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AT

UNITED
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	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of former Yugoslavia since 1991	Case No.	IT-05-87-PT
		Date:	4 July 2006
		Original:	English

IN TRIAL CHAMBER III

Before: **Judge Iain Bonomy, Presiding**
Judge Ali Nawaz Chowhan
Judge Tsvetana Kamenova

Registrar: **Mr. Hans Holthuis**

Decision of: **4 July 2006**

PROSECUTOR

v.

MILAN MILUTINOVIĆ
NIKOLA ŠAINOVIĆ
DRAGOLJUB OJDANIĆ
NEBOJŠA PAVKOVIĆ
VLADIMIR LAZAREVIĆ
SRETEN LUKIĆ

DECISION ON PROSECUTION'S RULE 92 *BIS* MOTION

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Mr. Tomislav Višnjić and Mr. Norman Sepenuk for Mr. Dragoljub Ojdanić
Mr. John Ackerman and Mr. Aleksander Alekšić for Mr. Nebojša Pavković
Mr. Mihajlo Bakrać for Mr. Vladimir Lazarević
Mr. Branko Lukić and Mr. Dragan Ivetić for Mr. Sreten Lukić

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 (the "Tribunal") is seized of the "Prosecution's Motion for Admission of Written Statements and Transcripts in Lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis* and Confidential Annexes A, B and C", filed on 26 May 2006 (the "Motion").

1. In its Motion, the Prosecution asks the Trial Chamber to admit into evidence certain material, consisting of witness statements, transcripts of testimony in *Prosecutor v. Milošević* and associated exhibits, from 58 proposed witnesses, two of whom are deceased.[1] Of the 58 people, the Prosecution seeks provisional admission of eight witness statements which currently do not satisfy the requirements of Rule 92 *bis*(B) of the Rules of Procedure and Evidence (the "Rules").[2]

2. The Accused filed a "Joint Defence Response to the Prosecution's Motion for Admission of Written Statements and Transcripts in Lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis*" on 15 June 2006 (the "Response").[3] The Trial Chamber is grateful to counsel for the Accused for filing a joint response, and encourages the filing of joint submissions whenever appropriate.

3. The Prosecution filed a timely Reply to the Accused's Response,[4] along with a request for leave to reply which the Trial Chamber will grant.

Applicable Law

4. Pursuant to Rule 92 *bis*(A), a "Trial Chamber may admit, in whole or in part, the evidence of a witness in the form of a written statement in lieu of oral testimony which goes to proof of a matter other than the acts and conduct of the accused as charged in the indictment."[5] Rule 92 *bis*(B) requires that each statement be accompanied by a verified[6] "declaration by the person making the written statement that the contents of the statement are true and correct to the best of that person's

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[1] *See* Prosecution's Motion for Admission of Written Statements and Transcripts in Lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis* and Confidential Annexes A, B and C, 26 May 2006 (the "Motion"), para. 2. Although the Motion lists 59 people whose evidence is proffered for admission, the Prosecution withdrew one witness on account of intending to call him for *viva voce* testimony. *See* Prosecution Notification of Additional Witness for the Week of Trial Commencing 10 July 2006 and Notice of Withdrawal of 92 *bis* Application for Witness Fred Abrahams, 27 June 2006, para. 3.

[2] *See* Motion, para. 123. Although the Prosecution states that it seeks provisional admission of the statements of seven witnesses, it identifies eight people: (1) Muharem Demiraj, (2) Fuad Haxhiberiqiri, (3) Daut Imeraj, (4) Sadije Sadiku, (5) John Sweeney, (6) Hebib Koka, (7) Proposed Witness K63 and (8) Nazilie Bala.

[3] In an "Order Arising from Rule 65 *ter* Conference" filed on 18 May 2006, the Pre-Trial Judge gave the Accused until 15 June 2006 to file their response to the Motion.

[4] *See* Prosecution Application for Leave to Reply and Reply to Joint Defence Response to the Prosecution's Motion for Admission of Written Statements and Transcripts in Lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis* with Confidential Annex, 22 June 2006 (the "Reply").

[5] Rules of Procedure and Evidence (the "Rules"), Rule 92 *bis*(A).

[6] *See* Rules 92 *bis*(B)(i) and (B)(ii).

knowledge and belief".[7] Where a written statement was made by a person who later died, Rule 92 *bis*(C) excuses the proffering party from producing the verified declaration, so long as the Trial Chamber is satisfied that the witness is in fact dead[8] and that, "from the circumstances in which the statement was made and recorded", there are "satisfactory indicia of its reliability."[9] In addition to a written statement, Rule 92 *bis*(D) provides that a Chamber also "may admit a transcript of evidence given by a witness in proceedings before the Tribunal which goes to proof of a matter other than the acts and conduct of the accused."[10] Rule 92 *bis*(E) states that the Chamber shall decide "whether to admit the statement or transcript in whole or in part and whether to require the witness to appear for cross-examination."[11] Rule 92 *bis*(A)(ii)(c) indicates that whether a witness should be cross-examined is also a factor to be taken into account in determining whether the witness's evidence should be admitted in written form.

5. In general, a Trial Chamber deciding to admit evidence must always ensure, in accordance with Rule 89, that the evidence is relevant, probative and not unduly prejudicial.[12] Specifically deciding whether to admit written evidence pursuant to Rule 92 *bis* is a two-step process: first, a Trial Chamber must determine whether the material is admissible at all under the Rule; second, if the material is admissible, the Chamber must decide whether to exercise its discretion to admit the material into evidence.

6. With respect to the first step, the plain language of Rule 92 *bis*(A) excludes only one type of written evidence, namely, that which concerns "the acts and conduct of the accused". As the *Milošević* Trial Chamber reasoned, the

> phrase "acts and conduct of the accused" in Rule 92*bis* is a plain expression and should be given its ordinary meaning: deeds and behaviour of the accused. It should not be extended by fanciful interpretation. No mention is made of acts and conduct by alleged co-perpetrators, subordinates or, indeed, of anybody else. Had the rule been intended to extend to acts and conduct of alleged co-perpetrators or subordinates it would have said so.[13]

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[7] Rule 92 *bis*(B).

[8] *See* Rule 92 *bis*(C)(i).

[9] Rule 92 *bis*(C)(ii).

[10] Rule 92 *bis*(D).

[11] Rule 92 *bis*(E).

[12] *See* Rules 89(C) and (D); *Prosecutor v. Galić*, Case No. IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92 *bis*(C), 7 June 2002 ("*Galić* Appeals Decision"), para. 35 ("[E]vidence is admissible only if it is relevant and . . . has probative value, general propositions which are implicit in Rule 89(C)."); *Prosecutor v. Galić*, Case No. IT-98-29-T, Decision on the Prosecution's Request for Admission of Rule 92 *bis* Statements, 26 July 2002 ("*Galić* Trial Decision"), para. 15 ("In deciding on admission of Rule 92 *bis* statements, the Trial Chamber must further determine whether the statement is relevant evidence which it deems to have probative value, within the meaning of Rule 89(C) and may exclude evidence 'if its probative value is substantially outweighed by the need to ensure a fair trial', pursuant to Rule 89(D).").

[13] *Prosecutor v. Milošević*, Case No. IT-02-54-T, Decision on Prosecution's Request to Have Written Statements Admitted Under Rule 92 *bis*, 21 March 2002, para. 22 (citation omitted).

The Appeals Chamber later adopted this reading, stating that there is a

> clear distinction drawn in the jurisprudence of the Tribunal between (a) the acts and conduct of those others who commit the crimes for which the indictment alleges that the accused is individually responsible, and (b) the acts and conduct of the accused as charged in the indictment which would establish his responsibility for the acts and conduct of those others. It is only a written statement which goes to proof of the latter acts and conduct which Rule 92*bis*(A) excludes . . . .[14]

It is therefore clear that the only kind of written statement or transcript absolutely precluded from admission under Rule 92 *bis* is one which goes to proof of the acts and conduct of an accused.[15]

7. Assuming, however, that a piece of written evidence does not concern the acts of the accused and is thus admissible, the second step for a Trial Chamber deciding a Rule 92 *bis* motion is to determine whether to exercise its discretion to admit the evidence.[16] Rules 92 *bis*(A)(i) and (A)(ii) set out factors both for and against the admission of a piece of evidence.[17] In addition to

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[14] *Galić* Appeals Decision, para. 9.

[15] The "acts and conduct" of an accused refer to evidence offered to establish:

(a) that the accused committed (that is, that he personally physically perpetrated) any of the crimes charged himself, or

(b) that he planned, instigated or ordered the crimes charged, or

(c) that he otherwise aided and abetted those who actually did commit the crimes in their planning, perpetration or execution of those crimes, or

(d) that he was a superior to those who actually did commit the crimes, or

(e) that he knew or had reason to know that those crimes were about to be or had been committed by his subordinates, or

(f) that he failed to take reasonable steps to prevent such acts or to punish those who carried out those acts.

Where the prosecution case is that the accused participated in a joint criminal enterprise, and is therefore liable for the acts of others in that joint criminal enterprise, Rule 92*bis*(A) excludes also any written statement which goes to proof of any act or conduct of the accused upon which the prosecution relies to establish –

(g) that he had participated in that joint criminal enterprise, or

(h) that he shared with the person who actually did commit the crimes charged the requisite intent for those crimes.

Galić Appeals Decision, para. 10 (citations omitted).

[16] *See, e.g., Galić* Appeals Decision, para. 18 (describing the decision whether to admit a non-accused's evidence, which "could . . . be of substantial importance to the prosecution case", as a "question of discretion" for the Trial Chamber); *Milošević*, paras. 22-23 (After finding "that the statements go to proof of matters other than the acts and conduct of the accused", the "next issue is whether the Trial Chamber should exercise its discretion in favour of admitting the written statements into evidence.").

[17] The Rules state:

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

(a) is of a cumulative nature, in that other witnesses will give or have given oral testimony of similar facts;

(b) relates to relevant historical, political or military background;

(c) consists of a general or statistical analysis of the ethnic composition of the population in the places to which the indictment relates;

(d) concerns the impact of crimes upon victims;

(e) relates to issues of the character of the accused; or

(f) relates to factors to be taken into account in determining sentence.

(ii) Factors against admitting evidence in the form of a written statement include whether:

(a) there is an overriding public interest in the evidence in question being presented orally;

these factors, the Appeals Chamber has instructed that a Trial Chamber should consider the circumstances of the particular case so that each decision can be made fairly. Where, for example, 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 Trial Chamber may decide that it would not be fair to the accused to permit the evidence to be given in written form."[18] However, as Rules 92*bis*(A)(ii)(c)[19] and 92 *bis*(E)[20] indicate, it may be appropriate to admit a "pivotal" or important witness statement where the Accused will also have an opportunity to cross-examine the witness. In *Milošević*, for example, where the proffered written "evidence relate[d] to a 'critical element of the Prosecution's case' or, put another way, to a live and important issue between the parties,"[21] the "requirements of a fair trial demand[ed] that the accused be given the right to cross-examine the witnesses in order to fully test the Prosecution's case."[22] Where important proffered evidence is generated by a witness who later dies and is therefore unavailable for cross-examination, fairness and the circumstances of the case may preclude the witness's evidence from being admitted pursuant to Rule 92 *bis*.

Submissions

8. The Prosecution states that its proffered evidence is admissible under Rule 92 *bis* because it does not concern the acts and conduct of the Accused.[23] The evidence should be admitted, the Prosecution argues, because two of Rule 92 *bis*(A)(i)'s factors favouring admission apply: the evidence is of a "cumulative nature, in that other witnesses will give . . . oral testimony of similar facts",[24] and the evidence "concerns the impact of crimes upon victims".[25] The Prosecution also submits that the evidence satisfies the requirements of Rule 89,[26] and that the evidence's being offered "to establish the 'crime base' is a factor weighing in favour of its admission",[27] which the

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(b) a party objecting can demonstrate that its nature and source renders it unreliable, or that its prejudicial effect outweighs its probative value; or

(c) there are any other factors which make it appropriate for the witness to attend for cross-examination.

Rules 92 *bis*(A)(i) and (A)(ii).

[18] *Galić* Appeals Decision, para. 13.

[19] "Factors against admitting evidence in the form of a written statement include whether . . . there are any other factors which make it appropriate for the witness to attend for cross-examination."

[20] ". . . The Trial Chamber shall decide, after hearing the parties, whether to . . . require the witness to appear for cross-examination."

[21] *Milošević*, para. 24 (*quoting Prosecutor v. Sikirica*, Case No. IT-95-08-T, Decision on Prosecution's Application to Admit Transcripts Under Rule 92*bis*, 23 May 2001, para. 4).

[22] *Milošević*, para. 25.

[23] *See* Motion, para. 7.

[24] Rule 92 *bis*(A)(i)(a).

[25] Rule 92 *bis*(A)(i)(d).

[26] *See* Motion, para. 13.

[27] *Ibid.*, para. 8.

Trial Chamber agrees is a factor that favours admission.[28] The Prosecution asserts that none of Rule 92 *bis*(A)(ii)'s factors which weigh against admission applies to the evidence here,[29] and that none of the witnesses should be required to appear for cross-examination.[30]

9. In response, the Accused contend that "[n]one of the evidence in the Motion is admissible under Rule 92 *bis*"[31] because the evidence concerns the acts of the accused and their proximate subordinates, is pivotal to the Prosecution's case and goes to live and important issues in the case.[32] The Accused maintain that, if any evidence is admitted, each Accused "must be allowed the right to cross-examine each witness."[33] With respect to the two deceased persons whose evidence the Prosecution offers, the Accused submit that such evidence cannot be admitted under any circumstances.[34]

10. Before proceeding to discuss the proffered evidence, the Trial Chamber is obliged to correct a number of the parties' misstatements of law.

11. First, the Prosecution is mistaken in asserting that a "party seeking to cross-examine a witness must make a concrete showing of why cross-examination of that witness is appropriate."[35] Far from there being a presumption against cross-examination, the Statute of the Tribunal guarantees to each accused the right "to examine, or have examined, the witnesses against him".[36] Moreover, Rule 85(B) states that "[e]xamination-in-chief, cross-examination and re-examination shall be allowed in each case".[37] The Prosecution correctly notes that "the right to cross-examine witnesses is not an absolute right",[38] as Rule 92 *bis*(E)'s provision – that the "Trial Chamber shall decide . . . whether to require the witness to appear for cross-examination" – of course implies. But the fact that the Trial Chamber may order or deny cross-examination does not mean that a party

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[28] *See Galić* Appeals Decision, para. 16 ("Rule 92*bis* was primarily intended to be used to establish what has now become known as 'crime-base' evidence".).

[29] *See* Motion, para. 9.

[30] *Ibid.*, para. 14. The Prosecution states that the proffered witnesses do not offer "evidence on the core issues of the case . . . . Their evidence, while important, is not a 'critical element' of the Prosecution case . . . . [T]he right to cross-examination should be balanced against the interest in efficient and expeditious trial proceedings. Requiring these witnesses to appear for cross-examination will extend the trial unnecessarily."). *Ibid.*, paras. 17-18.

[31] Joint Defence Response to the Prosecution's Motion for Admission of Written Statements and Transcripts in Lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis*, 15 June 2006 (the "Response"), para. 6.

[32] *See ibid.*, para. 12.

[33] *Ibid.*, para. 14.

[34] *See ibid.*, para. 32.

[35] Motion, para. 15. *See also* Reply, para. 15 ("In order for the Trial Chamber to decide whether or not to order that a witness appear for questioning by the Defence, it is necessary for the Defence to provide specific reasons, identifying concrete issues or areas, as the basis for calling a witness for cross-examination.").

[36] Statute of the Tribunal, Article 21(4)(e).

[37] Rule 85(B).

[38] Motion, para. 15 (*quoting Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-T, First Decision on Prosecution's Motion for Admission of Witness Statements and Prior Testimony Pursuant to Rule 92 *bis*, 12 June 2003, para. 14).

desirous of cross-examination must "make a concrete showing" of why it is warranted. Rather, it is the Trial Chamber's responsibility to provide for cross-examination if appropriate under the circumstances, regardless of whether the cross-examining party makes any particular showing.[39]

12. Second, the Accused contend that the proffered evidence is inadmissible under Rule 92 *bis* because "many of the proposed 92 *bis* witnesses are said to corroborate each other, which is contrary to both the express language of and spirit of Rule 92 *bis*."[40] "[A]ccording to Rule 92 bis(A)(i)(a)", say the Accused, "the statement of one 92 bis witness cannot be used to corroborate the statement of another 92 bis witness."[41] Rule 92 *bis*(A)(i)(a) says nothing of the sort; it merely favours the admission of written evidence which "is of a cumulative nature, in that other witnesses will give or have given oral testimony of similar facts". Black's Law Dictionary defines corroborative evidence as that which "differs from but strengthens or confirms what other evidence shows".[42] The Accused offer no reason to exclude evidence, admissible under Rule 92 *bis*, which makes other proffered material more reliable. Given the choice, it would be bizarre to prefer uncorroborated evidence, and the Trial Chamber declines to do so.

13. Third, the Accused appear to believe that a prerequisite of admitting written evidence under Rule 92 *bis* is that the evidence corroborate that of a *viva voce* witness.[43] To be clear, there is no requirement that written evidence proffered pursuant to Rule 92 *bis* corroborate, be within the scope of[44] or "add something to"[45] the evidence of *viva voce* witnesses. Nor, for that matter, must one piece of written evidence corroborate other written evidence.[46] Cumulative evidence and

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[39] *See Blagojević and Jokić*, para. 14 (The "decision to accept evidence without cross-examination is one which the Trial Chamber shall arrive at only after careful consideration."); *Galić* Trial Decision, para. 18 (The "Chamber should carefully examine in which circumstances admission of [a] Rule 92 *bis* statement without cross-examination will not impact on the fairness of the trial.").

[40] Response, para. 12.

[41] Annex to the Accused's Joint Response Pursuant to Rule 92 *bis* ("Annex to Response"), p. 3.

[42] Black's Law Dictionary (8th ed. 2004).

[43] *See* Annex to Response, p. 1 (The "statement does not corroborate the statements of designated *viva voce* witnesses"), p. 4 ("The statement is not corroborative to designated viva voce witness"), p. 5 ("For large part of [the witness's] statement no viva voce witness is chosen to be corroborated").

[44] The Accused at times object that a particular witness's proffered written evidence is "out of the scope of viva voce witness testimony". Annex to Response, p. 14. There is no requirement, however, that written evidence be within the scope of oral evidence.

[45] Reply, para. 10 ("As stated by the Trial Chamber in *Galić*, evidence tendered under Rule 92 *bis* must add something to that of viva voce witnesses, otherwise it would be merely repetitive".). As far as this Chamber understands the *Galić* Trial Decision, it expressed that Chamber's view, in light of its reading of the statutory right to an expeditious trial and the circumstances of that case, that it would admit further written evidence only if the evidence added "details and information which contribute to a better understanding or assessment of the evidence presented." *Galić* Trial Decision, para. 16. Although it may be sensible, in the circumstances of a given case, to exclude merely repetitious evidence, the Trial Chamber notes that such exclusion is a function of a Chamber's discretion rather than any prohibition found in Rule 92 *bis*.

[46] In at least two instances, the Accused object that the proffered written statements "are not corroborative to each other". Annex to Response, pp. 6, 7. In light of the Accused's (mistaken) assertion that one piece of 92 *bis* evidence may not corroborate another, the Trial Chamber assumes that the Accused did not intend to argue that one piece of

corroborative evidence may be preferred, but a preference is not a requirement. Rule 92 *bis* does not require that proffered written evidence be cumulative or corroborative of either *viva voce* or other written evidence.

14. Fourth, although not a point of law, the Chamber rejects the Accused's assertion that "it would be very difficult indeed for a Trial Chamber to conclude that sworn 92 *bis* statements of Albanian witnesses should be taken at face value."[47] In support of this contention, the Accused rely on a paragraph of the Trial Judgement in *Prosecutor v. Limaj et al.* in which that Chamber related its disbelief of certain witnesses, formerly members of the Kosovo Liberation Army, to one expert witness's understanding of the "Albanian concept of honour".[48] This Trial Chamber should not have to make the obvious point that the demeanour of witnesses in another proceeding has no bearing on deciding the Motion here. What should also go without saying is that the assumption underlying the Accused's statement – that a witness's credibility is subject to doubt depending on his or her ethnicity – is as insulting as it is unwelcome in a court of law.

Discussion

15. Turning first to the proffered evidence from the 56 living witnesses,[49] the Trial Chamber has reviewed it and finds that none of it concerns the acts and conduct of the Accused. Accordingly, it is all admissible under Rule 92 *bis*. The Chamber must therefore next determine whether to admit the material, which involves deciding whether the witnesses should in fairness be made to appear for cross-examination.

16. Forty-nine of the 56 living people identified in the Motion appear to have witnessed crimes charged in the Indictment.[50] The Trial Chamber finds that a good deal of the material from these

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such evidence in fact must corroborate another. In any event, the argument is without merit: corroborated evidence may be more desirable than uncorroborated evidence, but Rule 92 *bis* does not require that one piece of written evidence corroborate another.

[47] Response, para. 24.

[48] The Chamber stated in part:

> At times, it became apparent to the Chamber, in particular taking into account the demeanour of the witnesses and the explanation offered for the differences [between their *viva voce* testimony and prior statements], that the oral evidence of some of these witnesses [former members of the Kosovo Liberation Army] was deliberately contrived to render it much less favourable to the Prosecution . . . . It appeared that overriding loyalties had a bearing upon the willingness of some witnesses to speak the truth in court about some issues. It is not disputed that notions of honour and other group values have a particular relevance to the cultural background of witnesses with Albanian roots in Kosovo.

Prosecutor v. Limaj et al., Case No. IT-03-66-T, Judgement, 30 November 2005, para. 13. The Chamber then quoted from an expert report which described the "Albanian concept of honour [that] governs all relations that extend beyond blood kinship". *Ibid.*

[49] The Trial Chamber addresses the evidence from the two now-deceased witnesses in paragraphs 20-22.

[50] They are, in the order listed in the Motion: (1) Hebib Koka, (2) Agron Mehmeti, (3) Xhemajl Beqiri, (4) Hysni Berisha, (5) Hamide Fondaj, (6) Osman Kuci, (7) Shefqet Zogaj, (8) Rexhep Krasniqi, (9) Hysni Kryeziu, (10) Rahim Latifi, (11) Nazilie Bala, (12) Emin Kabashi, (13) Proposed Witness K63, (14) Florim Krasniqi, (15) Bedri Hyseni,

proposed witnesses "is of a cumulative nature, in that other witnesses will give . . . oral testimony of similar facts",[51] and that this favours admitting the material into evidence. For example, the proferred evidence of Hysni Berisha, an apparent eyewitness to alleged crimes in Suva Reka / Suharekë, is similar to the anticipated testimony of proposed *viva voce* witnesses Shryete Berisha and Halit Berisha. Likewise, the evidence of John Sweeney, a journalist who visited Mala Kruša / Krusë e Vogel after an alleged attack, is similar to the expected testimony of proposed *viva voce* witness Lufti Ramadani. The Trial Chamber reiterates that the proffered written evidence need not be cumulative to expected oral evidence, although such a quality favours admission. In addition to a good deal of the proffered written evidence being similar to expected *viva voce* testimony, the Trial Chamber finds that the proffered evidence "concerns the impact of crimes upon victims",[52] as eyewitness accounts of murder, deportation and other alleged crimes obviously concern the impact of those crimes upon the people who survived them. Moreover, the Chamber finds that the proffered evidence "relates to the factors to be taken into account in determining sentence",[53] as the witnesses' depictions of the commission of the alleged crimes and their consequences would, in the event of a guilty plea or verdict, affect sentence.[54]

17. In respect of factors against admission, the Accused assert in two instances – with regard to proposed witnesses Ian Hendrie and Helen Ranta – that there is an "overriding public interest in the evidence in question being presented orally".[55] Mr. Hendrie's evidence relates to the crime scene and bodies found at Račak / Reçek, while Dr. Ranta's concerns the autopsies performed on those bodies and conclusions to be drawn in association with other related evidence. Neither person was an eyewitness to the alleged crimes or to any acts of the Accused, and the written evidence of both is similar to the expected testimony of *viva voce* witnesses.[56] In these circumstances, the Trial Chamber does not consider that there is an overriding public interest in presenting the witnesses'

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(16) Isuf Zhuniqi, (17) Agim Jemini, (18) Reshit Salihu, (19) Mehmet Avdyli, (20) Hadije Fazliu, (21) Milazim Thaci, (22) Xhevahire Rrahmani, (23) Gani Baqaj, (24) Milaim Cekaj, (25) Shpend Dobrunaj, (26) Sofie Imeraj, (27) Daut Imeraj, (28) Fetije Imeraj, (29) Ndrec Konaj, (30) Edison Zatriqi, (31) Muharem Demiraj, (32) Aferdita Hajrize, (33) Sadije Sadiku, (34) Hani Hoxha, (35) Martin Pnishi, (36) Merfidete Selmani, (37) Lizane Malaj, (38) Merita Deda, (39) Sejdi Lami, (40) Isa Raka, (41) Fadil Vishi, (42) Proposed Witness K31, (43) Mehmet Mazrekaj, (44) Proposed Witness K58, (45) Fetije Vishaj, (46) Musa Ajeti, (47) Qamil Shabani, (48) Shrukri Gerxhaliu and (49) Fedrije Xhafa.

[51] Rule 92 *bis*(A)(i)(a).

[52] Rule 92 *bis*(A)(i)(d).

[53] Rule 92 *bis*(A)(i)(f).

[54] *See, e.g., Prosecutor v. Martić*, Case No. IT-95-11-T, Decision on Prosecution's Motions for Admission of Transcripts Pursuant to Rule 92 *bis*(D) and of Expert Reports Pursuant to Rule 94 *bis*, 13 January 2006, para. 29 (The "evidence . . . relating to the number of killed, expelled and missing persons, as well as the evidence . . . relating to the number, cause and identity of the victims of the crimes charged in the Indictment, are factors to be taken into account in determining a sentence".).

[55] Annex to Response, pp. 2, 3 (*quoting* Rule 92 *bis*(A)(ii)(a)).

[56] The Prosecution notes that Dr. Ranta's "findings are unique and not repetitive of other evidence," but that "the general process of forensic examination and the examinations conducted at Račak are cumulative to other witnesses." Reply, para. 26.

evidence orally. The Accused also object, with regard to proposed witnesses Rexhep Krasniqi,[57] Milazim Thaci,[58] Rahim Latifi,[59] Agim Jemini[60] and Fuad Haxhibeqiri,[61] that the proffered written evidence is essentially "unreliable"[62] or that "its prejudicial effect outweighs its probative value".[63] The Accused make their objections, however, without offering any persuasive reasons why the evidence at issue is doubtful or prejudicial.[64] Also unable to identify any valid reason, the Trial Chamber cannot agree with the Accused. The Accused additionally assert, without explanation, that Osman Kuci's proffered evidence is "not relevant to any incident in the Indictment".[65] On the contrary, Mr. Kuci's evidence concerns the crimes allegedly committed in Suva Reka / Suharekë. The Trial Chamber notes that one factor does weigh against admission of the witnesses' evidence, as discussed below: it is "appropriate for the witness[es] to attend for cross-examination".[66] The Chamber does not consider this reason enough, however, to deny the Motion, as the Chamber's discretion to order or deny cross-examination as appropriate under the circumstances[67] plainly envisages admitting a piece of written evidence while ordering that its source be made available for questioning. Finally, the objections regarding corroboration, which the Accused make in respect of most proffered witnesses, are unpersuasive for reasons already discussed.

18. With regard to whether the witnesses should be made to appear for cross-examination in the event their evidence is admitted, the Chamber notes that the bulk of the Prosecution's proffered written evidence comes from eyewitnesses to crimes charged in the Indictment. As in the *Milošević*

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[57] *See* Annex to Motion, p. 4 ("The nature and source of this statement render it unreliable and its prejudicial effect outweighs its probative value.").

[58] *See ibid.*, p. 6 ("The statement has a lack of truthfulness, honesty, reliability in comparison with other evidences.").

[59] *See ibid.*, p. 11 ("Admission of this statement will cause prejudice to the Accused".).

[60] *See ibid.*, p. 13 ("Admission of this statement will cause prejudice to the Accused".).

[61] *See ibid.*, p. 15 ("The statement lacks reliability in comparison to other evidences.").

[62] *Ibid.*, p. 4 (*quoting* Rule 92 *bis*(A)(ii)(b)).

[63] *Ibid.*, p. 4 (*quoting* Rule 92 *bis*(A)(ii)(b)).

[64] With regard to Rexhep Krasniqi, the Accused doubt the reliability of his statement because it is dated 12 March 1999 but concerns events in the village of Dushanov which are said to have occurred between 24 and 28 March 1999. In its Reply, however, the Prosecution states that Mr. Krasniqi's statement was misdated and was in fact taken on 12 April 1999. *See* Reply, para. 27. In a Confidential Annex to its Reply, the Prosecution attaches a declaration from one of its investigators asserting that the statement was likely taken in April 1999. The Trial Chamber is satisfied that the statement was misdated, which does not make it prejudicial or render its nature or source unreliable.

With regard to Rahim Latifi and Agim Jemini, the Accused assert that their statements are prejudicial because they are the "only" or "crucial" evidence the Prosecution intends to offer with respect to crimes allegedly committed in the village of Pirana. Even assuming for the sake of argument that this is the case, it does not prejudice the Accused. If the only piece of evidence offered to prove a particular crime is written evidence, then an accused cannot be convicted of that crime if the evidence is admitted without an opportunity for cross-examination. *See Galić* Appeals Decision, para. 12 n. 34. If, on the other hand, cross-examination is permitted, then the accused cannot be said to have suffered prejudice.

With regard to Milazim Thaci and Fuad Haxhibeqiri, the Accused merely assert unreliability without offering any reason to doubt the evidence.

[65] Annex to Motion, p. 3.

[66] Rule 92 *bis*(A)(ii)(c).

[67] *See* Rule 92 *bis*(E).

case, the proffered evidence here relates "to alleged attacks by Serb forces on Kosovo municipalities and the resulting deportations and killings."[68] The Trial Chamber in that case found that "the requirements of a fair trial demand that the accused be given the right to cross-examine the witnesses in order to fully test the Prosecution's case."[69] This Chamber agrees that the eyewitness material "relates to a 'critical element of the Prosecution's case' or, put another way, to a live and important issue between the parties".[70] Indeed, most issues in this case are "live and important", as the Accused deny that any alleged crimes for which they could be held responsible were committed in the course of the events described in the Indictment. The Chamber thus also finds that the proffered evidence of non-eyewitnesses, which concerns issues such as the number and identity of victims as well as the situations at the crime scenes before and after the alleged attacks, is of sufficient importance to provide an opportunity to conduct cross-examination. In addition, the fact that a good deal of the proffered evidence is hearsay is another reason to allow the Accused to question the witnesses. Although the proffered testimony transcripts indicate that the witnesses previously were cross-examined, the Trial Chamber finds that because the questioning was conducted almost entirely by Slobodan Milošević, a self-represented accused untrained and inexperienced in the practice of criminal defence, his cross-examination of the witnesses does not make such questioning inappropriate here.

19. Considering that there are factors which favour admitting the proffered written evidence, that there is only one factor which disfavours admission, that the evidence satisfies the requirements of Rule 89 and that admitting the evidence in written form would save significant time during trial without prejudicing the Accused, the Trial Chamber finds that it would be appropriate to admit the evidence, provided that each witness whose evidence is admitted is made available for cross-examination. The actual decision whether to admit the material into evidence will be made in due course, as there remains the possibility that not all of the crime sites currently listed in the Indictment will be the subject of evidence at trial, and there is no point in now admitting what may not be discussed.[71]

20. Regarding the proffered evidence of the two witnesses who are now deceased, Ibrahim Rugova and Antonio Russo, the Trial Chamber is satisfied that both witnesses are dead[72] and that there are satisfactory indicia of the material's reliability.[73] Both witnesses affirmed that their

[68] *Milošević*, para. 24.
[69] *Ibid.*, para. 25.
[70] *Ibid.*, para. 24 (*quoting Sikirica*, para. 4).
[71] *See* Rules 73 *bis*(D) and (E).
[72] *See* Rule 92 *bis*(C)(i). With the material accompanying its Motion, the Prosecution included media reports of the deaths of both witnesses.
[73] *See* Rule 92 *bis*(C)(ii).

statements were true to the best of their knowledge, and the transcript of Dr. Rugova's testimony in *Milošević* was recorded after he was sworn, examined, cross-examined and re-examined.

21. There are compelling reasons, however, not to grant the Motion in relation to Dr. Rugova's evidence. First, a good deal of it – more, in fact, than the Prosecution indicates – concerns the acts and conduct of the Accused.[74] Dr. Rugova's references to the Rambouillet conference, for example, impliedly concern two Accused, Mr. Milutinović and Mr. Šainović, because they are alleged to have represented Serbian interests at the conference.[75] Second, a sizeable amount of Dr. Rugova's proffered evidence relates to controversial historical and political events[76] which might not have any significant bearing on the subjects which form the core of the Indictment, namely, the crimes allegedly committed in 1999. In such a wide-ranging Indictment as the one in this case, it is furthermore important for the Trial Chamber to exercise close supervision and control over the presentation of evidence relating to historical and political context so that it is not admitted

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[74] The Prosecution does not seek admission of the following portions of Dr. Rugova's evidence on the ground that they concern the acts and conduct of the Accused: (1) From the Witness Statement of Dr. Ibrahim Rugova, dated 1 and 3 November 2001 ("Statement of Dr. Rugova"), the section entitled "G15 Negotiating Team" on pages 6-7; the last three paragraphs of page 10 (beginning with the words "We left Prishtina around 7:00 a.m."); all of page 11; and the first two paragraphs of page 12; (2) From the transcript of Dr. Rugova's testimony in *Prosecutor v. Milošević*, Case No. IT-02-54-T ("Oral Testimony of Dr. Rugova"), pages 4214-4217 and 4228-4236. *See* Reply, para. 19 n. 20.

In addition, the Trial Chamber considers that the following material concerns the acts and conduct of the Accused and is therefore inadmissible: (1) From the Statement of Dr. Rugova, the section entitled "Rambouillet" on pages 7-8, because that section impliedly concerns the acts and intentions of two Accused, Mr. Milutinović and Mr. Šainović, who are said to have represented Serbian interests at the Rambouillet conference. *See* Redacted Third Amended Joinder Indictment, 21 June 2006 (the "Indictment"), para. 99. Additionally, the third and fourth paragraphs of page 12 are inadmissible because that material concerns a meeting between Dr. Rugova, Mr. Milutinović and Mr. Šainović as well as the purported acts of those two Accused. A document mentioned in the material, identified as exhibit 4.026 in the Motion's Confidential Annex C, is a 28 April 1999 joint statement signed by Dr. Rugova and Mr. Milutinović. This document is also inadmissible, as it concerns the acts and conduct of Mr. Milutinović. Finally, the last two paragraphs of page 12 of Dr. Rugova's statement are inadmissible because they impliedly concern the acts and conduct of the Accused; (2) From the Oral Testimony of Dr. Rugova, pages 4218-4220 are inadmissible because they concern the Rambouillet conference; pages 4237-4253 are inadmissible because they concern the joint statement signed by Dr. Rugova and Mr. Milutinović; page 4283, lines 1-6, is inadmissible because it concerns the Rambouillet conference; and page 4324, line 18, through page 4329 is inadmissible because the pages concern the Rambouillet conference.

[75] *See* Indictment, para. 99.

[76] In his statement, Dr. Rugova said: "MILOŠEVIĆ's aim was to ethnically cleanse Kosovo of Albanians. He was not interested in supporting the moderate Kosovo Albanian political forces. He did not make a distinction between the political option and the military option." Statement of Dr. Rugova, p. 5. This comment refers to the mental state and implied acts of Slobodan Milošević, a member of the alleged joint criminal enterprise in which the Accused are said to have been participants. *See* Indictment, para. 20. Consequently, the comment refers to someone for whose acts the Accused could bear responsibility. In light of the nature of the comment, the Trial Chamber considers that it would likely be unfair to the Accused to admit it in writing.

Similarly, the Chamber doubts the fairness of admitting the following pages from the Oral Testimony of Dr. Rugova: pages 4254-4255 (concerning a meeting between Dr. Rugova and Mr. Milošević); page 4257, line 23, through page 4258, line 2 (referring to a "massacre" being perpetrated by "Belgrade" and Mr. Milošević against Kosovo Albanians); page 4282, lines 4-13 (referring to Belgrade's "final aim" of "emptying Kosova of its population"); page 4305, lines 11-17 (referring to the "military state and situation in Kosova"); page 4315, lines 6-18 (referring to alleged Serb crimes orchestrated by Mr. Milošević); pages 4317-4320 (referring to allegedly criminal acts of Mr. Milošević); page 4339, line 24, through page 4340, line 7 (referring to purported Serb goals of ethnic cleansing and territorial expansion); and page 4349, lines 4-10 (stating that "Belgrade kept Kosova in its own by force, by violence").

indiscriminately in writing. It would not be reasonably practicable for the Trial Chamber to edit the statement and transcript of Dr. Rugova in advance of the trial in a way that would ensure that the evidence is confined to relevant matters in issue between the parties. Third, there is obviously no possibility of Dr. Rugova appearing for cross-examination which, in light of the nature of his evidence and circumstances of this case, weighs against admission. The Trial Chamber will therefore not admit Dr. Rugova's evidence.

22. By contrast, the written statement of Mr. Russo is directly relevant to crimes allegedly committed in Priština in 1999. It is thus relevant crime-base evidence. It is also cumulative, and said to be corroborative, of the evidence of proposed witnesses Nazilie Bala and Emin Kabashi,[77] who may be cross-examined. The Trial Chamber thus considers it appropriate to admit the evidence, albeit cross-examination is not possible. If the evidence is ultimately admitted, the Trial Chamber will have very much in mind the absence of the opportunity to cross-examine Mr. Russo when evaluating his evidence.

23. In light of the findings above, the Trial Chamber **GRANTS** the Motion in part and **ORDERS** as follows:

(1) the Prosecution's requests to file oversized submissions and a reply are granted;

(2) the proffered evidence of the witnesses listed in the Motion's Confidential Annexes is appropriate for admission, except that of Ibrahim Rugova, that which concerns the acts and conduct of any Accused or that which, when offered at trial, must have but lacks a Rule 92 *bis*(B) verified witness declaration;

(3) in due course, the Trial Chamber will admit into evidence the material listed in the Motion's Confidential Annexes, as appropriate;

(4) the Accused shall have an opportunity to cross-examine each witness whose written material is admitted into evidence.

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

Dated this fourth day of July 2006.
At The Hague,
The Netherlands.

Judge Iain Bonomy, Presiding
[Seal of the Tribunal]

[77] *See* Motion, para. 118 (Mr. Russo's "account of the deportation of Kosovo Albanians from Priština municipality is corroborative of that provided by other witnesses, including Nazilie Bala and Emin Kabashi.").