

UNITED
NATIONS



International Tribunal for the
Prosecution of Persons
Responsible for Serious Violations of
International Humanitarian Law
Committed in the Territory of the
Former Yugoslavia since 1991

Case No. IT-05-87/1-T
Date: 16 March 2009
Original: English

IN TRIAL CHAMBER II

Before: Judge Kevin Parker, Presiding
Judge Christoph Flügge
Judge Melville Baird

Registrar: Mr John Hocking, Acting Registrar

Decision: 16 March 2009

PROSECUTOR

v.

VLASTIMIR ĐORĐEVIĆ

PUBLIC

**DECISION ON PROSECUTION'S MOTION FOR ADMISSION
OF TRANSCRIPTS OF EVIDENCE IN LIEU OF *VIVA VOCE*
TESTIMONY PURSUANT TO RULE 92 *BIS***

The Office of the Prosecutor:

Mr Chester Stamp
Ms Daniela Kravetz
Mr Matthias Neuner
Ms Priya Gopalan
Ms Silvia D'Ascoli

Counsel for the Accused:

Mr Dragoljub Đorđević
Mr Veljko Đurđić

I. BACKGROUND

1. This decision of Trial Chamber II (“Chamber”) is in respect of the “Prosecution’s Motion for Admission of Transcripts of Evidence in Lieu of Viva Voce Testimony Pursuant to Rule 92*bis* with Public Annex A and Confidential Annex B”, filed by the Office of The Prosecutor (“Prosecution”) on 28 October 2008 (“Motion”) in compliance with the Pre-Trial Judge’s Order of 10 October 2008.¹ The Prosecution thereby seeks the admission into evidence of written statements of the witnesses whose mode of testimony was designated to be under Rule 92*bis* of the Rules of Procedure and Evidence (“Rules”) in the Prosecution’s Rule 65*ter* witness list filed on 1 September 2008.²
2. On 11 November 2008 Counsel for Vlastimir Đorđević (“Defence”) filed a response to the Motion,³ requesting that the Motion be denied, or, in the alternative, that all of the witnesses be called for cross-examination pursuant to Rule 92*bis*(C).⁴
3. On 17 November 2008 the Prosecution filed a request for leave to reply to the Defence Response to its Motion, which was granted by the Chamber.⁵ The following day, the Prosecution filed a reply to the Defence Response to its Motion.⁶
4. On 12 December 2008 the Prosecution filed the “Prosecution’s Notice in Respect to its Rule 65*ter* Witness List with Annex A” (“Prosecution’s Notice”), in which some witnesses were entirely removed from the Prosecution’s witness list, while the mode of testimony of some witnesses who were initially proposed to testify under Rule 92*bis* of the Rules was re-designated to Rule 92*ter* of the Rules.⁷
5. At the Pre-Trial Conference of 16 December 2008 the Chamber ordered the Defence to make further submissions, setting out the particular reasons for cross-examination of witnesses by the Defence as well as any submission it wishes to make about the reduction in the Prosecution’s

¹ *Prosecutor v Đorđević*, Case No. IT-05-87/1-PT, “Confirmatory Order on Submission of Motions Pursuant to Rules 92*bis*, 92*ter*, and 92*quater* and Further Scheduling Rule 65*ter* Conferences”, 10 October 2008, p 2.

² Motion, para 2.

³ *Prosecutor v Đorđević*, Case No. IT-05-87/1-PT, “Vlastimir Đorđević’s Response to Prosecution’s Motion for Admission of Transcripts of Evidence in Lieu of Viva Voce Testimony Pursuant to Rule 92*bis* with Public Annex A and Confidential Annex B”, 11 November 2008 (“Response”).

⁴ Response, p 12.

⁵ *Prosecutor v Đorđević*, Case No. IT-05-87/1-PT, “Prosecution’s Request for Leave to Reply to Vlastimir Đorđević’s Response to Prosecution’s Motion for Admission of Transcripts of Evidence in Lieu of Viva Voce Testimony Pursuant to Rule 92*bis* with Public Annex A and Confidential Annex B”, 17 November 2008.

⁶ *Prosecutor v Đorđević*, Case No. IT-05-87/1-PT, “Prosecution’s Reply to Vlastimir Đorđević’s Response to Prosecution Motion for Admission of Transcripts of Evidence in Lieu of Viva Voce Testimony Pursuant to Rule 92*bis* with Public Annex A and Confidential Annex B”, 18 November 2008 (“Reply”).

⁷ Prosecution’s Notice, paras 2, 4.

witness list, by 26 January 2009.⁸ Accordingly, the Defence filed “Vlastimir Đorđević’s Supplemental Motion in Regard to Cross-Examination for Rule 92bis Witnesses” on 26 January 2009 (“Supplemental Response”), reiterating its request to cross-examine all witnesses called under Rule 92bis of the Rules and providing, per witness, particular reasons in support.⁹ The Defence did not file a response to the Prosecution’s Notice with regard to the amendment of its Rule 65ter witness list.

II. SUBMISSIONS

6. The Prosecution submits that the proffered evidence is admissible pursuant to Rule 92bis of the Rules because it does not relate to proof of the acts or conduct of the Accused.¹⁰ It submits that the evidence of the proposed Rule 92bis witnesses constitutes “crime-base” evidence, for which Rule 92bis was primarily intended.¹¹ According to the Prosecution, while these witnesses describe crimes committed by soldiers, police officers and other persons, and although many of the direct perpetrators of the crimes were subordinates of the Accused, it is submitted that they “do not describe incidents involving the conduct of members of the upper echelons of the Serbian MUP and, in particular, on the level of a Deputy Minister.”¹² Finally, the Prosecution submits that none of the proposed witnesses were ever proximate to the Accused or were under an obligation to report to him, and none of them testified about links between the crimes on the ground and the Accused.¹³

7. It is submitted that the proffered evidence is relevant pursuant to Rule 89(C) of the Rules as it relates to crimes charged in Counts 1-5 of the Indictment, and is provided, in many cases, by survivors of the crimes or those who directly knew the victims.¹⁴ In this respect, it submits that the probative value outweighs any possible prejudicial effect of admission of this evidence in written form.¹⁵ The Prosecution contends that the evidence is reliable because all the witnesses gave sworn testimony and were subject to cross-examination in *Milutinović et al.*¹⁶

8. Concerning factors in favour of admission into evidence in written form, the Prosecution submits that the evidence is cumulative in nature to other evidence that will be led at trial, that it concerns the impact of crimes upon victims, and that it is used to establish the “crime base.”¹⁷ It submits that the fact that some of the proposed evidence is not cumulative and is not corroborative

⁸ T 94-95.

⁹ Supplemental Response, para 12.

¹⁰ Motion, para 9.

¹¹ Motion, para 9.

¹² Motion, para 9.

¹³ Motion, para 9.

¹⁴ Motion, paras 11, 12.

¹⁵ Motion, para 11.

¹⁶ Motion, para 11.

of other evidence, goes to the weight of evidence and not to admissibility.¹⁸ According to the Prosecution, none of the factors against admitting the proposed evidence in written form are present in this case.¹⁹

9. Additionally, it is the Prosecution's submission that none of the witnesses be required to appear for cross-examination, as none of the factors relevant to the determination of whether a witness should appear for cross-examination apply in the present case.²⁰ In this regard, it submits that the evidence provided by these witnesses does not go to core issues in the case such as "the acts and conduct of the Accused, the role or participation of the Accused in the joint criminal enterprise alleged in the Indictment, the structure and command and reporting systems of the forces controlled by Đorđević, or even the position the Accused held during the conflict".²¹ The Prosecution contends that the evidence provided by the Rule 92*bis* witnesses, while important, is not a "critical element" of the Prosecution's case in the context of the Chamber's determination of whether or not cross-examination should be allowed.²²

10. As an additional reason as to why the proposed witnesses should not be called for cross-examination, the Prosecution points out that these witnesses have already been subjected to cross-examination in *Milutinović et al.*, and that many of them had also been cross-examined during the *Milošević* trial.²³ It is argued that requiring these witnesses to appear again is not needed to protect the rights of the Accused, and "serves only to extend the trial unnecessarily".²⁴

11. Finally, the Prosecution submits that should the Chamber admit the evidence of any or all of these witnesses pursuant to Rule 92*bis*(A), the exhibits associated with the testimony should be admitted as well, as they form an "inseparable and indispensable part of the testimony."²⁵ It submits that with the intention of not "clutt[ering] the record with unnecessary or non-probative material", it has submitted only those exhibits it deems relevant and probative, suggesting that the Defence may propose to include any further exhibit it deems appropriate.²⁶

12. In its Response, the Defence submits that the proffered evidence does go to proof of the acts and conduct of the Accused, particularly with regard to the charges of command responsibility

¹⁷ Motion, paras 14, 15.

¹⁸ Motion, paras 16, 17.

¹⁹ Motion, para 18.

²⁰ Motion, paras 21, 24.

²¹ Motion, para 24.

²² Motion, para 24.

²³ Motion, para 25.

²⁴ Motion, paras 25, 26.

²⁵ Motion, para 27 (*quoting Prosecutor v. Delić*, Case No. IT-04-83-T, "Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 *bis*," 13 November 2007, para 15).

²⁶ Motion, para 28.

under Article 7(3) of the Statute of the Tribunal (“Statute”), and as encompassed in the allegations of participation in a joint criminal enterprise.²⁷ It is the position of the Defence, as underlined in its Supplemental Motion, that while the evidence sought for admission is largely crime-based, it relates to the alleged subordinates of the Accused, and it is “exactly the fact of whether or not these persons were subordinated to Vlastimir Đorđević that is at issue”.²⁸ Further, the Defence argues that, because such a large amount of uncontroverted evidence is proposed for admission under Rule 92bis, the prejudicial effect of its admission would outweigh its probative value.²⁹

13. The Defence asserts that should the Chamber consider any of the evidence admissible under Rule 92bis of the Rules, it should be allowed to cross-examine the witnesses.³⁰ It submits that not to allow for cross-examination of these witnesses “would subject the Accused to a partial trial *in absentia (sic)*, as he had no meaningful way to participate in the *Milošević* or *Milutinović et al.* proceedings from which most of this testimony is borne”.³¹ While the Defence concedes that cross-examination is not an absolute right, it submits that neither is it a right that may be easily dismissed.³² In this respect it submits that both the Statute and the Rules guarantee the right of an accused to examine the witnesses against him.³³ The Defence argues the evidence touches on live and important issues, adding that “it is only through cross-examination that [it] will be able to fully elicit testimony that will support the Defence case as to why each of these units was or was not subordinated to him.”³⁴ The Defence further expresses its concerns about the possible consequences of admitting the proposed evidence - as allegedly cumulative to evidence to be given by live witnesses - only to discredit that testimony during cross-examination.³⁵ Moreover, the Defence submits that it is aware of time restraints, and would endeavour to limit the cross-examination of these witnesses to the extent possible.³⁶

III. LAW

14. The law concerning the admission of evidence pursuant to Rule 92bis of the Rules has been sufficiently set out in this Chamber’s “Decision on Prosecution’s Motion for Admission of Evidence of Transcripts of Evidence of Forensic Witnesses in Lieu of *Viva Voce* Testimony

²⁷ Response, paras 7, 8.

²⁸ Supplemental Response, para 8; *see also* Response, para 17.

²⁹ Supplemental Response, para 7.

³⁰ Response, para 18; Supplemental Response, para 12.

³¹ Response, para 18; Supplemental Response, paras 6.

³² Response, para 20.

³³ Article 21 of the Statute and Rule 85(B) of the Rules; *see* Response para 20; Supplemental Motion, para 5.

³⁴ Supplemental Response, para 8; *see also* Response para 21.

³⁵ Supplemental Response, para 10.

³⁶ Supplemental Response, para 13.

Pursuant to Rule 92bis³⁷ and will, therefore, not be repeated in full in this decision. For written evidence to be admitted under Rule 92bis in lieu of oral testimony, it must go to proof of a matter other than the acts and conduct of an accused as charged in the indictment.³⁸ Even where a written statement or transcript goes to proof of a matter other than the acts and conduct of an accused, pursuant to Rule 92bis of the Rules, the admission of evidence in written form remains a matter for the discretion of the Chamber.³⁹ The Chamber must ensure that the trial is fair. In particular, as held by the Appeals Chamber in *Galić*, “[w]here 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, the Chamber may decide that it would not be fair to the accused to permit evidence to be given in written form”.⁴⁰ Further, Rule 92bis(C) also expressly contemplates that where a witness’s evidence in chief is given in written form, the Chamber may in its discretion require that the witness appear for cross-examination, if the interests of justice so require.⁴¹ One pertinent consideration in this regard is whether the evidence relates to “live and important issues between the parties” or whether the evidence goes to proof of a “critical element of the Prosecution’s case”.⁴² The particular circumstances of each case, or which concern the particular witness, may make it appropriate, as a matter of fairness, for the witness to be required to appear for cross-examination.

IV. DISCUSSION

15. As noted, the Prosecution filed a Notice on 12 December 2008 seeking, *inter alia*, the removal of witnesses from its witness list, and to re-designate the mode of testimony for a number of witnesses from Rule 92bis to Rule 92ter of the Rules, to which the Defence did not respond.⁴³ There is nothing which suggests that the Defence would be unduly prejudiced by the Prosecution’s proposal to rely on Rule 92ter for these witnesses. The Chamber therefore grants leave to the Prosecution to re-designate the mode of testimony of the witnesses, accordingly.

³⁷ *Prosecutor v Đorđević*, Case No. IT-05-87/1-T, “Decision on Prosecution’s Motion for Admission of Transcripts of Evidence of Forensic Witnesses in Lieu of *Viva Voce* Testimony Pursuant to Rule 92bis,” 11 February 2009, (“First Rule 92bis Decision”), paras 4-8.

³⁸ First Rule 92bis Decision, para 5.

³⁹ First Rule 92bis Decision, para 6.

⁴⁰ First Rule 92bis Decision, para 6; *see Prosecutor v. Stanislav Galić*, Decision on Interlocutory Appeal concerning Rule 92 bis (C), 7 June 2002 (“*Galić* Appeals Decision”), para 13.

⁴¹ First Rule 92bis Decision, para 7.

⁴² First Rule 92bis Decision, para 7.

⁴³ The Rule 92bis witnesses sought for removal from the list are: Muharrem Dashi, K24, K31, K62, K63, K68, Xhevahire Rrahmani, Abdullah Salihu, Fadil Vishi, and Fetije Vishaj. Other witnesses sought to be removed from the list are Dušan Loncar; Radomir Marković, Klaus Naumann, Zlatomir Pešić, Wolfgang Petritsch, representative of civil court, and Obrad Stevanović (Prosecution’s Notice, paras 2). Those for which the Prosecution sought to re-designate the mode of testimony from Rule 92bis to Rule 92ter are: Bajram Bucaliu, Ali Gjogjaj, Baton Haxhiu, Ndrec Konaj, K20, K83, Hazbi Loku, and Abdylhaqim Shaqiri (Prosecution Notice, para 4).

16. The Chamber need not set out in detail the precise charges alleged in the Indictment against the Accused. In particular charges are laid under Articles 3 and 5 of the Statute of the Tribunal alleging, *inter alia*, deportation and forcible transfer as crimes against humanity, murder as a violation of the laws or customs of war and as a crime against humanity as well as deportation and forcible transfer, murder, sexual assaults, and wanton destruction or damage of Kosovo Albanian religious sites as acts of persecution qualifying as crimes against humanity. These crimes are charged on various bases of individual criminal responsibility under Article 7(1), including joint criminal enterprise, and on the basis of superior responsibility as the Accused is alleged to have been a superior of the actual perpetrators under Article 7(3). It is not the Prosecution case, however, that the Accused himself was the perpetrator of any of the physical acts against victims. Both under Articles 7(1) and 7(3) of the Statute it is alleged that the Accused's responsibility arises by virtue of his senior positions of authority, principally as Assistant Minister of the Ministry of Interior ("MUP"), for acts performed in the field by others, and by his participation in the alleged joint criminal enterprise ("JCE"),⁴⁴ the objectives of which were implemented "through members of the forces of the FRY and Serbia".⁴⁵ While the Indictment defines expansively forces of the FRY and Serbia,⁴⁶ it does not particularize individuals or precisely the identity of units as perpetrators of the specific allegations in the Indictment. The Defence case is essentially negative and expressed in very general terms. In particular, it denies any involvement or responsibility of the Accused, denies his participation in the alleged JCE, and denies that the forces of which he was the superior and exercised effective control over were perpetrators of any of the acts as charged in the Indictment.⁴⁷

17. Against the background of the allegations in the Indictment, the Chamber has reviewed the evidence of the 31 remaining witnesses now sought to be admitted pursuant to Rule 92*bis* of the

⁴⁴ See *Prosecutor v. Vlastimir Đorđević*, Case No. IT-05-87/1-PT, "Fourth Amended Indictment", 9 July 2008 ("Indictment"). The Accused is further alleged to have been the Chief of the Public Security Department ("RJB") and a member of the "Joint Command". The JCE as charged, is alleged to have been in existence between at least the end of October 1998 and June 1999. Members of the JCE, as alleged, include, but are not limited, to the six Accused in the *Milutinović et al.* trial (paras 14, 20, 63 of the Indictment). The purpose of this JCE is alleged to be the modification of the ethnic balance in Kosovo to ensure continued Serbian control over the province, to be achieved by criminal means "consisting of a widespread or systematic campaign of terror and violence that included deportations, murders, forcible transfers and persecutions" directed at the Kosovo Albanian population (para 19 of the Indictment). According to the Indictment, the Joint Command (alleged to have been headed by Nikola Šainović) "was mandated to co-ordinate the work of civil affairs organs with the activities of the organisations that constituted the forces of the FRY and Serbia in Kosovo and to ensure that they conducted operations in accordance with political objectives." It is further alleged that the Joint Command exercised *de facto* command authority over these bodies; this command authority complemented the VJ and MUP internal chains of command to ensure co-operation and coordination (para 24 of the Indictment). The Joint command included senior members of the civilian, political and military leadership, including, *inter alia*, the Accused (paras 24 and 61 of the Indictment).

⁴⁵ This is defined in para 20 of the Indictment to include a wide range of police, military and civil defence units, reserve units and volunteers.

⁴⁶ Indictment, para 20.

⁴⁷ *Prosecutor v. Vlastimir Đorđević*, Case No. IT-05-87/1-T, "Vlastimir Đorđević's Pre-Trial Brief Pursuant to Rule 65ter (F)", 22 September 2008 ("Defence Pre-Trial Brief"), *see especially* paras 13, 18, 38, and 43.

Rules.⁴⁸ The Chamber notes here that it is not in the possession of the complete materials for witness K81. It has only received a transcript of this witness from the *Milutinović et al.* trial, during which K81 was questioned about his evidence provided in previous statements. In the absence of this material, the testimony of the witness is incomplete. The Chamber will therefore postpone its decision with regard to witness K81 until the Prosecution supplies it with the additional statements.

18. The majority of the remaining witnesses are victims of and/or eyewitnesses to crimes alleged in the Indictment. These crimes are alleged to have occurred in a total of 13 municipalities throughout Kosovo. The statements and transcripts of these witnesses concern, *inter alia*, the entry of what are variously described as Serb forces, MUP or police, or similar general descriptions, into the respective villages of these witnesses, the forced expulsion from their homes by these forces, and acts of mistreatment at the hands of these forces. Many of these witnesses provide first-hand or hearsay accounts of incidents of murder. Some provide evidence of the burial or removal of bodies by these forces in various locations. The evidence does not identify personal conduct of the Accused, or that of other named members of the alleged JCE. However, the proffered evidence is relevant to charges against the Accused as set out in the Indictment. Further, and in particular in the absence of specific Defence allegations to that effect, the statements do not appear to be inherently unreliable. It is the case that the general reliability of most of these witnesses has already been tested by cross-examination in the *Milutinović et al.* trial and, in some cases, in the *Milošević* trial.

19. It is apparent from the terms of Rule 92bis and the jurisprudence of this Tribunal that none of this proffered evidence concerns the acts and conduct of the Accused himself. In each case it deals with the conduct of variously and generally identified forces in the field. It is, therefore, evidence which is capable of being received in written form pursuant to Rule 92bis. The factors identified in Rule 92bis(A)(i) and (ii) do not tell strongly for or against the reception of this evidence in written form.⁴⁹

20. The criminal conduct described by the proposed witnesses in the proffered evidence does not identify the presence or participation of any identified person who is closely or directly associated with the Accused. Nor does it purport to deal with the conduct of any of the other

⁴⁸ In alphabetical order, by last name: Halit Berisha, Hysni Berisha; Merita Deda/Dedaj; Hadije Fazliu; Hamide Fondaj; Aferdita Hajirizi; Ali Hoti; Hani Hoxha; Bedri Hyseni; Agim Jemini; K58; K72; K74; K81; Sabit Kadriu; Florim Elmi Krasniqi; Rexhep Krasniqi; Hysni Kryeziu; Sejdi Lami; Rahim Latifi; Mehmet Mazrekaj; Martin Pnishi; Sabri Popaj; Isa Raka; Reshit Salihi; Qamil Shabani; Milazim Thaqi; Lulzim Vejsa; Edison Zatriqi; Isuf Zhuniqi; Shefqet Zogaj.

⁴⁹ While it is noted that the factors set out in Rule 92bis(A)(i) and (ii) are not binding on the Chamber, it considers the fact that the evidence of a number of the proposed Rule 92bis witnesses appears to be of a cumulative nature of the expected testimony of *viva voce* witnesses in this trial as a factor favourable to the admission of the written evidence of the proposed Rule 92bis evidence. In addition, much of the evidence concerns the impact of the crimes upon the victims, and may relate to factors to be taken into account in the potential determination of a sentence.

specifically named members of the alleged JCE, or of persons closely or directly associated with any member of the alleged JCE. Subject to the discussion later in this decision concerning two of the contemplated witnesses, there is nothing particular to each witness or to their proffered statements and transcripts, which suggests it could be unsafe or unfair to receive their evidence-in-chief in written form. While the evidence may be of relevance in the case it does not deal with persons proximate to the Accused, nor does it concern matters so pivotal to the case that it would be unfair to admit it in written form. It may be described as crime-base evidence.

21. Having regard to these matters, and subject to the discussion of two particular witnesses later in this decision, the Chamber is therefore persuaded that it would be appropriate in the interests of justice to admit the evidence of all but the two witnesses discussed later in the decision in the form of the written statements and transcripts of previous testimony proposed in the Motion.

22. In addition to the above general comments, for the purpose of its more specific analysis of the evidence, the Chamber has grouped the proposed witnesses into categories as follows:

1. Two witnesses required to provide full evidence orally

23. Milazim Thaqi, a survivor of the alleged massacre in Izbica/Izbicë in Srnica/Skenderaj Municipality, provides a first-hand description of the events at Izbica/Izbicë and a description of the perpetrators of this incident, which is scheduled in the Indictment.⁵⁰ The Chamber notes that material inconsistencies exist in the witness's evidence. While the Chamber has heard the *viva voce* evidence of another survivor of this specific incident, it notes that this individual was not in the same group of men as Milazim Thaqi.⁵¹ The Chamber is of the view that Milazim Thaqi's inconsistent evidence regarding the identification of perpetrators, as well as other inconsistencies revealed in his evidence, is of such a nature that it would be preferable for this evidence to be given *viva voce*.

24. Another witness whose evidence the Chamber considers should be heard in full is that of K72. While the Chamber has heard live testimony in this case relating to the exhumation of a number of mass grave sites in Prizren Municipality,⁵² K72, working for the VJ as a civilian, is expected to give evidence on the exhumation of bodies from a mass grave site at the Bistražin bridge, from about one hundred individual grave sites at the public cemetery in Brekovac, and from about ten individual graves in the village of Guška. The witness states that he participated in these

⁵⁰ Indictment, para 75(f).

⁵¹ See testimony of Mustafa Dragaj.

⁵² See testimony of Ali Gjogaj.

exhumations at the order of what he says were police members. K72 is expected, furthermore, to provide evidence of the extent of the involvement of the MUP in these operations. He also describes the clothing worn by the victims that were dug up. It appears from the Prosecution's Pre-Trial Brief that K72 is the only witness relied upon by the Prosecution in relation to the exhumations bodies from the three locations named above.⁵³ The disinterment of bodies and transport of such bodies from Kosovo to Serbia with the involvement of the MUP is an important part of the Prosecution's case.⁵⁴ It is the view of this Chamber that the interests of justice would be best served if K72 provides his evidence *viva voce*.

2. Witnesses not required to appear for cross-examination

25. Ali Hoti, a doctor from the village of Velika Kruša/Krusha e Madhe in Orahovac/Rahovec Municipality provides a hearsay account of the alleged massacre in Mala Kruša/Krushë e Vogël scheduled in the Indictment.⁵⁵ Other witnesses have given direct evidence of this particular incident and have been cross-examined by the Defence. Ali Hoti may also provide a very general hearsay account of an alleged massacre in Velika Kruša/Krusha e Madhe. The witness's description of the perpetrators of this event is both a hearsay account and is very general. The Chamber therefore does not consider that the rights of the Accused would be impaired should the witness's evidence be given in written form. It is noted that the Defence submits that only one of the written statements of this witness is proposed for admission pursuant to Rule 92*bis* by the Prosecution, and that the statements may be contradictory.⁵⁶ The Chamber is not in possession of another statement by this witness and notes that there is no such statement on the Prosecution's Rule 65*ter* list. The Chamber, therefore, is unable to make a determination as to whether the evidence provided in any such additional statement is materially inconsistent with the statement proposed for admission by the Prosecution. Should any additional statement of this witness exist, and should the Defence be of the view that the evidence provided therein is materially inconsistent with the evidence in the proffered witness statement, it will be open to the Defence to raise the issue before the Chamber by specific Motion.

26. Hadije Fazliu provides evidence of "shelling" by "Serbian forces" of the village of Turicevac/Turiçec in Srbica/Skenderaj Municipality on 26 March 1999. This evidence is very general, and the Chamber will hear other evidence about alleged attacks on other villages in Srbica/Skenderaj Municipality. The Chamber notes that this witness may also describe the entry of

⁵³ See *Prosecutor v. Vlastimir Đorđević*, Case No. IT-05-87/1-PT, "Prosecution's Submissions Pursuant to Rule 65*ter* (E) with Confidential Annex I, Annex II and Annex III", 1 September 2008, ("Prosecution Pre-Trial Brief"), para 167.

⁵⁴ Prosecution Pre-Trial Brief, paras 167-173.

⁵⁵ Indictment, para 75(c).

⁵⁶ Response, Confidential Annex A, p 2.

police and military in the morning of 29 March 1999 into Tusilje/Tushile, not scheduled in the Indictment, and provide a general description of these forces. While it may go to proof of the widespread or systematic nature of the attacks in Srbica/Skenderaj Municipality, the Chamber is not persuaded that the witness's evidence goes to proof of a material aspect of the Prosecution case. It is of the view that the Defence would not be prejudiced by a lack of cross-examination of this witness.

27. Hamide Fondaj describes an attack by "Serb forces" on Belanica/Bellanicë in Suva Reka/Suharekë Municipality on 1 April 1999. The witness gives a description of the forces involved as VJ soldiers in green camouflage uniforms, police in blue camouflage, and paramilitaries with bandanas and painted faces, and states that the police and paramilitaries that entered Belanica/Bellanicë fired at the houses. The description of the perpetrators is straightforward and the Chamber will hear the cross-examination of another witness on the alleged attack on Belanica/Bellanicë.⁵⁷ While the witness provides a general and perhaps unclear description of police officers participating in the mistreatment and extortion of money from civilians in a convoy on 2 April 1999, the Chamber notes that this incident is not scheduled in the Indictment.⁵⁸ The Chamber is not satisfied that Hamide Fondaj's evidence in this respect is material in establishing the important elements of the Prosecution's case. The Chamber is not persuaded the Accused would be prejudiced in his right to a fair trial should Hamide Fondaj not appear for cross examination.

28. Florim Elmi Krasniqi⁵⁹ provides evidence on the inflow of refugees into Mirosavlje/Mirosalë in Uroševac/Ferizaj Municipality on 5 April 1999 from the direction of Zltara village. The witness further describes the entry of Serb forces, which he describes in some detail as VJ, into Mirosavlje/Mirosalë on 8 April 1999. Having reviewed this witness's proposed evidence, the Chamber is of the view that this witness does not describe acts of perpetrators directly, and only refers to the consequences of their acts. Further, the Chamber will hear the live evidence of other witnesses in this trial concerning attacks of villages in Uroševac/Ferizaj Municipality.⁶⁰ While it is noted that the witness also provides accounts of a number of murders, this evidence is based on hearsay accounts and does not relate to any incidents scheduled in the Indictment. The Chamber does not consider that this witness's evidence will go to proof of a material aspect of the

⁵⁷ See para 29, witness Shefquet Zogaj.

⁵⁸ Indictment, para 72(d)(i).

⁵⁹ The Chamber notes that the portion of the transcript sought for admission by the Prosecution pursuant to Rule 92*bis* does not include the solemn declaration provided by the witness. The Prosecution is requested to re-upload to portion of the transcript including this solemn declaration.

⁶⁰ Rule 92*ter* witnesses Bajram Bucaliu and Ibush Ibishi.

Prosecution's case. For these reasons, it does not consider it necessary that this witness appears for cross-examination.

3. Witnesses required to appear for cross-examination

29. While for the most part, the proposed written evidence of the remaining witnesses describes the perpetrators of the respective offences in terms which are not precise, even as to their unit or their character as regular, reserve, volunteer or the like, nevertheless, it appears that in part, the Prosecution's case will rely on the general effect of much or all of this evidence to support the proposition that the perpetrators, or some of them, were subordinate to the Accused, or to other members of the alleged JCE, and that that the Accused is criminally responsible for their acts either under Article 7(1) or 7(3) of the Statute. The identification of these perpetrators, not only individually but also by virtue of their unit and force, is therefore an issue joined between the Prosecution and the Defence. It may well prove material to the ultimate question of the criminal responsibility of the Accused for the conduct being describes by these witnesses. In many respects the evidence of some or all of these witnesses may have been tested in cross-examination in one or more earlier trials. Nevertheless, the Chamber is not able to be satisfied that it would be fair to this Accused if he were not given the opportunity to test by cross-examination the evidence of those witnesses which deal with the identification of the perpetrators of various events alleged in the Indictment and which could form a basis for the conviction of the Accused. This evidence is potentially sufficiently central to the Prosecution case to require that the Accused, by his counsel, be able to test it. Other Accused in earlier cases who have cross-examined various of these witnesses cannot be said to have the same interest as this Accused in this particular issue.

30. In particular, some of the proposed witnesses appear to provide very general, unclear, or inconsistent descriptions of perpetrators involved in the conduct described by the witness. These witnesses are Hysni Berisha, Merita Deda/Dedaj,⁶¹ Aferdita Hajrizi, Hani Hoxha, Rexhep Krasniqi, K74, Sabit Kadriu, Rahim Latifi, Isa Raka, Reshit Salihi, Qamil Shabani, Lulzim Vejsa, Shefqet Zogaj,⁶² and Edison Zatriqi. Also in this category is witness K58, who provides circumstantial evidence concerning the allegation of sexual assault of at least three women in a building nearby a field in Beleg on or about 29 March 1999, as charged in the Indictment.⁶³ K58 also overheard one

⁶¹ The Chamber notes that the portion of the transcript sought for admission by the Prosecution pursuant to Rule 92bis does not include the solemn declaration provided by the witness. The Prosecution is requested to re-upload to portion of the transcript including this solemn declaration.

⁶² The Chamber notes that the Prosecution seeks the admission of, *inter alia*, Rule 65ter number 02322 for witness Shefqet Zogaj. This document includes the witness's statement of 25/26 April 1999. This statement, within the same Rule 65ter number, is followed by a statement of Bedri Hyseni, dated 31 January 2002. The Prosecution is requested to remove the statement of Bedri Hyseni from Rule 65ter 02322.

⁶³ Indictment, para 72(1).

of the girls who returned to the room in which the witness herself was detained tell her mother that she had been raped. The Chamber notes that it will also hear the evidence of K20, a Rule 92*ter* witness and one of the victims of this allegation. However, in light of the fact that the K58's evidence concerning the description of individuals who came to the room to take and return girls – whom she describes as paramilitaries in her statement and as police in her testimony in *Milutinović et al.* – may be inconsistent and unclear, the Chamber considers it is in the interests of justice that the witness be required to appear for cross-examination.

31. Other witnesses name alleged perpetrators of acts that can be relied upon to establish the counts charged in the Indictment. These witnesses are Halit Berisha, Bedri Hyseni, Agim Jemini, Hysni Kryeziu, Mehmet Mazrekaj, and Martin Pnishi. In the view of the Chamber, cross-examination of these witnesses could enable the Defence to explore the alleged subordination of these individuals to the Accused and to test the basis on which these witnesses identify these individuals.

32. Other witnesses appear to provide almost the only evidence of a specific scheduled incident in the Indictment. Isuf Zhuniqi is a survivor of the scheduled murder incident at Belaja bridge, near Bela Crvka/Bellacërkë village in Orahovac/Rahovec Municipality, alleged to have taken place on or about 25 March 1999.⁶⁴ Sabri Popaj does also provide an account of this incident from the viewpoint of an eye-witness. Another witness, Sejdi Lami, describes the attack on Vata hamlet in Kačanik/Kaçanik Municipality on 13 April 1999,⁶⁵ and is the only witness to give evidence about to the alleged murder of 13 civilians in this hamlet in the course of this attack.

33. For the above general and particular reasons, the Chamber is persuaded that it would be in the interests of justice for the witnesses specified in the order which follows to appear for cross-examination. It is the expectation of the Chamber that cross-examination of each of these witnesses other than Isuf Zhuniqi, Sabri Popaj and Sejdi Lami, will be concentrated mainly on the identification of the perpetrators of each incident alleged in the Indictment which is dealt with in the evidence of the witness. Cross-examination on other subjects will be closely monitored for relevance and substance.

34. Finally, the Chamber will deal here with a correlative issue raised in the Defence in their Response. It submits that many of the proposed exhibits for admission under Rule 92*bis* of the Rules were not on the Prosecution's Rule 65*ter* list, and that as such, they should be rejected due to

⁶⁴ Indictment, para 75(b).

⁶⁵ Indictment, para 75(k)(ii).

late notice.⁶⁶ Given this late introduction of the documents, the Defence contends that it makes it impossible for it to provide the Chamber with complete submissions as to the “newly proposed evidence.”⁶⁷ Should it not be summarily rejected, it submits that the evidence put forth may not be reliable unless tested through the witness.

35. The Defence further takes issue with what it describes as “cherry-pick[ing]” by the Prosecution of exhibits, omitting to include those which in its view would only “clutter the record with unnecessary and non-probative value”.⁶⁸ It is the position of the Defence that this selection process is in violation of the jurisprudence of this Tribunal, which extends to the admission of exhibits that are an “inseparable and indispensable” part of the written testimony of a witness.⁶⁹ Further, the Defence submits that for a number of witnesses, the Prosecution has not included their statement(s) as proposed exhibits,⁷⁰ arguing that this selective approach is not admissible as the statements may be contradictory.⁷¹ The Defence proposes that any decision on the admission of such exhibits be postponed until the potential cross-examination of the witness.⁷²

36. The Prosecution submits that the Defence had access to the contested material by 11 December 2007, and that on 1 September 2008, when the Prosecution filed its witness list including witness summaries, the Defence was duly notified of its intention to seek to tender material produced by each witness into evidence through a future Rule 92*bis* motion.⁷³

37. Concerning the documents proffered by the Prosecution, relating to each of the proposed Rule 92*bis* witnesses identified in Confidential Annex B to the Motion as not being on the Rule 65*ter* exhibit list filed by the Prosecution on 1 September 2008,⁷⁴ the Chamber does not consider that there has been a lack of notice as suggested by the Defence. The Defence has been in possession of this material since December 2007, and, in addition, was put on notice of the Prosecution’s intention to use these exhibits as indicated in the Prosecution’s Rule 65*ter* witness list filed with its Pre-Trial Brief on 1 September 2008. The Chamber, therefore, does not accept that the Accused would be prejudiced by the addition of these documents to the Rule 65*ter* list.

⁶⁶ Response, para 29; *see* Confidential Annex B to the Response.

⁶⁷ Response, para 31.

⁶⁸ Response, para 30.

⁶⁹ Response, para 30.

⁷⁰ Response, Confidential Annex A. The Defence submits that the written statement(s) of, for example, the following witnesses was not proposed for admission pursuant to Rule 92*bis* by the Prosecution: Halit Berisha, Ali Hoti, Agim Jemini, Rexhep Krasniqi, Hysni Kryeziu, K81, Sabri Popaj, Isa Raka, Reshit Salihi, Qamil Shabani, and Shefqet Zogaj.

⁷¹ Response, Confidential Annex A, *see*, for example, para 17, Shefqet Zogaj.

⁷² Response, para 30.

⁷³ Reply, paras 6 and 7.

⁷⁴ Response, para 29; *see* Confidential Annex B.

38. Tribunal jurisprudence has established that exhibits accompanying witness statements or transcripts which “form an inseparable and indispensable part of the testimony of the witness” may be admitted along with a witness’s statement or transcript.⁷⁵ In particular, an exhibit falls within this category when the witness actually discusses it during his evidence and if it is one without which the written statement or transcript becomes incomprehensible or of lesser probative value.⁷⁶ The Chamber has therefore reviewed the exhibits proffered by the Prosecution through each proposed Rule 92bis witness. It is satisfied that they may be properly admitted in association with the written evidence of the respective witnesses.

39. Concerning the Defence submission regarding what it describes as the Prosecution’s practice of “cherry-picking” of exhibits, it is not obvious to the Chamber that there are additional exhibits which ought also to have been proffered by the Prosecution because of their relevance to this case. If the Defence considers that there are additional relevant exhibits, dealt with in the written evidence of witnesses who will not be required to appear for cross examination, it may submit a supplementary motion seeking the admission of these exhibits. Any such motion, however, should be limited to those witnesses which the Chamber does not require to appear for cross-examination.

40. With regard to those witnesses who are required, by this decision, to provide their testimony *viva voca* and those required to appear for cross-examination, the Chamber considers that it would be procedurally more appropriate for the Prosecution to seek to tender the associated exhibits for the witnesses when they appear for cross-examination. The Defence will then have the opportunity to propose the inclusion of further exhibits it deems relevant to the evidence of a particular witness. Concerning the submission by the Defence that a number of these witnesses have provided statements that were not proffered by the Prosecution pursuant to Rule 92bis, the Chamber is of the view that such should they contain evidence that is materially inconsistent with the evidence proffered by the Prosecution, the Defence will have the opportunity to put these inconsistencies to the witness, and seek the admission of such statements during cross-examination.

⁷⁵ *Prosecutor v. Momčilo Perišić*, Case No. IT-04-81-T, “Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 bis”, 2 October 2008 (*Perišić Decision*), para 16; *Prosecutor v. Stanišić and Simatović*, Case No. IT-03-69-PT, “Decision on Prosecution’s Motion for Admission of Written Statements and Associated Exhibits Pursuant to Rule 92bis of the Rules (Two Witnesses)”, 18 March 2008 (“*Stanišić and Simatović Decision*”), para 20. *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-T, Decision on Admission of Written Statements, Transcripts, and Associated Exhibits Pursuant to Rule 92ter, 22 February 2007, p 3.

⁷⁶ *Perišić Decision*, para 16; *Prosecutor v. Lukić and Lukić*, Case No. IT-98-32/1-T, “Decision on Confidential Prosecution Motion for the Admission of Prior Testimony with Associated Exhibits and Written Statements of Witnesses pursuant to Rule 92 ter,” 9 July 2008, para 15; *Stanišić and Simatović Decision*, para 20.

V. DISPOSITION

41. For the foregoing reasons, and pursuant to Rule 92*bis* of the Rules, the Chamber

(A) **GRANTS** leave to the Prosecution's request, in its Motion, to add the transcripts and associated exhibits listed in the sixth column of confidential Annex B to the Motion;

(B) **REFUSES** the Motion in respect of witnesses K72 and Milazim Thaqi;

(C) **RESERVES** its Decision with respect to the evidence of K81 until such time as it is provided with the prior statement(s) of this witness;

(D) **GRANTS** the Motion to admit the evidence of the remaining 28 witnesses in writing and **ORDERS** that:

(i) witnesses Hadije Fazliu, Hamide Fondaj, Ali Hoti, and Florim Elmi Krasniqi shall not be required to appear for cross-examination;

(ii) the written statements and transcripts pertaining to the witnesses identified in section (D)(i) of this disposition will be admitted into evidence, subject to compliance with the requirements of Rule 92*bis*(B), when they are tendered at a convenient time in the trial proceedings; exhibits associated with these written statements and transcripts should be tendered for admission into evidence at the same time;

(iii) witnesses Halit Berisha, Hysni Berisha, Merita Deda/Dedaj, Aferdita Hajrizi, Hani Hoxha, Bedri Hyseni, Agim Jemini, K58, K74, Sabit Kadriu, Rexhep Krasniqi, Hysni Kryeziu, Sejdi Lami, Rahim Latifi, Mehmet Mazrekaj, Martin Pnishi, Sabri Popaj, Isa Raka, Reshit Salihi, Qamil Shabani, Lulzim Vejsa, Edison Zatriqi, Isuf Zhuniqi and Shefqet Zogaj shall appear for cross-examination;

(iv) the written statements, transcripts and associated exhibits pertaining to the witnesses identified in section (D)(iii) of this disposition should be tendered for admission into evidence when these witnesses appear in court for cross-examination.

Dated this sixteenth day of March 2009
At The Hague
The Netherlands



Judge Kevin Parker
Presiding

[Seal of the Tribunal]