

**UNITED  
NATIONS**



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

Case No. IT-95-11-T  
Date: 16 January 2006  
Original: English

**IN TRIAL CHAMBER I**

**Before:** Judge Bakone Justice Moloto  
Judge Janet Nosworthy  
Judge Frank Höpfel

**Registrar:** Mr. Hans Holthuis

**Decision of:** 16 January 2006

**PROSECUTOR**

v.

**MILAN MARTIĆ**

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**DECISION ON PROSECUTION'S MOTIONS FOR THE  
ADMISSION OF WRITTEN EVIDENCE PURSUANT TO RULE  
92 *BIS* OF THE RULES**

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**The Office of the Prosecutor:**

**Mr. Alex Whiting  
Mr. Colin Black  
Ms. Nisha Valabhji**

**Counsel for the Accused:**

**Mr. Predrag Milovančević**

## I. INTRODUCTION

1. **TRIAL CHAMBER I** (“Trial Chamber”) of the International Criminal 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 seized of the Prosecution Motion for Admission of Transcripts and Written Statements in Lieu of *Viva Voce* Testimony pursuant to 92*bis*, filed Partly Confidential and with Partly *Ex parte* Annexes, on 28 February 2005 (“92 *bis* Motion”),<sup>1</sup> whereby it seeks the admission into evidence pursuant to Rule 92 *bis* (A), (C) and (D) of the Rules of Procedure and Evidence (“Rules”) of:

(a) 12<sup>2</sup> written statements<sup>3</sup> with associated documents and without cross-examination,

(b) 7<sup>4</sup> transcripts of testimony given by witnesses in previous proceedings<sup>5</sup> before the Tribunal, with associated documents.

2. On 21 April 2005, the Defence objected to the admission of the transcripts of evidence given by witnesses in previous Tribunal proceedings, statements and associated documents given by the witnesses (“Defence Response”).<sup>6</sup> In the alternative, should the statements be admitted into evidence, the Defence requested permission to cross-examine the witnesses.

<sup>1</sup> The Annexes are: Confidential Annex A - Schedule and Transcripts, Confidential Annex B - Schedule and Written Statements, Confidential Annex C - Exhibits Referred to by Witnesses in Testimony, Confidential and *Ex parte* Annex D - Schedule of the Transcripts and Related Exhibits of the Testimonies given by MM-06 and MM-08, and Confidential and *Ex parte* Annex E - Transcripts of the Testimonies given by MM-06 and MM-08. The Trial Chamber notes that the Prosecution requested the admission of several more statements and transcripts.

<sup>2</sup> The Prosecution originally requested the admission of 18 written statements. However, in light of the confidential “Prosecution Notification Regarding Certain Witnesses on its Rule 65 *ter* List”, filed 24 November 2005, in which the Prosecution indicates it is withdrawing fourteen witnesses, the Trial Chamber will not consider the Prosecution request insofar as it concerns the witnesses who were withdrawn.

<sup>3</sup> 92 *bis* Motion, paras 1, 25. The Prosecution request includes one written statement of a deceased person, Boško Brkić, and eight unattested statements, made by MM-020, MM-023, MM-024, MM-025, MM-031, MM-034, MM-039 and MM-044. The Prosecution does not request admission of the portions of the statements listed in column 5 of Confidential Annex A, Confidential Annex B, and Confidential and *Ex parte* Annex D and submits that the witnesses ought to be heard *viva voce* on those parts of their statement.

<sup>4</sup> The Prosecution originally requested the admission of 10 transcripts of prior testimony of witnesses. However, in light of the confidential “Prosecution Notification Regarding Certain Witnesses on its Rule 65 *ter* List”, filed 24 November 2005, in which the Prosecution indicates it is withdrawing fourteen witnesses, the Trial Chamber will not consider the Prosecution request insofar as it concerns the witnesses who were withdrawn.

<sup>5</sup> Witnesses MM-04, MM-06, MM-07, MM-08, MM-035, MM-037 and MM-044 testified in *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54 (“*Milošević* case”).

<sup>6</sup> Response to Prosecution Motion for Admission of Written Evidence and Motion for Recognising as Validly Done Filing of Response, filed confidentially on 21 April 2005 (“Defence Response”)

3. On 28 April 2005, the Prosecution submitted that the Defence Response should be rejected because it considered the information provided by the Prosecution was sufficient to enable the Trial Chamber to decide on the 92 *bis* Motion.<sup>7</sup>

4. On 24 November 2005, the Prosecution filed a confidential "Prosecution Notification Regarding Certain Witnesses on its Rule 65 *ter* List" ("Prosecution Notification"), in which it stated that it would not seek the admission of the evidence of fourteen witnesses, whose evidence is relevant to the charges related to Prnjavor, Šipovo and Bosanka Gradiška. The Trial Chamber will therefore not consider these fourteen witnesses in this decision.<sup>8</sup>

## II. APPLICABLE LAW

### A. Admission of written statements and transcripts under Rule 92 *bis*

5. Rule 92 *bis* (A) of the Rules governs the admission of written evidence in the form of statements in lieu of oral testimony and provides for a general test for such admission. Rule 92 *bis* (D) of the Rules governs the admission into evidence of transcripts of evidence given by a witness in proceedings before the Tribunal. The test to be applied in both these cases is whether the written statement or transcript sought to be admitted goes to proof of a matter other than the acts and conduct of the accused as charged in the indictment. Rule 92 *bis* (A)(i) gives a non-exhaustive list of factors which purport to establish that a statement should be admitted in lieu of oral evidence<sup>9</sup> and Rule 92 *bis* (A)(ii) gives a non-exhaustive list of factors which would work against the admission into evidence of statements.

6. The Appeals Chamber in *Prosecutor v. Stanislav Galić* elaborated on the test under Rule 92 *bis* and held that Rule 92 *bis* (A) excludes the admission of written statements which go to proof of any act or conduct of the accused upon which the prosecution relies to establish:

- (a) that the accused committed (that is, personally physically perpetrated) any of the crimes charged himself or herself, or
- (b) that he planned, instigated or ordered the crimes charged, or

<sup>7</sup> Prosecution Response to Defence Motion to Recognise as Validly Done the Filing of Response to Prosecution's Motion for Admission of Written Evidence; Request for Leave to Reply to Defence Response; Reply ("Consolidated Reply"), para. 9. The Trial Chamber notes that on 19 May 2005, the Trial Chamber by oral decision granted the Defence's motions for recognising as validly done the Defence's filings, finding that good cause existed in the present case pursuant to Rule 127 of Rules, Transcript of Status Conference, 19 May 2005, T. 180-81.

<sup>8</sup> The Prosecution indicated that it will not call Witnesses MM-049 through MM-063.

<sup>9</sup> *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92 *bis* (C), 7 June 2002 ("Galić Decision"), para. 9, which refers to the admission of witness statements under Rule 92 *bis* (A), but the same principle is applicable to the admission of transcripts of evidence under Rule 92 *bis* (D). See also *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Decision on Prosecution Motion for the Admission of Transcripts in Lieu of *Viva Voce* Testimony Pursuant to 92 *bis* (D)-Foča Transcripts, 30 June 2003 ("Milošević Decision") para. 10.

- (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 that he failed to take reasonable steps to prevent such acts or to punish those who carried out those acts.<sup>10</sup>

7. The Appeals Chamber further elaborated that where an accused allegedly participated in a joint criminal enterprise,<sup>11</sup> and is therefore held liable for the acts of others in that joint criminal enterprise, Rule 92 *bis* excludes any written statements which go to proof of any acts or conduct of the accused upon which the Prosecution relies to establish:

- (a) that he had participated in that joint criminal enterprise, or
- (b) that he shared with the person who actually did commit the crimes charged the requisite intent for those crimes.<sup>12</sup>

8. The Appeals Chamber specified that there is a distinction between (a) the acts and conduct of *those others* who committed the crimes for which the indictment alleges that the accused is individually responsible, which can be admitted into evidence pursuant to the Rule, and (b) the acts and conduct of *the accused* as charged in the indictment which establish his responsibility for the acts and conduct of those others, which are excluded from the procedure laid down in the Rule.<sup>13</sup>

9. The Appeals Chamber further held that *proximity* to the accused of the acts and conduct described in the written evidence is relevant to the exercise of the Trial Chamber's discretion in deciding whether the evidence should be admitted in written form at all.<sup>14</sup> The Appeals Chamber recalled that "Rule 92 *bis* was primarily intended to be used to establish what has now become known as "crime-base" evidence, rather than the acts and conduct of what may be described as the accused's immediately proximate subordinates—that is, subordinates of the accused of whose conduct it would be easy to infer that he knew or had reason to know."<sup>15</sup> The Appeals Chamber added that "[w]here the evidence is so pivotal to the prosecution case, and where the person whose

<sup>10</sup> *Galić* Decision, para. 10.

<sup>11</sup> Indictment, paras 3, 4.

<sup>12</sup> *Galić* Decision, para. 10.

<sup>13</sup> *Galić* Decision, para. 9, which refers to the admission of witness statements under Rule 92 *bis*(A), but the same principle is applicable to the admission of transcripts of evidence under Rule 92 *bis*(D).

<sup>14</sup> *Ibid.*, para. 13.

<sup>15</sup> *Ibid.*, para. 16.

acts and conduct the written statement describes is so proximate to the accused,” a Chamber may decide not to admit the proposed evidence in written form in accordance to Rule 92 *bis* (A)(ii).<sup>16</sup>

#### **B. The formalities under Rule 92 *bis* (B)**

10. Rule 92 *bis* (B) governs the formalities to be followed in order for a statement to be admissible under this Rule, *inter alia* that the person making the statement makes the declaration that the contents of the statement are true and correct to the best of the person’s knowledge and belief.

11. The Prosecution has submitted seven written statements which have not been certified in accordance with Rule 92 *bis* (B).<sup>17</sup> The Defence objects to their admission as being premature.<sup>18</sup> The Chamber considers that in order to expedite the proceedings, the Prosecution is allowed to propose written statements for provisional admission pending their certification under Rule 92 *bis* (B).

#### **C. Admission of a statement of a deceased person pursuant to Rule 92 *bis* (C)**

12. Rule 92 *bis* (C) concerns the admission of an unattested written statement given by a person who has subsequently died, who can no longer with reasonable diligence be traced, or who is by reason of bodily or mental condition unable to testify orally. The Trial Chamber must be satisfied on a balance of probabilities that the above-mentioned circumstances exists before admitting a statement pursuant to this Rule. Furthermore, Rule 92 *bis* (C) must be read in conjunction with Rule 89(C), which authorises the Trial Chamber to admit any evidence which it deems to have probative value.

#### **D. Cross-examination of witnesses pursuant to Rule 92 *bis* (E)**

13. Rule 92 *bis* (E) states that the Trial Chamber may decide to require a witness providing evidence pursuant to this Rule to appear for cross-examination.

14. In accordance with the jurisprudence of the Tribunal, *proximity* is an important aspect of the test of necessity of cross-examination.<sup>19</sup> However, proximity does not necessarily lead to exclusion of evidence. As mentioned above, where the individual, whose acts and conduct are described in the statement, is so proximate to the accused and where the evidence is so pivotal to

<sup>16</sup> *Ibid.*

<sup>17</sup> 92 *bis* Motion, para. 25. The unattested statements were made by Witnesses MM-020, MM-023, MM-024, MM-025, MM-031, MM-034, MM-039 and MM-044.

<sup>18</sup> Defence Response, para. 20.

<sup>19</sup> *Galić* Decision, para. 13.

the Prosecution case, the Trial Chamber may decide (i) not to admit the statement at all, or (ii) to require the witness to appear for cross-examination.<sup>20</sup> In general, only when the prejudicial effect cannot be counter-balanced by allowing the accused the opportunity to cross-examine the witness, will the Trial Chamber decide to exclude the evidence.

15. Other factors listed in the jurisprudence of the Tribunal relevant to the Trial Chamber's decision on admission of the evidence with or without cross-examination include whether, if the witness was cross-examined in the previous proceedings, the cross-examination in those proceedings adequately dealt with the issues relevant to the defence in the current proceedings,<sup>21</sup> whether the evidence in question relates to "live and important issue between the parties, as opposed to a peripheral or marginally relevant issue",<sup>22</sup> and whether the witness was extensively cross-examined by an accused *with a common interest*.<sup>23</sup>

### III. DISCUSSION

#### A. Do the statements and transcripts go to proof of the acts or conduct of the Accused?

##### 1. Admissibility of 12 written statements pursuant to Rule 92 bis (A)

16. The Prosecution seeks to admit into evidence the written statements with their associated documents of twelve witnesses.<sup>24</sup> The Prosecution submits that the written statements of nine of these witnesses<sup>25</sup> do not in any part relate to the acts and conduct of the Accused. With regard to the remaining three witnesses,<sup>26</sup> the Prosecution submits that parts of their statements relate to the acts and conduct of the Accused.<sup>27</sup> Therefore the Prosecution does not propose those portions for admission under Rule 92 bis (A), but submits that these three witnesses be brought to testify before this Tribunal in relation to those portions.<sup>28</sup> The Trial Chamber does not consider the parts of the statements which go to the acts and conduct of the Accused, as specified by the Prosecution, to be part of the Prosecution's 92 bis Motion. The Defence accepts that the evidence

<sup>20</sup> *Galić* Decision, paras 13-15: "there is often but a short step from a finding that the accused knew or had reason to know that those crimes were about to be or had been committed by 'his subordinates'," (para. 14)

<sup>21</sup> *Prosecutor v. Sikirica et al.*, Case No. IT-95-8-T, Decision on Prosecutor's Application to Admit Transcripts Under Rule 92 bis, 23 May 2001, para. 4.

<sup>22</sup> *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, paras. 24-5.

<sup>23</sup> *Prosecutor v. Aleksovski*, Case No. IT-95-95-14/1-AR73, 16 February 1999; *Milošević* Decision, para. 38.

<sup>24</sup> Witnesses MM-019, MM-020, MM-023, MM-024, MM-025, MM-031, MM-032, MM-033, MM-034, MM-039, MM-047, MM-048, 92 bis Motion, paras 1, 2; *see also* the Confidential Annex B and Prosecution Notification, para. 1.

<sup>25</sup> Witnesses MM-019, MM-020, MM-023, MM-024, MM-031, MM-032, MM-033, MM-034, MM-039, 92 bis Motion, para. 15.

<sup>26</sup> Witnesses MM-025, MM-047 and MM-048.

<sup>27</sup> The Prosecution has identified specific parts of the statements which go to the acts and conduct of the Accused.

<sup>28</sup> 92 bis Motion, para. 16.

contained in the written statements, as proposed by the Prosecution, does not go to proof of the acts or conduct of the Accused.<sup>29</sup>

17. The Chamber finds that the statements and the associated documents of Witnesses MM-019, MM-020, MM-023, MM-024, MM-031, MM-032, MM-033, MM-034 and MM-039, as a whole, meet the requirements for admission. With regard to the three remaining witnesses, Witness MM-025, MM-047 and MM-048, the Trial Chamber finds that the statements may be admitted pursuant to Rule 92 *bis* provided they are redacted.

2. Admissibility of 7 transcripts sought to be admitted pursuant to Rule 92 *bis* (D)

18. The Prosecution seeks to admit into evidence the transcripts of the testimony in other proceedings of 7 witnesses, with associated documents.<sup>30</sup> The Prosecution submits that the Witnesses MM-04, MM-035 and MM-037<sup>31</sup> do not relate in any part to the acts and conduct of the Accused. However, with regard to the four Witnesses MM-06, MM-07, MM-08<sup>32</sup> and MM-044<sup>33</sup>, the Prosecution admits that some portions of the transcripts of their testimony relate to the acts and conduct of the Accused. The Prosecution therefore does not propose that these portions be admitted under Rule 92 *bis* (D), but submits that these witnesses be brought to testify before the Tribunal in relation to those portions.<sup>34</sup> The Trial Chamber does not consider the parts of the transcripts which go to the acts and conduct of the Accused, as specified by the Prosecution, to be part of the Prosecution's 92 *bis* Motion. The Defence accepts that the evidence contained in the transcripts, as proposed by the Prosecution, does not address the acts and conduct of the Accused.<sup>35</sup>

19. The Trial Chamber finds that the transcripts and associated documents of the Witnesses MM-04, MM-35 and MM-37, in whole, and the transcripts and associated documents of the Witnesses MM-06, MM-07, MM-08 and MM-044, provided that these transcripts be filed in redacted form, meet the requirements for admission under Rule 92 *bis* of the Rules.

<sup>29</sup> Defence Response, para. 10.

<sup>30</sup> Witnesses MM-04, MM-06, MM-07, MM-08, MM-035, MM-037, MM-044, 92 *bis* Motion, para. 1, and its Confidential Annex A.

<sup>31</sup> *Ibid.*, para. 12.

<sup>32</sup> *Ibid.*, para. 13, and those parts are identified in the column 5 of Confidential and *Ex parte* Annex D. The parts of MM-06's testimony which go to proof of the acts and conduct of the Accused are also listed in the column 5 of Confidential and *Ex parte* Annex D.

<sup>33</sup> *Ibid.*, para. 13, and those parts are identified in the column 5 of Confidential Annex A.

<sup>34</sup> *Ibid.*, para. 13.

<sup>35</sup> Defence Response, para. 10.

**B. Are there any discretionary factors which militate against the admission of the statements or transcripts?**

1. The 12 written statements

20. The Prosecution submits that the above-mentioned 12 statements are admissible because none of the factors which might militate against admitting evidence in written form are applicable.<sup>36</sup> The Prosecution explains that there are no reasons to believe that the evidence submitted is either unreliable, or that its prejudicial effect outweighs its probative value.<sup>37</sup> The Prosecution further submits that (a) a significant part of the written statements of the Witnesses MM-019, MM-020, MM-025 and MM-048 relates to the relevant historical, political or military background in this case,<sup>38</sup> (b) the evidence contained in the statements is largely cumulative with the evidence that will be presented during the trial through live witnesses,<sup>39</sup> (c) the statements given by the Witnesses MM-020 and MM-025 consist of a general or statistical analysis of the ethnic composition of the population in the locations mentioned in the Indictment,<sup>40</sup> and (d) there is a compelling interest in conducting the trial expeditiously.<sup>41</sup>

21. The Defence submits that the Prosecution fails to identify the specific parts of the evidence which are allegedly of a cumulative nature, or which relate to relevant historical, political or military background, or which consist of a general or statistical analysis of the ethnic composition of the population.<sup>42</sup> Furthermore, the Defence submits that the statements of Witnesses MM-025, MM-047 and MM-048 go to proof of “the existence of a joint criminal enterprise of which the accused was allegedly a member, the relations within it, its objectives, activities and role in the crimes charged in the indictment” and “the structure and activities of the so-called “Martić’s Police”” which according to the Defence is evidence relating to issues pivotal to the Prosecution case and which describes the acts and conduct of persons close to the Accused.<sup>43</sup> The Defence further submits that much of the proposed “crime-base” evidence refers to the activities of the so-called “Martić’s Police” or other groups associated with the Accused and their alleged role in the crimes charged, often identifying their members.<sup>44</sup> The Defence therefore submits that it would be unfair to the Accused to admit evidence pertaining to these

<sup>36</sup> 92 *bis* Motion, para. 21.

<sup>37</sup> *Ibid.*, para. 21.

<sup>38</sup> *Ibid.*, para. 15.

<sup>39</sup> *Ibid.*, para. 18. The cumulative aspect is reflected in details in column 3 of the Confidential Annex A and the Confidential and *Ex parte* Annex D.

<sup>40</sup> *Ibid.*, para. 19 and fn 23.

<sup>41</sup> *Ibid.*, para. 20.

<sup>42</sup> Defence Response, para. 10.

<sup>43</sup> *Ibid.*, para. 11.

<sup>44</sup> *Ibid.*, fn 23.



persons proximate to the Accused without permitting the Defence to cross-examine these witnesses.<sup>45</sup>

22. The Trial Chamber notes that the Prosecution seeks to tender only parts of the statements of Witnesses MM-025, MM-047 and MM-048. The Trial Chamber is also of the opinion that in their redacted form the statements do not contain evidence which is so pivotal to the Prosecution case, or so proximate to the Accused, that they cannot be admitted. No discretionary factors exist which militate against the admission of these statements.

## 2. The 7 transcripts

23. The Prosecution submits that there are no reasons to believe that the proposed evidence contained in the 7 transcripts mentioned above is unreliable or that its prejudicial effect outweighs its probative value.<sup>46</sup> The Prosecution further submits that there is no overriding public interest which requires having the evidence presented orally since the Accused had access to the previous testimony.<sup>47</sup> The Prosecution claims in its Consolidated Reply that the Defence fails to substantiate its submissions and that the objecting party is obliged to demonstrate that the nature and source of the proposed evidence render it unreliable, or that its prejudicial effect outweighs its probative value.<sup>48</sup>

24. The Defence submits that much of the crime-base evidence contained in these transcripts goes to the proof of the existence of a joint criminal enterprise, and to the activities of “Martić police” and groups allegedly associated with the Accused.<sup>49</sup>

25. The Trial Chamber finds that the evidence of the witnesses is not so pivotal to the Prosecution case or so proximate to the Accused that the transcripts, whether or not in redacted form, should not be admitted. No discretionary factors exist which militate against the admission of these statements.

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<sup>45</sup> *Ibid.*, para. 12.

<sup>46</sup> 92 *bis* Motion, para. 21.

<sup>47</sup> *Ibid.*

<sup>48</sup> Consolidated Reply, 5 April 2005, para. 12,

<sup>49</sup> Defence Response, paras 11 and 12 and their footnotes.

### C. Should the witnesses be required to appear for cross-examination?

#### 1. The 12 written statements

26. The Prosecution seeks to admit the written statements of Witnesses MM-019, MM-020, MM-024, MM-033, MM-034, MM-039, MM-047 and MM-048<sup>50</sup> without cross-examination. The Prosecution further seeks the admission of the written statements of Witnesses MM-023, MM-025,<sup>51</sup> MM-031 and MM-032. The Prosecution submits that parts of the statements of the latter four witnesses require cross-examination because, rather than referring to acts and conduct of the Accused, those parts refer to acts and conduct of others, namely to crimes and activities of “Martić Police” or policemen or SAO Krajina forces.<sup>52</sup>

27. As noted previously, the Defence submits that, in the event that the Trial Chamber admits the statements into evidence, all witnesses should be called for cross-examination on all aspects of the statements and the associated documents.<sup>53</sup> The Defence argues that all the evidence is pivotal to the Prosecution case and relates to issues which are dispute between the parties.<sup>54</sup> Furthermore, it is submitted that “[t]he evidence provided by [the 12] witnesses in the written statements was never subject to cross-examination”.<sup>55</sup>

28. The Trial Chamber finds that in respect to the written statements of Witnesses MM-019, MM-020, MM-024, MM-033, MM-034, MM-039 and MM-047 none of the factors listed in the jurisprudence on Rule 92 *bis* (E) are applicable. Consequently, the Trial Chamber finds it would not be unfair to the Accused not to call these witnesses for cross-examination or to admit the evidence.

29. The Trial Chamber finds that certain parts of the written statements of the Witnesses MM-023, MM-025, MM-031, and MM-032 refer to crimes and activities of “Martić Police” or policemen and other SAO Krajina forces. The Trial Chamber further finds that Witness MM-048

<sup>50</sup> The Trial Chamber notes that it has already found that the written statement of Witnesses MM-047 and MM-048 should be filed in a redacted version, because parts of those statements go to the acts and conduct of the accused, and as such those parts are inadmissible pursuant to Rule 92 *bis* of the Rules, *see supra*, para. 17.

<sup>51</sup> *See fn above.*

<sup>52</sup> 92 *bis* Motion, para. 17.

<sup>53</sup> Defence Response, paras 13, 15.

<sup>54</sup> *Ibid.*, para. 16. The Defence submits that the proposed evidence contains numerous references to the accused himself, the forces he allegedly commanded or otherwise influenced, his alleged subordinates or people otherwise proximate to him, and their alleged involvement in the crimes charged. In addition, it submits that some of the evidence goes to proof of the existence of a joint criminal enterprise, of which the accused was allegedly member, the relations within it, its objectives, activities and role in the crimes charged. However, the Defence fails to identify what parts and which statements relate to these allegations.

<sup>55</sup> *Ibid.*, para. 17.

gave evidence as to the activities of a special unit, referred to as the “Red Berets” from Banja Luka. This evidence concerns the acts and conduct of units who allegedly have committed crimes for which the Accused is held responsible and a possible involvement in crimes by units from outside the SAO Krajina. This evidence is so pivotal to the Prosecution’s case, that these witnesses should be called for cross-examination on the evidence they provided on these units.

## 2. The 7 transcripts

30. The Prosecution seeks to admit the transcripts of the Witnesses MM-04, MM-06, MM-07, MM-08, MM-035, MM-037 and MM-044 without cross-examination, except for a few portions of the testimony of Witnesses MM-037 and MM-044 which, rather than going to the acts and conduct of the Accused, relate to acts and conduct of others, namely to crimes allegedly committed by “Martić’s Police”.<sup>56</sup> The Prosecution requests that in the absence of a “specific, admissible and relevant” additional line of enquiry being identified by the Accused the witnesses should not be required to attend for further cross-examination<sup>57</sup> since they already testified and were effectively and extensively cross-examined in the previous proceedings by an accused with a substantially similar interest as this Accused in opposing and contesting their evidence.<sup>58</sup>

31. The Defence submits that in the event that the Trial Chamber decides that the evidence is admissible, all witnesses should appear for cross-examination on all aspects of the testimony contained in the transcripts and the associated documents.<sup>59</sup> The Defence argues that the transcripts go to proof of important issues which are in dispute between the parties.<sup>60</sup> In relation to the testimony of Witnesses MM-04, MM-06, MM-07, MM-08, MM-035, MM-037 and MM-044, the Defence submits that the previous cross-examination of these witnesses in previous proceedings<sup>61</sup> does not adequately cover the issues in dispute between the parties in the present case and that “[g]iven the rather particular circumstances of the *Milošević* case, the introduction of Mr. Milošević’s cross-examination instead of the one conducted by the Defence in this case

<sup>56</sup> 92 bis Motion, para. 14.

<sup>57</sup> Strinović Motion, 28 February 2005, para. 13.

<sup>58</sup> 92 bis Motion, para. 14.

<sup>59</sup> Defence Response, paras 13, 15. The Defence clarifies in para. 16 of the Defence Response that the evidence contains “several numerous references to the accused himself, the forces he allegedly commanded or otherwise influenced, his alleged subordinates or people otherwise proximate to him, and their alleged involvement in the crimes charged. Some of the evidence goes to the proof of the existence of a joint criminal enterprise of which the accused was allegedly a member, the relations within it, its objectives, activities and role in the crimes charged. All this evidence is pivotal to the prosecution case and related to issues which are in dispute between the parties.”

<sup>60</sup> Defence Response, para. 16.

<sup>61</sup> The witnesses were cross-examined in *Prosecutor v. Slobodan Milošević*.

would most certainly result in the breach of the Accused's rights set out in Article 21 of the Statute."<sup>62</sup>

32. With regard to the transcripts of prior testimony of Witnesses MM-04 and MM-035, the Trial Chamber finds that none of the factors listed in the jurisprudence on Rule 92 *bis* (E) are applicable. Consequently, the Trial Chamber finds it would not be unfair to the Accused not to call these witnesses for cross-examination or to admit the evidence.

33. The Trial Chamber finds that the evidence presented by Witness MM-06 could be considered as going to the existence of a joint criminal enterprise in which the Accused allegedly participated, to the alleged goal of the joint criminal enterprise, and to the effective control the Accused allegedly had over units committing crimes. The Trial Chamber further finds that evidence provided by Witness MM-07 with regard to Arkan's Tigers, the alleged effective control of the Accused over units committing crimes, and a "policy" in "the area of responsibility in the Kordun area" "to get as many Croats as possible out of the territory" is evidence which may be pivotal to the Prosecution case. The Trial Chamber also finds that the evidence provided by Witness MM-08 could go to the existence of a joint criminal enterprise in which the Accused allegedly participated, to the relationship of the Accused with other members of this alleged joint criminal enterprise, and to the "Red Berets". Moreover, the Trial Chamber finds that the previous testimony of Witnesses MM-037 and MM-044 concerned issues relating to "Martić's Police". The Trial Chamber finds that the above-mentioned parts of the previous testimony of these witnesses relate to acts and conduct of other, but are pivotal to the case for the Prosecution and thus necessitate that the witnesses be called for cross-examination.

#### **D. The deceased witness**

34. The Prosecution seeks to admit into evidence the written statement of a deceased person named Boško Brkić. The Prosecution submits that the contents of this statement do not pertain to the acts and conduct of the Accused. It further argues that this statement should be regarded as "crime-base" evidence and that it is of a cumulative nature.<sup>63</sup> The Defence accepts that the "statement cannot be said to go to the acts or conduct of the Accused".<sup>64</sup> However, the Defence argues that this statement should not be admitted because only one *viva voce* witness will give

<sup>62</sup> Defence Response, para. 18; *See also*, Defence Response, para. 17.

<sup>63</sup> 92 *bis* Motion, para. 23.

<sup>64</sup> Defence Response, para. 19.

evidence on the same event so the cumulative status of the statement of Boško Brkić is questionable.<sup>65</sup>

35. The Trial Chamber finds that on the balance of probabilities, Boško Brkić is deceased. The death certificate of the deceased person attached to the Prosecution's Motion satisfies the criteria of 92bis (C)(i). The Trial Chamber further finds that statement goes to proof of an attack on the village of Škabrnja by Serb forces in November 1991 and not to proof of the acts or conduct of the Accused.

36. The Trial Chamber is of the opinion that the factor of cumulative nature does not require a minimum quantity of *viva voce* witnesses. The Trial Chamber also finds that there are satisfactory indicia of the reliability of the statement. The Trial Chamber further finds that the prejudicial effect of admitting this statement does not substantially outweigh its probative value. The statement of the deceased Boško Brkić will therefore be admitted into evidence.

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<sup>65</sup> Defence Response, para. 19.

#### IV. DISPOSITION

37. For the foregoing reasons, the Trial Chamber:

**PURSUANT TO Rule 92 *bis* (A) of the Rules**

**ADMITS** into evidence the written statements and their associated documents of Witnesses MM-019, MM-020, MM-023, MM-024, MM-031, MM-032, MM-033, MM-034, and MM-039;

**ADMITS** into evidence, in redacted form as specified above, the written statements and their associated documents of Witnesses MM-025, MM-047 and MM-048;

**ORDERS** that Witnesses MM-023, MM-025, MM-031, MM-032 appear for cross-examination on matters concerning “Martić Police” or policemen and other SAO Krajina forces, and MM-048 appear for cross-examination on the matter of the special unit referred to as the “Red Berets”.

**PURSUANT TO Rule 92 *bis* (C) of the Rules,**

**ADMITS** into evidence the written statement made by the deceased witness Boško Brkić, and

**PURSUANT TO Rule 92 *bis* (D),**


**ADMITS** into evidence the transcripts of the previous testimony of Witnesses MM-04, MM-035 and MM-037 and therewith associated documents,

**ADMITS** into evidence, in redacted form as specified above, the transcripts of the previous testimony, and therewith associated documents, of Witnesses MM-06, MM-07, MM-08 and MM-044; and

**ORDERS** that Witness MM-06, appear for cross-examination on matters going to the existence of a joint criminal enterprise in which the Accused allegedly participated, to the alleged goal of the joint criminal enterprise, and to the effective control the Accused allegedly had over units committing crimes; that Witness MM-07 appear for cross-examination on matters concerning the Arkan’s Tigers, the alleged effective control of the Accused over units committing crimes, and a “policy” in “the area of responsibility in the Kordun area” “to get as many Croats as possible out of the territory”; that Witness MM08 appear for cross-examination on matters concerning the

existence of a joint criminal enterprise in which the Accused allegedly participated, to the relationship of the Accused with other members of this alleged joint criminal enterprise, and to the “Red Berets”; that Witness MM-037 and Witness MM-044 appear for cross-examination on matters concerning “Martić’s Police”.

Done in English and French, the English version being authoritative,



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Judge Bakone Justice Moloto  
Presiding

Dated this sixteenth day of January 2006  
At The Hague  
The Netherlands

**[Seal of the Tribunal]**