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UNITED NATIONS

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

Case No.: IT-05-88/2-T

Date: 07 July 2010

Original: English

IN TRIAL CHAMBER II

Before: **Judge Christoph Flügge, Presiding**
Judge Antoine Kesia-Mbe Mindua
Judge Prisca Matimba Nyambe

Registrar: **Mr. John Hocking**

Decision of: **07 July 2010**

PROSECUTOR

v.

ZDRAVKO TOLIMIR

PUBLIC

DECISION ON PROSECUTION'S MOTION FOR ADMISSION OF WRITTEN EVIDENCE PURSUANT TO RULES 92 *BIS* and 94 *BIS*

Office of the Prosecutor
Mr. Peter McCloskey

The Accused
Zdravko Tolimir

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's Motion for Admission of Written Evidence in Lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis*", filed on 13 February 2009 ("Rule 92 *bis* Motion"), and hereby renders its decision thereon.

I. INTRODUCTION

1. In its Rule 92 *bis* Motion, the Prosecution requests that the Chamber admit written evidence from 130 witnesses pursuant to Rule 92 *bis* of the Rules of Procedure and Evidence ("Rules"). Since the Rule 92 *bis* Motion was filed, the Prosecution has moved for the admission of the written evidence of 20 of these witnesses pursuant to Rule 92 *ter*,[1] and has otherwise withdrawn its application for admission pursuant to Rule 92 *bis* with respect to 3 witnesses,[2] leaving 107 witnesses for whom such an application is still pending.[3] Moreover, 9 of the 107 remaining witnesses are experts.

2. Many of these 107 witnesses have testified previously before the Tribunal. Several have testified *viva voce* in *Prosecutor v. Popović et al.* ("*Popović*"), and the Prosecution submits the transcripts of their testimony in *Popović*, along with associated exhibits here. Some witnesses testified pursuant to Rule 92 *ter* in *Popović*, and the Prosecution submits the transcripts of both their *Popović* testimony, as well as their prior testimony in either *Prosecutor v. Blagojević and Jokić* ("*Blagojević*") or *Prosecutor v. Krstić* ("*Krstić*"), along with associated exhibits here. Several witnesses did not testify in court during the *Popović* case, however, and the Prosecution submits their transcripts from *Blagojević* and/or *Krstić*.[4]

3. Additionally, the Prosecution moves for the admission of several witnesses who have not previously testified before the Tribunal. These witnesses include witnesses who have testified in national proceedings and witnesses who submit a statement pursuant to Rule 92 *bis* (B).[5]

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1 Witnesses Nos. 15, 38, 42, 43, 44, 59, 60, 81, 82, 83, 92, 94, 100, 102, 105, 107, 110, 117, 134, and 139.

2 Witnesses Nos. 27, 99, and 185.

3 Witnesses Nos. 2, 6, 8, 9, 10, 11, 12, 13, 14, 17, 18, 20, 21, 22, 23, 24, 25, 28, 36, 41, 45, 46, 47, 51, 52, 54, 56, 57, 61, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 97, 101, 104, 106, 111, 113, 116, 118, 119, 120, 122, 123, 124, 125, 132, 133, 135, 138, 140, 141, 142, 143, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 173, 175, 177, 178, 179, 180, 181, 182, 183, 184, 186, and 190.

4 Witnesses Nos. 28, 54, 56, 59, 61, 165, and 190.

5 Witnesses Nos. 52, 63–80, 57, 60, 185, and 186.

II. PROCEDURAL BACKGROUND

4. On 13 March 2009, the Prosecution filed the "Prosecution's Notice of Disclosure of Expert Witness Reports Pursuant to Rule 94 *bis* and Attached Appendices A and B" ("Prosecution Rule 94 *bis* Notice"), in which it gave notice of disclosure of several expert witness reports for witnesses whose evidence was also the subject of the Prosecution's Rule 92 *bis* Motion.[6]

5. On 18 March 2009, the Prosecution filed confidentially the "Prosecution's Motion for Admission of Evidence Pursuant to Rule 92 *ter* with Appendices A–C" ("First Rule 92 *ter* Motion"), in which it requested (i) the conversion of its application for the admission of ten witnesses' written evidence pursuant to Rule 92 *bis* to an application for the admission of their evidence pursuant to Rule 92 *ter*[7] and (ii) requested to withdraw its request pursuant to Rule 92 *bis* with respect to four witnesses.[8] On the same date, the Prosecution filed confidentially the "Prosecution's Motion to Admit the Evidence of Bojanović, [B-161 from *Prosecutor v. Milošević*, Case No. IT-02-54-T] ("B-161") and Deronjić Pursuant to Rule 92 *quater* with Confidential Appendices A and B" ("Rule 92 *quater* Motion"), in which it requested the admission of the proposed evidence of three witnesses pursuant to Rule 92 *quater*, effectively withdrawing its request to admit their proposed evidence pursuant to Rule 92 *bis*.[9] Each of these requests were granted in the Chamber's "Decision on Prosecution's Motion for Admission of Evidence Pursuant to Rule 92 *ter* with Appendices A–C", dated 3 November 2009; and its "Decision on Prosecution's Motion for Admission of Evidence Pursuant to Rule 92 *quater*", dated 25 November 2009, respectively.

6. The Chamber received the "Urgent Requests by Zdravko Tolimir Regarding Setting Time Limits for Filing Responses to Prosecution Motions under Rules 92 *bis* and 94 *bis*", submitted by the Accused in BCS on 16 April 2009 and filed in English on 17 April 2009, in which the Accused requested that the Chamber (1) grant him until 29 May 2009 for the filing of a response to the Prosecution Rule 94 *bis* Notice and (2) temporarily refrain from setting a time limit for the filing of a response to the Rule 92 *bis* Motion. On 21 April 2009, the Prosecution filed the "Prosecution's Response to the Accused Tolimir's Requests Regarding Setting Time Limits for Filing Responses to Prosecution Motions Under Rules 92 *bis* and 94 *bis*" ("Prosecution Response"), acceding to the

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6 Prosecution Rule 94 *bis* Notice, para. 1. Notice of disclosure was given for Witnesses Nos. 2, 9, 10, 11, 12, 13, 14, 15, 16, 17, and 18; all of whom except Witnesses Nos. 15 and 16 were the subject of the Prosecution's Rule 92 *bis* Motion.

7 The Prosecution's request pertained to Witnesses Nos. 15, 42, 43, 44, 59, 60, 81, 82, 83, and 99.

8 Witnesses Nos. 27 and 98, 185 and 187. The Prosecution indicated that it would seek to call Witnesses Nos. 185 and 187 as *viva voce* witnesses, but indicated that it would not seek the admission of the evidence of Witnesses 27 and 98. First Rule 92 *ter* Motion, para. 26.

first request[10] and opposing the second, arguing that while a reasonable extension of time might be justified, refraining altogether from setting a time limit was not.[11]

7. On 24 April 2009, the Chamber issued the "Decision on Tolimir's Requests Regarding Setting Time Limits for Filing Responses to Prosecution Motions under Rules 92 *bis* and 94 *bis*", granting the Accused extensions of time to file his response to the Prosecution Rule 94 *bis* Notice by 25 May 2009 and his response to the Prosecution's 92 *bis* Motion by 8 June 2009.

8. On 11 May 2009, the Accused submitted the "Request for Extension of Time Limit for Filing a Response to the Prosecution Motion under Rule 92 *bis*", which was filed in the English version on 15 May 2009, in which he requested permission to submit a single response to the Rule 92 *bis* Motion by 15 July 2009, or to submit separate responses in four parts by 8 June 2009, 15 June 2009, 25 June 2009, and 17 July 2009, respectively. On 26 May 2009, the Prosecution filed the "Prosecution's Response to the Accused Tolimir's Request for Extension of Time Limit for Filing a Response to the Prosecution Motion under Rule 92 *bis*", in which it did not object to the Accused's request, but stated that the process of filing four separate responses would be unnecessarily complicated, and suggested that the Prosecution should be permitted to file a reply to any response by the Accused following the summer recess.

9. On 22 May 2009, the Accused submitted the "Notice of Zdravko Tolimir Pursuant to Rule 94 *bis* (B)(ii)", which was filed in English on 25 June 2009 ("Defence Rule 94 *bis* Notice"), in which the Accused stated that he did not accept the expert reports that were referenced in the Prosecution Rule 94 *bis* Notice and requested cross-examination of the Prosecution's expert witnesses whose expert reports were disclosed therein.

10. The Chamber issued its "Decision on Tolimir's Request for an Extension of Time Limit for Filing a Response to the Prosecution Motion under Rule 92 *bis*" on 29 May 2009, setting staggered time-limits for the Accused's multi-part response. In accordance with that decision, the Chamber received the following responses to the Rule 92 *bis* Motion from the Accused, each of which contained various challenges to the evidence proposed by the Prosecution for admission pursuant to Rule 92 *bis*:

> (i) "Zdravko Tolimir's Response to the Prosecution's Motion for Admission of Written Evidence in Lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis* Part One" ("Response Part One"), submitted on 8 June 2009 and filed confidentially in English on 22 June 2009;

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9 Witnesses Nos. 144, 174, and 176.

10 Prosecution Response, para. 3.

11 Prosecution Response, para. 4.

(ii) "Zdravko Tolimir's Response to the Prosecution's Motion for Admission of Written Evidence in Lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis* Part Two" ("Response Part Two"), submitted on 15 June 2009 and filed confidentially in English on 10 July 2009;

(iii) "Response of Zdravko Tolimir to the Prosecution's Motion for Admission of Written Evidence in Lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis* Part Three (UN Observer, Dutch Battalion Personnel and Intercept Operators)" ("Response Part Three"), submitted on 25 June 2009 and filed confidentially in English on 9 July 2009;

(iv) "Zdravko Tolimir's Response to the Prosecution's Motion for Admission of Written Evidence in Lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis* Part Four" ("Response Part Four", submitted on 10 July 2009 and filed confidentially in English on 29 July 2009.

11. On 31 July 2009, the Prosecution filed the "Prosecution's Request for Leave to Reply and Reply to Response of Zdravko Tolimir to the Prosecution's Motion for Admission of Written Evidence in Lieu of Viva Voce Testimony Pursuant to Rule 92 *bis*, Parts One to Four" ("Reply"), in which it submitted that the Accused's objection to all of the evidence proposed by the Prosecution pursuant to Rule 92 *bis* demonstrated a lack of good faith and reasonableness.

12. On 19 August 2009, the Accused submitted the "Request by Zdravko Tolimir for Leave to File a Rejoinder and Rejoinder to the Reply to the Response of Zdravko Tolimir to the Prosecution's Motion for Admission of Written Evidence in Lieu of Viva Voce Testimony Pursuant to Rule 92 *bis*", which was filed in the English version on 21 August 2009 ("Rejoinder").

13. On 26 November 2009, the Prosecution filed confidentially the "Prosecution's Supplementary Notice of Disclosure of Expert Witness Reports Pursuant to Rule 94 *bis* and Attached Appendices A and B" ("Supplementary Prosecution Rule 94 *bis* Notice"), concerning expert witnesses who were also the subject of its Rule 92 *bis* Motion.

14. On 11 January 2010, the Accused submitted "Zdravko Tolimir's Notice Pursuant to Rule 94 *bis*(B)(ii)", filed confidentially in English on 14 January 2010 ("Supplementary Defence Rule 94 *bis* Notice"), in which the Accused submitted that he did not accept the reports contained in the Supplementary Prosecution Rule 94 *bis* Notice and requested cross-examination of the Prosecution's expert witnesses whose expert reports were disclosed therein.

15. On 29 June 2010, the Prosecution filed the "Prosecution's Addendum to its Rule 94 *bis* Notices of Disclosure Concerning Expert Witness Reports", in which the Prosecution seeks leave to

supplement its Rule 94 *bis* disclosure in respect of Witness No. 9 by adding an expert report by the witness.

III. GENERAL SUBMISSIONS OF THE PARTIES

A. Motion

16. The Prosecution's Rule 92 *bis* Motion contains different types of written evidence from previous proceedings, including that which was given as *viva voce* testimony, as well as evidence admitted in previous trials pursuant to Rules 92 *bis* and/or 92 *ter*, and various combinations thereof. The Prosecution claims in the body of the Rule 92 *bis* Motion that none of the proposed evidence goes to the acts and conduct of the Accused,[12] and asserts that it is therefore admissible. However, the Prosecution later acknowledges that some exhibits discussed in one witness's testimony may mention the Accused, although the testimony of the witness pertains primarily to the collection and authentication of those exhibits.[13]

17. The Prosecution asserts that much of the proposed Rule 92 *bis* testimony is appropriate for admission pursuant to the Rule 92 *bis*(A)(ii) criteria because it is "crime base" or victim impact evidence, background or statistical information, or presents expert opinions that concern undisputed issues,[14] and according to the Prosecution, "it is unlikely that there will be any real challenge to the crime base".[15] The Prosecution further contends that the witnesses' evidence is reliable and submits that nothing suggests that the prejudicial effect of such evidence outweighs its probative value,[16] rendering it unnecessary for the witnesses to appear for cross-examination. In particular, the Prosecution points out that all of the evidence proposed for admission under Rule 92 *bis* has previously been presented orally before either this Tribunal or the Tuzla Cantonal Court.[17]

18. In addition, the Prosecution argues that "the majority of the evidence at issue is cumulative of testimony to be offered *viva voce* and/or through Rule 92 *ter* witnesses during trial".[18] Indeed, in Appendix A to the Rule 92 *bis* Motion, most—but not all—witnesses' evidence is cross-referenced with and alleged to be cumulative of other oral evidence.[19] The Prosecution notes that where

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12 Rule 92 *bis* Motion, para. 16.

13 Rule 92 *bis* Motion, Appendix A, p. 2, entry for Witness No. 6.

14 Rule 92 *bis* Motion, para. 22.

15 Rule 92 *bis* Motion, para. 22.

16 Rule 92 *bis* Motion, para. 23.

17 Rule 92 *bis* Motion, para. 24.

18 Rule 92 *bis* Motion, para. 23.

19 *See, e.g.*, Rule 92 *bis* Motion, Appendix A, p. 7, entries for Witnesses Nos. 21 and 22 (submitting that their evidence is cumulative because it is corroborated by Witness No. 19); *ibid.*, p. 26, entry for Witness No. 106 (submitting that evidence is cumulative because it is corroborated by Witnesses Nos. 95, 96, 109, 112, 103, 114,

evidence admitted under Rule 92 *bis* is the only evidence of certain facts alleged in the indictment, such evidence may only lead to a conviction if corroborated.[20] Citing the judgements of other trial chambers, the Prosecution asserts that "other evidence"—including the testimony of other witnesses, documentary evidence, and video footage—may serve to corroborate evidence admitted pursuant to Rule 92 *bis* in order for such evidence to form the basis of a conviction.[21] The Prosecution has therefore indicated in Appendix A of the Rule 92 *bis* Motion where proposed Rule 92 *bis* evidence is corroborated by other evidence, including the testimony of other witnesses (including other Rule 92 *bis* witnesses), documentary evidence, and video footage.[22]

B. Response

19. The Accused raises a number of recurring objections throughout his four part response. First, he often asserts that his defence strategy differs from that of previous accused.[23] Second, he claims that denying him the opportunity to cross-examine a particular witness would be a "flagrant" violation of his right to cross-examine and/or would be tantamount to a denial of the right to defence.[24] Similarly, the Accused states that any prior cross-examination should not be considered as a factor in favour of admission without cross-examination, or that very little weight should be given to it because his defence is "significantly different" than that of previous accused; his strategy and his arguments were not presented in the previous cases; and he would explore different topics and/or the same topics, but in greater depth.[25] Third, the Accused points out differences between the Prosecution's summaries of the witnesses' testimony filed pursuant to Rule 65 *ter*(E) and their previous testimony.[26] Finally, he contends that because the Prosecution claims that certain evidence is relevant to all counts in the indictment, such evidence is inadmissible under Rule 92 *bis*.[27]

20. In addition to the specific objections raised with regard to each witness, the Accused raises a general objection to admitting without cross-examination evidence going to the acts and conducts of the alleged members of either joint criminal enterprise ("JCE") alleged in the Prosecution's Third

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108, and 115); *cf. ibid.*, p. 32, entry for Witness No. 133 (submitting that evidence is cumulative because it is corroborated by "other Drina Corps witnesses also listed for 92 *bis* admission".).

20 Rule 92 *bis* Motion, para. 18.

21 Rule 92 *bis* Motion, para. 18.

22 *See, e.g.*, Rule 92 *bis* Motion, Appendix A, p. 2, entry for Witness No. 8 (submitting that the testimony is cumulative of Rule 92 *ter* Witness No. 15, as well as proposed Rule 92 *bis* Witnesses No. 18, and is corroborated by documentary evidence); *ibid.*, p. 8, entry for Witness No. 23, (submitting that the testimony is cumulative of Witnesses Nos. 19 and 26, as well as proposed Rule 92 *bis* Witnesses Nos. 20, 21, 22, 23, 24, 25, and 28. The Prosecution adds that Witness No. 23's evidence is corroborated by Proposed Adjudicated Facts Nos. 49–59, 84–116, 156–167, 168–179, 180–194, 433–451, 459–486, 487–494, 495–510, and 559–563).

23 *See, e.g.*, Response Part One, para. 21; Response Part Two, para. 72.

24 *See, e.g.*, Response Part One, para. 15; Response Part Two, para. 67.

25 *See, e.g.*, Response Part One, paras. 9, 19; Response Part Two, para. 22.

26 *See, e.g.*, Response Part Three, paras. 102–103, 116, 120, and 127.

Amended Indictment ("Indictment"). The Accused argues that he *must* be allowed to cross-examine these witnesses "because their testimony refers to conduct by individuals and groups of persons for whom the Prosecution contends that they were members of a joint criminal enterprise, and that Z. Tolimir was responsible for their acts or omissions".[28] Similarly, the Accused argues that evidence concerning the acts and conduct of VRS personnel whom the Accused is alleged to have supervised cannot be admitted without cross-examination.[29]

21. In response to the Prosecution's claim that the expert opinions concern matters not in dispute, the Accused states "that Prosecution's factual allegations, including those linked to the alleged 'crime-base' ARE VERY MUCH IN DISPUTE".[30] The Accused also states that the crime-base evidence referred to by the Prosecution is "the most disputed category".[31] With regard to DNA analysis, the Accused claims that the Prosecution has disclosed to the Defence material which "raises serious questions" that must be put to the witnesses on cross-examination. He also claims that the only way to ensure that his right to a fair trial is protected is to permit him the opportunity to cross-examine every witness.[32]

22. Finally, the Accused asserts that he does not want to set out in detail *how* his cross-examinations would be different than previous cross-examinations because this could be used to coach the witnesses and it would take too much time and space.

C. Reply

23. After requesting leave to file the Reply, the Prosecution submits that "the Accused's blanket objection to the use of Rule 92 *bis* . . . demonstrates a lack of good faith and goes far beyond any reasonable attempt to identify witnesses whose evidence goes to issues about which there can be genuine dispute between the parties".[33] As a result, the Prosecution argues, "the Response should be denied in its entirety".[34]

D. Rejoinder

24. The Accused first submits that a rejoinder is proper because the Prosecution has (i) "raised an accusation concerning conduct which allegedly runs counter to the principle of good faith" and

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27 *See, e.g.*,. Response Part One, para. 43.
28 Response Part Four, filed in English on 29 July 2009, para. 7.
29 Response Part Four, filed in English on 29 July 2009, para. 9.
30 Response Part One, para. 30 (emphasis in original).
31 Response Part One, para. 31.
32 Response Part One, paras. 56, 65.
33 Reply, para. 3.
34 Reply, para. 4.

(ii) misrepresented the nature of the Accused's Response.[35] More specifically, the Accused contends that "the Prosecution did not devote due care to considering the argumentation contained in the [Response]" and that his objections to the Prosecution's Rule 92 *bis* Motion cannot be construed as an action inconsistent with the principle of good faith.[36] Rather, he argues, "one party's objection to motions by the other can in no way be treated as a lack of good faith".[37]

25. The Accused further asserts that it is improper for the Prosecution to "claim that what is disputed is not disputed".[38] The Accused points out that the first of his four-part response contains a series of objections to the Prosecution's Rule 92 *bis* Motion as a whole, in addition to the specific objections presented in relation to each group of witnesses.[39] The Accused also reiterates several arguments contained in his Response, including his objection to the volume of witnesses addressed in the Rule 92 *bis* Motion,[40] as well as his view that the evidence of the Bosnian Muslim witnesses is "highly unreliable, even mutually contradictory".[41]

IV. APPLICABLE LAW

26. At the outset, the Chamber notes that while not explicit in the text of Rule 92 *bis* itself, all evidence, including that which is admitted pursuant to the Rule,[42] must satisfy the fundamental requirements for admissibility established in Rule 89(C) and (D).[43] As the Appeals Chamber has noted:

> Far from being an 'exception' to Rule 89 [...] Rule 92 *bis* identifies a particular situation in which, once the provisions of Rule 92 *bis* are satisfied, and where the material has probative value within the meaning of Rule 89(C), it is in principle in the interests of justice within the meaning of Rule 89(F) to admit the evidence in written form.[44]

27. Rule 92 *bis* permits the Trial Chamber to dispense with the attendance of a witness in person and instead admit the written statement or transcript of previous testimony of a witness in lieu of oral testimony, where the evidence goes to proof of a matter other than the acts and conduct of the

35 Rejoinder, para. 2.
36 Rejoinder, para. 5.
37 Rejoinder, para. 11.
38 Rejoinder, para. 12.
39 Rejoinder, para. 6.
40 Rejoinder, para. 5.
41 Rejoinder, para. 7.
42 *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. 12 (referring to the "intention of Rule 92*bis*... to qualify the previous preference in the Rules for 'live, in court' testimony, and to permit evidence to be given in written form where the interests of justice allow provided that such evidence is probative and reliable...").
43 Rule 89 (C) provides: "A Chamber may admit any relevant evidence which it deems to have probative value". According to Rule 89 (D), "A Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial".
44 *Galić* Appeals Decision, para. 12.

accused as charged in the indictment.[45] Even where admissible, the Chamber is not bound to admit such evidence, but must use its discretion and determine (i) whether admission is appropriate,[46] and (ii) where the evidence is appropriate for admission, whether the Chamber will still exercise its discretion to require the witness in question to appear for cross-examination at trial.[47] If the witness is required to appear, the provisions of Rule 92 *ter* apply.[48]

28. Accordingly, the Chamber's Rule 92 *bis* analysis consists of either three or four steps, depending on the type of written testimony tendered. First, the Chamber must decide whether the evidence is admissible in that it goes to proof of a matter other than the acts and conduct of the accused as charged in the Indictment. Second, where the evidence is admissible, the Chamber must decide whether it is appropriate to admit such evidence pursuant to Rule 92 *bis*. Third, if the evidence is admitted, the Chamber must also decide whether to exercise its discretion to require the witness to appear for cross-examination. Finally, if the evidence submitted for admission pursuant to Rule 92 *bis* consists of a written statement, the formal requirements of Rule 92 *bis*(B) must be met.

A. Admissibility

29. Rule 92 *bis* provides that evidence is inadmissible under the rule if it goes to proof of the acts and conduct of the accused as charged in the indictment. The particular meaning to be ascribed to the phrase "acts and conduct of the accused" has been described by another Chamber of the Tribunal as follows:

> 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.[49]

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45 Rule 92 *bis*(A).

46 Rule 92 *bis*(A) ("A Trial Chamber *may* . . . admit, in whole or in part...") (emphasis added).

47 Rule 92 *bis*(C) ("The Trial Chamber shall decide... *whether* to require the witness to appear for cross-examination") (emphasis added).

48 Rule 92 *bis*(C). Rule 92 *ter* provides:

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

49 *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 ("*Milošević* Decision"), para. 22 (citation omitted) (emphasis added).

The Appeals Chamber has specified that the prohibition against admitting evidence that goes to proof of the acts and conduct of the accused extends to any of the accused's acts and conduct which could be used to show that he participated in or shared the intent of other members of an alleged joint criminal enterprise,[50] determining that Rule 92 *bis* excludes written evidence which goes to proof of any act or conduct of the accused which the Prosecution relies upon 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, preparation 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.[51]

30. In other words, since the acts and conduct "test" is personal to the accused, the fact that evidence tendered pursuant to Rule 92 *bis* relates to the acts and conduct of an accused's subordinate, or to the acts and conduct of some other person for whose acts and conduct the accused is charged with responsibility is not directly relevant to the admissibility of the evidence. Rather, it is relevant to the overall exercise of the Chamber's discretion under Rule 92 *bis*, as will be discussed in further detail below.[52]

B. Whether the Evidence Should be Admitted

31. Although the Chamber may consider any factor in relation to the question of whether admissible written evidence should be admitted, a non-exhaustive list of factors—weighing in favour of and against admission—is included in Rule 92 *bis*(A), and reads as follows:

> (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:

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50 *Galić* Appeals Decision, paras. 9–10.

51 *Galić* Appeals Decision, para. 10. *See also Prosecutor v. Lukić and Lukić*, Case No. IT-98-32/1-T, Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 *bis*, 22 August 2008 ("*Lukić* Trial Decision"), para. 15; *Prosecutor v. Karadžić*, Case No. IT-95-5/18-PT, Decision on Prosecution's Third Motion for Admission of Statements and Transcripts of Evidence in Lieu of *viva voce* Testimony Pursuant to Rule 92 *bis* (Witnesses for Sarajevo Municipality), 15 October 2009, ("*Karadžić* October 2009 Decision"), para. 5.

52 *Prosecutor v. Brdanin & Talić*, Case No. IT-99-36-T, Public Version of the Confidential Decision on the Admission of Rule 92 *bis* Statements Dated 1 May 2002, 23 May 2002 ("*Brdanin* May 2002 Decision"), para. 14. *See also* discussion *infra* para. 32.

(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;

(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.

32. Although the fact that written evidence pertains to the acts and conduct of the accused's subordinates is not determinative of the admissibility of such evidence under Rule 92 *bis*, the Appeals Chamber has stated that the rule was primarily intended to be used to establish what is now referred to as crime-base evidence "rather than the acts and conduct of what may be described as the accused's immediately proximate subordinates".[53] Thus, while the mere fact that written evidence relates to the acts and conduct of the accused's subordinate, or of some other person for whose acts and conduct the accused is charged with responsibility is not determinative of the propriety of its admission under the Rule, other chambers have explicitly considered whether the individual whose acts and conduct are described in the statement or transcript is so proximate to the accused and the evidence is pivotal to the Prosecution's case that it would be unfair to admit the evidence in written form.[54]

C. Whether the Witness Should Appear for Cross-Examination

33. Where the Chamber decides to admit written evidence pursuant to Rule 92 *bis*, it may nevertheless require the witness to appear for cross-examination, at which point the provisions of

[53] *Galić* Appeals Decision, para. 16.

Rule 92 *ter* apply.[55] One chamber has held that Rule 92 *bis* imparts "discretion to the Trial Chamber whether to decide if cross-examination is appropriate under the circumstances, regardless of any particular showing from the cross-examining party".[56] In other words, where the responding party has requested cross-examination in relation to a particular witness, the Chamber should conduct an independent analysis of whether it is appropriate to call the witness for cross-examination, regardless of whether the arguments of the party requesting cross-examination are persuasive standing alone.

34. The Tribunal's case law provides a number of examples of criteria used by various chambers to aid the analysis of whether to require a witness whose written evidence is admitted pursuant to Rule 92 *bis* to appear for cross-examination. The Chamber may consider, *inter alia*:

(i) the overriding obligation to ensure the accused a fair trial under Articles 20 and 21 of the Statute;[57]

(ii) whether the evidence in question relates to a critical element of the Prosecution's case, or to a "live and important issue between the parties, as opposed to a peripheral or marginally relevant issue";[58]

(iii) the cumulative nature of the evidence;[59]

(iv) whether the evidence is "crime-base" evidence or whether it relates to the acts and conduct of subordinates for which the accused is allegedly responsible;[60]

(v) the proximity of the accused to the acts and conduct described in the evidence;[61] and

(vi) where transcripts are concerned, whether the previous cross-examination was conducted by an accused with a substantially common interest and whether the cross-examination

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54 *Galić* Appeals Decision, paras. 13–16. *See also Brđanin* May 2002 Decision, para. 14.

55 Rule 92 *bis* (C).

56 *Lukić* Trial Decision, para. 24 (citing *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-PT, Decision on Prosecution's Rule 92 *bis* Motion, 4 July 2006, para. 11 (citations omitted)).

57 *Prosecutor v. Sikirica et al.*, Case No. IT-95-08-T, Decision on the Prosecution's Application to Admit Transcripts Under Rule 92*bis*, 23 May 2001 ("*Sikirica* Decision"), para. 4.

58 *Milošević* Decision, paras. 24–25; *See, e.g., Prosecutor v. Brđanin and Talić*, Case No. IT-99-36-T, Decision on "Objection and /or Consent to Rule 92 *bis* Admission of Witness Statements Number One" Filed by Brđanin on 16 January 2002 and "Opposition du Général Talić à L'Admission des Dépositions Recueillies en Application de L'Article 92 *bis* du Règlement" filed by Talić on 21 January 2002, para. 18 (expunging sections of transcript dealing with actions of troops under the Accused's command, which it would have been unfair to admit against the Accused); *Karadžić* October 2008 Decision, para. 8.

59 *Milošević* Decision, para. 23.

60 *Galić* Appeals Decision, paras. 13–16; See also *Prosecutor v. Brđanin*, Case No. IT-99-36-T, Third Decision on the Admission of Written Statements Pursuant to Rule 92 *bis*, 3 September 2002, para. 44; *Milošević* Decision, para. 22 ("The fact that conduct is that of co-perpetrators or subordinates is relevant to whether cross-examination should be allowed and not to whether a statement should be admitted"); *Prosecutor v. Martić*, Case No. IT-95-11-T, Decision on Prosecution's Motion for Admission of Transcripts Pursuant to Rule 92 *bis* (D) and of Expert Reports Pursuant to Rule 94 *bis* ("*Martić* Decision"), 13 January 2006, para. 19; *Prosecutor v. Delić*, Case No. IT-04-83-T, Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 *bis*, 13 November 2007, para. 12; *Prosecutor v. Perišić*, Case No. IT-04-81-T, Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 *BIS*, 2 October 2008, para. 12; *Karadžić* October 2009 Decision, paras. 8, 10.

61 *Galić* Appeals Decision, para. 15.

of the witness in the earlier proceedings dealt adequately with the issues relevant to the current proceedings.[62]

35. In practice, many chambers have also considered the Rule 92 *bis* (A)(i) and (ii) factors in the context of determining whether a proposed Rule 92 *bis* witness should appear for cross-examination.

D. Expert Witnesses and Rule 94 *bis*

36. Nine of the witnesses proposed by the Prosecution are expert witnesses[63] whose proposed evidence includes statements and/or reports that are the subject of Rule 92 *bis* and Rule 94 *bis* motions. Therefore, the Chamber finds it appropriate to discuss below Rule 94 *bis*, the Rule pertaining to the testimony of expert witness, and to briefly discuss the jurisprudence of the Tribunal with regard to the relationship between Rules 92 *bis* and 94 *bis*.

37. Rule 94 *bis* provides as follows:

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

38. The jurisprudence regarding the relationship between Rules 92 *bis* and 94 *bis* is varied and a number of factors have been considered in determining how the rules interact and to what degree each influences a chamber's analysis of the admissibility of a particular piece of expert evidence, including: (i) whether the evidence consists of statements, transcripts of prior testimony, and/or expert reports;[64] (ii) whether or not the opposing party objects to the evidence;[65] (iii) whether prior

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62 *Prosecutor v. Milošević*, Case No. IT-02-54-T, Decision on Prosecution Motion for the Admission of Transcripts in Lieu of *Viva voce* Testimony Pursuant to Rule 92 *bis*(D) – Foča Transcripts, 30 June 2003, paras. 38–42; *Sikirica* Decision, para. 4.

63 Witnesses Nos. 8, 9, 10, 11, 12, 13, 14, 17, and 18.

64 *See, e.g.,. Martić* Decision, para. 47; *Prosecutor v. Prlić, Stojić, Praljak, Petković, Ćorić, and Pušić*, Case No. IT-04-74-T, Decision on the Prosecution Motions for Admission of Evidence Pursuant to Rule 92 *bis* of the Rules, 8 December 2006 (English translation), 08 January 2007 (French original) ("*Prlić et al.* December 2006 Decision"), para. 22.

evidence given before the Tribunal was subjected to adequate cross-examination;[66] and (iv) whether the evidence has been tendered under one or both rules.[67]

39. Where, as here, a party has tendered transcripts of expert testimony along with associated exhibits such as expert reports pursuant to Rule 92 *bis*, while also following the notice and disclosure regime of Rule 94 *bis* with regard to many of the same expert reports, the Chamber must decide the following:

(i) Whether and to what extent Rule 92 *bis* and/or Rule 94 *bis* govern the admission of transcripts of prior testimony of expert witnesses and associated exhibits, including expert reports; and

(ii) Whether and to what extent Rule 92 *bis* and/or Rule 94 *bis* govern the Chamber's discretionary analysis of whether an expert witness should be called for cross-examination when the opposing party objects to the admission of that expert's report(s).

40. The jurisprudence of the Tribunal shows that Rule 92 *bis* is *lex specialis* with regard to the admission of transcripts and/or written in lieu of oral testimony, even when applied to transcripts of prior testimony of expert witnesses.[68] A number of chambers have also determined that Rule 92 *bis* governs the admissibility of expert reports tendered as exhibits associated with the transcripts of prior testimony.[69]

41. A majority of chambers have held that Rule 92 *bis* also governs a chamber's discretionary analysis of whether to require an expert to appear for cross-examination when an opposing party objects to the admission of the expert's report(s), but Rule 94 *bis*(C) influences this discretion to varying degrees. Most chambers considering the issue have held that the right to cross-examination granted to an opposing party in Rule 94 *bis*(C) removes or at least reduces the discretion bestowed

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65 *See, e.g,. Prosecutor v. Mrksić, Radić and Slijivančanin,* Case No. IT-95-13/1-T, Confidential Decision on Prosecution's Motion for Admission of Transcripts and Written Statements Pursuant to Rule 92 *bis*, 21 October 2005 ("*Mrksić et al.* October 2005 Decision"), para. 10.

66 *See, e.g,. Prlić et al.* December 2006 Decision, paras. 23, 27.

67 *Prosecutor v. Karadžić,* Case No. IT-95-5/18-T, Decision on Prosecution's Motion for Admission of Evidence of Eight Experts Pursuant to Rules 92 *bis* and 94 *bis*, 9 November 2009 ("*Karadžić* November 2009 Decision"), para. 24.

68 *See Galić* Appeals Decision, para 18, 27; *Mrksić et al.* October 2005 Decision, para. 10; *Martić* Decision, paras. 23, 35–36, 47; *Prosecutor v. Popovic, Beara, Nikolić, Borovčanin, Miletić, Gvero, and Pandurević.*, Decision on Prosecution's *Confidential* Motion for Admission of Written Evidence in Lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis*, 12 September 2006 ("*Popović et al.* September 2006 Decision"), para. 52; *Prlić et al.* December 2006 Decision, para. 22; *But see Prosecutor v. Slobodan Milošević,* Case No. IT-02-54-T, Decision on Prosecution's Application for Admission of Written Statement of Dr. Berko Zecevic Pursuant to Rule 92 *bis* (A), 9 September 2003, p. 2; *Prosecutor v. Slobodan Milošević,* Case No. IT-02-54-T, Decision on Prosecution's Submission of the Expert Reports of Helge Brunborg Pursuant to Rule *94 bis* and Motion for the Admission of Transcripts Pursuant to Rule 92 *bis* (D), 30 October 2003, p. 4. (the *Milošević* Trial Chamber stated in both decisions that the proper procedure to be followed for admitting expert evidence is Rule 94 *bis*).

69 *Galić* Appeals Decision, para. 41; *Karadžić* November 2009 Decision, para. 17.

upon a chamber by Rule 92 *bis* with regard to cross-examination.[70] According to this approach, and in accordance with the Rule 94 *bis* procedure, if an opposing party does not accept expert reports which have also been tendered as associated exhibits under Rule 92 *bis*, cross-examination should be granted.[71]

E. The Admission of Exhibits Associated with Prior Testimony

42. In addition to a witness's prior testimony or statement(s), a chamber may admit into evidence exhibits that "form an inseparable and indispensable part of the testimony" along with the testimony or statement itself.[72] Not all material referred to in a witness's testimony should necessarily be considered inseparable and indispensable, however. For a proposed exhibit to be considered inseparable and indispensable, the witness must have discussed the material during the testimony to such an extent that the testimony would become incomprehensible or lose probative value without the respective exhibit.[73]

V. DISCUSSION

A. Introduction

43. As a preliminary matter, the Chamber finds it appropriate to address some issues encountered when analysing the Prosecution Rule 92 *bis* Motion. First, the Motion does not clearly identify which evidence is being proposed for admission. The proposed Rule 92 *bis* witnesses are listed in the body of the Motion as well as in Appendices A and B of the Motion. Appendix B of the Motion contains a list of the proposed evidence, including the dates of prior testimony for each witness and the exhibit numbers assigned in previous proceedings to the materials tendered as exhibits associated with prior testimony pursuant to the Rule 92 *bis* Motion. In addition to these lists, the Prosecution provided the Chamber with electronic copies of the proposed evidence on a CD-ROM. The Chamber, however, found several errors and inconsistencies within and between the

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70 *Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-T, Decision on Prosecution's Motions for Admission of Expert Statements, 7 November 2003 ("*Blagojević* Decision"), para. 27; *Mrksić et al.* October 2005 Decision, para. 10; *Martić* Decision, paras. 23, 35–36, 47; *Popović et al.* September 2006 Decision, para. 52; *Karadžić* November 2009 Decision, para. 24.

71 *Karadžić* November 2009 Decision, paras. 23–24.

72 *Prosecutor v. Naletilić and Martinović*, Case No. IT-98-34-PT, Decision Regarding Prosecutor's Notice of Intent to Offer Transcripts Under Rule 92 *bis* (D), 9 July 2001, para. 8. *See also 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. 30; *Popović et al.* September 2006 Decision, para. 24; and *Prosecutor v. Đorđević*, Case No. IT-05-87/1-T, Decision on Prosecution's Motion for Admission of Transcripts of Evidence in Lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis* ("*Đorđević* Decision"), 16 March 2009.

73 *Đorđević* Decision, para. 38. *See also Prosecutor v. Lukić and Lukić*, Case No. IT-98-32/1-T, Decision on Confidential Prosecution Motion for the Admission of Prior Testimony with Associated Exhibits and Written Statements of Witnesses pursuant to Rule 92 ter, 9 July 2008, para. 15; *Karadžić* October 2009 Decision, 15 October 2009, para. 11.

body of the Motion; Appendix A and B of the Motion; and the proposed evidence provided to the Chamber.[74] Accordingly, the Chamber notified the Prosecution of the existence of such discrepancies.[75] The Prosecution replied on the same day, stating that Appendix B of the Prosecution Rule 92 *bis* Motion—a spreadsheet listing the witness names, dates of prior testimony, and former exhibit numbers of the proposed associated exhibits—was to be considered the authoritative list of the proposed evidence.[76] The Chamber has thus based its analysis on the proposed evidence as listed in Appendix B.

44. Second, the Chamber considers unfortunate the Prosecution's failure to provide the Chamber with information that would have been very helpful to the Chamber's analysis of the proposed evidence. For example, the Prosecution did not provide the Rule 65*ter* numbers in the instant case for any of the proposed evidence, nor did it provide the Chamber with an indication of the trials in which each of the associated exhibits were admitted. The Chamber also observes that the Prosecution has tendered the same documents multiple times through different witnesses.

45. As another preliminary matter, the Chamber notes that the Prosecution has not listed all of the previous testimony of some witnesses in Appendix B. These include Witnesses Nos. 20, 61, 119, 140, 141, 142, and 190, for whom transcripts of the witnesses' testimony in the *Blagojević* case on certain dates were not tendered with the Rule 92 *bis* Motion. Because these previous transcripts were not listed in Appendix B, and were therefore not effectively tendered, the Chamber has not considered them for the purposes of this Decision. Similarly, the Prosecution has not provided the Chamber with the proposed evidence or related information with respect to Witness No. 182 and, therefore, the Chamber has not considered this witness for the purposes of this Decision.

46. In the discussion which follows, the Chamber has examined the submissions of the parties with respect to the proposed evidence tendered in the Rule 92 *bis* Motion. As a result of the very large number of witnesses included in the Rule 92 *bis* Motion, as well as the voluminous submissions of the parties, the Chamber will not summarise the evidence of each of the 107 witnesses considered in this Decision. Instead, the Chamber has grouped the witnesses into six

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74 For example, paragraph 11 of the Rule 92 *bis* Motion mistakenly refers to Appendix A as "Appendix B", and Appendix B as "Appendix A". Furthermore, for many witnesses there are discrepancies between the Appendices and the materials provided to the Chamber. For example, for Witness No. 2, Appendix A lists 8 days of testimony from 4 trials, Appendix B lists 6 days of testimony from 3 trials, and the CD submitted with the Rule 92 *bis* Motion contains only 2 days of testimony from 1 trial.

75 On 25 January 2010, the Chamber sent an email to the Prosecution, with a copy to the Accused's Legal Associate, noting that there were several discrepancies in the Rule 92 *bis* Motion.

76 On 25 January 2010, the Prosecution replied to the Chamber, copying the Accused's Legal Associate, correcting the mistaken references to the Appendix and informing the Chamber that "the complete list of each witness's

categories based on its analysis of the proposed evidence and submissions, namely: (i) experts; (ii) United Nations ("UN") personnel; (iii) Bosnian Muslims; (iv) intercept operators; (v) Bosnian Serbs; and (vi) additional witnesses.

47. The Chamber further notes that the voluminous nature of the parties' submissions regarding the proposed evidence has led the Chamber to discuss below only those submissions which are, in the view of the Chamber, relevant to its Rule 92 *bis* analysis; unclear and/or irrelevant submissions have necessarily been disregarded.

B. Experts

1. Summary

48. The Prosecution proposes the admission of the prior testimony and associated exhibits of nine expert witnesses pursuant to Rule 92 *bis:* Witnesses Nos. 8, 9, 10, 11, 12, 13, 14, 17 and 18.[77] Each of their proposed evidence relates to the events and crime base alleged in the Indictment and includes overviews and expert reports from senior Prosecution investigators regarding the Prosecution's forensic investigative methodologies, as well as the creation and maintenance of lists of missing persons. The proposed evidence also includes previous testimony and expert reports pertaining to handwriting analysis; forensic pathology and the identification of victims; and the archaeological and anthropological examinations of grave sites, human remains, and related evidence.

49. The evidence proposed for these nine expert witnesses has been the subject of the parties' submissions pursuant to both Rule 92 *bis* and Rule 94 *bis*. While the Prosecution submits the witnesses' expert reports and related materials as exhibits associated with their prior testimony,

testimony and accompanying exhibits which the Prosecution proposes for Rule 92 *bis* admission" was contained in Appendix B.

[77] It is unclear whether the Prosecution tenders the proposed evidence of Witnesses Nos. 2 and 6 as that of expert witnesses. While the body of the Prosecution Rule 92 *bis* Motion states that eleven experts are tendered (para. 34), and Witnesses Nos. 2 and 6 are mentioned in a related footnote (fn. 35), these eleven experts are not clearly listed in the Motion. Also, Appendix A of the Motion lists Witnesses Nos. 2 and 6 under the separate heading of "OTP/ICTY WITNESSES" rather than including them in the "EXPERT WITNESSES" section. Similarly, both witnesses are referred to as "OTP WITNESSES" rather than "ICTY EXPERTS" in subsequent submissions (*see, e.g.,* "Notice and Motion Concerning Prosecution's Submission of Its Updated Rule 65ter Exhibit List, Witness List and Witness Summaries with Confidential Appendices A, B and C", filed confidentially on 7 May 2010, Appendix B, p. 1). Furthermore, only one of the witnesses, Witness No. 2, is the subject of a Prosecution 94 *bis* submission. For these and other reasons, Witnesses Nos. 2 and 6 are considered separately in the "additional witnesses" section of the instant Decision.

which is proposed for admission pursuant to Rule 92 *bis*, many, but not all, of the expert reports have also been the subject of submissions relating to the notice regime set out in Rule 94 *bis*.[78]

2. Submissions

50. In support of the admission of the experts' evidence pursuant to Rule 92 *bis*, the Prosecution submits that the expert evidence does not go to the acts or conduct of the Accused as charged in the Indictment and largely pertains to matters which are not in dispute.[79] The Prosecution further claims that the testimony of each expert witness is cumulative within the meaning of Rule 92 *bis*.[80] Moreover, the Prosecution highlights that the witnesses' qualifications and the reliability of their testimony have been challenged in at least one, if not more, trials before the Tribunal.[81] In this regard, the Prosecution submits that the proposed expert witnesses have been adequately cross-examined in previous trials and, therefore, their evidence should be admitted without cross-examination in the instant case.[82] The Prosecution's submissions do not address the relationship between Rule 92 *bis* and Rule 94 *bis* or the influence, if any, of Rule 94 *bis* on the Chamber's discretionary powers to require a witness to appear for cross-examination pursuant to Rule 92 *bis*(C).

51. As a procedural matter, the Accused submits that Rule 92 *bis* does not apply to the admission of expert evidence.[83] Rather, he argues, Rule 94 *bis* and Rule 92 *bis* are each *lex specialis*; Rule 94 bis relates to expert testimony, while Rule 92 *bis* is "the rule according to which a witness should testify *viva voce*".[84] Had Rule 92 *bis* been intended to pertain to expert evidence, he contends, such intent would be clear within the text of the Rule.[85]

52. In the view of the Accused, expert evidence must be considered only under Rule 94 *bis*, which, he argues, confers a right on any objecting party to cross-examine any expert whose testimony that party does not accept.[86] In this regard, the Accused reiterates that in addition to objecting to the admission of the *transcripts* of the expert witnesses' prior testimony and associated exhibits, he also objected to the *expert reports* and requested cross-examination of the proposed

78 The Prosecution Rule 94 *bis* Notice discloses and tenders the expert reports for the following witnesses whose previous testimony and associated exhibits including expert reports are also tendered pursuant to Rule 92 *bis*: Witnesses Nos. 2, 9, 10, 11, 12, 13, 14, 17, and 18.

79 Rule 92 *bis* Motion, para. 34.

80 Rule 92 *bis* Motion, Appendix A, pp. 2–6.

81 Rule 92 *bis* Motion, para. 34.

82 Rule 92 *bis* Motion, paras. 31, 34.

83 Response Part One, para. 76.

84 Response Part One, para. 89.

85 Response Part One, para. 86.

86 Response Part One, para. 87.

expert witnesses, as outlined in the Defence Rule 94 *bis* Notice.[87] The Accused thus argues that the resulting right to cross-examine the expert witnesses cannot be "derogated" by applying the discretionary provisions of Rule 92 *bis* relating to cross-examination.[88]

53. Alternatively, the Accused submits that if Rule 94 *bis*(C) does not automatically grant a right to cross-examination for an objecting party, the expert nature of the evidence should be a factor considered by the Chamber in favour of allowing cross-examination under its discretion pursuant to Rule 92 *bis*.[89]

54. The Accused further argues that all of the proposed expert reports pertain to key elements of the Prosecution's case, as demonstrated by the number of expert witnesses proposed by the Prosecution and the reliance of the Prosecution's Pre-Trial Brief on this evidence.[90] In addition, he contends that much of the proposed expert evidence is not actually cumulative, as the Prosecution claims, because the statement of one expert is merely repeated in the statement of another.[91] Moreover, he asserts that the evidence is not cumulative because the testimonies cover different fields of expertise and do not consider the same questions or establish the same facts.[92]

55. Although he acknowledges that the proposed experts' qualifications and competence to provide relevant statements are not particularly contentious matters, the Accused notes that neither bears on his objections to the methods used in their respective analyses.[93] Instead, the Accused challenges the reliability and probative value of their previous testimony and expert reports.[94] In this regard, the Accused asserts that a large number of the reports contain conclusions made by other experts, rather than the expert witnesses themselves, and suggests that the portions containing such conclusions be redacted.[95] He claims that the only way to resolve the questions regarding relevancy, reliability, the scope of expertise, and "other matters raised by these reports" is to require the proposed expert witnesses to appear for cross-examination.[96]

56. Furthermore, the Accused submits that the fact that some of the expert testimonies and accompanying exhibits were admitted in the *Blagojević* case without cross-examination is irrelevant because the present case, in which the Accused strongly objects to their admission, is

87 Response Part One, paras. 82–83.
88 Response Part One, para. 88.
89 Response Part One, paras. 77, 92, 94.
90 Response Part One, para. 78.
91 Response Part One, paras. 96–97.
92 Response Part One, para. 97.
93 Response Part One, para. 94.
94 Response Part One, para. 94.
95 Response Part One, paras. 83, 94.
96 Response Part One, para. 94.

distinguishable from the *Blagojević* case where the defence did not object.[97] For Witness No. 8, the Accused lists subjects that he considers were not adequately covered during the previous cross-examinations including, *inter alia*, the methods used for demographic analysis; and the reliability of DNA analysis and lists of victims and/or missing persons.[98]

3. Analysis

57. As a preliminary matter, the Chamber finds that the proposed evidence for all nine of the above expert witnesses is relevant and probative pursuant to Rule 89(C). Furthermore, the Chamber agrees with the Prosecution that none of the testimonies of these nine expert witnesses goes to the acts or conduct of the Accused as charged in the Indictment, and is therefore admissible under Rule 92 *bis*(A).

58. Moving to the submissions with regard to the relationship between Rule 92 *bis* and Rule 94 *bis*, the Tribunal's jurisprudence, although varied, generally supports the Accused's submission that where proposed expert evidence has been the subject of submissions pursuant to both Rules 92 *bis* and 94 *bis*, the provisions of Rule 94 *bis*(C) give an objecting party an opportunity to cross-examine an expert witness on his/her expert reports.[99] The jurisprudence also generally supports the alternative argument that if Rule 94 *bis*(C) does *not* grant a right to cross-examination of an expert witness for an opposing party, the nature of such expert evidence is a factor to be considered in favour of allowing cross-examination in the Chamber's discretionary analysis under Rule 92 *bis*.[100] Moreover, the Chamber notes that other jurisprudence not cited by the Accused supports the similar alternative claim that *if* cross-examination of expert witnesses remains discretionary pursuant to Rule 92 *bis*, then the relevant Chamber must exercise such discretion "in light of" the protections offered by Rule 94 *bis*(C).[101]

59. Therefore, for the reasons stated above, this Chamber is of the view that Rule 92 *bis* governs the admissibility of the tendered transcripts of previous testimony and the associated exhibits which include expert reports, but that the provisions of Rule 94 *bis*(C) influence the Chamber's discretion with regard to cross-examination to such an extent that all of the expert witnesses offered in the

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97 Response Part One, para. 80.

98 Response Part One, para. 138.

99 *Blagojević* Decision, para. 27; *Mrksić et al.* October 2005 Decision, para. 10; *Martić* Decision, paras. 23, 35–36, 47; *Popović et al.* September 2006 Decision, para. 52; *ibid.*, Separate Opinion of Judge Kimberly Prost, para. 2; *Karadžić* November 2009 Decision, paras. 24, 43.

100 *Popović et al.* September 2006 Decision, para. 51; *Prosecutor v. Đorđević*, Case No. IT-05-87/1-T, Decision on Prosecution's Motion for Admission of Transcripts of Evidence of Forensic Witnesses in Lieu of *Viva Voce* Testimony Pursuant to Rule 92 *BIS*, 11 February 2009, para. 8; *Karadžić* November 2009 Decision, para. 25.

101 *Blagojević* Decision, para. 27; *Popović et al.* September 2006 Decision, paras. 51–52.

Prosecution's Rule 92 *bis* Motion should be required to appear for cross-examination pursuant to Rule 92 *bis*(C).[102]

60. As the Chamber finds the above procedural arguments dispositive with respect to the question of admissibility and cross-examination, there is no need to enter into a lengthy discussion regarding the submissions of the parties with respect to each expert witness. Nevertheless, the Chamber notes that it would have reached the same result had it not considered the relationship between Rule 92 *bis* and Rule 94 *bis*, as the weak cumulative nature of much of the proposed evidence, as well as its relation to live and important issues in the case against the Accused would have mandated cross-examination pursuant to Rule 92 *bis*(C). In this respect, the Chamber also considers that the specialized nature of the proposed expert evidence is indeed a factor weighing in favour of allowing cross-examination in its analysis under Rule 92 *bis*(A)(ii)(c).

C. UN Personnel

1. Summary

61. The Prosecution submits the prior testimony and associated exhibits of eight UN military personnel pursuant to Rule 92 *bis:* Witnesses Nos. 20, 21, 22, 23, 24, 25, 28, and 36. All were members of the UN's Dutch Battalion ("DutchBat"), with the exception of Witness No. 36, who was a UN Military Observer ("UNMO"). The proposed evidence of each of these witnesses relates to the events and crime-base alleged in the Indictment, mainly with regard to the collapse of the Srebrenica enclave; the movement of people into Potočari; the conditions and events there including the alleged separation of men and women; and the movement of people out of Potočari on/around 12 and 13 July 1995.

2. Submissions

62. The Prosecution submits that the proposed evidence of each of the eight witnesses does not relate to the acts or conduct of the Accused and "bears sufficient indicia of reliability as recognised by the *Krstić, Blagojević* and *Popović* Trial Chambers".[103] The Prosecution also asserts that the testimony of the above witnesses is cumulative with, *inter alia,* the Rule 92 *ter* testimonies of Witnesses Nos. 19 and 26.[104] The Prosecution further contends that the testimony of the above

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[102] Although not the subject of the Prosecution's Rule 94 *bis* Notices, the proposed evidence of Witness No. 8 is clearly that of an expert nature and the witness is listed as an "expert" in Prosecution submissions (*see e.g.* Prosecution Rule 92 *bis* Motion, Appendix A, p. 2; and "Notice and Motion Concerning Prosecution's Submission of Its Updated Rule 65ter Exhibit List, Witness List and Witness Summaries with Confidential Appendices A, B and C", filed confidentially on 7 May 2010, Appendix B, p. 1.).

[103] Rule 92 *bis* Motion, para. 37.

[104] *See, e.g.*, Appendix A to the Rule 92 *bis* Motion, entries for Witnesses Nos. 20 and 25.

witnesses goes to proof of the crime base and at least partially relates to relevant historical and military background.[105]

63. The Accused objects in principle to the admission of seven of the eight DutchBat witnesses' testimonies pursuant to Rule 92 *bis*, arguing that this constitutes "a totally inappropriate manner" in which to make use of the rule.[106] He also asserts that "circumstances concerning the Dutch Battalion are pivotal in this case" and that none of the DutchBat witnesses have been cross-examined regarding their preparation for their deployment or the reasons why some members left Srebrenica and went to Zagreb.[107] Without offering support, the Accused suggests that the DutchBat witnesses may not be reliable, implying that they may be biased[108] or may "be under an obligation . . . to promote the official version of events in order to protect . . . the national security of the Kingdom of the Netherlands".[109] Finally, the Accused suggests that because their testimony is inconsistent with that of Colonel Karremans in the *Blagojević* case, it must be given limited probative value.[110]

64. For Witnesses Nos. 24 and 25, the Accused makes no specific objections, while for Witness No. 28, the Accused argues only that the previous cross-examination in the *Blagojević* case was not sufficient. He also contends that much of the testimony of the other witnesses is based on hearsay and/or speculation, and requests cross-examination on topics such as the rules of engagement and strategy of DutchBat and how these were applied in and around Potočari;[111] the humanitarian aid convoys, which he argues was not available during previous trials;[112] and the relationship between UN military personal and ABiH forces as well as their contact with VRS personnel in and around Potočari.[113]

3. Analysis

65. As a preliminary matter, the Chamber notes that the Accused's allegation regarding the reliability of the eight UN Personnel witnesses' evidence is unsubstantiated, and therefore finds that such evidence is relevant and probative pursuant to Rule 89(C). Furthermore, the Chamber notes that none of the testimony of the eight UN military personnel goes to the acts or conduct of the

105 *See, e.g.*, Appendix A to the Rule 92 *bis* Motion, entries for Witnesses Nos. 23 and 28.
106 Response Part Three, para. 26.
107 Response Part Three, para. 31.
108 Response Part Three, para. 34 ("the Dutch Battalion . . . openly took the Muslim side throughout the conflict").
109 Response Part Three, para. 36.
110 Response Part Three, para. 30.
111 Response Part Three, paras. 62, 90–92.
112 Response Part Three, paras. 83, 92, 115.
113 Response Part Three, paras. 63, 103, 107.

Accused as charged in the Indictment, and it is therefore admissible under Rule 92 *bis* (A). Moreover, the Chamber observes that the previous cross-examinations in the *Krstić*, *Blagojević* and *Popović* cases are not demonstrably inadequate and cover many of the same subjects as proposed by the Accused. Further, the Chamber considers that much of the testimony goes to proof of the crime base and often relates to the relevant historical, political, and/or military background. Finally, the Chamber finds that much of the proposed evidence is indeed cumulative with that of Witnesses Nos. 19 and 26 who have testified pursuant to Rule 92 *ter*. Each of these factors weigh in favour of admission without cross-examination under Rule 92 *bis*(A).

66. In the view of the Chamber, however, several of the DutchBat witnesses' proposed evidence (i) goes to proof of the acts and conduct of proximate members of the alleged JCEs and (ii) pertains to live and important issues between the parties. In particular, Witness No. 20's testimony addresses his attendance at each of the three Hotel Fontana meetings, meetings with Colonel Ljubiša Beara, and the alleged separation of Bosnian Muslim men from the convoy near Tišća. Witness No. 21's testimony describes the situation in the enclave since January 1995, the alleged separation of Bosnian Muslim men from the women and children at Potočari, as well as the presence of General Ratko Mladić and Captain Momir Nikolić there. Witness No. 22 testified about accompanying women and children from Potočari, that he saw Bosnian Muslim men detained at a football field near Nova Kasaba, and about a brief meeting with Beara, during which Beara allegedly arranged for Witness No. 22's safe return to Potočari. Witness No. 23 testified about the restriction of aid convoys, as well as the discovery of nine bodies near a stream outside the compound in Potočari. Additionally, the testimony of Witness No. 36, a UN Military Observer, relates to his contact with senior VRS officers in charge of the alleged separation within and transport from Potočari, and to his having witnessed the separation of the men and women prior to the women and children's transportation out of the enclave. The Chamber considers that the above testimonies thus concern live and important issues between the parties and pertain to proof of the acts and conducts of proximate members of the alleged JCEs – factors which, pursuant to Rule 92 *bis*(A)(ii)(c), weigh in favour of requiring these witnesses to appear for cross-examination.

67. While the proposed evidence of Witnesses Nos. 24 and 25 also addresses some acts and conduct of other members of the alleged JCEs, in the Chamber's view, this evidence concerns matters which are not sufficiently proximate to the Accused to require cross-examination when balanced with the factors in favour of admission without cross-examination. Similarly, while the proposed evidence of Witness No. 28 addresses a number of important issues, the Chamber does not find them to be so live and important to the case against the Accused that cross-examination is required when balanced with the factors in favour of admission without cross-examination.

68. Accordingly, for the reasons stated above, the Chamber, after considering and balancing all the relevant factors, will provisionally admit the proposed evidence of Witnesses Nos. 24, 25, and 28 pursuant to Rule 92 *bis*(A) and will provisionally admit the proposed evidence of Witnesses Nos. 20, 21, 22, 23, and 36 pursuant to Rule 92 *bis*(C).

D. Bosnian Muslims

1. Summary

69. The Prosecution requests the admission of the written evidence of twenty-eight witnesses whom it groups together as "Bosnian Muslim Victims/Survivors".[114] This group of witnesses is comprised of survivors of various alleged executions, family members of victims or missing persons, and victim impact witnesses. Their testimony relates to subjects such as leaving their homes for the Srebrenica or Žepa enclaves; joining and travelling with the column; surrendering to VRS forces; their transportation to and/or the conditions in places such as Potočari, Sandići Meadow, Petkovci Dam, and Branjevo Military Farm; witnessing alleged executions; and the alleged separation of men and boys from women and children.

70. In particular, this group of witnesses includes the evidence of two witnesses who merit additional description: Witness No. 47, a former resident of Žepa whose *viva voce* testimony in the *Popović* case dealt with his escape from the enclave by swimming across the Drina river; and Witness No. 54, a Branjevo Farm survivor whose *viva voce* testimony in the *Krstić* trial was admitted pursuant to Rule 92 *bis* in the *Blagojević* and *Popović* cases and concerns the events at Branjevo Farm, including the identification of a group who allegedly participated in the executions there.

2. Submissions

71. According to the Prosecution, the proposed evidence of the Bosnian Muslim victim/survivor witnesses "goes to proof of the crime-base and victim impact that underlies the Indictment's charges".[115] The Prosecution also contends that the evidence of most of the Bosnian Muslim victim/survivor witnesses is cumulative of other witnesses who will testify in court, and that it

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[114] Rule 92.*bis* Motion, para. 35. The Prosecution requested that Witness No. 38's evidence be considered for admission pursuant to Rule 92 *ter*, rather than Rule 92 *bis*. Prosecution's Motion for Leave to Amend the Witness List, Admission of Evidence Pursuant to Rule 92 *ter*, and Protective Measures, with Appendices, 11 February 2010, paras. 4, 26. Accordingly, this Decision considers the admission of the written evidence of twenty eight rather than twenty nine Bosnian Muslim witnesses: Witnesses Nos. 41, 45, 46, 47, 51, 52, 54, 56, 57, 61, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, and 80.

[115] Rule 92 *bis* Motion, para. 35.

relates to the relevant historical background.[116] The Prosecution further submits that many of these witnesses have appeared before the Tribunal and should not therefore be required to appear again unless "absolutely necessary" due to the traumatic nature of their experiences.[117] Finally, the Prosecution submits that the proposed evidence for this group of witnesses "has already been deemed proper for submission under Rule 92 *bis*, as the *Blagojević* Trial Chamber admitted much of it under the Rule without cross-examination".[118]

72. The Accused objects in principle to the admission of such a large percentage of the total number of Bosnian Muslim victim/survivor witnesses' evidence being admitted pursuant to Rule 92 *bis*.[119] He also argues that the evidence is generally too pivotal to the case to be appropriate for admission pursuant to Rule 92 *bis*.[120] Citing the fact that much of the proposed evidence addresses the formation and movement of the column as well as the "situation in Potočari" as examples,[121] he asserts that "this evidence relates to matters of vital importance to the Prosecution case".[122] The Accused points to what is now paragraph 224[123] of the Prosecution's Amended Pre-Trial Brief, one of the paragraphs in which the Prosecution alleges that one of the Accused's contributions to the JCE to murder the able-bodied men from Srebrenica involved making proposals aimed at "block[ing] and captur[ing] the Bosnian Muslim men [from the column]".[124] The Accused also submits that the answer to "the question of whether he facilitated forcible transfer and deportation depends to a great extent on the circumstances", including the formation of the column.[125]

73. The Accused also argues that the proposed evidence of the Bosnian Muslim witnesses is inappropriate for admission pursuant to Rule 92 *bis* because it is not cumulative. According to the Accused, the testimonies "differ regarding important circumstances that are crucial to this case".[126] Regarding the question of whether the witnesses should be required to appear for cross-examination, the Accused reiterates that his defence strategy differs from that of other Defences, as

116 Rule 92 *bis* Motion, para. 35.
117 Rule 92 *bis* Motion, para. 36.
118 Rule 92 *bis* Motion, para. 36.
119 Response Part Two, para. 2.
120 Response Part Two, para. 4.
121 Response Part Two, paras. 9–11.
122 Response Part Two, para. 2.
123 With the filing of the Prosecution's Amended Pre-Trial Brief, para. 207 of the original Pre-Trial Brief (to which the Accused refers) became para. 224. In fact, paras. 225–234 of the Amended Pre-Trial Brief expand on similar allegations.
124 Prosecution's Amended Pre-Trial Brief, para. 227.
125 Response Part Two, paras. 15, 18.
126 Response Part Two, para. 5.

he seeks to challenge the Prosecution's evidence by cross-examining the Bosnian Muslim witnesses, rather than by calling his own witnesses.[127]

74. In addition to his objections to this group of witnesses as a whole, the Accused makes particularised submissions pertaining to each witness's proposed evidence, including his request for cross-examination on specific topics. These topics include, *inter alia*, the formation, composition, and functioning of the column;[128] whether certain witnesses were members of the ABiH;[129] the presence and role of the ABiH with respect to the column;[130] the reasons behind several witnesses' fear of Serbs;[131] the circumstances leading up to and surrounding witnesses' transportation to and/or detainment at certain alleged holding and/or execution sites; [132] and questions regarding the Accused's submissions that several of the witnesses are biased and/or that their testimony is unreliable.[133]

75. The Accused raises specific objections relating to the bias, credibility, and/or unreliability of the proposed evidence of Witnesses Nos. 45, 46, 47, 51, 54, 57, and 77. The Accused also specifically opposes on authenticity grounds the proposed evidence of Witnesses Nos. 63, 64, 65, 71, 72, and 73. The Accused questions the authenticity of each of these six sets of statements, pointing to inconsistencies in the statements regarding the relevant witness's literacy, signature, and/or adoption of the statement. Moreover, the Accused asserts that each of these six witnesses should be called for cross-examination because they are illiterate.

3. Analysis

76. As a preliminary matter, the Chamber finds that the proposed evidence of all 28 Bosnian Muslim victim/survivor witnesses is *prima facie* relevant and probative pursuant to Rule 89(C). The Chamber also observes that none of the proposed evidence of these witnesses relates to proof of the acts or conduct of either the Accused or proximate members of the alleged JCEs. Moreover, the Chamber finds that the proposed evidence of all 28 Bosnian Muslim victim/survivor witnesses is appropriately characterised as crime base evidence. In the Chamber's view, the proposed evidence of each of these witnesses, with the exception of Witness No. 47, is sufficiently cumulative within the meaning of the Rule. Finally, the Chamber finds that the traumatic nature of the experiences of these witnesses and the related hardships that appearing for cross-examination might cause them are

127 Response Part Two, para. 22.

128 *See, e.g.*,. Response Part Two, paras. 122–123, 134, 138, 139, 155, 161.

129 *See, e.g.*,. Response Part Two, paras. 109, 121, 129, 159.

130 *See, e.g.*,. Response Part Two, paras. 55, 137, 144, 161.

131 *See, e.g.*,. Response Part Two, paras. 83, 136, 218.

132 *See, e.g.*,. Response Part Two, paras. 100, 111, 151–152.

additional factors in favour of admitting the proposed evidence pursuant to Rule 92 *bis* without requiring the respective witnesses to appear for cross-examination.

77. Despite the Accused's objection to the admission of such a large percentage of the total number of Bosnian Muslim victim/survivor witnesses pursuant to Rule 92 *bis*, the Chamber notes that there is nothing in the Rule or the jurisprudence that suggests that the proportion of a certain category of witnesses whose evidence is proposed for admission pursuant to Rule 92 *bis* is dispositive with respect to the analysis of whether the evidence can or should be admitted under the Rule. Moreover, the Chamber is of the view that one of the purposes of the rule is to facilitate the admission of such crime-base evidence.[134] Similarly, the Chamber considers that the Accused's arguments regarding the relevance of these witnesses' testimony to the question of his responsibility seem to blur the distinction between evidence related to the crime base, background, or the impact of crimes on victims; and evidence regarding his acts or conduct as charged in the Indictment. It is clear from the wording of Rule 92 *bis* as well as the jurisprudence that while the latter type of evidence is expressly inadmissible,[135] the Rule is meant to facilitate the admission of the former.

78. Furthermore, the Chamber finds the Accused's assertion that these witnesses should be required to appear for cross-examination because of the Accused's defence strategy of cross-examining the Prosecution's witnesses rather than calling his own unpersuasive when considered in light of all other factors. The Chamber is mindful that the Accused retains the right to challenge Prosecution evidence by calling his own witnesses. Accordingly, admitting the proposed evidence of these witnesses without cross-examination cannot be considered a denial of the Accused's right to challenge this evidence.

79. In relation to the Accused's requests for cross-examination of the witnesses on specific topics, the Chamber finds, notwithstanding the exceptions noted below, that the majority of the subjects proposed by the Accused for cross-examination pertain to peripheral matters. Moreover, the Accused has not demonstrated how his requested cross-examinations would differ from those in earlier cases. For example, the Accused claims that the prior cross-examination of Witness No. 56

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133 *See, e.g.*,. Response Part Two, paras. 75, 112, 120, 126, 144, 188, 201, 203, 206.

134 *Galić* Appeal, para. 16.

135 Rule 92 *bis*(A) ("A Trial Chamber may . . . admit . . . the evidence of a witness in the form of a written statement or transcript of evidence . . . *which goes to a matter other than the acts and conduct of the accused as charged in the indictment.*") (emphasis added).

was inadequate, but requests cross-examination on many of the issues covered by counsel in the previous case.[136]

80. Turning to the Accused's objections relating to the bias, credibility, and/or unreliability of the proposed evidence of Witnesses Nos. 45, 46, 47, 51, 54, 57, and 77; the Chamber, having carefully reviewed the proposed evidence, finds that the Accused has not demonstrated that the nature and source of the proposed evidence of these witnesses renders it unreliable. Similarly, the Chamber finds no merit in the Accused's assertion that certain witnesses would need to be cross-examined simply because they are illiterate.

81. The Chamber finds, however, that the proposed evidence of Witness No. 47, which concerns his escape across the Drina River, is not sufficiently cumulative with other oral evidence for admission pursuant to Rule 92 *bis* (A). Moreover, since the Prosecution alleges that the Accused played a significant role in the events leading up to the alleged forcible removal of the Muslim population from Žepa,[137] the Chamber considers that this evidence relates to a live and important issue. Having weighed all the relevant factors, the Chamber finds, pursuant to Rule 92 *bis* (A)(ii)(a), that the unique nature and importance of the proposed evidence of Witness 47 amounts to an overriding public interest in the evidence in question being presented *viva voce*. Accordingly, the Prosecution's motion for the admission of the written evidence of Witness No. 47 pursuant to Rule 92 *bis* is denied.

82. Furthermore, the Chamber notes that the proposed evidence of Witness No. 54 relates to the events at Branjevo Farm and concerns the identification of individuals alleged to have taken part in the executions there. The Chamber finds that since the Prosecution has alleged that the Accused was responsible for a unit that took part,[138] this testimony relates to a live and important issue between the parties. Furthermore, the Chamber notes that the cross-examination in the *Krstić* trial was rather brief, and the Accused has requested cross-examination on several topics that the Chamber views as relevant.[139] The Chamber finds that the importance of the proposed evidence and the lack of comprehensive previous cross-examination on these issues are factors that weigh in favour of requiring the witness to appear for cross-examination. Therefore, having weighed all the relevant factors, the Chamber decides to require Witness No. 54 to appear for cross-examination pursuant to Rule 92 *bis*(C).

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136 *See* Response Part Two, para. 182.

137 *See, e.g.*, paras. 198, 200, 202–205, 207, 210, 235–238, 243–255 of the Prosecution's Amended Pre-Trial Brief.

138 *See* Third Amended Indictment, paras. 2, 21.11, 29(c).

139 For example, the Accused requests that he be permitted to cross-examine Witness No. 54 on the issue of how distinctions between captured civilians and soldiers could be drawn based on the clothing of each, the bodies observed by Witness No. 54 in a field. *See, e.g.*, paras. 146–150.

83. Similarly, the Chamber observes that, in addition to the testimony of Witness No. 54, the testimonies of Witnesses Nos. 41, 51, and 56 pertain to their respective experiences in the column of Bosnian Muslim men who sought to walk from Srebrenica to territory held by the ABiH. In particular, Witness No. 41's testimony pertains to his detention in Sandići Meadow, his transport to and detention at Petkovci school, and his survival of and escape from an execution site at Petkovci dam. Witness No. 51's testimony also relates to the detention of Bosnian Muslim men at Sandići Meadow, while Witness No. 56's testimony describes his capture at Nezuk and his survival of an execution there. The Chamber is of the view that in light of the unique nature of these witnesses' respective testimonies, there is an overriding public interest in their evidence being heard orally. Accordingly, the Chamber will admit the evidence of Witnesses Nos. 41, 51, and 56 pursuant to Rule 92 *bis*(C) and require them to appear for cross-examination.

84. As for the Accused's objections regarding the authenticity and reliability of the proposed evidence of Witnesses Nos. 63, 64, 65, 71, 72, and 73, the Chamber observes that the proposed evidence of each of these witnesses, as well as Witnesses Nos. 66, 67, 68, 69, 70, 74, 75, 76, 77, 78, 79, and 80, consists of two parts: a statement given to the Cantonal courts in Tuzla and Sarajevo, respectively, which incorporates and effectively adopts an attached statement given to the Prosecution. The original versions of the Cantonal statements are written in BCS, while the original versions of the statements to the Prosecution are written in English. Each of the Prosecution statements, however, contains an additional declaration indicating that the statements were read back to the respective witnesses in BCS.

85. Nevertheless, the Chamber first notes that there are certain discrepancies between the Cantonal and Prosecution statements of Witness No. 63. While the former states that the witness is illiterate, the latter states that the witness can read and write.[140] Moreover, although the Cantonal statement indicates that Witness No. 63 authenticated each page with a fingerprint, no fingerprints appear on any of the documents submitted to the Chamber. Although the Accused did not raise this type of authenticity objection in relation to the evidence of Witnesses Nos. 67 and 80, the Chamber notes similar inconsistencies between the statements and declarations of these witnesses as well. In particular, the Cantonal statements of Witnesses Nos. 67 and 80 also indicate that the witnesses authenticated each page with their respective fingerprints, yet the witnesses' respective names appear handwritten on each page, and there are no fingerprints visible on the documents. The Chamber finds that these discrepancies render the statements of Witnesses Nos. 63, 67, and 80 insufficiently clear with regard to the requirements of Rule 92 *bis*(B)(ii).

[140] *Compare* Cantonal Court statement, p. 2, para. 2 with paras. 4, 5 of the Prosecution Witness statement.

86. Similarly, the Chamber notes that the Cantonal statement of Witness No. 72 refers to a Prosecution statement that is five pages long, while the Prosecution statement that is attached contains only two and a half pages and a full-page photograph. The Chamber is thus of the view that the proposed evidence of Witness No. 72 is incomplete, and admission is therefore denied without prejudice. Accordingly, the admission of the written evidence of Witnesses Nos. 63, 67, 72, and 80 pursuant to Rule 92 *bis* is denied without prejudice, notwithstanding the fact that the Prosecution remains free to obtain a new declarations pursuant to Rule 92 *bis*(B)(i)(b) if it sees fit to do so.

87. In contrast, the Chamber observes that Witnesses Nos. 64, 65, 66, 68, 69, 70, 71, and 73 each attested to their statements to the Prosecution, as well as the translation declaration, by affixing either their fingerprint or signature to each page thereof. The Chamber finds these declarations to be compliant with the requirements of Rule 92 *bis*(B).

88. Finally, the Chamber notes that neither Witness No. 52 nor Witness No. 61 has been subjected to cross-examination in previous trials. Moreover, the Chamber is of the opinion that topics on which the Accused proposes to cross-examine these witnesses are relevant.[141] Therefore, having weighed all the relevant factors, the Chamber finds it appropriate to require these two witnesses to attend for allow cross-examination pursuant to Rule 92 *bis*(A)(ii)(c) so that cross-examination may be conducted on these topics.

89. For the reasons discussed above and after balancing all the relevant factors, the Chamber finds that for 17 witnesses in this group, there is no overriding public interest in the oral presentation of their evidence, nor is there any other factor which would make it appropriate to require them to appear for cross-examination. Accordingly, the Chamber will admit the proposed evidence of the following 17 witnesses pursuant to Rule 92 *bis*(A) and/or (B) without cross-examination: Witnesses Nos. 45, 46, 57, 64, 65, 66, 68, 69, 70, 71, 73, 74, 75, 76, 77, 78, and 79.

[141] For example, the Accused proposes to put questions to Witness No. 52 regarding, *inter alia*, (i) an instance in which members of the column fired upon three men who advised them to surrender to the Serbs, (ii) the overlap between travel routes used by civilians and unarmed military and those used by armed military, (iii) the direction in which the column travelled. Response Part Two, paras. 135–138. The Accused also proposes to put questions to Witness No. 61 regarding issues pertaining to the impact of the alleged crimes on the victims. Response Part Two, paras. 193–195.

E. Intercept Operators

1. Summary

90. The Prosecution requests the admission of the proposed evidence of eight members of the ABiH and MUP involved in intercepting VRS communications.[142] The proposed evidence of this group of witnesses, known as "intercept operators", covers the methodologies and equipment used by the ABiH and MUP to monitor, record, and transcribe intercepted conversations by VRS personnel. The proposed evidence of these witnesses also relates to the chain of custody; general authenticity and reliability; and information regarding specific relevant intercepts.

2. Submissions

91. The Prosecution makes several submissions with respect to all of the proposed evidence of the intercept operators. In this regard, the Prosecution contends that their proposed evidence is similar to that of a custodian of records kept in the ordinary course of business and is offered to authenticate and lay the foundation for the admission of various intercepts.[143] The Prosecution asserts that it will only rely upon the witnesses' evidence to authenticate the intercepts and to summarize the methods used to obtain them.[144] The Prosecution claims that the evidence is not concerned with the content of the intercepts nor is the Accused speaking or mentioned in the intercepts.[145] According to the Prosecution, presenting live witnesses for each of the many intercepts would be repetitive and waste court resources.[146] Instead, the Prosecution proposes that a "representative sample" of intercept operators be called to testify *viva voce*, and that the testimony of the remainder be admitted in written form.[147] Finally, the Prosecution clarifies that any intercept operators whose testimony goes to the acts and conduct of the Accused will be called for oral testimony.[148]

92. In addition to the overarching submissions contained in the body of the Rule 92 *bis* Motion, the Prosecution makes essentially the same submissions with respect to the proposed evidence of

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142 While the Rule 92 *bis* Motion requested the admission of the proposed evidence of 17 Intercept Operators, Witness No. 99 was withdrawn as a Rule 92 *bis* witness in the Prosecution's First Rule 92 *ter* Motion. Furthermore, the Chamber's "Decision on Prosecution's Motion to Convert Eight Rule 92 *bis* Witnesses to Rule 92 *ter* Witnesses", 31 May 2010, granted the Prosecution's request to convert Witness Nos. 92, 94, 100, 102, 105, 107, 110, and 117 from Rule 92 *bis* to Rule 92 *ter* witnesses. Therefore, the instant Decision considers only the following eight intercept operators: Witnesses Nos. 97, 101, 104, 106, 111, 113, 116, and 118.

143 Rule 92 *bis* Motion, para. 38.

144 Rule 92 *bis* Motion, para. 38.

145 Rule 92 *bis* Motion, para. 38.

146 Rule 92 *bis* Motion, para. 40.

147 Rule 92 *bis* Motion, para. 40.

148 Rule 92 *bis* Motion, para. 40.

each intercept operator.[149] The Prosecution submits the following in relation to each intercept operator: (1) the testimony is primarily directed at authenticating intercepts and is not concerned with the content of the intercepts; (2) the testimony will be relied upon by the Prosecution only to authenticate the intercepts and to outline the procedural and technical aspects of obtaining the intercepts; and (3) the Accused does not speak in the intercepts about which the witness testifies; nor is the Accused mentioned in the intercepts.[150] Additionally, the Prosecution submits that each intercept operator's proposed evidence is cumulative with that of several oral witnesses to the extent that it concerns the methods and procedures used in intercepting and transcribing military communications.[151]

93. Addressing the proposed evidence of the intercept operators in its entirety, the Accused submits that it is inadmissible because it is unreliable and irrelevant.[152] Alternatively, the Accused submits that the testimony and associated exhibits should not be admitted without cross-examination for the following reasons: (i) the authenticity and reliability of the intercepts are live and important issues;[153] (ii) intercept operators are especially biased, and, as a result, extreme caution must be used when evaluating the evidence, particularly since these issues of bias have not been debated;[154] (iii) the Prosecution has not argued that the evidence is relevant and such relevance cannot be determined by the witnesses' statements;[155] (iv) intercept operators cannot be used to admit a large number of non-related intercepts where the purpose will be disclosed only later in the trial;[156] (v) previous cross-examination was inadequate because the Accused's defence with regard to authenticity and reliability was not presented in earlier trials;[157] (vi) the Accused would explore the features and capabilities of equipment in greater detail;[158] (vii) intercepts have come from sources other than ABiH or MUP;[159] and (viii) the Accused has many questions regarding the chain of custody and the selection of the intercepts in light of ABiH bias against the VRS.[160]

149 Rule 92 *bis* Motion, Appendix A, pp. 23–29.
150 Rule 92 *bis* Motion, Appendix A, pp. 23–29.
151 Rule 92 *bis* Motion, Appendix A, pp. 23–29.
152 Response Part Three, para. 127.
153 Response Part Three, paras. 127, 129, 132.
154 Response Part Three, para. 124.
155 Response Part Three, para. 126.
156 Response Part Three, para. 128.
157 Response Part Three, para. 129.
158 Response Part Three, para. 129.
159 Response Part Three, para. 129.
160 Response Part Three, paras. 130–131.

3. Analysis

94. As a preliminary matter, the Chamber finds that the proposed evidence of the eight intercept operators is relevant and probative within the meaning of Rule 89(C). The Chamber also finds that the proposed intercept evidence does not go to the acts or conduct of the Accused as charged in the Indictment. Accordingly, the proposed evidence for these eight intercept operators is admissible under Rule 92 *bis*.

95. The Chamber notes that the proposed evidence of the eight intercept operators is very similar to that of several witnesses who will give or have given oral testimony, namely Witnesses Nos. 90, 91, 92, 93, 94, 95, 96, 99, 100, 102, 103, 105, 107, 108, 109, 110, 112, 114, 115, and 117. These witnesses will testify or have testified regarding the standard procedures used by their units to monitor, record, and transcribe conversations of VRS personnel. The Chamber, therefore, finds the proposed evidence of the eight intercept operators to be highly cumulative; a factor weighing in favour of admission without cross-examination.

96. While the Accused has set forth a variety of arguments for calling the intercept operators for cross-examination, the Chamber does not find any of them compelling. The Accused has not demonstrated that the nature and source of the intercepts renders them unreliable or that their prejudicial effect outweighs their probative value. The previous cross-examination of these witnesses was detailed and thorough, and furthermore, many of the issues raised by the Accused in his Response were addressed therein. Moreover, the proposed intercept evidence was the subject of many oral and written submissions pertaining to authenticity and reliability before the *Blagojević* and *Popović et al.* Trial Chambers. Therefore, the Chamber does not find persuasive the Accused's arguments that the previous cross-examinations were inadequate or that the issues of authenticity and reliability have not been previously debated.

97. Similarly, while it can be argued that the content of the intercepts, as well as their authenticity and reliability, are live and important issues between the parties, a factor which weighs in favour of calling these witnesses for cross-examination, in the Chamber's view, this factor is balanced by the fact that the proposed evidence of the intercept operators is highly cumulative. The Prosecution is expected to call at least 20 intercept operators for oral testimony, three of whom were intercept supervisors. Thus, the Accused will have ample opportunity to challenge the authenticity and reliability of intercepts, as well as pose questions regarding their content even if the instant group of eight intercept operators is not required to appear for cross-examination.

98. Finally, although the Accused does not raise the issue that many of the intercepts relate to the acts and conduct of proximate members of the alleged JCEs, the Chamber has nevertheless

considered this as a factor potentially weighing in favour of requiring cross-examination for each witness, since some of the proposed intercept evidence does go to the acts and conduct of proximate members of the alleged JCEs. As set out above, however, evidence relating to the acts and conduct of proximate members of an alleged JCE must be considered in light of the importance of such acts or conduct, and the degree of proximity to the Accused. In this respect, the Chamber finds that the degree of importance of the acts or conduct and the degree of proximity to the Accused are insufficient to require cross-examination.

99. Moreover, this factor is supported by other factors in favour of admitting the proposed evidence without cross-examination, including, for example, the fact that the intercept operators are being offered only to authenticate the intercepts. In this context, the proposed intercept operators could not testify as to the truth of the content of the intercepts even if they were called for cross-examination. Accordingly, having considered all the relevant factors, the Chamber decides to admit the proposed evidence of Witnesses Nos. 97, 101, 104, 106, 111, 113, 116, and 118 without requiring the witnesses to appear for cross-examination.

F. Bosnian Serbs

1. Summary

100. The Prosecution submits the proposed evidence of 50 witnesses whom it terms "Bosnian Serb Witnesses" as follows: 41 RS MUP, Serbian MUP, and VRS witnesses;[161] seven Serb civilian witnesses;[162] and two Serb journalists.[163] All but one of the proposed Bosnian Serb witnesses testified either *viva voce* or pursuant to Rule 92 *ter* in the *Popović et al.* case.[164]

2. Submissions

101. The Prosecution asserts that the proposed evidence of all of the Bosnian Serb witnesses concerns the crime base and corroborates the testimony of other witnesses.[165] According to the

[161] Witnesses Nos. 119, 120, 122, 123, 124 , 125, 132, 133, 135, 138, 140, 141, 142 , 143, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, and 173. However, the subsequent "Prosecution's Rule 92 *BIS* and Rule 92 *TER* Motion for Five Witnesses, Notice of Continuation of Protective Measures, and Confidential Appendices," 23 April 2010, para. 2, withdraws the tendering of Witnesses Nos. 134 and 139 as 92 *bis* witnesses and instead offers their proposed evidence pursuant to Rule 92 *ter*. Therefore, neither witness has been considered for the purposes of the instant Decision.

[162] Witnesses Nos. 175, 177, 178, 179, 180, 181, and 182. However, as discussed above, while the Prosecution listed Witness No. 182 in the Prosecution Rule 92 *bis* Motion, Appendix A and B, the Prosecution did not provide any information regarding the proposed evidence of Witness No. 182. Therefore, this witness has not been considered for the purposes of the instant Decision.

[163] Witnesses Nos. 183 and 184.

[164] Witness No. 165.

[165] Rule 92 *bis* Motion, para. 41.

Prosecution, none of this proposed evidence goes to the proof of the "direct" acts and conduct of the Accused.[166] Finally, the Prosecution claims that the proposed evidence provides information concerning the location and participation of VRS and MUP troops, including information regarding mass executions and/or burials.[167]

102. The Prosecution gives more detail on the areas of testimony and the cumulative nature of the proposed evidence in its individual submissions for each witness. The Prosecution claims for the majority of the Bosnian Serb witnesses that the proposed evidence relates to (i) proof of the crime base; (ii) the relevant historical and military backgrounds surrounding the conditions during the VRS takeover of the Srebrenica and Žepa enclaves; (iii) the alleged separation, detention, and mass execution of Bosnian Muslim men; and (iv) the alleged forcible transfer of the Muslim population during July and August 1995.[168]

103. In addition to the submissions common to most of the Bosnian Serb witnesses, the Prosecution makes unique submissions for Witnesses Nos. 135, 183, and 184. The Prosecution submits that the proposed evidence of Witness No. 135 is directed at authenticating the daily combat report issued by his battalion command on 14 July 1995.[169] According to the Prosecution, the proposed evidence of Witness No. 183 primarily relates to the authentication of video footage taken by the witness; to proof of the crime base described above; and to Ljubomir Borovčanin's involvement in the crimes charged.[170] Lastly, the Prosecution submits that the proposed evidence of Witness No. 184 relates to Beara's involvement in the charged crimes.[171]

104. The Prosecution makes submissions concerning the cumulativeness of the proposed evidence with other oral testimony for only 12 of the 52 proposed witnesses in this category: Witnesses Nos. 119, 120, 122, 123, 124, 125, 147, 148, 149, 170, 178, and 181.[172] For the remaining witnesses, the Prosecution either makes unsupported submissions or is silent about whether or not the proposed evidence can be considered cumulative with that of other oral evidence.

105. In his submissions regarding this group of witnesses as a whole, the Accused asserts that some, if not all, are unreliable because they might have given their testimony to avoid being

166 Rule 92 *bis* Motion, para. 41.
167 Rule 92 *bis* Motion, para. 41.
168 Rule 92 *bis* Motion, Appendix A, pp. 29–53.
169 Rule 92 *bis* Motion, Appendix A, p. 32.
170 Rule 92 *bis* Motion, Appendix A, p. 52.
171 Rule 92 *bis* Motion, Appendix A, p. 52.
172 Rule 92 *bis* Motion, Appendix A, pp. 29–31, 37–39, 46, 49, 51.

prosecuted at the Tribunal or to gain other benefits.[173] He also contends that the sheer number of witnesses in this category is so excessive that admitting the evidence without cross-examination would violate his fair trial rights.[174] Similarly, the Accused asserts that it would be impossible to undertake a complete analysis of the evidence to establish inconsistencies due to the large volume of proposed evidence and large number of witnesses.[175]

106. The Accused submits that the proposed evidence of the Bosnian Serb witnesses concerns issues which are neither peripheral nor marginally relevant.[176] In particular, the Accused claims that a large number of witnesses would need to be cross-examined regarding the column and whether its members were taken prisoner or voluntarily surrendered.[177] He asserts that there are many contradictions between the RS MUP witnesses and the Bosnian Muslim witnesses with regard to the demilitarisation of the safe area and the presence of the ABiH within its boundaries.[178] The Accused argues that cross-examination of RS MUP witnesses is essential in order to establish that the Prosecution's claims that he was directing the work of the intelligence and security organs in proposing measures to block and capture the column are untrue and illogical.[179]

107. Furthermore, according to the Accused, the fact that the proposed evidence refers to the acts and conduct of other members of the alleged JCEs, some of whom are alleged to have been subordinates of the Accused, precludes this evidence from being admitted without cross-examination.[180]

108. The Accused also makes several submissions regarding the proposed evidence of each witness, with the exception of Witnesses Nos. 162, 163, 164, 166, and 168, for whom the Accused makes no specific submissions. In sum, the Accused's submissions for the proposed evidence of individual witnesses concern, *inter alia*, the degree of importance of the proposed testimony, its cumulativeness, the credibility of the witnesses, the adequacy of the previous cross-examinations, and the extent to which the proposed evidence goes to proof of the acts or conduct of proximate members of the alleged JCEs.[181]

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173 Response Part Four, para. 5.
174 Response Part Four, paras. 4, 9.
175 Response Part Four, para. 10.
176 Response Part Four, para. 6.
177 Response Part Four, paras. 6, 8.
178 Response Part Four, para. 4.
179 Response Part Four, para. 8.
180 Response Part Four, para. 7.
181 Given the extent of the Accused's submissions with regard to each witness, the Chamber finds it more appropriate to discuss the submissions as necessary in the following section.

3. Discussion

(a) RS MUP, Serbian MUP, and VRS Witnesses

109. Although the Prosecution claims that the evidence of the VRS witnesses concerns the crime base and corroborates the testimony of other witnesses, the Chamber notes that some of the testimony appears to concern matters other than the crime base. Much of the proposed evidence instead concerns the knowledge, intent, actions, whereabouts of, and/or coordination between proximate members of the alleged JCEs. For example, Witness No. 122's proposed evidence concerns the whereabouts of Mladić and Borovčanin and an order allegedly given by Mladić on 12 July 1995 in Potočari. Similarly, the proposed evidence of Witness No. 133 discusses the transportation, meetings, whereabouts, and conversations between Krstić, Popović, Mladić, Beara, and others. Likewise, the proposed evidence of Witnesses Nos. 140, 141, and 142 also concern relevant actions or conduct of various proximate members of the alleged JCEs. In the Chamber's view, this type of evidence appears to fall outside the scope of what the Chamber considers crime-base evidence.[182]

110. While the Prosecution claims in the body of the Rule 92 *bis* Motion that the proposed evidence does not go to the "direct" acts and conduct of the Accused, the Chamber notes that neither Rule 92 *bis* nor the jurisprudence of the Tribunal state that the proposed evidence must relate to the "direct" acts and conduct of an accused in order to be considered inadmissible. Moreover, although the Prosecution additionally submits for almost every witness in this category that their "evidence is appropriate for admission under 92*bis* as it does not mention the acts and conduct of the Accused,"[183] the Chamber notes that the proposed evidence of two of the VRS witnesses for whom the Prosecution makes this claim does in fact pertain to the acts and conduct of the Accused: Witnesses Nos. 132 and 138.[184] The proposed evidence from the *Popović et al.* case for Witness 132 includes testimony regarding an order received from the Accused and an associated exhibit, which is the relevant order type-signed by the Accused.[185] Similarly, in addition to the same

[182] Compare the proposed evidence of Witnesses Nos. 122, 133, 140, 141, and 142 with that of Witnesses Nos. 169 and 170, for example. Both of the latter witnesses were drivers whose testimony pertained to receiving orders to transport and execute prisoners from VRS soldiers who are *not* named in the Indictment as members of the alleged JCEs.

[183] *See, e.g.*, Rule 92 *bis* Motion, Appendix A, p. 32, entry for Witness No. 135.

[184] The Chamber notes that a similar situation existed for Witness No. 134, but as discussed previously, this witness was withdrawn as a Rule 92 *bis* witness and tendered instead as a Rule 92 *ter* witness and is not included, therefore, in the instant Decision.

[185] Bozo Momčilović, T.14131–14132 (22 August 2007); Ex. P00033 (VRS Main Staff communication to the Drina Corps Command, regarding combat operations around Srebrenica, signed by Tolimir, 9 July 1995).

associated exhibit tendered through Witness No. 132, the proposed evidence of Witness 138 includes testimony from the *Blagojević and Jokić* case where the Accused is discussed.[186]

111. With respect to the Prosecution's claims of cumulativeness, the Chamber reiterates its view that for testimony to be considered cumulative within the meaning of Rule 92 *bis*, it should be cumulative with other *oral* testimony.[187] Accordingly, when considering the cumulative nature of a witness's proposed Rule 92 *bis* evidence, the Chamber has not considered other written evidence which has also been proposed for admission pursuant to Rule 92 *bis* in the same motion. Moreover, the Chamber considers the Prosecution's arguments with regard to cumulativeness to be unhelpful without specific references to the testimony of other witnesses who will testify in court. Ultimately, the Chamber finds that the majority of the proposed witnesses do not testify about facts similar to those anticipated to be addressed in the oral testimony of other witnesses. Accordingly, the Chamber considers that the testimony of many of the VRS witnesses is only partially or weakly cumulative within the meaning of Rule 92 *bis*, while some of the proposed Rule 92 *bis* testimony of the VRS witnesses is not cumulative at all.

112. Turning to the objections raised by the Accused, the Chamber notes that the Accused has not demonstrated or otherwise provided support for his submissions regarding the alleged unreliability of the witnesses supposedly resulting from cooperation with the Tribunal with a view to avoiding prosecution or gaining some other benefit. In the view of the Chamber, the Accused's submission that a complete analysis of the proposed evidence is impossible because of its size is similarly unsupported. The Chamber thus finds both of these arguments unpersuasive.

113. Nor does the Accused provide support for his assertion that there are many contradictions between the testimony of RS MUP and Bosnian Muslim witnesses, particularly with regard to demilitarisation of the safe areas and the presence of the ABiH. Although the Accused refers to paragraphs 210 and 214 of the Prosecution's Pre-Trial Brief, these paragraphs alone do not appear to demonstrate the inconsistencies alleged by the Accused. Similarly, the Accused's references to paragraphs 218–238 of the Pre-Trial Brief do not, on their own, demonstrate the need to require each of the proposed VRS witnesses to appear for cross-examination regarding the column. Furthermore, the Accused has not provided any support for his claim that the previous cross-examinations of these witnesses were inadequate or would substantially differ from the topics on which he requests cross-examination.

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186 Mirco Trivic, T. 10754, 10756 (10 June 2004).

187 Rule 92 *bis*(A)(i)(a) (emphasis added).

114. The Chamber finds some merit, however, in the Accused's submission that much of the proposed evidence concerns the acts or conducts of proximate members of the alleged JCEs, as well as his related submission that much of the proposed evidence covers live and important issues. As discussed above, much of the proposed evidence of the RS MUP, Serbian MUP, and VRS witnesses concerns the knowledge, intent, actions, whereabouts of, and/or coordination between these members of the alleged JCEs. In this regard, the Chamber notes that the acts and conduct of those identified by the Prosecution as key members of the alleged JCEs are presented in some detail in the Prosecution's Pre-Trial Brief and contested by the Accused, which provides support to the Accused's submission that these acts and conduct are live and important issues between the parties.[188] The Chamber thus finds that much of the evidence of this group of witnesses concerns live and important issues and is sufficiently proximate to the Accused to require the witnesses to appear for cross-examination.

115. After a careful review of all of the proposed evidence within this category of witnesses and having weighed the factors for and against admission, based on the reasons discussed above, the Chamber finds that the proposed evidence for the following witnesses is sufficiently cumulative and goes to proof of the crime-base and/or military or historical background: Witnesses Nos. 119, 120, 123, 124, 146, 147, 154 , 155, 157, 159, 160, 161, 163, 164, 165, 166, 167, 168, 169, 170, and 173. The Chamber will provisionally admit the proposed evidence of these witnesses pursuant to Rule 92 *bis*(A), without requiring them to appear for cross-examination.

116. In contrast, after a careful review of all of the proposed evidence within this category of witnesses and having weighed the factors for and against admission, based on the reasons discussed above, the Chamber finds that the proposed evidence for the following witnesses concerns live and important issues and/or goes to the act or conduct of proximate members of the alleged JCEs: Witnesses Nos. 122, 125, 133, 140, 141, 142, 143, 145, 148, 149, 150, 151, 152, 153, 156, 158, and 162. The Chamber will provisionally admit the proposed evidence for these witnesses pursuant to Rule 92 *bis*(C), subject to their appearance for cross-examination.

117. As elaborated above, the Chamber finds that some of the proposed evidence of Witnesses Nos. 132 and 138 goes to the acts or conduct of the Accused as charged in the Indictment and is, therefore, inadmissible under Rule 92 *bis*(A). The Chamber, therefore, will provisionally admit the proposed evidence for these witnesses pursuant to Rule 92 *bis*(C), subject to their appearance for cross-examination.

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[188] *See* "Prosecution's Amended Pre-Trial Brief, Filed Pursuant to the Trial Chamber's Decision on Accused's Preliminary Motion Pursuant to Rule 72 (A) (ii)", 16 February 2010, paras. 224–315.

118. The Prosecution submits that the proposed evidence of Witness No. 135 is directed at authenticating a daily combat report issued by his battalion command on 14 July 1995, which bears his signature. The Chamber notes, however, that there were several inconsistencies in his testimony from the *Popović et al.* case; discrepancies between the witness's statement and his testimony; and the witness denied authorship of the combat report he was called to authenticate. The Chamber, therefore, finds that the probative value of the proposed evidence of this witness is low and outweighed by the prejudicial effect it would have if admitted, particularly without cross-examination. Moreover, the Chamber considers that the proposed evidence of Witness No. 135 is only weakly cumulative and pertains to live and important issues between the parties. Having weighed all the relevant factors for and against admission, the Chamber finds pursuant to Rule 92 *bis*(A)(ii)(a) and (b), that the inconsistencies and low probative value of the proposed written evidence of Witness No. 135 constitutes an overriding public interest in the evidence in question being presented *viva voce*. The Prosecution's motion for Witness No. 135 is, therefore, denied.

(b) Serb civilian witnesses

119. As with the proposed Rule 92 *bis* testimony of the VRS witnesses, the Chamber observes that the proposed Rule 92 *bis* evidence of the Serb civilian witnesses pertains to the acts and conduct of other members of the alleged JCEs.[189] For example, Witness No. 175's testimony relates to, *inter alia*, Mladić's instruction to the civilian authorities at the first Hotel Fontana meeting to help the refugees at Potočari, his carrying out such instructions at Potočari, and a meeting between himself and Beara at which Beara introduced Witness No. 175 to two uniformed VRS officers seeking construction equipment, which Witness No. 175 suspected was for burying bodies. Witness No. 177's testimony relates to his personal experience of driving past the Kravica Warehouse and seeing the executions of five men, his meeting with Borovčanin on/around 13 July to discuss the MUP Special Police Brigade's departure to Zvornik, and a meeting at which Beara instructed him to procure equipment for burial at Glogova. The Accused alleges that the testimony pertains to "highly contested" issues and requests that he be afforded the opportunity to cross-examine both witnesses.[190]

120. Witness No. 179 testified in relation to a meeting at the Zvornik Brigade barracks, during which Beara allegedly told Witness No. 179 that he expected the assistance of the municipality with the burial operation. The Accused claims that this evidence is relevant to the existence of an

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189 Additionally, the Chamber notes that the evidence of Witness No. 179 pertains to the acts and conduct of the Accused. Specifically, the transcript of Witness No. 179's testimony mentions the Accused in relation to an exhibit used with Witness No. 179 in a previous proceeding.

190 Response Part Four, paras. 189–194.

execution plan and is therefore not appropriate for admission without cross-examination.[191] The Accused also claims that there are inconsistencies between Witness No. 179's prior statements and his testimony at trial and submits that cross-examination should be permitted as a result.[192]

121. The Chamber considers that none of these witnesses' testimonies are sufficiently cumulative of other oral evidence. The Chamber also notes the transcript of Witness No. 179 mentions the Accused and would therefore not be admissible under Rule 92 *bis*(A) without a redaction. Moreover, Witnesses Nos. 175, 177 and 179 testified in relation to acts and conduct of a direct subordinate of the Accused which are sufficiently proximate to the Accused to require cross-examination when balanced with the factors in favour of admission without cross-examination.

122. Similarly, the Chamber finds that the issues addressed in the testimony of Witnesses Nos. 175, 177 and 179 are sufficiently live and important to the case against the Accused that cross-examination is warranted. Accordingly, having determined that for Witnesses Nos. 175, 177 and 179, the factors against admitting the evidence in written form outweigh the factors in favour of admission, the Chamber will provisionally admit the proposed evidence for these witnesses pursuant to Rule 92 *bis*(C), subject to their appearance for cross-examination.

123. Witnesses Nos. 178 and 180 held similar positions at the Zvornik hospital, and the testimony of both concerns the transfer of 11 wounded Bosnian Muslim men from Milići Hospital.[193] The Accused asserts that neither witness's testimony can be considered evidence of the crime base.[194] Rather, he argues, Witness No. 178's evidence is only probative of the humane treatment of wounded Muslims.[195] According to the Accused, Witness No. 180's testimony is inadmissible because it is only probative of the wounded being picked up from Milići and does not pertain to what happened to them after they were taken to the Zvornik Hospital.[196]

124. In the Chamber's view, neither witness's testimony is cumulative of other evidence which is currently proposed to be given orally. Moreover, the Chamber considers that the issues addressed in the testimony of Witnesses Nos. 178 and 180 are sufficiently live and important to the case against the Accused that cross-examination should be permitted. The Chamber also considers that the proposed evidence of Witnesses Nos. 178 and 180 is sufficiently similar such that it is only necessary to call only one of the witnesses, Witness No. 180, to appear for cross-examination.

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191 Response Part Four, para. 200.

192 Response Part Four, para. 199.

193 One of these eleven patients, Aziz Bećirović, who is listed as one of the victims in para. 21.15(1) of the Third Amended Indictment, died during his stay at the Zvornik Hospital.

194 Response Part Four, paras. 195, 202.

195 Response Part Four, para. 195.

196 Response Part Four, para. 203.

Accordingly, after having weighed the factors for and against admission, the proposed evidence of Witness No. 178 will be admitted pursuant to Rule 92 *bis*(A) without requiring the witness to appear for cross-examination and the proposed evidence of Witness No. 180 will be provisionally admitted pursuant to Rule 92 *bis*(C), subject to the witness appearing for cross-examination.

125. The testimony of Witness No. 181 relates to the planning of the burial operation of the Kravica Warehouse victims, the removal of bodies from the Vuk Karadžić school, orders to secure prisoners at the Bratunac medical centre and to provide water to the people at Potočari and Sandići meadow. The Accused requests cross-examination regarding Potočari, Kravica, Glogova, Vuk Karadžić school, relations between the army and the SDS and civilian authorities, and the role of Miroslav Deronjić.[197]

126. In the view of the Chamber, Witness No. 181's testimony is cumulative of the testimony of both Witness No. 175 and 177. Additionally, while the proposed evidence of Witness No. 181 addresses a number of relevant and probative issues, they are not, in the Chamber's view, so important to the case against the Accused that cross-examination is required when balanced with the factors in favour of admission without cross-examination. Accordingly, the Chamber considers it appropriate to admit the testimony of Witness No. 181 pursuant to Rule 92 *bis*(A) without requiring the witness to appear for cross-examination.

(c) Journalists

127. The testimony of Witness No. 183, a Belgrade journalist, relates to the filming of a documentary and writing an article on the events surrounding the fall of Srebrenica. However, the video clips filmed by Witness No. 183 form an integral part of the Prosecution's "trial video", and the Prosecution has indicated that such clips are likely to be used with other witnesses throughout the trial. Witness No. 183 was also "embedded" with Borovčanin's Special Police Brigade and travelled with Borovčanin personally. The Accused contends that this evidence is too pivotal to be appropriate for admission under Rule 92 *bis* and requests cross-examination regarding "pressure put on members of the journalistic profession who dare to write about Srebrenica".[198]

128. Witness No. 184, also a Belgrade journalist, gave evidence regarding a 2002 interview with Beara which appeared in the weekly magazine Svedok, in which Beara claimed that he did not participate in the preparation of the Serbian forces entering Srebrenica, as he was on the Bihać front at the time, and that he did not know what was being prepared regarding Srebrenica. The Accused

[197] Response Part Four, para. 206.
[198] Response Part Four, para. 211.

requests cross-examination regarding the "role of the journalistic profession in forming a picture of Srebrenica".[199]

129. The Chamber observes, firstly, that neither the testimony of Witness No. 183 nor the testimony of Witness No. 184 is sufficiently cumulative of other oral evidence. Moreover, the Accused is mentioned in the transcript of Witness No. 183's testimony; while the mention does not describe his acts or conduct, the Chamber considers that if the transcript were to be admitted pursuant to Rule 92 *bis* without cross-examination, it would be proper to redact this portion. However, the Chamber notes that the testimony of Witness No. 183 is central to the case against the Accused to be admitted pursuant to Rule 92 *bis*(A), as it pertains to the collection of video evidence which has been and is likely to be tendered throughout the trial. Additionally, in the view of the Chamber, the testimony of Witness No. 184 pertains to acts and conduct of the direct subordinate of the Accused which are sufficiently proximate to the Accused to require cross-examination when balanced with the factors in favour of admission without cross-examination. Thus, the Chamber finds that the testimony of Witnesses Nos. 183 and 184 pertains to live issues which are sufficiently important to the case against the Accused to convince the Chamber that, notwithstanding the existence of factors weighing in favour of dispensing with the witness's attendance, the requested cross-examination should be permitted. Accordingly, the prior testimony of Witnesses Nos. 183 and 184 will be provisionally admitted pursuant to Rule 92 *bis*(C), subject to the witnesses appearing for cross-examination.

G. Additional Witnesses

130. The Chamber finds it appropriate to address the Prosecution's request for the admission of the written evidence of Witnesses Nos. 2, 6, 186 and 190 separately.

1. Witness No. 2

131. Witness No. 2, a former Prosecution Investigator, testified in previous proceedings about his role in the forensic examination of alleged mass-execution sites. He also authored six reports on the discovery, exhumation, and analysis of several mass graves. The Prosecution has tendered these reports as exhibits associated with his previous testimony.

132. The Prosecution submits that the proposed evidence of Witness No. 2 is cumulative. According to the Prosecution, the proposed evidence of Witness No. 2 pertains to issues not in dispute and none of the proposed evidence mentions the Accused.[200] The Accused submits, *inter*

[199] Response Part Four, para. 213.

[200] Rule 92 *bis* Motion, Appendix A, p. 1, entry for Witness No. 2.

alia, that the proposed evidence of Witness No. 2 has no probative value because the conclusions contained in his report are, in fact, the conclusions of other experts.[201] The Accused also contends that Witness No. 2 does not possess the relevant expertise or personal knowledge himself to render such conclusion, and, he argues, it is improper for the Prosecution to introduce purported expert testimony through the opinions of a non-expert.[202] Finally, the Accused submits that the previous cross-examinations of this witness were inadequate and he suggests several potential topics on which he would cross-examine the witness.[203]

133. The Chamber finds that although the proposed evidence of Witness No. 2 does not go to the acts or conduct of the Accused, it does pertain to issues including the methodologies of exhumation of mass graves, and the linking of primary and secondary graves, as well as the methods of analysis used by the Prosecution and experts. The Chamber is of the opinion, particularly given the reasoned opposition by the Accused, that these issues are the subject of dispute between the parties and are seemingly critical to the Prosecution's case, and are therefore live and important issues between the parties. Having determined that, the factors against admitting the evidence of Witness No. 2 in written form outweigh the factors in favour of admission, the Chamber will provisionally admit the proposed evidence of Witness No. 2 pursuant to Rule 92 *bis*(C), subject to his appearance for cross-examination.

2. Witness No. 6

134. Witness No. 6, a former Prosecution Research Officer, testified in previous proceedings about her role in the translation, authentication, and analysis of radio intercepts from ABiH and the State Security Service. Her testimony also concerned the methods used by the Prosecution to verify intercept reliability.

135. The Prosecution submits that the proposed evidence of Witness No. 6 relates to background information concerning intercepts.[204] Although Witness No. 6 mentions the Accused in the context of intercepts, and some of the intercepts tendered as exhibits associated with her testimony also concern the Accused, the Prosecution submits that her proposed evidence is limited to the authentication process with regard to intercepts.[205]

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201 Response Part One, paras. 107, 115.
202 Response Part One, para. 118.
203 Response Part One, paras. 109–110, 112.
204 Rule 92 *bis* Motion, Appendix A, p. 2, entry for Witness No. 6.
205 Rule 92 *bis* Motion, Appendix A, p. 2, entry for Witness No. 6.

136. The Accused argues that the prior testimony of Witness No. 6, along with its associated exhibits, refers to the Accused as well as to members of the alleged JCEs, thereby rendering the proposed evidence inadmissible pursuant to Rule 92 *bis*.[206] The Accused further submits that intercept authenticity can only be properly established by an expert. The Accused claims that Witness No. 6 is not an expert and therefore cannot establish such authenticity, or, if she is an expert, her evidence must be governed by the provisions of Rule 94 *bis*.[207] Furthermore, the Accused argues that the importance of intercept authenticity and the inadequacy of previous cross-examination necessitate the cross-examination of Witness No. 6 in the instant case.[208]

137. With regard to the proposed testimony of Witness No. 6, the Chamber notes that parts of it relate to the acts and conduct of the Accused as charged in the Indictment, which would require redaction if the remainder were admitted without requiring Witness No. 6 to appear for cross-examination. The Chamber observes that the proposed testimony of Witness No. 6 relates to the authenticity of the intercept, and thereby pertains to a live and important issue between the parties. The Chamber also notes that the proposed evidence of Witness No. 6 relates to the acts and conducts of other members of the alleged JCEs which are sufficiently proximate to the Accused to require cross-examination.

138. Having determined that the factors against admitting the evidence of Witness No. 6 in written form outweigh the factors in favour of admission, the Chamber will provisionally admit the proposed evidence of Witnesses No. 6 pursuant to Rule 92 *bis*(C), subject to her appearance for cross-examination.

3. Witness No. 186

139. Witness No. 186, a Žepa survivor, gave a statement to the Prosecution in which he describes his flight into the mountains after Srebrenica fell, his being stopped by a Serb soldier when about to board a bus with his mother and sister, his subsequent flight into the hills to join his father, their escape across the Drina River and subsequent capture and detention in Šljivica and Mitrovo Polje. The Prosecution submits that the proposed testimony of Witness 186 relates to the relevant historical background and goes to proof of the crime base of the alleged forcible transfer and deportation from Žepa.[209] The Prosecution asserts that the proposed evidence does not go to the acts

206 Response Part One, para. 125.
207 Response Part One, paras. 122–123.
208 Response Part One, para. 124.
209 Rule 92 *bis* Motion, Appendix A, p. 53, entry for Witness No. 186.

or conduct of the Accused and is cumulative with several other witnesses.[210] The Accused does not raise any specific objections with regard to this witness.

140. The Chamber notes that Witness No. 186 has never testified before the Tribunal and that his proposed evidence relates to the events in Žepa, in which the Prosecution alleges that the Accused played a significant role, which he adamantly disputes. The Chamber thus considers that the proposed evidence of Witness No. 186 relates to live and important issues between the parties. Having weighed all the relevant factors, the Chamber, pursuant to Rule 92 *bis* (A)(ii)(a), finds that the unique nature and importance of the proposed evidence of Witness 186, coupled with the fact that he has never testified before the Tribunal, results in the existence of an overriding public interest in his evidence being presented *viva voce*. The Prosecution's motion for Witness No. 186 is therefore denied.

4. Witness No. 190

141. Witness No. 190, a former member of the VRS and a member of the alleged JCEs, testified in prior proceedings regarding, *inter alia*, the Bratunac Brigade including policies on Srebrenica and preparation for the attack, the Hotel Fontana meeting, having been told by Popović on the morning of 12 July at the Hotel Fontana (prior to the third meeting) that the able-bodied men would be separated, temporarily detained, and then killed; and a meeting with Beara on the night of 13 July during which Beara told him that the prisoners held in Bratunac would be transferred to Zvornik and killed.

142. The Prosecution requests the admission of Witness No. 190's testimony in the *Blagojević* case. The Prosecution contends that his proposed evidence relates to the relevant historical background and crime base.[211] The Prosecution also submits that the proposed evidence does not go to the acts or conduct of the Accused and is cumulative with unspecified Rule 92 *bis* witnesses.[212] The Accused argues that the witness should be called to testify *viva voce* because his testimony is unreliable as a result of his plea agreement with the Prosecution.[213] He also argues that the testimony is too central to the case because the witness was a direct participant in relevant events and gave testimony regarding the alleged members of the JCEs.[214] The Accused also refers to

[210] Rule 92 *bis* Motion, Appendix A, p. 53, entry for Witness No. 186.
[211] Rule 92 *bis* Motion, Appendix A, p. 54, entry for Witness No. 190.
[212] Rule 92 *bis* Motion, Appendix A, p. 54, entry for Witness No. 190.
[213] Response Part Four, para. 225.
[214] Response Part Four, para. 228.

inconsistencies in the witness's previous testimony as a reason for calling the witness to testify *viva voce*.[215]

143. The Chamber finds that while the prior testimony of Witness No. 190 does not describe the acts or conduct of the Accused, it does describe his position within the hierarchy of the Main Staff, and much of his proposed evidence goes to the acts or conduct of fellow members of the alleged JCEs, particularly Beara. Having weighed all the relevant factors, the Chamber, pursuant to Rule 92 *bis*(A)(ii)(a) and (b), finds that the degree of reliability and importance of the proposed evidence of Witness No. 190 amounts to an overriding public interest in the evidence in question being presented *viva voce*. The Prosecution's motion for Witness No. 190 is, therefore, denied.

VI. DISPOSITION

For these above stated reasons, the Trial Chamber, pursuant to Rules 54, 89, 92 *bis,* and 94 *bis* of the Rules, hereby **GRANTS** the Motion **IN PART** and:

(1) **GRANTS** leave to the parties to file the Reply and Rejoinder, respectively;

(2) **ORDERS** that:

(a) The written statements and/or transcripts of prior testimony tendered in the Rule 92 *bis* Motion, Appendix B for Witnesses Nos. 24, 25, 28, 45, 46, 57, 64, 65, 66, 68, 69, 70, 71, 73, 74, 75, 76, 77, 78, 79, 97, 101, 104, 106, 111, 113, 116, 118, 119, 120, 123, 124, 146, 147, 154, 155, 157, 159, 160, 161, 163, 164, 165, 166, 167, 168, 169, 170, 173, 178, and 181 shall be provisionally admitted into evidence pursuant to Rule 92 *bis*(A) and/or (B) without requiring the witnesses to appear for cross-examination subject to the Prosecution, within 30 days of the date of this Decision, providing the corresponding Rule 65 *ter* numbers in the present case and replacing all transcripts headed "Not Official; Not Corrected" with transcripts reflecting the official record;

(b) The associated exhibits tendered in the Rule 92 *bis* Motion, Appendix B which were admitted through each witness listed in paragraph (2)(a) above during the relevant prior proceedings shall be provisionally admitted subject to the Prosecution, within 30 days of the date of this Decision, providing the corresponding Rule 65 *ter* numbers in the present case;

[215] Response Part Four, paras. 227–228.

(c) The written statements and/or transcripts of prior testimony tendered in the Rule 92 *bis* Motion, Appendix B for Witnesses Nos. 2, 6, 8, 9, 10, 11, 12, 13, 14, 17, 18, 20, 21, 22, 23, 36, 41, 51, 52, 54, 56, 61, 122, 125, 132, 133, 138, 140, 141, 142, 143, 145, 148, 149, 150, 151, 152, 153, 156, 158, 162, 175, 177, 179, 180, 183, and 184 shall be provisionally admitted into evidence subject to the witnesses appearing for cross-examination and fulfilling the conditions of Rule 92 *ter,* and the Prosecution, within 30 days of the date of this Decision, providing the corresponding Rule 65 *ter* numbers in the present case and replacing all transcripts headed "Not Official; Not Corrected" with transcripts reflecting the official record;

(d) The associated exhibits tendered in the Rule 92 *bis* Motion, Appendix B which were admitted through each witness listed in paragraph (2)(c) above during the relevant prior proceedings shall be provisionally admitted subject to the witnesses appearing for cross-examination and fulfilling the requirements of Rule 92 *ter,* and the Prosecution, within 30 days of the date of this Decision, identifying for the materials tendered for each witness in the Rule 92 *bis* Motion, Appendix B the following:

(i) all exhibits admitted through the relevant witness in each prior proceeding;

(ii) all exhibits used with the relevant witness, but admitted through a different witness in each prior proceeding;

(iii) all materials used with the relevant witness in court, but not admitted in each prior proceeding; and

(iv) the corresponding 65 *ter* numbers in the present case for those materials identified in paragraphs (i)–(iii) above.

(e) The Prosecution shall, within 30 days of the date of this Decision, indicate to the Chamber whether it intends to seek protective measures, or variations thereof, for any of the witnesses whose proposed evidence is provisionally admitted above; and whether any of the written statements, transcripts, or associated exhibits provisionally admitted by this Decision should be admitted under seal;

(3) **ORDERS** the Registry, to mark for identification the materials as described in paragraphs (2)(a)–(2)(d) above;

(4) **ORDERS** that for those materials as identified in (2)(d)(ii) and (iii) above, which were not admitted through the relevant witness in the prior proceeding, the Chamber will require an

additional showing of relevance in relation to the present case prior to admitting such materials.

(5) **DENIES** the Motion in all other respects.

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

Judge Christoph Flügge
Presiding Judge

Dated this seventh day of July 2010
At The Hague
The Netherlands

[Seal of the Tribunal]