from other trials should be admitted pursuant to Rule 92*bis* of the ICTY RPE "involves three steps".[33] First, the ICTY trial chamber "must decide whether the evidence is admissible in that it goes to proof of a matter other than the acts and conduct of the accused". Accordingly, if the evidence goes to proof

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28 See, for example, ICTY, Decision on Urgent Defence Motion Requesting an Order to the Amicus Curiae to Take and Disclose Proposed Witness Statements, *Prosecutor v. Hartmann*, Case No. IT-02-54-R77.5, T. Ch. II, 29 January 2009, par. 6, to be published in volume XXXVII.

29 *Ibid.*, par. 8.

30 ICTY, *Prosecutor v. Popović et al.,* Case No. IT-05-88.

31 ICTY, Decision on Prosecution's Confidential Motion for Admission of Written Evidence In Lieu of Viva Voce Testimony Pursuant to Rule 92*bis*, *Prosecution v. Popović et al.*, Case No. IT-05-88-T, T. Ch. II, 12 September 2006.

32 See, for example R. Haveman, A. de Brouwer and M. Dolman in Klip/ Sluiter ALC-VIII-327, ALC-XI-383 and ALC-XIV-488, respectively.

33 Decision on Prosecution's Confidential Motion for Admission of Written Evidence In Lieu of Viva Voce Testimony Pursuant to Rule 92*bis*, *Prosecution v. Popović et al.*, *supra* note 31, par. 8.

of such acts and conduct, it is inadmissible by law, without any discretion left to the judges.[34] Second, where the evidence is admissible, i.e. where it does not go to proof of acts and conduct of the accused, the ICTY trial chamber "must decide whether it is appropriate to admit the evidence". At this "step", trial chambers have wide discretion as to whether to admit such evidence. In exercising such discretion, trial chambers may take into consideration the factors listed in Rule 92*bis*, paragraph A, and, since that list is not exhaustive, "ultimately…any [other] factor which [an ICTY trial chamber] finds appropriate".[35] Finally, if the evidence is admitted, the ICTY trial chamber "must decide whether the witness giving the evidence should still be required to appear for cross-examination", which is also a matter of discretion. The factors to be taken into consideration in exercising such discretion are set out below. In particular, the Popović *et al.* decision raises some interesting points in regard to the first and final "steps".

b. Proof of a matter other than the acts or conduct of the accused

In the Popović *et al.* motion, the prosecution sought admission of transcripts of testimony and exhibits tendered through that testimony of a (prosecution) witness involved in the prosecution's investigations of intercepted military communications and of (prosecution) witnesses involved in the actual intercepting of such communications. Apparently, a number of witnesses in the latter group named one or more of the accused in their testimony in other cases, "or else one or more of the exhibits tendered with the transcript [of testimony] [mentioned] one of the [a]ccused by name". The prosecution argued that the testimony was not concerned with the content of the intercepts and would only be relied on to authenticate the intercepts and to outline the procedural and technical aspects of obtaining intercepts.[36] According to the Trial Chamber, however, the problem with the prosecution's argument was that "Rule 92*bis* is concerned with the content of the evidence" and that "[w]here that content implicates the acts or conduct of the [a]ccused as charged in the [i]ndictment, the evidence is inadmissible under [Rule 92*bis*], regardless of the purpose for which it is tendered".[37] As such, "[t]hat the underlying transcript merely provides the vehicle by which the offending material is introduced is of no regard".[38] The first "step" in determining whether a statement should be admitted pursuant to Rule 92*bis* is, therefore, a strict one. Interestingly though, in respect of a number of intercepts comprising an exhibit sought for admission through the witness involved in the prosecution's investigations (which implicated the acts or conduct of some of the accused), the Trial Chamber was of the view that had the prosecution indicated which of those intercepts were to be tendered through other witnesses (in the same trial), admission pursuant to Rule 92*bis* might have been possible. According to the Trial Chamber, "[i]n that instance, [the witness in respect of whom admission pursuant to Rule 92*bis* of the ICTY RPE is being sought] would merely be pointing out certain aspects of evidence already appropriately before the Trial Chamber in its own right, and the safeguards in Rule 92*bis* [of the ICTY RPE] would not be offended by the admission of the…exhibit – in lieu of oral evidence".[39]

Furthermore, according to the Trial Chamber, descriptions by witnesses of events in which an accused is alleged to have participated (but which do not actually refer to an accused), which appear to play a prominent role in the prosecution's theory of the case, "surely" implicate the acts or conduct of the accused and are inadmissible pursuant to Rule 92*bis* of the ICTY RPE.[40]

c. Cross-examination

In relation to the third and final "step" of Rule 92*bis*, the Popović *et al.* decision lists the following as factors to consider in the determination of whether to require cross-examination: (1) the overriding obligation to ensure the accused a fair trial under Articles 20 and 21 of the ICTY Statute; (2) whether the evidence in question relates to a critical element of the prosecution's case or to a live and important issue between the parties, as opposed to a peripheral or marginally relevant issue; (3) the cumulative nature of the evidence; (4) whether the evidence is "crime-base" evidence or whether it relates to the acts and conduct of subordinates

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34 See R. Haveman, *supra* note 32, p. 329.

35 Decision on Prosecution's Confidential Motion for Admission of Written Evidence In Lieu of Viva Voce Testimony Pursuant to Rule 92*bis*, *Prosecution v. Popović et al., supra* note 31, par. 14.

36 *Ibid.*, par. 105.

37 *Ibid.*, par. 105.

38 *Ibid.*, par. 105.

39 *Ibid.*, par. 29.

40 *Ibid.*, par. 57 and 75.

for which the accused is allegedly responsible; (5) the proximity of the accused to the acts and conduct described in the evidence; and (6) whether the cross-examination of the witness in the earlier proceedings dealt adequately with the issues relevant to the current proceedings.[41]

It is the final factor that is of particular interest here. In relation to one of the (prosecution) witnesses, whose transcript of testimony from another trial was sought for admission and who, in that other trial, had been a defence witness and cross-examined by the prosecution only, the Trial Chamber observed that the witness did "not appear to have been extensively cross-examined by any party having a motive even remotely similar to the [a]ccused in this case".[42] Similarly, in relation to another witness, in determining whether to require cross-examination, the Trial Chamber was "mindful that the witness was not actually cross-examined in [the other trial] as the [d]efence chose not to ask [the witness] any questions when presented with the opportunity". Such circumstances would appear to weigh against admission without cross-examination.[43]

In addition (and on a more general note), it is worth mentioning that, more than once in the Popović *et al.* decision, the Trial Chamber alludes to a failure on the part of the defence (the party seeking cross-examination of the Rule 92*bis* witness) to provide (supported) arguments on why it seeks to cross-examine.[44] In this regard, it is notable that, since the rendering of the Popović *et al.* decision, another ICTY trial chamber has held that "Rule 92*bis* does not place an explicit burden on the party seeking cross-examination to make any particular showing of the necessity of such cross-examination".[45] While the latter approach may not absolve the party seeking cross-examination from having to make such a showing altogether, it does (arguably) ease any burden placed on a party to make such a showing.

d. Admission of exhibits admitted in other trials

Another issue addressed in the Popović *et al.* decision is the admission of exhibits admitted in other trials pursuant to Rule 92*bis* of the ICTY RPE. In the Popović *et al.* motion, the prosecution sought the admission of a number of exhibits that were tendered and admitted with the testimony of the proposed Rule 92*bis* witness in another trial. According to the Trial Chamber, the case law of the ICTY supported the prosecution's request and the exhibits proposed for admission were admitted "as a result of the prior testimony". The Trial Chamber was of the view that "transcripts read in the absence of the exhibits to which the witness referred cannot be fully evaluated for relevance and probative value" and that "ultimately, each exhibit that was shown to a witness during testimony in the earlier trial should be before the Trial Chamber as it evaluates the transcript".[46] It also confirmed that such exhibits are subject to the same requirements as written statements and transcripts of testimony in other trials pursuant to Rule 92*bis*.[47]

e. Expert testimony under Rule 92*bis*

A further issue addressed in the Popović *et al.* decision, is the interplay between Rule 92*bis* and Rule 94*bis* of the ICTY RPE. In the Popović *et al.* motion, the prosecution sought the admission pursuant to Rule 92*bis* of transcripts of prior expert testimony from another trial and of the experts' reports "as exhibits integral to the transcripts because they were used during the previous oral testimony", without having (yet) filed such reports pursuant to Rule 92*bis*.[48] As to the transcripts, the Trial Chamber found that their admissibility was governed solely by Rule 92*bis*, "without regard to the filing of reports under Rule 94*bis* […]"[49] In doing so,

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41 *Ibid.*, par. 16.

42 *Ibid.*, par. 59.

43 In ICTY, Decision on Prosecution's Motions for Admission of Written Evidence Pursuant to Rule 92*bis* of the Rules, *Prosecutor v. Martić*, Case No. IT-95-11-T, T. Ch. I, 16 January 2006, particular emphasis was placed on such circumstances. See par. 15.

44 See, for example, Decision on Prosecution's Confidential Motion for Admission of Written Evidence In Lieu of Viva Voce Testimony Pursuant to Rule 92*bis*, *Prosecution v. Popović et al., supra* note 31, par. 92, 99 and 101.

45 ICTY, Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92*bis*, *Prosecutor v. Lukić and Lukić*, Case No. IT-98-32/1-T, T. Ch. III, 22 August 2008, par. 24.

46 Decision on Prosecution's Confidential Motion for Admission of Written Evidence In Lieu of Viva Voce Testimony Pursuant to Rule 92*bis*, *Prosecution v. Popović et al., supra* note 31, par. 23-24. See also par. 25, where the Trial Chamber found that "items such as photographs, maps or other documents referenced in and attached to written statements proposed for admission" are also suitable for admission.

47 *Ibid.*, par. 30 and 105.

48 *Ibid.*, par. 42.

49 *Ibid.*, par. 43.

the Trial Chamber rejected the defence assertion that transcripts of prior expert testimony cannot be admitted pursuant to Rule 92*bis* unless the prosecution first moves the admission of the experts' reports under Rule 94*bis* and the defence accepts the reports without cross-examination.[50] Significantly, though, at the third "step" of Rule 92*bis*, the Trial Chamber observed that the manner in which the prosecution had sought the admission of transcripts deprived the accused of any opportunity to seek cross-examination of the experts pursuant to Rule 94*bis*, paragraph C, "a provision which on its face seems to grant an opposing party a not inconsiderable right to demand live cross-examination of expert witnesses",[51] and that if it were to ignore such provision in exercising its discretion under Rule 92*bis*, "this would nullify whatever right is secured by Rule 94*bis* wherever an expert has testified previously before the Trial Chamber".[52] Accordingly, in the Trial Chamber's view, although it had the discretionary power to admit the transcripts pursuant to Rule 92*bis*, the determination of whether to require the experts to appear for cross-examination, was not a matter of discretion. In other words, because the accused did not accept the transcripts pursuant to Rule 94*bis*, paragraph C, the evidence could not be admitted pursuant to Rule 92*bis* without permitting the defence to cross-examine the experts at trial.[53] In this context, it is worth noting an earlier ICTY decision in the Martić case, in which transcripts of prior expert testimony were admitted pursuant to Rule 92*bis* without cross-examination, on the grounds that the expert witness had previously been thoroughly cross-examined (in the other trial) on the issues identified by the defence.[54] Contrary to the view of the Trial Chamber in Popović *et al.*, therefore, the question of whether cross-examination is required in respect of expert testimony sought for admission pursuant to Rule 92*bis*, would appear to be a matter of discretion for ICTY trial chambers.[55]

As to the expert reports, the Trial Chamber was of the view that Rule 94*bis* was the rule applicable to their admission,[56] Judge Prost diverging in opinion on this point.[57] However, because it had already ruled that the experts were required to appear for cross-examination (as discussed in the previous paragraph) and the accused, therefore, had the "same opportunity to cross-examine the experts regarding any aspects of these reports as they would be accorded by the direct application of Rule 94*bis*", the Trial Chamber deemed it appropriate to admit the reports pursuant to Rule 92*bis*.

f. Interplay between Rule 92*bis* and Rule 89, paragraph F

The final issue to be noted here is the interplay between Rule 92*bis* and Rule 89, paragraph F of the ICTY RPE. According to the Trial Chamber, "unlike Rule 92*bis* [of the ICTY RPE], Rule 89(F) permits the Trial Chamber to receive a witness's evidence in written form without prohibiting evidence going to the acts or conduct of the accused" and therefore that "the Trial Chamber's decision denying admission pursuant to Rule 92*bis*(D) is without prejudice to the Prosecution moving the admission of these transcripts pursuant to Rule 89(F)".[58] It should be noted that this account of the interplay between Rule 92*bis* and Rule 89, paragraph F, does not reflect (all of) the nuances in the ICTY case-law on this matter. As, however, the prosecution did not seek the admission of such written evidence pursuant to Rule 89, paragraph F, (and the Trial Chamber did not, therefore, conduct an analysis as to admissibility pursuant to that rule), a discussion of such nuances are beyond the scope of this commentary.[59]

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50 *Ibid.*, par. 45.
51 *Ibid.*, par. 51.
52 *Ibid.*, par. 52.
53 *Ibid.*, par. 52.
54 ICTY, Decision on Prosecution's Motions for Admission of Transcripts Pursuant to Rule 92*bis* (D) and of Expert Reports Pursuant to Rule 94*bis*, *Prosecutor v. Martić*, Case No. IT-95-11-T, T. Ch. I, 13 January 2006, par. 35.
55 K. Khan and R. Dixon, *supra* note 11, par. 9-98.
56 Decision on Prosecution's Confidential Motion for Admission of Written Evidence In Lieu of Viva Voce Testimony Pursuant to Rule 92*bis*, *Prosecution v. Popović et al., supra* note 31, par. 53.
57 Separate Opinion of Judge Kimberly Prost, par. 1-5.
58 Decision on Prosecution's Confidential Motion for Admission of Written Evidence In Lieu of Viva Voce Testimony Pursuant to Rule 92*bis*, *Prosecution v. Popović et al., supra* note 31, par. 116.
59 For a discussion of the case-law and nuances on this matter, see M. Dolman, *supra* note 31, p. 495-499.