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-95-5/18-T

Date: 21 March 2014

Original: English

IN THE TRIAL CHAMBER

Before: **Judge O-Gon Kwon, Presiding Judge**
Judge Howard Morrison
Judge Melville Baird
Judge Flavia Lattanzi, Reserve Judge

Registrar: **Mr. John Hocking**

Decision of: **21 March 2014**

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC with CONFIDENTIAL ANNEX

DECISION ON PROSECUTION'S MOTION TO ADMIT EVIDENCE IN REBUTTAL

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused

Mr. Radovan Karadžić

Standby Counsel

Mr. Richard Harvey

THIS TRIAL CHAMBER of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 ("Tribunal") is seised of the "Prosecution Motion to Admit Evidence in Rebuttal", filed by the Office of the Prosecutor ("Prosecution") on 4 March 2014 ("Motion"), and hereby issues its decision thereon.

I. Background and Submissions

A. Prosecution Motion

1. In the Motion, the Prosecution seeks leave to present, pursuant to Rule 85(A)(iii) of the Tribunal's Rules of Procedure and Evidence ("Rules"), the evidence of 14 witnesses in rebuttal.[1] It argues that the proposed rebuttal evidence is relevant and probative to the issues contained in the Third Amended Indictment ("Indictment") and directly responds to significant issues arising from the Accused's defence case which it could not have reasonably anticipated during its case.[2] Further, the Prosecution submits that the admission of the proposed evidence in rebuttal would serve the interests of justice by making "important evidence on unanticipated Defence issues available to the Trial Chamber".[3]

2. The Prosecution further argues that the Accused's failure to provide any "useful notice" of the Defence case, both before and following the filing of his pre-trial brief,[4] has made it particularly difficult to anticipate the nature of his challenges.[5] According to the Prosecution, these difficulties were acknowledged by the Pre-trial Chamber when it held, in a "Decision Regarding the Accused's Pre-Trial Brief" filed on 30 July 2009 ("Pre-Trial Brief Decision"), that any prejudice arising from the Accused's failure to comply with the Rules may be remedied at a later stage by viewing sympathetically an application by the Prosecution to introduce evidence it had not anticipated presenting, such as, by recalling witnesses.[6] The Prosecution also submits that it relied heavily on

1 Motion, para. 1 (submitting that it seeks to tender the evidence of 11 witnesses pursuant to Rule 92 *ter*, one witness pursuant to Rule 92 *quater*, and two witnesses pursuant to either Rule 92 *bis* or Rule 92 *quater*). The Prosecution also submits that it reserves the right to file a further motion to admit evidence in rebuttal if any of the currently pending motions filed by the Accused on his proposed Rule 92 *bis* witnesses "raises unanticipated challenges" to its case. Motion, para. 2, fn. 2.

2 Motion, para. 1.

3 Motion, para. 1.

4 At a status conference on 2 April 2009, the Accused stated the following: "We can only agree perhaps on whether it was sunny on a particular day or rainy. Everything else is going to be challenged, starting with joint criminal enterprise and everything that happened on the ground. Everything is controversial. Everything is going to be challenged and the Prosecution should be aware of that. We are going to challenge everything." *See* Status Conference, T. 180 (2 April 2009).

5 Motion, para. 4.

6 Motion, para. 4.

adjudicated facts in order to establish certain aspects of its case and that, in relation to many incidents, it avoided calling live witness in accordance with this Chamber's instruction to avoid tendering evidence which merely supports the content of specific adjudicated facts.[7] Thus, according to the Prosecution, where the Accused has brought adjudicated facts into question, "fairness demands that the Prosecution be permitted to adduce rebuttal evidence to support these facts."[8]

3. The Prosecution notes that the Accused's approach to adjudicated facts has been chaotic and difficult to predict, and that this is attributable to his refusal to provide notice in accordance with the Rules.[9] In any event, relying on the "Decision on the Accused's Motion to Strike Scheduled Sarajevo Shelling and Sniping Incidents" issued on 27 January 2012 ("Sarajevo Decision"), the Prosecution argues that rebuttal evidence should be admitted "even where the Defence has given notice of an intention to challenge particular adjudicated facts" as to hold otherwise would undermine the purpose of Rule 94(B).[10] In relation to specific adjudicated facts discussed in the Motion, the Prosecution does not accept that the Defence evidence challenging those facts is reliable or credible but still "tenders rebuttal evidence in case the Trial Chamber finds that the Defence has successfully put any of the adjudicated facts at issues into question".[11] The Prosecution submits that the presentation of the rebuttal evidence will be limited to five hours and 30 minutes of direct examination, thus it would not unreasonably extend the length of trial or infringe on the rights of the Accused.[12]

4. For the municipalities component of the case, the Prosecution seeks to tender the evidence of ten witnesses to rebut the Accused's challenges to adjudicated facts concerning events in five municipalities.[13] It seeks to tender the evidence of Ron Haviv, pursuant to Rule 92 *ter*, to rebut the Accused's challenges to adjudicated facts concerning the nature of the conflict in Bijeljina in April 1992 and related to Scheduled Incident A.1.1 of the Indictment.[14] In relation to Bratunac and Scheduled Incident A.3.1, the Prosecution seeks to tender the evidence of two witnesses pursuant to Rule 92 *ter*, Ramo Hodžić and Šaha Arifović, to rebut the Accused's challenges to adjudicated

7 Motion, para. 5.
8 Motion, para. 5.
9 Motion, para. 6.
10 Motion, para. 7, citing to para. 11 of the Sarajevo Decision.
11 Motion, para. 8.
12 Motion, para. 9.
13 Motion, para. 10.
14 Motion, paras. 11, 16. The Prosecution submits that the estimated time for its examination in chief will take 30 minutes.

facts and the Defence evidence concerning the May 1992 attack on the village of Hranča.[15] For Foča, the Prosecution seeks to tender the evidence of four witnesses in rebuttal to the Accused's challenges to adjudicated facts concerning the persecution of non-Serbs "during and after the takeover of Foča" as alleged in the Indictment.[16] These four witnesses, who were residents of Foča in 1992, are KDZ060, Safet Avdić, Dževad Lojo, and KDZ030.[17] The Prosecution seeks to present the evidence of both KDZ060 and Avdić pursuant to Rule 92 *bis* or 92 *quater*, and the evidence of Lojo and KDZ030 pursuant to Rule 92 *ter*.[18] In relation to Ključ, the Prosecution requests to tender the evidence of Azim Medanović, an eye-witness to the events, pursuant to Rule 92 *ter*, in relation to Scheduled Incident A.7.2.[19] It also requests to be allowed to call another witness pursuant to Rule 92 *ter* in relation to Scheduled Incident B.10.1.[20] With regard to Prijedor, the Prosecution seeks to tender the evidence of one witness, Safet Tači, pursuant to Rule 92 *ter* in relation to the alleged killing of civilians in Room 3 at the Keraterm camp as listed in Scheduled Incident B.15.1 of the Indictment and beatings that allegedly occurred during interrogations at the Keraterm camp.[21]

5. For the Sarajevo component of the case, the Prosecution seeks to tender the evidence of two witnesses, Hamdija Čavčić, pursuant to Rule 92 *quater* and Todd Cleaver, pursuant to Rule 92 *ter*, in relation to Scheduled Incidents G.5 as well as F.7, F.11, F.12, F.14, F.15, and F.16, respectively.[22]

6. Finally, in relation to the Srebrenica component of the case, the Prosecution seeks to tender the evidence of two witnesses pursuant to Rule 92 *ter*, namely KDZ065 and Mujo Subašić.[23]

7. The Prosecution's submissions in relation to each of the proposed rebuttal witnesses will be examined in further detail below.[24]

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15 Motion, paras. 17, 20, 24. The Prosecution submits that the estimated time for its examination in chief will take 30 minutes for each witness.

16 Motion, para. 25, referring to paragraphs 48–60 of the Indictment and the related Scheduled Incidents.

17 Motion, paras. 29–33.

18 Motion, paras. 30–33. The Prosecution submits that KDZ060 and Avdić have indicated an inability to testify due to serious health problems and it may seek to tender his evidence pursuant to Rule 92 *quater* depending on pending medical documentation. Motion, fns. 40–41.

19 Motion, paras. 39–40, 44. The Prosecution estimates that it will use 30 minutes on direct examination of this witness.

20 Motion, Confidential Appendix A, paras. 81–82, 85. The Prosecution estimates that it will use 30 minutes on direct examination of this witness.

21 Motion, paras. 45, 50. The Prosecution estimates that it will use 30 minutes on direct examination of this witness.

22 Motion, paras. 53, 58, 67. The Prosecution submits that Čavčić is deceased and it estimates that it will use 30 minutes on direct examination of Cleaver.

23 Motion, paras. 73–74.

24 *See* paras. 22 *et seq. infra*.

B. Accused Response

8. On 17 March 2014, the Accused filed the "Response to Motion for Rebuttal Evidence and 90th Disclosure Violation Motion" ("Response"), stating that he does not, "in principle", oppose the Motion and agrees that it is appropriate for the Prosecution to offer evidence in rebuttal when he has contested adjudicated facts.[25] He also submits that he reserves the right to oppose any and all evidence that is sought to be admitted in rebuttal by the Prosecution pursuant to Rule 92 *bis* or Rule 92 *quater* and will address these issues when responding to individual motions filed by the Prosecution.[26] He also specifically requests that the Chamber set a deadline for disclosure under Rule 66(A)(ii) for the proposed rebuttal witnesses and that the rebuttal case not commence until 30 days after this disclosure is complete.[27]

C. Prosecution Request for Leave to Reply

9. On 21 March 2014, the Prosecution filed the "Prosecution Request to Reply to Karadžić's Response to the Prosecution's Motion for Rebuttal Evidence" ("Request for Leave to Reply"), in which it seeks leave to reply to the Response and address the Accused's request therein that the rebuttal case not commence until 30 days after completion of Rule 66(A)(ii) disclosure relating to proposed rebuttal witnesses.[28]

II. Applicable Law

10. Rule 85(A)(iii) of the Rules provides for the presentation of rebuttal evidence. The jurisprudence of the Appeals Chamber establishes that "rebuttal evidence must relate to a significant issue arising directly out of Defence evidence which could not reasonably have been anticipated".[29] Evidence which goes to a matter that is a fundamental part of the case that the Prosecution was required to prove should be brought as part of the Prosecution case and not in rebuttal.[30] The Prosecution cannot call additional evidence merely because its case has been met by certain evidence to contradict it.[31] Only highly probative evidence on a significant issue in

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25 Response, para. 1.

26 Response, para. 2.

27 Response, para. 3.

28 Request for Leave to Reply, para. 1.

29 *Prosecutor v. Delalić et al.*, Case No. IT-96-21-A, Judgement, 20 February 2001 ("*Čelebići* Appeal Judgement"), para. 273 (affirmed by *Prosecutor v. Naletilić and Martinović*, Case No. IT-98-34-A, Judgement, 3 May 2006 ("*Natelić and Martinović* Appeal Judgement"), paras. 255, 258; *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, Judgement, 17 December 2004, ("*Kordić and Čerkez* Appeal Judgement"), paras. 220–221.

30 *Čelebići* Appeal Judgement, para. 275.

31 *Naletilić and Martinović* Appeal Judgement, paras. 255, 258.

response to Defence evidence, and not merely reinforcing the Prosecution case, will be permitted on rebuttal.[32] Evidence on peripheral and background issues will be excluded.[33]

11. The Appeals Chamber has held that by taking judicial notice of an adjudicated fact, a Chamber establishes a well-founded presumption for the accuracy of this fact, which does not have to be proven again at trial.[34] Taking judicial notice does not shift the ultimate burden of persuasion, which remains with the Prosecution. The Prosecution is only relieved of its initial burden to produce evidence on the point, but the Accused may then put the point into question by introducing reliable and credible evidence to the contrary.[35] The fact that the Accused challenges the accuracy of one or several adjudicated facts does not, in and of itself, give the Prosecution a right to bring evidence in rebuttal.[36]

III. Discussion

A. Prosecution's General Argument

12. As noted above, the Prosecution's general argument in support of the Motion is that it relied heavily on adjudicated facts in this case, partly due to the Chamber's instructions, and that it was difficult to anticipate the nature of the Accused's challenges as he failed to provide adequate notice of his defence in his pre-trial brief. Accordingly, the Prosecution argues that fairness now demands that it be allowed to adduce evidence in rebuttal to support the challenged adjudicated facts.[37] In making this argument, the Prosecution relies on the Pre-Trial Brief Decision where the Pre-trial

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[32] *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-T, Oral Decision, T. 26647 (18 October 2000) ("*Kordić and Čerkez* Oral Decision") (cited by *Prosecutor v. Stanišić and Župljanin*, Case No. IT-08-91-T, Decision Granting in Part the Prosecution's First and Second Motions to Present Evidence in Rebuttal, confidential, 15 December 2011 ("*Stanišić and Župljanin* Decision"), para. 31; *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Further Decision on Prosecution's Motion to Admit Evidence in Rebuttal and to Reopen its Case, 27 March 2009 ("*Popović* Decision"), para. 95; *Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-T, Decision on Prosecution's Motion to Admit Evidence in Rebuttal and Incorporated Motion to Admit Evidence Under Rule 92 *bis* in its Case on Rebuttal and to Re-Open its Case for a Limited Purpose, 13 September 2004 ("*Blagojević and Jokić* Decision"), para. 6; *Prosecutor v. Galić*, Case No. IT-98-29-T, Decision on Rebuttal Evidence, 2 April 2003 ("*Galić* Decision"), para. 4; *Prosecutor v. Krstić*, Case No. IT-98-33-T, Decision on the Defence Motions to Exclude Exhibits in Rebuttal and Motion for Continuance, 4 May 2001 ("*Krstić* Decision"), para. 10).

[33] *Kordić and Čerkez* Oral Decision.

[34] *Prosecutor v. Milošević*, Case No. IT-02-54-AR73.5, Decision on the Prosecution's Interlocutory Appeal Against the Trial Chamber's 10 April 2003 Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, 28 October 2003, p. 4.

[35] *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-AR73(C), Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice, 16 June 2006, para. 42.

[36] *Prosecutor v. Lukić and Lukić*, Case No. IT-98-32/1-T, Decision on Rebuttal Witnesses, 25 March 2009 ("*Lukić and Lukić* Decision"), p. 8.

[37] *See* para. 2 *supra*.

Chamber found that the Accused's brief did not list the specific matters in the Prosecution's brief with which he took issue.[38] The Pre-trial Chamber then stated as follows:

> Nevertheless, while there are many benefits to be had from a pre-trial brief that is in full compliance with Rule 65 *ter* (F), it is also noteworthy that the start of the Accused's trial is imminent and that he must use his resources to the full extent possible to prepare for it. Accordingly, in these particular circumstances, rather than ordering the Accused to submit a revised pre-trial brief, the Chamber considers that the appropriate remedy for the Prosecution is for the Chamber to acknowledge the potential for prejudice to it in the presentation of its case. As a result, if, during the trial, the Accused makes a specific challenge to factual allegations in the Prosecution's pre-trial brief, which was not heralded in his pre-trial brief and which could not have been reasonably anticipated by the Prosecution, the Chamber may view sympathetically an application by the Prosecution to introduce evidence it had not anticipated presenting, for example, by recalling a witness. This is particularly so in relation to adjudicated facts of which judicial notice had been taken prior to the submission of the Accused's pre-trial brief.[39]

13. The extract reproduced above indicates that the Prosecution's application for additional evidence and/or for recalling witnesses may be viewed sympathetically only if the Accused makes a specific challenge that (i) was not heralded in his pre-trial brief *and* (ii) could not have been reasonably anticipated by the Prosecution. The Chamber notes that the approach taken at the time by the Pre-trial Chamber is consistent with the test for the admission of rebuttal evidence, namely that it must relate to a significant issue arising directly out of Defence evidence which could not reasonably have been anticipated by the Prosecution.

14. The Chamber also recalls its "Decision on Accused's Motion to Preclude Evidence or Withdraw Adjudicated Facts" issued on 31 March 2010 ("Adjudicated Facts Decision"), where it dealt with the Accused's request to prevent the very first Prosecution witness from testifying on the basis that some of the judicially-noticed adjudicated facts came from his evidence in a previous case. In denying that request, the Chamber first referred to the Pre-Trial Brief Decision and the assurances outlined above, and then stated as follows:

> The Chamber further notes that it is open to the Accused to challenge any or all of the judicially-noticed facts in this case and, indeed, in light of the Accused's assertions that he intends to refute all aspects of the Prosecution's case, and his refusal to identify particular areas of the Prosecution's case with which he takes issue, it may reasonably be assumed that he will attempt to do so. In this context, the Chamber considers that precluding the Prosecution from bringing evidence that may overlap with adjudicated facts at this stage of the case may bring with it the possibility that the Prosecution would consider it necessary to file an application to present substantial amounts of evidence in rebuttal, following the hearing of the defence case. This would be directly contrary to the purpose of judicially-noticing adjudicated facts, leading as it would to a potentially considerable extension in the length of the case. Therefore, while the Chamber encourages the Prosecution to ensure that it avoids tendering or leading evidence that

[38] Pre-Trial Brief Decision, para. 4.

[39] Pre-Trial Brief Decision, para. 5.

> merely supports the content of specific adjudicated facts, it is not convinced that witness evidence should be precluded simply on the basis that it overlaps with one or more adjudicated facts.[40]

15. Accordingly, in acknowledging the difficulties faced by the Prosecution due to the Accused's failure to specify his challenges, the Chamber decided to allow the Prosecution to bring evidence that overlapped to some extent with adjudicated facts judicially noticed in this case. In doing so, the Chamber attempted to alleviate some of the prejudice suffered by the Prosecution stemming from the flaws in the Accused's pre-trial brief. Indeed, throughout the case, the Prosecution availed itself of that opportunity as a large part of the crime base evidence it brought overlaps with its adjudicated facts.[41] In addition, as also explicitly stated in the Adjudicated Facts Decision, the Chamber took this decision in order to avoid a situation where the Prosecution would consider it necessary to present substantial amounts of evidence in rebuttal.

16. The Prosecution argues that it followed the instructions of the Chamber in the Adjudicated Facts Decision and, therefore, in many cases avoided tendering evidence which merely supported the content of specific adjudicated facts.[42] This strategy does not, in and of itself, mean that the Prosecution is entitled to bring rebuttal evidence whenever those specific adjudicated facts have been challenged.[43] It remains for the Prosecution to demonstrate that the test for presenting evidence in rebuttal is met in relation to each specific witness proposed as part of its rebuttal case.

17. While the Prosecution claims that the Accused's approach to adjudicated facts has been so chaotic that it could not anticipate some of the challenges that he ultimately raised, the Chamber notes that the Accused repeated on more than one occasion that he would be challenging every single adjudicated fact.[44] The Chamber itself warned the Prosecution before the start of the Prosecution's live evidence that it should assume that the Accused would attempt to do as he promised.[45] Thus, from the very beginning of this case, the Prosecution was on notice that the Accused's case would be substantial and would be based on extensive challenges to the Prosecution evidence. That being the case, the Prosecution could and should have anticipated, at

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40 Adjudicated Facts Decision, para. 17 [footnote omitted].

41 The Chamber also notes that in addition to judicially noticing over 2,000 adjudicated facts, the Chamber also admitted the evidence of 145 Prosecution witnesses pursuant to Rule 92 *bis* and 92 *quater*, and allocated to the Prosecution 300 hours for the presentation of its case. During those 300 hours, the Prosecution presented the evidence of 196 witnesses.

42 *See* Motion, para. 5.

43 *Cf. Lukić and Lukić* Decision, p. 8.

44 *See e.g.* Status Conference, T. 180 (2 April 2009); Response to First Prosecution Motion for Judicial Notice of Adjudicated Facts, 30 March 2009, paras. 6–9; Response to Third Prosecution Motion for Judicial Notice of Adjudicated Facts and Motion for List of Witnesses to be Eliminated, 29 May 2009, para. 2; Response to Second Prosecution Motion for Judicial Notice of Adjudicated Facts, 22 July 2009, para. 2.

45 *See* para. 14 *supra* citing to Adjudicated Facts Decision, para. 17.

the very least, some of the more obvious challenges that could be made to its evidence, for example, challenges to the origin and/or direction of fire for shelling incidents and to the alleged civilian status of victims for killing incidents.

18. The Prosecution goes further and claims that rebuttal evidence should be permitted even where notice of challenges to specific adjudicated facts has been given, as otherwise the object and purpose of Rule 94(B) would be undermined.[46] The Prosecution relies on the Sarajevo Decision which dealt with, *inter alia*, the Accused's request during the Prosecution case to strike out one of the alleged incidents from the Indictment on the basis that the Prosecution relied entirely on adjudicated facts in relation thereto; in support, the Accused argued that the presumption created by those specific adjudicated facts would disappear once his case started and he began to elicit evidence relating to the incident.[47] The Chamber denied the request, stating as follows:

> Finally, the Chamber considers that the Accused's argument regarding the effect of adjudicated facts with respect to incident G5 is misguided. As stated by the Appeals Chamber, the effect of adjudicated facts which are judicially noticed under Rule 94 (B) of the Rules is only to relieve the Prosecution of its initial burden to produce evidence on the point. The Accused may then put that point into question by introducing reliable and credible evidence to the contrary. If and when he does so, the Prosecution may still choose to present additional evidence on the point during its rebuttal case. [...] In addition, accepting the Accused's argument in relation to incident G5 would effectively render Rule 94 (B) ineffectual as the Prosecution would never be able to rely on adjudicated facts if it had notice that the defence would challenge them. Accordingly, the Chamber does not consider that this particular incident should be removed from the Indictment on the basis that the Prosecution is, at this point, relying solely on adjudicated facts in relation thereto.[48]

19. The Chamber notes that nothing in the quotation above suggests that a rebuttal request would be granted as a matter of course, even when the Prosecution is on notice as to the specific challenge to an adjudicated fact. In addition, the Chamber's comment about the purpose of Rule 94(B) being rendered ineffectual was made in the context of the Accused's argument that the Chamber should strike out incident G.5 from the Indictment because it was supported solely by adjudicated facts which he was about to challenge later in time. The Chamber considered that removing incidents from an indictment on the basis of a simple notice that adjudicated facts related thereto would be challenged while no evidence supporting that challenge had yet been brought, would render Rule 94(B) ineffectual. This does not mean, however, that Rule 94(B) would also be rendered ineffectual if the Prosecution was not allowed to lead evidence in rebuttal to support a number of its adjudicated facts. Regardless of whether or not rebuttal evidence is led, it remains for the Chamber, during its deliberations on the entire trial record, to weigh the adjudicated facts at

[46] Motion, para. 7.

[47] Sarajevo Decision, para. 2.

[48] Sarajevo Decision, para. 11 [footnote omitted].

issue against the reliability and credibility of the challenging evidence presented by the opposing side.

20. Finally, the Prosecution generally submits that it offers the proposed rebuttal evidence "in case the Trial Chamber finds that the Defence has successfully put any of the adjudicated facts at issue into question".[49] However, bolstering the Prosecution case, be it through supplementing adjudicated facts or reinforcing live evidence, is not a valid reason for allowing presentation of rebuttal evidence.[50] The sole query is whether a significant issue arose out of Defence evidence that could not reasonably have been anticipated by the Prosecution.

21. In light of the discussion above, the Chamber will consider the Motion with respect to each proposed witness separately by looking at the circumstances surrounding each witness and in particular (i) whether the proposed rebuttal evidence is a significant issue that arose out of the Defence evidence and (ii) whether the Prosecution had notice of the Accused's challenges in relation thereto and, in the negative, whether it could have nevertheless reasonably anticipated those challenges.

B. Municipalities Witnesses

(1) Bijeljina: Scheduled Incident A.1.1 of the Indictment

22. In the Motion, the Prosecution submits that in order to support its allegations in relation to Scheduled Incident A.1.1, the alleged killing of at least 48 civilians by Bosnian Serb forces during the takeover of Bijeljina, it relied almost entirely on adjudicated facts.[51] It argues that it could not have reasonably foreseen that the Accused would challenge these adjudicated facts because he initially only challenged them on "procedural grounds" and not on their accuracy.[52] The Prosecution submits that during the Defence case, the Accused called witnesses who testified that the armed conflict in Bijeljina was started by the Bosnian Muslims, the conflict broke out spontaneously, and the victims were mainly "battle casualties" rather than victims of deliberate killings.[53] The Prosecution submits that the Defence evidence goes beyond the adjudicated facts about the alleged killings in Bijeljina and impacts the Prosecution case about the nature and organisation of the attack on non-Serb civilians in Bijeljina.[54] In rebuttal, the Prosecution seeks to

[49] Motion, para. 7.
[50] *See* para. 10 *supra*.
[51] Motion, para. 12.
[52] Motion, para. 13.
[53] Motion, para. 13.
[54] Motion, para. 14.

tender the evidence of Haviv, a photojournalist who was present in Bijeljina in early April 1992 and accompanied Arkan's men when they allegedly killed four Bosnian Muslim civilians; Haviv was able to photograph three of the alleged killings and he witnessed the mistreatment of another Bosnian Muslim man.[55]

23. The Chamber notes that in order to support its allegations in relation to Scheduled Incident A.1.1, the Prosecution relied on Adjudicated Facts 2243 to 2246. The Prosecution also led the evidence of Rule 92 *ter* and Rule 92 *bis* witnesses who testified about killings in Bijeljina during and after the takeover and also about the situation in Bijeljina leading up to the alleged takeover.[56]

24. During the Defence phase of the case, the Accused challenged a number of the Adjudicated Facts on which the Prosecution relied for the purpose of supporting its allegations regarding this municipality. Specifically, the Accused adduced evidence in his Defence case with respect to Scheduled Incident A.1.1 to suggest that most of the casualties in Bijeljina occurred during the course of fierce fighting between Bosnian Serb and Bosnian Muslim forces, who wore civilian clothes and put up armed resistance and that these clashes were largely initiated by Bosnian Muslims.[57] According to the Prosecution, Haviv, who is proposed in rebuttal, could testify about the execution and mistreatment of Bosnian Muslim civilians by Arkan's men.[58]

25. The Chamber finds that the challenges with respect to the status of the purported victims of Scheduled Incident A.1.1, as well as the nature of the conflict and alleged takeover of Bijeljina are significant issues which have arisen directly out of Defence evidence presented on this issue. However, while the Chamber notes that none of the above challenges by the Accused were heralded in his pre-trial brief, it considers that, given their nature, they could reasonably have been anticipated by the Prosecution. The Prosecution could have reasonably anticipated that the Accused would challenge the circumstances in which the takeover of Bijeljina is alleged to have occurred and that he would challenge the status of the individuals who were allegedly killed during the takeover of the town as well as the circumstances in which they were killed.

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55 Motion, para. 15.

56 KDZ023, P65 (Transcript from *Prosecutor v. S. Milošević*), T. 26123–26124; P2919 (Witness statement of KDZ023 dated 29 September 1996), p. 5; P4850 (Witness statement of Amor Mašović dated 23 March 2012), para. 118; Amor Mašović, T. 27218–27219 (10 April 2012).

57 D3140 (Witness statement of Živan Filipović dated 18 March 2013), para. 22. *See also* D3089 (Witness statement of Milivoje Kićanović dated 3 March 2013), para. 24 (claiming that there were 42 victims and that this number included seven Bosnian Serbs and that the Bosnian Muslims who had previously shot at him were not in uniform); D3133 (Witness statement of Cvijetin Simić dated 16 March 2013), para. 39; Cvijetin Simić, T. 35633 (19 March 2013) (stating that the armed Bosnian Muslims who guarded barricades were not in uniforms). *See also* D3142 (Criminal report against Hasan Tirić), pp. 51–52 (listing 31 people who were killed at the barricade near the hospital while they were putting up armed resistance); D1463 (Bijeljina District Council letter to Cyrus Vance and Radovan Karadžić, 16 April 1992).

58 Motion, paras. 11–16.

26. Accordingly, the Chamber will not allow the Prosecution to present the evidence of Ron Haviv in order to rebut the challenges which arose out of Defence evidence with respect to events in Bijeljina.

(2) Bratunac: Scheduled Incident A.3.1 of the Indictment

27. In the Motion, the Prosecution submits that it has relied almost entirely on adjudicated facts to support its allegations in relation to Scheduled Incident A.3.1 that on 3 May 1992, Bosnian Serb forces attacked Hranča and burned 43 houses and, in the week following this attack, killed 12 Bosnian Muslim villagers.[59] The Prosecution argues that it could not have reasonably foreseen that the Accused would challenge these adjudicated facts because he initially only challenged them on "procedural grounds" and not on their accuracy.[60] However, it argues that the Accused challenged these adjudicated facts by calling witnesses who testified that the attack was a result of "a conflict that arose when the Muslims attacked a passing JNA column, and the resulting deaths were battle casualties rather than victims of deliberate killings".[61] It submits that (i) proposed rebuttal witness Hodžić was a resident of Hranča and an eye-witness to the events who will testify that the Bosnian Muslims in the village were disarmed prior to 3 May 1992, and that (ii) proposed rebuttal witness Arifović, also a resident of Hranča and an eye-witness to the events, will describe the 3 May 1992 attack, the killing of a young girl, the burning and looting of the village, and the detention and expulsion of the civilians.[62]

28. The Chamber notes that in order to support its allegations in relation to Scheduled Incident A.3.1 of the Indictment, the Prosecution relied almost exclusively on Adjudicated Facts 2316 to 2318 and also a Rule 92 *ter* witness who testified that he heard about these killings.[63]

29. During the Defence phase of the case, the Accused adduced some evidence with respect to Scheduled Incident A.3.1 which suggested that the attack on Hranča arose after Bosnian Muslims attacked a passing JNA column and the deaths that ensued resulted from battle and not from

[59] Motion, para. 18.
[60] Motion, para. 19.
[61] Motion, para. 20.
[62] Motion, paras. 22–23.
[63] P3188 (Witness statement of Mušan Talović dated 14 July 2011), para. 16.

deliberate killings.[64] According to the Prosecution, Hodžić and Arifović can testify about the deliberate attack against the village and the killing of residents.[65]

30. The Chamber finds that the challenges with respect to the nature of the attack on the village of Hranča and the way in which the purported victims of Scheduled Incident A.3.1 died are significant issues which have arisen directly out of Defence evidence presented on this issue. However, while the Chamber notes that none of the above challenges by the Accused were heralded in his pre-trial brief, it considers that, given their nature, they could reasonably have been anticipated by the Prosecution. The Prosecution could have reasonably anticipated that the Accused would challenge the circumstances in which the attack on the village of Hranča is alleged to have occurred, as well as how individuals were allegedly killed. Furthermore, during the Prosecution case, the Accused cross-examined a Prosecution witness about the alleged attack on the JNA column in Hranča and tendered into evidence a document to support his point.[66]

31. Accordingly, the Chamber will not allow the Prosecution to present the evidence of Ramo Hodžić and Šaha Arifović in order to rebut the challenges which arose out of Defence evidence in relation to events in Bratunac with respect to Scheduled Incident A.3.1.

(3) Foča

i. Acts of persecutions

32. In the Motion, the Prosecution submits that it relied almost entirely on adjudicated facts to support its allegations that in April 1992 in Foča, Bosnian Serb civilian and military authorities persecuted the non-Serb population through "killings, forcible transfer, large-scale arrests, property destruction, dismissals, house searches, restrictions on movement and communications, and confiscation of property".[67] The Prosecution argues that it could not have reasonably foreseen that the Accused would challenge these adjudicated facts as he initially only challenged them on "procedural grounds" and not on their accuracy.[68] It submits that proposed rebuttal witness KDZ060 will provide evidence about the alleged large-scale arrests, detention, abuse, and killing of non-Serb civilians; the deliberate destruction of Bosnian Muslim property and mosques; the denial

[64] D3398 (Witness statement of Ljubisav Simić dated 7 April 2013), para. 56; D3690 (Witness statement of Neđo Nikolić dated 8 June 2013), para. 8; D3174 (Witness statement of Vujadin Stević dated 23 March 2013), para. 13; D3194 (Witness statement of Rodoljub Đukanović dated 24 March 2013), para. 39; D3852 (Witness statement of Mirko Perić dated 1 July 2013), para. 10.

[65] Motion, paras. 17–24.

[66] Mušan Talović, T. 17660–17661 (22 August 2011); D1644 (Video footage of attack on JNA troops).

[67] Motion, para. 26, referring to Adjudicated Facts 749, 752, 767–768, 770–774, 776–777, 903–907, 909–910, 913–914, and 2410.

[68] Motion, para. 27.

of medical treatment to the Bosnian Muslims; transferring property to the Bosnian Serbs; and the restrictive measures imposed on Bosnian Muslims that led to their leaving the area.[69] Proposed rebuttal witness Avdić is expected to testify about the attack on Foča by the Bosnian Serb army ("VRS"); the treatment of Bosnian Muslims by the military police; the burning and looting of Bosnian Muslim houses and mosques; and his treatment while detained at the KP Dom prison.[70] Proposed rebuttal witness Lojo is expected to testify about the takeover of Foča by the VRS; being forced to leave Foča; his treatment while detained at the KP Dom prison; and the transfer of his property to the Bosnian Serbs.[71] Finally, the Prosecution seeks to tender the evidence of KDZ030 who can testify about the attacks on Bosnian Muslim villages in Foča.[72] The Chamber notes that KDZ030's proposed rebuttal evidence is also being tendered for the purposes of Scheduled Incident A.5.4 and scheduled detention facilities in Foča, which are discussed below.

33. The Chamber notes that in order to support its allegations in relation to the alleged acts of persecutions in Foča, including killings, forcible transfer, arrests, property destruction, dismissals, house searches, restrictions on movement and communications, and confiscation of property the Prosecution relied on Adjudicated Facts 749, 752, 767 to 768, 770 to 774, 776 to 777, 903 to 907, 909 to 910, and 913 to 914. The Prosecution also led the evidence of several 92 *ter* witnesses and a 92 *bis* about actions taken against Bosnian Muslims in Foča.[73]

34. During the Defence phase of the case, the Accused adduced evidence to suggest that civilian authorities in Foča (i) treated Bosnian Muslims the same way as Bosnian Serbs and took measures to ensure their safety; (ii) allowed Bosnian Muslims to remain in their villages and did not force them to sign over their property; (iii) did not restrict movement; and (iv) were not responsible for the killings in the town which were isolated cases.[74] According to the Prosecution, proposed rebuttal witnesses KDZ060, Safet Avdić, Dževad Lojo, and KDZ030, four residents of Foča, can provide evidence in support of its allegations of persecutions in Foča.[75]

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69 Motion, para. 30.

70 Motion, para. 31.

71 Motion, para. 32.

72 Motion, para. 33.

73 KDZ239, P3336 (Transcript from *Prosecutor v. Krnojelac*), T. 1188–1189; KDZ017, T. 19890 (5 October 2011); KDZ379, P3332 (Transcript from *Prosecutor v. Krnojelac*); P90 (Witness statement of KDZ216 dated 8 June 1998), (under seal).

74 D3314 (Witness statement of Radojica Mladenović dated 1 April 2013), paras. 39, 46, 51, 57; D2767 (Witness statement of Milutin Vujičić dated 14 January 2013), paras. 7–8, 15–16, 30–31; Milutin Vujičić, T. 32124, 32133, 32145–32146, (17 January 2013); Trifko Pljevaljčić, T. 32306, 32322, 32342 (21 January 2013). *See also* D1690 (Announcement of Foča Municipal Assembly, 7 April 1992).

75 Motion, paras. 25–33.

35. The Chamber finds that challenges with respect to the alleged acts of persecutions against the Bosnian Muslims in Foča are significant issues which have arisen directly out of Defence evidence presented on this issue. However, while the Chamber notes that none of the above challenges by the Accused were heralded in his pre-trial brief, it considers that, given their nature, they could reasonably have been anticipated by the Prosecution. The Prosecution could have reasonably anticipated that the Accused would challenge the acts of persecution which are charged with respect to Foča by bringing evidence which would seek to refute the Prosecution's evidence about the mistreatment of the Bosnian Muslim population by the Bosnian Serb authorities. Furthermore, during the Prosecution's case, the Accused cross-examined a number of Prosecution witnesses about the request made by Bosnian Serb authorities in Foča for all residents not to move out and to return to the municipality.[76]

36. Accordingly, the Chamber will not allow the Prosecution to present the evidence of KDZ060, Safet Avdić, Dževad Lojo, and KDZ030 in order to rebut the challenges which arose out of Defence evidence with respect to the alleged acts of persecution in Foča.

ii. Mješaja/Trošanj: Scheduled Incident A.5.4 of the Indictment

37. Given the confidential nature of some of the evidence pertaining to this Scheduled Incident, the Prosecution's submissions are detailed in a confidential annex appended to this decision.[77]

38. The Chamber notes that in order to support its allegations in relation to Scheduled Incident A.5.4, the alleged killing of a number of people hiding in the woods near Mješaja/Trošanj in the municipality of Foča, the Prosecution relied exclusively on Adjudicated Facts 2398 to 2401.

39. During the Defence phase of the case, the Accused presented evidence with respect to Scheduled Incident A.5.4 to suggest that people in the village of Trošanj had not surrendered their weapons and that Gojko Janković rather than being responsible for the attack on this village was sent to see how the Bosnian Serb and Bosnian Muslim population could be rescued after Bosnian Muslim attacks.[78] According to the Prosecution, proposed rebuttal witness KDZ030 will describe details pertaining to the attack on the village of Trošanj.[79]

[76] KDZ239, T. 18983 (16 September 2011); KDZ379, T. 18835 (15 September 2011); KDZ017, T. 19868–19869, 19872 (4 October 2011) (private session).

[77] *See* Confidential Annex, para. 1.

[78] D3314 (Witness statement of Radojica Mladenović dated 1 April 2013), para. 41; D3316 (Agreement between Trošanj Muslim representatives and Foča authorities, 24 April 1992); Milutin Vujičić, T. 32128 (17 January 2013).

[79] Motion, Confidential Appendix A, para. 80.

40. The Chamber finds that the challenges with respect to Scheduled Incident A.5.4, including who led the attack and the surrounding circumstances of the attack, are significant issues which have arisen directly out of Defence evidence presented on this issue. However, while the Chamber notes that none of the above challenges by the Accused were heralded in his pre-trial brief, it considers that, given their nature, they could reasonably have been anticipated by the Prosecution. The Prosecution could have reasonably anticipated that the Accused would challenge the circumstances under which the village of Trošanj was attacked and who was allegedly responsible for leading this operation.

41. Accordingly, the Chamber will not allow the Prosecution to present the evidence of KDZ030 in order to rebut the challenges which arose out of Defence evidence in relation to events in Foča with respect to Scheduled Incident A.5.4.

iii. Buk Bijela (Scheduled Incident C.10.4), Foča High School (Scheduled Incident C10.7), Partizan Hall (Scheduled Incident C.10.5), and Karaman's House (Scheduled Incident C.10.2)

42. In the Motion, the Prosecution submits that it has relied entirely on adjudicated facts and one Rule 92 *bis* witness statement to support the allegations of the detention of Bosnian Muslim women and the crimes that occurred at Buk Bijela, Foča High School, Partizan Hall, and Karaman's House.[80] In addition to its argument that it could not have reasonably foreseen that the adjudicated facts would be challenged by the Accused, the Prosecution also submits that the Accused only raised general objections to all of the Prosecution's Rule 92 *bis* motions and therefore it was not on notice that the Accused would challenge this evidence.[81] During the Accused's defence case, the Accused brought witnesses who testified that the Bosnian Muslim women were taken to these facilities for their own protection and that measures were taken to guard the persons in these facilities.[82] The Prosecution submits that the Defence evidence is equivocal; however it still seeks to tender the evidence of KDZ030 in relation to Scheduled Incidents C.10.2, C.10.4, C.10.5, and C.10.7.[83]

43. The Chamber notes that in order to support its allegations in relation to Scheduled Detention Facilities C.10.2, C.10.4, C.10.5, and C.10.7 in Foča and the alleged mistreatment of

[80] Motion, para. 35.
[81] Motion, para. 36.
[82] Motion, para. 37.
[83] Motion, paras. 37–38.

detainees in these facilities, the Prosecution has relied on Adjudicated Facts 787 to 797, 799 to 821, and 2406 to 2408, as well as the evidence of a Rule 92 *bis* witness.[84]

44. During the Defence phase of the case, the Accused adduced evidence to suggest that women were brought to detention facilities in Foča for their own protection, the authorities issued strict orders to guard the persons in the facilities, and that people were free to leave.[85] According to the Prosecution, proposed rebuttal witness KDZ030 will testify about Scheduled Detention Facilities in Foča.[86]

45. The Chamber finds that the challenges with respect to these Scheduled Detention Facilities and the conditions and reasons for detention are significant issues which have arisen directly out of Defence evidence presented on this issue. However, while the Chamber notes that none of the above challenges by the Accused were heralded in his pre-trial brief, it considers that, given their nature, they could reasonably have been anticipated by the Prosecution. The Prosecution could have reasonably anticipated that the Accused would challenge the reasons why Bosnian Muslims were being kept in the detention facilities in Foča and the conditions of detention.

46. Accordingly, the Chamber will not allow the Prosecution to present the evidence of KDZ030 in order to rebut the challenges which arose out of Defence evidence with respect to Scheduled Detention Facilities in Foča.

(4) Ključ

i. Prhovo and the road to Pećl: Scheduled Incident A.7.2 of the Indictment

47. In the Motion, the Prosecution submits that it has relied on nine adjudicated facts and the evidence of a Rule 92 *bis* witness to support the allegations related to Scheduled Incident A.7.2, that it could not have reasonably foreseen that the adjudicated facts would be challenged by the Accused, and that it was not on notice of any specific challenges to the Rule 92 *bis* evidence.[87] It argues that during the Accused's defence case, the Accused brought witnesses who testified that Adamović was not the commander of the unit in question and did not participate in the alleged killings and also refuted the numbers of the VRS soldiers involved, that the alleged killings were

[84] P90 (Witness statement of KDZ216 dated 8 June 1998), (under seal); KDZ216, P69 (Transcript from *Prosecutor v. Kunarac*, Case No. IT–96–23&23/1) (under seal).

[85] Milutin Vujičić, T. 32096, 32131–32132 (17 January 2013); D2767 (Witness statement of Milutin Vujičić dated 14 January 2013), paras. 11, 33; Trifko Pljevaljčić, T. 32343–32344 (21 January 2013).

[86] Motion, para. 38.

[87] Motion, paras. 40–41, referring to witness KDZ056.

not organised or deliberate and that the target of the attack were Bosnian Muslim paramilitary groups and not the civilian population.[88]

48. The Chamber notes that during its case, in order to support the allegations relating to Scheduled Incident A.7.2, the Prosecution relied on Adjudicated Facts 922 to 928 and 2437 to 2438, as well as on the testimony of KDZ056,[89] which was tendered and admitted pursuant to Rule 92 *bis*.[90] According to the Prosecution, this evidence suggests that during an attack on Prhovo on or about 1 June 1992, which was carried out by approximately 100 soldiers commanded by Marko Adamović, unarmed men were shot and Adamović ordered the soldiers to set fire to the village and to kill the women and children.[91]

49. Three witnesses gave evidence relating to Scheduled Incident A.7.2 during the Defence phase of the case. Adamović denied having led the unit involved in the incident at Prhovo, suggested that another unit had been involved, and referred to his acquittal before the Court of BiH.[92] Rajko Kalabić testified that Adamović visited the municipal offices in Ključ on several occasions on 1 June 1992 and accordingly, could not have been in Prhovo on that date.[93]

50. Adamović also testified that the commander of the military police platoon that was involved in the Prhovo incident had told him that his unit had come under fire from "Muslim extremists" as it was leaving the village, and that, in a panic, the platoon commander's men had opened fire randomly in the direction from which the fire had come.[94] Jovo Kevac testified that "Muslim paramilitary formations" and not the village of Prhovo had been the target of an attack, and that "Muslim extremists" attacked a military police patrol in Prhovo.[95]

51. The Prosecution now proposes to call Medanović to testify pursuant to Rule 92 *ter* in order to rebut the testimony of these three Defence witnesses.[96] Specifically, Medanović is expected to testify: (i) that the Prhovo villagers surrendered to the Bosnian Serb soldiers; (ii) that the individuals who were killed were unarmed civilians; (iii) that the process whereby men, women,

88 Motion, para. 42.

89 Motion, para. 40.

90 KDZ056, P686 (Transcript from *Prosecutor v. Brđanin*).

91 Motion, para. 41.

92 D4165 (Witness statement of Marko Adamović dated 1 December 2013), paras. 8, 9, 23.

93 D4169 (Witness statement of Rajko Kalabić, 1 December 2013), para. 18.

94 D4165 (Witness statement of Marko Adamović dated 1 December 2013), para. 3.

95 D4268 (Witness statement of Jovo Kevac dated 25 January 2014), paras. 8, 17. Kevac also testified that he had never heard of and "does not believe that" Adjudicated Facts 923, 924, 925, 926, and 927 are true, because he "would have learned about it". D4268 (Witness statement of Jovo Kevac dated 25 January 2014), paras. 18–22.

96 The Chamber observes that it is unclear from the Motion whether the Prosecution proposes to tender an eight page written statement (65 *ter* 26073) or Medanović's testimony in the *Krajišnik* case (65 *ter* 25943) pursuant to Rule 92 *ter*. Motion, paras. 39–44; Annex B.

and children were lined up and individuals singled out, beaten, and shot was organised; (iv) that Marko Adamović was the commander of the unit; (v) that Adamović ordered that the village be burned down and the women and children killed; and (vi) that the process whereby the men were killed on the road to Peći was deliberate and not random as Adamović testified.[97]

52. The bulk of Medanović's proposed rebuttal testimony relates to the significant issues of whether the alleged killings were organised in nature, as well as whether civilians were targeted.[98] Although the Prosecution submits that it could not have reasonably foreseen if and how the Adjudicated Facts relating to Scheduled Incident A.7.3 would be challenged,[99] the Chamber considers that, while none of the above challenges by the Accused were heralded in his pre-trial brief, the Prosecution could and should have reasonably anticipated that, in light of his admonition that he intended to refute all aspects of the Prosecution's case, the Accused would challenge the alleged organised nature of the killings and the alleged civilian status of the victims.

53. Accordingly, the Chamber will not allow the Prosecution to present the evidence of Azim Medanović in order to rebut the challenges brought by the Accused in relation to Scheduled Incident A.7.2.

ii. Velagići: Scheduled Incident B.10.1

54. In the Motion, the Prosecution submits that, to support the allegations related to Scheduled Incident B.10.1, it has relied on four adjudicated facts supplemented by the evidence of a Rule 92 *bis* witness.[100] According to the Prosecution, it could not have reasonably foreseen that the adjudicated facts would be challenged by the Accused and it was not on notice of any specific challenges to the Rule 92 *bis* evidence.[101] The Prosecution submits that the evidence it seeks to tender in rebuttal will, *inter alia,* supplement the written evidence already on the record and provide the Accused with an opportunity to put his case to the witness in question.[102]

97 Motion, paras. 43–44.

98 The Chamber considers that the precise number of men in the VRS unit involved in the incident at Prhovo and the specific identity of their commander pertain to an issue which arises directly from the Defence evidence. However, they are not so significant as to merit the presentation of rebuttal evidence. *See* D4165 (Witness statement of Marko Adamović dated 1 December 2013), para. 8 (suggesting that only one platoon of military police—between 30 and 40 men— had been involved in the incident at Prhovo).

99 Motion, para. 41.

100 Motion, Confidential Appendix A, para. 82.

101 Motion, Confidential Appendix A, paras. 82–83.

102 Motion, Confidential Appendix A, para. 85.

55. Given the confidential nature of some of the evidence pertaining to this Scheduled Incident, the Chamber will detail the Prosecution's submissions in the confidential annex appended to this decision.

56. The Chamber considers that providing the Accused with an opportunity to put his case to a Rule 92 *bis* witness and enabling the Chamber to assess that witness's credibility first-hand are considerations that are properly taken into account by the moving party when filing a motion pursuant to Rule 92 *bis* rather than in relation to a motion to tender evidence in rebuttal. Similarly, providing an opportunity to supplement written evidence that has already been admitted pursuant to Rule 92 *bis* is not a factor that is germane to an analysis of whether the rebuttal standard has been met.

57. The Chamber acknowledges that the alleged uncontrolled nature of the killings described in Scheduled Incident B.10.1 as well as the identity of the perpetrators of the incident are significant issues that arise directly from the evidence presented during the Defence phase of the case. However, although the Prosecution submits that it could not have reasonably foreseen if and how the Adjudicated Facts relating to Scheduled Incident B.10.1 would be challenged,[103] the Chamber considers that, given the Accused's admonition that he intended to refute all aspects of the Prosecution's case, the Prosecution could and should have reasonably anticipated that the Accused would challenge the alleged organised nature of the killings and the identity of the perpetrators.

58. Accordingly, the Chamber will not allow the Prosecution to call KDZ024 to testify pursuant to Rule 92 *ter* in order to rebut the challenges brought by the Accused in relation to Scheduled Incident B.10.1.

(5) Prijedor

i. Keraterm Room 3 killings: Scheduled Incident B.15.1 of the Indictment

59. In the Motion, the Prosecution submits that the evidence in relation to Scheduled Incident B.15.1 is based on five adjudicated facts, as supplemented by three witnesses whose evidence was admitted pursuant to Rule 92 *bis*.[104] It argues that it could not have reasonably foreseen that the adjudicated facts would be challenged by the Accused and that it was not on notice of any specific challenge to the evidence of the three Rule 92 *bis* witnesses.[105] It submits that during the Defence case, the Accused called witnesses who testified that the alleged killings occurred as the result of a

[103] Motion, Confidential Appendix A, para. 83.
[104] Motion, para. 46.
[105] Motion, para. 47.

rebellion or an escape attempt by the detainees or was a spontaneous revenge act.[106] To rebut this evidence, the Prosecution submits that Tači, who was a detainee at Keraterm camp, will testify that although he was not in Room 3 when the alleged killing occurred, he observed the manner in which the detainees in Room 3 were killed and how their bodies were removed the following day.[107]

60. The Chamber notes that in order to support its allegations in relation to Scheduled Incident B.15.1, the alleged killing of approximately 150 people in Room 3, the Prosecution relied on: (i) Adjudicated Facts 1215 to 1219; and (ii) the evidence of three witnesses admitted pursuant to Rule 92 *bis*—KDZ050, Jusuf Arifagić, and Safet Tači.[108] According to the Prosecution, this evidence suggests that on or about 24 July 1992, Bosnian Serb personnel entered Keraterm camp and a gun was placed on a table outside Room 3 where 200 residents from the Brdo area were detained; later that evening, gun shots and human cries were heard. The next morning, dead bodies were piled outside of Room 3 and the area was covered with blood. A truck arrived to remove the bodies and a fire engine cleaned Room 3 and the area.[109]

61. During the Defence phase of the case, the Accused adduced evidence with respect to Scheduled Incident B15.1 to suggest that the killings which occurred in Room 3 at Keraterm were not the result of a planned massacre. Draško Vujić and Dušan Janković testified that there had been a "rebellion" or "mutiny" on behalf of the detainees at Keraterm and that firearms were used and many people killed as a result.[110] Dragan Radetić testified that he heard that some of the detainees at Keraterm attempted to escape from Keraterm and that some of them were killed.[111] Finally, Milomir Stakić testified that according to his intelligence at the time, after several Serbian soldiers were killed at the front line, members of their unit "raided Keraterm and killed several dozens of prisoners out of revenge".[112]

62. In rebuttal, the Prosecution proposes to call Tači in order to supplement his written evidence already admitted under Rule 92 *bis*, provide the Accused with an opportunity to put his case to the

[106] Motion, para. 48.

[107] Motion, para. 49.

[108] KDZ050, P680 (Transcript from *Prosecutor v. Sikirica*); Jusuf Arifagić, P689 (Transcript from *Prosecutor v. Stakić*); Safet Tači, P693 (Transcript from *Prosecutor v. Kvočka*).

[109] Adjudicated Facts 1215–1219; KDZ050, P679 (Transcript from *Prosecutor v. Sikirica*), T. 2507–2518 (under seal); Jusuf Arifagić, P689 (Transcript from *Prosecutor v. Stakić*), T. 7095–7104; Safet Tači, P693 (Transcript from *Prosecutor v. Kvočka*), T. 3763–3770.

[110] D4242 (Witness statement of Draško Vujić dated 24 January 2014), para. 8; Dušan Janković, T. 47282–47283 (18 February 2014).

[111] D4226 (Witness statement of Dragan Radetić dated 17 January 2014), para. 49.

[112] D4195 (Witness statement of Milomir Stakić dated 16 November 2013), para. 24; Milomir Stakić, T. 45286–45287 (17 December 2013).

witness, and enable the Chamber to assess his credibility first-hand.[113] The Prosecution submits that Tači's evidence rebuts the evidence brought by the Accused regarding Scheduled Incident B.15.1 and supports the Prosecution's case that the Room 3 killings at Keraterm was a planned, deliberate massacre.[114]

63. The Chamber first recalls that, as mentioned above, supplementing written evidence that has already been admitted under Rule 92 *bis* by calling the very same witness is neither an appropriate use of rebuttal evidence nor germane to whether the rebuttal test has been met.[115] Turning now to the rebuttal test, the Chamber considers that the challenges brought by the Accused with respect to Scheduled Incident B.15.1 and whether the alleged killings in Room 3 at Keraterm were planned, as well as the circumstances surrounding the alleged killings, are significant issues that arise directly out of the evidence presented by the Accused. However, while the Chamber notes that none of the above challenges by the Accused were heralded in his pre-trial brief, it considers that, given their nature, the challenges presented by the Accused on this particular scheduled incident could reasonably have been anticipated by the Prosecution. Given the Accused's statement that he would challenge every charge against him, including any adjudicated fact that may have been judicially noticed, the Chamber considers that the Prosecution could have reasonably anticipated that the Accused would challenge the alleged organised nature of all the killing incidents in Prijedor, and especially those associated with the larger alleged camps in Prijedor, such as Keraterm.

ii. Alleged beatings during interrogations at Keraterm: Scheduled Incident C.20.3 of the Indictment

64. In the Motion, the Prosecution submits that in relation to the allegation that beatings occurred during interrogations at Keraterm, it has relied on one adjudicated fact and the evidence of two Rule 92 *bis* witnesses.[116] Although the Accused did not object to the admission of this adjudicated fact, the Prosecution argues that he led evidence that detainees at Keraterm were treated properly and the prospective evidence of Tači will rebut this evidence.[117] It submits that although Tači's evidence on these issues is already in evidence pursuant to Rule 92 *bis*, calling Tači

[113] *See* Motion, para. 50.
[114] *See* Motion, para. 50.
[115] *See* para. 56 *supra*.
[116] Motion, para. 51.
[117] Motion, paras. 51–52.

to testify would supplement his written evidence, give the Accused an opportunity to put his case to the witness, and also allow the Chamber to assess Tači's credibility firsthand.[118]

65. The Chamber notes that in order to establish that detainees at Keraterm were beaten during interrogations there, the Prosecution has relied on: (i) Adjudicated Fact 1206; and (ii) the evidence of three witnesses admitted pursuant to Rule 92 *bis*—KDZ050, Arifagić, and Tači.[119] According to the Prosecution, this evidence establishes that detainees were frequently beaten while being interrogated.[120]

66. During his case, the Accused elicited evidence to rebut that beatings occurred during interrogations at Keraterm. In particular, Dragan Radetić testified that he did not recall or hear of any verbal or physical torture of detainees there, and had there been such cases, he would have remembered them; moreover, he stated that all persons interviewed at Keraterm were treated properly.[121] In rebuttal, the Prosecution also proposes to call Tači to testify to rebut the evidence elicited by the Accused that interrogations were not accompanied by beatings at Keraterm.[122]

67. The Chamber again recalls that, as mentioned above, supplementing written evidence that has already been admitted under Rule 92 *bis* by calling the very same witness is neither an appropriate use of rebuttal evidence nor germane to whether the rebuttal test has been met.[123] Turning now to the rebuttal test, the Chamber considers that the challenges brought by the Accused with respect to the conditions at Keraterm, and in particular whether beatings occurred there, are significant issues that arise directly out of the evidence presented by the Accused during his defence case. However, while the Chamber notes that none of the above challenges by the Accused were heralded in his pre-trial brief, it considers that the Prosecution could have reasonably anticipated that the Accused would bring evidence to refute Prosecution evidence about the mistreatment of detainees at Keraterm. Specifically, the Prosecution could have reasonably anticipated that the Accused would call an insider witness who would testify that beatings did not occur at Keraterm and/or that he never witnessed such beatings himself.

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118 Motion, para. 50.

119 KDZ050, P680 (Transcript from *Prosecutor v. Sikirica*); Jusuf Arifagić, P689 (Transcript from *Prosecutor v. Stakić*); Safet Tači, P693 (Transcript from *Prosecutor v. Kvočka*).

120 *See also* Adjudicated Facts 1215–1219; KDZ050, P679 (Transcript from *Prosecutor v. Sikirica*), T. 2500–2507 (under seal); Jusuf Arifagić, P689 (Transcript from *Prosecutor v. Stakić*), T. 7083–7094; Safet Tači, P693 (Transcript from *Prosecutor v. Kvočka*), T. 3755–3763.

121 D4226 (Witness statement of Dragan Radetić dated 17 January 2014), paras. 32, 44, 45.

122 *See* Motion, para. 52.

123 *See* para. 56 *supra*.

68. Accordingly, the Chamber will not allow the Prosecution to present the evidence of Safet Tači in order to rebut the challenges which arose out of evidence brought by the Accused with respect to Scheduled Incident B.15.1 or Scheduled Incident C.20.3.

C. Sarajevo Witnesses

69. As noted above, the Prosecution proposes to present the evidence of two witnesses, namely Hamdija Čavčić and Todd Cleaver, in order to rebut Sarajevo-related evidence led by the Accused during his case.

i. Hamdija Čavčić (Scheduled Incident G.5)

70. In the Motion, the Prosecution proposes to tender the evidence of Čavčić, which it submits will rebut the Accused's challenges to 12 adjudicated facts related to Scheduled Incident G.5.[124] The Prosecution submits that it could not have reasonably foreseen if and how these facts would be challenged because the Accused only challenged them on "procedural grounds" and not on their accuracy.[125] Čavčić was a ballistics expert in the Security Services Centre ("CSB") and was part of the team that investigated the shelling incident in Dobrinja listed in Scheduled Incident G.5.[126] During the Defence case, the Accused's own expert witness, Zorica Subotić, challenged the adjudicated facts relating to this scheduled incident and also challenged the direction of fire of the mortar and the methodology of Čavčić.[127] The Prosecution seeks to rebut these "newly raised issues" by tendering the witness statement of Čavčić which details the methodology employed by him during the course of the investigation.[128] The Prosecution argues that not only would Čavčić's statement assist the Chamber in assessing the weight of the evidence, it would also allow the Chamber to assess the context of the extracts from his statement relied upon by Subotić in her report.[129]

71. Čavčić's statement discusses the CSB Sarajevo's methodology in determining direction of fire generally, the fact that he employed that method in investigating the said incident, and the manner in which he reached his conclusions in the ballistics report. The Chamber notes that this ballistics report is already in evidence, as part of the larger CSB Sarajevo report, having been admitted through Prosecution's expert witness Richard Higgs.[130] For this incident, the Prosecution

[124] Motion, paras. 53–54.
[125] Motion, para. 54.
[126] Motion, para. 55.
[127] Motion, para. 55.
[128] Motion, paras. 56–57.
[129] Motion, para. 57.
[130] *See* P1438 (BiH MUP Report re shelling of Dobrinja on 12 July 1993).

relies primarily on (i) the Rule 92 *ter* evidence of Higgs, including documentary evidence introduced through him, such as P1438 and the UNPROFOR report on the incident,[131] and (ii) Adjudicated Facts 271 to 282. Both (i) and (ii) conclude that the shell which exploded at the incident site came from SRK positions. During his testimony, Higgs commented on P1438 and, while noting that there should be a slightly larger margin of error, agreed with the findings made therein.[132] The Accused then cross-examined Higgs, focusing on the findings related to direction of fire and the fact that the shell exploded on the victim's body, thus leaving little evidence to consider when determining the direction of fire.[133]

72. During his own case, the Accused again challenged Čavčić's conclusions on the direction of fire using his expert witness Zorica Subotić, who went to the incident site and conducted a detailed analysis of this incident in her expert report. While quoting from Čavčić's witness statement of 16 November 1995[134] and from P1438, she proceeded to disagree with Čavčić's conclusions on the direction of fire, concluding that the shell had come from the positions of the ABiH.[135] Subotić was then cross-examined extensively on her conclusions; indeed, many of the points raised in the Prosecution's rebuttal motion in relation to this issue were put to her during that cross-examination.[136]

73. The Chamber considers that the challenge brought by the Accused with respect to direction and/or origin of fire for Scheduled Incident G.5 is a significant issue that arises directly out of the evidence presented by the Accused. Indeed, the issue of direction of fire is at the very core of shelling incident allegations. However, while, the Chamber notes that the Accused's pre-trial brief did not herald a challenge to Scheduled Incident G.5, it considers that the Accused's challenge could reasonably have been anticipated by the Prosecution. First, as recalled above, the Accused's position has always been that he would challenge every charge against him, including any adjudicated fact that may be judicially noticed. Disputing direction and/or origin of fire is a typical challenge made to shelling incidents, such as G.5, and is usually made by attacking the methodology of the ballistics experts called by the Prosecution. Thus, the attack on Čavić's report could reasonably have been anticipated, particularly since the Accused's cross-examination of Higgs heralded it and since the Prosecution knew early on in the case that the Accused had

[131] *See* P1442 (UNPROFOR report re shelling of Dobrinja on 12 July 1993).

[132] Richard Higgs, T. 5920 (18 August 2010); P1437 (Richard Higgs's Consolidated Report on Sarajevo Shelling Incidents, 13 March 2009), pp. 8–9.

[133] T. 5994–6004 (19 August 2010).

[134] The Chamber notes that Subotić quotes directly from Čavčić's statement, covering the crux of his evidence as far as Scheduled Incident G.5 is concerned.

[135] D3542 (Zorica Subotić's expert report entitled "Mortar Operations in Sarajevo Area in 1992-1995", 15 August 2012), pp. 74–92.

[136] Zorica Subotić, T. 38366–38390 (15 May 2013); T. 38396–38405 (16 May 2013).

commissioned a ballistics expert who would challenge all the shelling incidents. Similarly, the substance of that challenge could reasonably have been anticipated by the Prosecution given Higgs' testimony as to the specific circumstances of this incident, namely the fact that the shell exploded on the victim rather than on the ground. Indeed, the Prosecution concedes that it offers Čavčić's statement merely so that it would assist the Chamber in assessing the weight of his report in P1438.[137] However, according to the jurisprudence of this Tribunal, evidence which is available to the Prosecution from the beginning, the relevance of which does not arise suddenly but simply remedies a defect in the Prosecution case, is generally not admissible as part of the Prosecution's rebuttal case.[138]

74. Accordingly, the Chamber will not allow the Prosecution to present the evidence of Hamdija Čavčić in order to rebut the challenges made to its case on Scheduled Incident G.5 by the Accused and his expert witness Subotić.

ii. Todd Cleaver (Scheduled Incidents F.7, F.11, F.12, F.14, F.15, and F.16)

75. In the Motion, the Prosecution proposes to call Cleaver, its former employee, in order to counteract the Accused's evidence relating to (i) the line of sight in relation to Scheduled Incident F.7 and (ii) the line of sight from Grbavica onto Zmaja od Bosne Street, which impacts on a number of sniping incidents, namely Scheduled Incidents F.11, F.12, F.14, F.15, and F.16.[139] Cleaver's statement is yet to be prepared but the Prosecution explains that he was in Sarajevo both during and immediately after the conflict, and that he took various photographs, including those discussed in this case, namely 65 *ter* 25124 (relating to F.7) and P6019 to P6024 (relating to the line of sight from Grbavica).[140] He will elaborate on where these photographs were taken from, as well as what is depicted on them.[141] The Prosecution also intends to tender two photograph logs that describe the photographs Cleaver took in Sarajevo.[142] The Prosecution argues that Cleaver's evidence is highly probative, rebuts unforeseen testimony of Defence witnesses, and would assist the Chamber in assessing the weight of the evidence.[143]

76. The Chamber notes that with respect to Scheduled Incident F.7, the Prosecution relies primarily on Adjudicated Facts 198–208 and the Rule 92 *ter* evidence of its sniping expert Patrick

[137] Motion, para. 57.
[138] *See* para. 10 *supra*.
[139] Motion, para. 58. The Chamber notes that while the Prosecution does not refer to it in its Motion, the line of sight from Grbavica is also relevant to Scheduled Incident F.11.
[140] Motion, paras. 59–67.
[141] Motion, paras. 62, 66.
[142] These are in e-court under Rule 65 *ter* numbers 26079 and 26080. *See* Motion, Confidential Appendix B.
[143] Motion, para. 67.

Van der Weijden, Prosecution investigator Barry Hogan, and doctors who provided medical information relating to the treatment of the victims of this incident, Bakir Nakaš and Youssef Hajir. The Adjudicated Facts in question state that there was a line of sight between the scene of the incident and Nedžarići,[144] and both van der Weijden and Hogan testified to that effect.[145] Also in evidence is a BiH MUP report on the incident which includes the finding that the bullet came from Nedžarići.[146] The Accused cross-examined Van der Weijden extensively on the alleged origin of fire, namely the Faculty of Theology in Nedžarići, implying that the shots did not come from there but came from the ABiH side of the confrontation line.[147]

77. In addition, during his case, the Accused challenged the existence of the line of sight between the Faculty of Theology and the site of the incident. Both Svetozar Guzina and Mile Sladoje testified that the location of the incident was not visible from the Faculty.[148] Defence expert witness, Mile Poparić, then testified that during his visit to the Faculty in 2010 neither the incident site nor the buildings surrounding it could be seen from the Faculty.[149] The Prosecution showed him 65 *ter* 25124, a photograph taken by Cleaver in 1996, but Poparić could not confirm that it was taken from the Faculty. The Prosecution decided not to tender the photograph and moved on, stating that it would deal with this issue with another witness.[150]

78. The issue of the line of sight from Grbavica is relevant to Scheduled Incidents F.11, F.12, F.14, F.15, and F.16. For each of these incidents the Chamber judicially noticed a number of Adjudicated Facts, namely: Adjudicated Facts 2921–2932 (F.11), 2938–2946 (F.12), 2955–2969 (F.14), 2976–2985 (F.15), and 2986–2997 (F.16). They state that the bullets came from (i) the Metalka building (F.11, F.12, F.14),[151] (ii) one of the four skyscrapers in Lenjinova street (F.14,[152] F.15[153]), or (iii) broadly Grbavica (F.16).[154] Some of the Adjudicated Facts either specifically mention that there was a line of sight between those alleged origins of fire and Zmaja od Bosne

[144] Adjudicated Facts 206. Nedžarići was said to have been controlled by the SRK at the time. *See* Adjudicated Fact 207.

[145] Barry Hogan, T. 11213–11214, T. 11274–11276 (3 February 2011); P2202 (Photograph re sniping incident of 25 May 1994 in Dobrinja marked by Barry Hogan); P2207 (Images re scheduled sniping incidents in Sarajevo); P1621 (Expert Report of Patrick Van der Weijden entitled "Sniping Incidents in Sarajevo '92-'94"), p. 54.

[146] P1892 (BiH MUP Report re sniping incident of 25 May 1994 in Dobrinja).

[147] Patrick Van der Weijden, T. 7062–7073 (28 September 2010).

[148] D2553 (Witness statement of Svetozar Guzina dated 3 December 2012), para. 44; D2479 (Witness statement of Mile Sladoje dated 25 November 2012), para. 29.

[149] D3652 (Mile Poparić's expert report entitled "Small Arms Fire on the Sarajevo Area 1992-1995", 15 August 2012), para. 105; T. 38972–38975 (30 May 2013).

[150] Mile Poparić, T. 39244–39246 (4 June 2013).

[151] *See* Adjudicated Facts 2931–2932, 2943–2944, 2946, 2968.

[152] For F14, the Adjudicated Facts establish that the bullet came either from the Metalka building or from the four skyscrapers in Lenjinova street.

[153] *See* Adjudicated Facts 2968, 2984–2985.

[154] *See* Adjudicated Fact 2995, 2997.

street, while others imply so.[155] In addition, the evidence brought by the Prosecution to support the allegations relating to those incidents is voluminous and consists of both Rule 92 *bis* and 92 *quater* evidence, primarily from victims,[156] and Rule 92 *ter* evidence, primarily from CSB Sarajevo ballistic experts.[157] Furthermore, the Prosecution also led the evidence of the sniping expert Van der Weijden and the Prosecution investigator Hogan. Accordingly, during the Prosecution case, a substantial body of evidence was admitted in relation to the origin of fire for these incidents and the line of sight between Grbavica and Zmaja od Bosne. This includes an interactive photo book containing 360 degree panoramic photographs of the area and the evidence of Mirza Sabljica who went to Metalka and the four skyscrapers in 1996 and took photographs of their interior, including those of the lines of sight from what he alleged were the sniping holes in the walls.[158]

79. During the Prosecution case, the Accused's challenges on the incidents involving Grbavica and Zmaja od Bosne did not focus on the line of sight. However, during the Accused's defence case, two of his witnesses challenged the line of sight. Vladimir Lučić stated on cross-examination that one could not see the high rises in Grbavica from the Maršal Tito barracks, which are located on the Zmaja od Bosne street. He was then cross-examined further and shown one of the videos in evidence depicting the SRK positions in Grbavica.[159] Dragan Maletić testified that from the SRK positions the SRK soldiers could only see the enemy's first line of defence, which made it impossible to attack any parts of the city.[160] During cross-examination, the Prosecution challenged this evidence by producing photographs P6019 to P6024 but since Maletić responded that he did not know where the pictures were taken from and the Accused objected to their admission on that basis, the Chamber admitted them only for the limited purpose of understanding the cross-examination.[161]

80. The Prosecution claims that none of this Defence evidence could have been anticipated during the Prosecution case. It therefore offers it now in order to "assist the Chamber in assessing the weight, if any, to be accorded to the [d]efence evidence on this issue."[162]

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155 *See* Adjudicated Facts 2931, 2944, 2985, and 2997.

156 *See e.g.* Huso Palo, Sabina Šabanić, KDZ289, Mirsad Kučanin, Slavica Livnjak, Zlatko Međedović, and KDZ090.

157 *See e.g.* Alma Mulaosmanović Čehajić, Alen Gičević, Mirza Sabljica, Dragan Mioković, and KDZ485.

158 *See e.g.* P2213 (Image re scheduled sniping and shelling incidents in Sarajevo); P1738 (Photographs of sniper nests), P1695 (Witness statement of Mirza Sabljica dated 11 February 2010), pp. 60–62; P1736 (BiH MUP Reports re sniper nest sites, 25 April 1996); P926 (Witness statement of Aernout Van Lynden dated 26 February 2010), paras. 92–100; P806 (SKY news report re Sarajevo, with transcript).

159 Vladimir Lučić, T. 30815–30816 (3 December 2012); P806 (SKY news report re Sarajevo, with transcript).

160 D2519 (Witness statement of Dragan Maletić dated 9 November 2012), para. 14.

161 Dragan Maletić, T. 30851–30857 (3 December 2012), T. 30858–30865 (4 December 2012).

162 Motion, paras. 58, 67.

81. The Chamber considers that the challenge brought by the Accused with respect to direction and/or origin of fire for incidents involving Grbavica and Zmaja od Bosne is a significant issue that arises directly out of the evidence presented by the Accused. Indeed, as with the shelling incidents, the origin and/or the direction of fire, is a core issue when it comes to any sniping incident. However, while the Chamber notes that none of the above challenges by the Accused were heralded in his pre-trial brief, it considers that, given that the Accused put the Prosecution on notice that he would challenge everything but the weather in this case, challenges to the origin of fire through disputing lines of sight could and should reasonably have been anticipated by the Prosecution. Again, the nature of those challenges could also have been reasonably anticipated as the Prosecution was on notice early on in the case that the Accused would commission a sniping expert of his own who would dispute the Prosecution's evidence on all alleged sniping incidents. Similarly, the Prosecution could have reasonably anticipated that the Accused would also present the evidence of SRK soldiers who held positions in Grbavica at the time and could testify as to the line of sight between Grbavica and the locations of a number of incidents.

82. While the Prosecution is correct in asserting that during the Prosecution case, the Accused's challenges on the incidents involving Grbavica and Zmaja od Bosne did not focus on the line of sight, this does not impact on the Chamber's conclusion above because the type of evidence already presented by the Prosecution in relation to F.11, F.12, F.14, F.15, and F.16 shows that it did in fact anticipate such a challenge and went to great lengths to provide the Chamber with photographic and other type of evidence relating to the line of sight.

83. Accordingly, the Chamber will not allow the Prosecution to present the evidence of Todd Cleaver in order to rebut the challenges made to its case by the Accused in relation to the above-mentioned sniping incidents.

D. Srebrenica Witnesses

84. In the Motion, the Prosecution submits that its evidence on Scheduled Incident E.1 of the Indictment is based on three adjudicated facts and the evidence of witness KDZ065 admitted in this case pursuant to Rule 92 *bis*.[163] The Prosecution argues that it could not have reasonably foreseen that the Accused would challenge these adjudicated facts and that, despite the fact that the Accused opposed the admission of all the evidence tendered through Rule 92 *bis*, he did not specifically challenge the admission of KDZ065's evidence.[164] It also submits that although the Accused did not bring evidence that directly contradicted the adjudicated facts on the Jadar River killing

[163] Motion, para. 69.
[164] Motion, para. 70.

incident, the Defence evidence, if believed, "could undermine" them.[165] In rebuttal, the Prosecution seeks to call KDZ065 pursuant to Rule 92 *ter* to supplement his Rule 92 *bis* evidence, to provide the Accused an opportunity to cross-examine KDZ065, and to enable the Chamber to assess KDZ065's credibility firsthand.[166] In addition, the Prosecution seeks to tender, also pursuant to Rule 92 *ter*, the evidence of Subašić, a nurse who was travelling in the column of Bosnian Muslim men fleeing Srebrenica, and who is expected to testify that on 14 July 1995 he treated a man who had survived an attempted execution; the Prosecution submits this man was KDZ065.[167]

85. The Chamber notes that the only evidence the Prosecution seeks to tender in rebuttal for the Srebrenica component of its case is in relation to Schedule Incident E.1. In order to support its allegations with respect to this scheduled incident, the Prosecution relied solely on (i) the transcripts of KDZ065's prior testimony in the *Krstić* and *Popović et al.* cases, as well as a number of associated exhibits, all of which were admitted in this case pursuant to Rule 92 *bis*,[168] and (ii) Adjudicated Facts 1689 to 1691. The Prosecution claims that this evidence proves that, on 13 July 1995, Bosnian Serb forces executed approximately 15 Bosnian Muslim men on the bank of the Jadar River.[169]

86. During his testimony in the *Krstić* and *Popović et al.* cases, KDZ065 testified to having been the sole survivor of the execution of 15 Bosnian Muslim men from Srebrenica on the bank of the Jadar River on 13 July 1995, and provided evidence as to the events in and around Konjević Polje leading up to the alleged execution, including the description of a number of individuals he encountered while being moved around various locations in Konjević Polje.[170] The three adjudicated facts admitted in relation to this scheduled incident are based on, and originated from, KDZ065's evidence in the *Krstić* case.[171]

87. Three Defence witnesses, namely KW558, Mirko Perić, and Nenad Deronjić, testified before the Chamber to refute aspects of KDZ065's 92 *bis* evidence. A detailed description of these witnesses' evidence is included in the confidential annex appended to this decision.[172] For purposes of the public part of this decision, it suffices to say that all three witnesses directly refuted

[165] Motion, paras. 71–72.
[166] Motion, para. 73.
[167] Motion, para. 74.
[168] Decision on Prosecution's Fifth Motion for Admission of Statements In Lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis* (Srebrenica Witnesses), 21 December 2009, confidential, para. 67(B).
[169] Motion, para. 69.
[170] *See* KDZ065, P336 (Transcript from *Prosecutor v. Krstić*), T. 3235–3290; P336 (Transcript from *Prosecutor v. Popović*), T. 3184–3293.
[171] *See* Prosecution's Fifth Motion for Admission of Statements in Lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis* (Srebrenica Witnesses), 29 May 2009, paras. 5, 23.
[172] *See* Confidential Annex, para. 5.

KDZ065's evidence, and denied various aspects of the events surrounding the alleged execution at the bank of the Jadar River on 13 July 1995, as described by KDZ065.

88. The Prosecution argues that it could not have reasonably foreseen that Adjudicated Facts 1689 to 1691 would be challenged by the Accused.[173] Thus, despite the fact that, according to the Prosecution, none of the Defence evidence on Scheduled Incident E.1 directly contradicts these adjudicated facts, it now proposes to recall KDZ065 pursuant to Rule 92 *ter* in order to safeguard its case in the event the Chamber takes a contrary view, with the aim to: (i) give KDZ065 the opportunity to supplement his 92 *bis* evidence, (ii) provide the Accused an opportunity to cross-examine KDZ065, and (iii) enable the Chamber to assess KDZ065's credibility firsthand.[174]

89. The Chamber again recalls that, as mentioned above, supplementing written evidence that has already been admitted under Rule 92 *bis* by calling the very same witness is neither an appropriate use of rebuttal evidence nor germane to whether the rebuttal test has been met.[175] Turning now to the rebuttal test, the Chamber considers first that the challenges brought by the Accused with respect to Scheduled Incident E.1 and specifically on the circumstances surrounding the alleged execution, including the presence of a number of individuals at Konjević Polje on 13 July, are significant issues that arise directly out of the evidence presented by the Accused. The Chamber also notes that none of the challenges by the Accused, as discussed in the confidential annex to this decision, were included in his pre-trial brief. However, the number of victims of the Srebrenica component of the case has been a core issue throughout the proceedings, and the Accused has put the Prosecution on notice from very early on that it would be challenging all aspects of the events at Srebrenica, including the conclusions on the identification through DNA analysis of Srebrenica victims.[176] Furthermore, KW558 and Deronjić both testified in the *Blagojević* case as early as 2004, and provided evidence which contradicted aspects of KDZ065's evidence.[177] Thus, while the Chamber acknowledges that the Accused's challenges with respect to the circumstances surrounding Scheduled Incident E.1 were extensive, they could, by their very nature, reasonably have been anticipated by the Prosecution. Accordingly, the Chamber will not allow the Prosecution to recall KDZ065 pursuant to Rule 92 *ter* in order to rebut the challenges brought by the Accused

[173] Motion, para. 70.

[174] Motion, paras. 72–73.

[175] *See* para. 56 *supra*.

[176] *See inter alia* Response by Dr. Radovan Karadžić to the Prosecution's Motion Regarding the Proffered Evidence of Eight Experts Pursuant to Rules 94 *bis* and 92 *bis* of 29 May 2009, 4 September 2009, paras. 2–3; Accused's opening statement, T. 985–987 (2 March 2010); Order on Selection of Cases for DNA Analysis, 19 March 2010.

[177] *See inter alia* KW558, D37643 (Transcript from *Prosecutor v. Blagojević*), T. 6533–6534 (under seal); Nenad Deronjić, D3760 (Transcript from *Prosecutor v. Blagojević*), T. 8191–8193.

90. Given that the Prosecution seeks to tender the evidence of Subašić in rebuttal solely to establish that KDZ065 was treated for injuries on 14 July 1995, and to recount the story of the execution at the Jadar River as told to him by KDZ065,[178] the same reasoning used by the Chamber not to allow the Prosecution to recall KDZ065 applies in the present case. Accordingly, the Chamber will not allow the Prosecution to present the evidence of Mujo Subašić in order to rebut the Accused's challenges with respect to Scheduled Incident E.1.

C. Prosecution Request for Leave to Reply

91. In light of the Chamber's decision not to allow the Prosecution to present rebuttal evidence on grounds other than those the Prosecution wishes to address in the proposed reply, the Chamber will deny the Request for Leave to Reply.

IV. Disposition

92. Accordingly, the Chamber, pursuant Rule 85(A)(iii) of the Rules, hereby **DENIES** the Motion and the Request for Leave to Reply.

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

Judge O-Gon Kwon
Presiding

Dated this twenty-first day of March 2014
At The Hague
The Netherlands

[Seal of the Tribunal]

[178] Motion, para. 74.