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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-T

Date: 12 September 2006

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IN TRIAL CHAMBER II

Before: **Judge Carmel Agius, Presiding**
Judge O-Gon Kwon
Judge Kimberly Prost
Judge Ole Bjørn Støle – Reserve Judge

Registrar: **Mr. Hans Holthuis**

Decision of: **12 September 2006**

PROSECUTOR
v.
VUJADIN POPOVIĆ
LJUBIŠA BEARA
DRAGO NIKOLIĆ
LJUBOMIR BOROVČANIN
RADIVOJE MILETIĆ
MILAN GVERO
VINKO PANDUREVIĆ

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

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Mr. John Ostojić and Mr. Christopher Meek for Ljubiša Beara
Ms. Jelena Nikolić and Mr. Stéphane Bourgon for Drago Nikolić
Mr. Aleksandar Lazarević and Mr. Miodrag Stojanović for Ljubomir Borovčanin
Ms. Natacha Fauveau Ivanović for Radivoje Miletić
Mr. Dragan Krgović for Milan Gvero
Mr. Peter Haynes and Mr. Đorđe Sarapa for Vinko Pandurević

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* and Attached Annexes A-D", filed *confidentially* by the Prosecution on 12 May 2006 ("Motion").

I. INTRODUCTION

1. The Trial Chamber has also received the following: "Response on Behalf of Drago Nikolić to Prosecution Motion for Admission of Written Evidence in Lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis*" ("Nikolić Response"), filed *confidentially* on 21 June 2006; "Corrigendum to Response on Behalf of Drago Nikolić to Prosecution Motion for Admission of Written Evidence in Lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis*" ("Nikolić Corrigendum"), filed *confidentially* on 22 June 2006; "Response on Behalf of Vujadin Popović to Prosecution Motion for Admission of Written Evidence in Lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis*" ("Popović Response"), filed *confidentially* on 26 June 2006; "Response on Behalf of Vinko Pandurević to the Prosecution's Motion for Admission of Written Evidence in Lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis*" ("Pandurević Response"), filed on 29 June 2006; "Borovčanin Defence Response to Confidential 'Prosecution's Motion for Admission of Written Evidence in Lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis* and Attached Annexes A-D'" ("Borovčanin Response"), filed *confidentially* on 30 June 2006; "Joint Defence Response by the Accused Radivoje Miletić and Milan Gvero to Prosecution Motion for Admission of Written Evidence Pursuant to Rule 92 *bis*" ("Miletić/Gvero Response"), filed *confidentially* on 30 June 2006; "Prosecution's Consolidated Reply to Defence Responses to Prosecution Motion for Admission of Written Evidence in Lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis*" ("Reply"), filed *confidentially* on 7 July 2006;[1] "Defendant, Ljubiša Beara's Response to Confidential 'Prosecution's Motion for Admission of Written Evidence in Lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis* and Attached Annexes A-D'" ("Beara Response"), filed *confidentially* on 11 July 2006;[2] and "Prosecution's Submission Regarding ... Ljubiša Beara's Response to Confidential Prosecution's Motion for Admission of Written Evidence in Lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis* and Attached Annexes A-D" ("Prosecution's Beara Reply"), filed on 18 July 2006.

[1] On 21 June 2006, the Prosecution filed "Prosecution Request to File a Consolidated Reply to Defence Responses to Prosecution Motion for Admission of Written Evidence in Lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis*". This request was granted by the Trial Chamber in a decision issued on 26 June 2006.

[2] The Beara Response was filed simultaneously with "Defendant, Ljubiša Beara's Request for Leave to File Response to the Prosecution's Motion for Admission of Written Evidence in Lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis* and Attached Annexes A–D." The Trial Chamber granted leave during the Pre-trial Conference held on 14 July 2006, T. 335 (14 July 2006). The Prosecution was granted leave to reply. T. 250–251 (13 July 2006).

2. The Prosecution moves, pursuant to Rule 92 *bis* of the Rules of Procedure and Evidence ("Rules"), for the admission in written form of evidence from forty-three witnesses. In its Reply, however, the Prosecution seeks leave to withdraw that request with regard to three witnesses—Witness No. 15, Witness No. 50, and Witness No. 158—stating it will attempt to call these witnesses for live testimony at trial.[3] The Trial Chamber will grant such leave. Accordingly, these three witnesses and the related Defence objections are not addressed further in this Decision.

3. Most of the remaining forty Rule 92 *bis* witnesses testified in earlier trials before the Tribunal. Thus, the Prosecution seeks to admit transcripts of the oral testimony of nineteen witnesses that testified in *Prosecutor v. Krstić* ("*Krstić*")[4] and whose testimony was then accepted under Rule 92 *bis*(D) in *Prosecutor v. Blagojević and Jokić* ("*Blagojević*")[5] without cross-examination,[6] of two witnesses that testified in *Krstić* whose testimony was not tendered in *Blagojević*,[7] of eight witnesses who testified only in *Blagojević*,[8] and of three witnesses who testified in both *Krstić* and *Blagojević*.[9]

4. In addition to transcripts of prior testimony, the Prosecution moves for the admission of all exhibits admitted into evidence in the earlier trials "as a result of the prior testimony" of these witnesses.[10] The Prosecution notes "[a]s other Trial Chambers have recognized, exhibits accompanying transcripts submitted under Rule 92*bis* 'form an inseparable and indispensable part of the testimony and can be admitted along with the transcripts.' Testimony of a witness may be rendered incomprehensible or incomplete if read without reference to the related exhibits."[11]

5. The Prosecution also moves, pursuant to Rule 92 *bis*(A), for the admission of written statements of eight witnesses that have not testified previously before the Tribunal.[12]

6. Also relevant to the analysis that follows, five of the forty proposed 92 *bis* witnesses are experts.[13] All five testified in *Krstić* and their testimony was admitted in *Blagojević* without cross-examination. In its Pre-Trial Brief, the Prosecution stated that it intended to file expert witness

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[3] Reply, para. 3.
[4] *Prosecutor v. Krstić*, Case No. IT-98-33-T.
[5] *Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-T.
[6] Witness No(s). 7, 10, 11, 12, 13, 14, 24, 25, 52, 53, 54, 55, 58, 59, 63, 64, 79, 80 and 151.
[7] Witness No(s). 23 and 78.
[8] Witness No(s). 22, 26, 28, 75, 82, 144, 145 and 146.
[9] Witness No(s). 56, 74 and 77.
[10] Motion, para. 27.
[11] Motion, para. 27.
[12] Motion, para. 4. Witness No(s). 27, 29, 51, 57, 60, 61, 62 and 81.
[13] Witness No(s). 10, 11, 12, 13 and 14.

reports for these five experts with the Trial Chamber pursuant to Rule 94 *bis*(A).[14] To date, no such reports have been filed with the Trial Chamber.

II. DISCUSSION

1. The Scope of Rule 92 *bis*

7. Pursuant to Rule 92 *bis*, a Trial Chamber may 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 accused as charged in the indictment.[15] Where admissible, the Trial Chamber is not bound to admit such evidence, but must use its discretion and determine whether admission is appropriate.[16] Additionally, even where the evidence is admitted, the Trial Chamber may still require the witness to appear for cross-examination at trial.[17]

8. Thus, an appropriate Rule 92 *bis* analysis involves three steps. First, the Trial 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. Second, where the evidence is admissible, the Trial Chamber must decide whether it is appropriate to admit the evidence. Finally, if the evidence is admitted, the Trial Chamber must decide whether the witness giving the evidence should still be required to appear for cross-examination.

9. Additionally, although not explicit in the text of Rule 92 *bis* itself, evidence admitted pursuant to the Rule must satisfy the fundamental requirements for admissibility established in Rule 89 (C) and (D), namely relevance and probative value that is not substantially outweighed by the need to ensure a fair trial.[18]

(A) Matters other than the acts and conduct of the Accused

10. The particular meaning to be ascribed to the phrase "acts and conduct of the accused" has been described by another Trial Chamber of the Tribunal as follows:

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[14] Prosecution's Filing of Pre-Trial Brief Pursuant to Rule 65 *ter* and List of Exhibits Pursuant to Rule 65 *ter*(E)(v), 28 April 2006 ("Prosecution's Pre-trial Brief"). *See* Annex B, paras. 10–14.

[15] Rule 92 *bis*(A) and (D).

[16] Rule 92 *bis*(A) ("A Trial Chamber *may* admit, in whole or in part"), (D) ("A Chamber *may* admit a transcript"), (E) ("The Trial Chamber shall decide ... *whether* to admit the statement or transcript in whole or in part") (italics added).

[17] Rule 92 *bis*(E) ("The Trial Chamber shall decide ... *whether* to require the witness to appear for cross-examination") (italics added).

[18] *Prosecutor v. Galić*, Case No. IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92 *bis*(C), 7 June 2002 ("*Galić* Appeal Decision"), para. 12 (considering that the "intention of Rule 92*bis* ... [was] 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").

> The phrase "acts and conduct of the accused" in Rule 92bis 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.[19]

11. The Appeals Chamber has further defined the parameters of this aspect of Rule 92 *bis*(A) to exclude 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.[20]

12. Additional caution must be exercised where the Accused is charged with individual responsibility for the acts and conduct of others. The Appeals Chamber has held that the phrase "acts and conduct of the accused as charged in the indictment" in Rule 92 *bis* should also be interpreted to mean the acts and conduct of the accused "which establish his responsibility for the acts and conduct of ... others."[21] Thus, where—as here—a joint criminal enterprise theory of individual criminal responsibility is alleged, and the accused is "therefore liable for the acts of others in that joint criminal enterprise,"[22] Rule 92 *bis*(A) also excludes any written statement which goes to any act 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.[23]

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[19] *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).

[20] *Galić* Appeal Decision, *supra* note 18, para. 10.

[21] *Ibid.* para. 9. Thus, Rule 92 *bis* should not be read to exclude "acts and conduct of those others who commit the crimes for which the indictment alleges that the accused is individually responsible." *Ibid.*

[22] *Ibid.* para. 10. *See also*, *Prosecutor v. Duško Tadić*, Case No. IT-94-1-A, Appeal Judgement, 15 July 1999, para. 220.

[23] *Galić* Appeal Decision, *supra* note 18, para. 10.

13. Written evidence relating to the acts and conduct of a subordinate of the accused, or of some other person for whose acts and conduct the accused is charged with responsibility, should not be confused with the acts and conduct of the accused. Written evidence of the latter never qualifies for admission pursuant to Rule 92 *bis*, whereas written evidence relating to the acts and conduct of others is admissible.[24] While such evidence is admissible, however, the fact that it relates to the conduct of some person for whose acts and conduct the accused is charged with responsibility is relevant to the exercise of the Trial Chamber's discretionary power under Rule 92 *bis*(E).[25]

(B) The exercise of discretion

14. Rule 92 *bis*(A) includes a list of specific factors to be considered on the question of whether admissible written evidence should be admitted. That list is not exclusive, however, and the Trial Chamber may ultimately consider any factor which it finds appropriate.

15. The Appeals Chamber has stated that Rule 92 *bis* 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."[26] Thus, another factor that has been explicitly considered is whether the individual whose acts and conduct are described in the statement or transcript is so proximate to the accused and the evidence is so pivotal to the Prosecution's case that it would be unfair to permit it to be given in written form.[27]

(C) Cross-examination

16. Even where the Trial Chamber has decided to admit the evidence, it may still require the witness to appear for cross-examination at trial. The Tribunal's case law has established several criteria to aid the analysis of whether to require a witness whose statement or prior testimony is admitted pursuant to Rule 92 *bis* to appear for cross-examination. A Trial Chamber should consider, *inter alia*: the overriding obligation to ensure the accused a fair trial under Articles 20 and 21 of the Statute;[28] 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";[29] the cumulative nature of the evidence;[30] whether the evidence is

[24] *See Milošević* Decision, *supra* note 19, 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").

[25] *Galić* Appeal Decision, *supra* note 18, para. 13.

[26] *Ibid.* para. 16.

[27] *Ibid.* paras. 13–16. *See* also *Prosecutor v. Brđanin & 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, para. 14.

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

[29] *Milošević* Decision, *supra* note 19, paras. 24–25.

"crime-base" evidence or whether it relates to the acts and conduct of subordinates for which the accused is allegedly responsible;[31] the proximity of the accused to the acts and conduct described in the evidence;[32] and whether the cross-examination of the witness in the earlier proceedings dealt adequately with the issues relevant to the current proceedings.[33]

2. The Proposed Rule 92 *bis* Witnesses

(A) The Prosecution's Submissions

17. The Prosecution contends that the evidence of its forty proposed 92 *bis* witnesses does not go to the acts or conduct of any Accused. Rather, it "consists of 'crime base,' victim impact, background or statistical information, or expert opinions concerning issues that are not in dispute."[34] Additionally, the Prosecution asserts that "[t]he majority of the evidence at issue is also cumulative of testimony to be offered by live witnesses,"[35] and that the testimony offered in previous trials is reliable as it has already been subject to cross-examination and has been deemed admissible by at least one other Trial Chamber.[36] Finally, the Prosecution argues that none of the forty proposed 92 *bis* witnesses should be required to appear for cross-examination.[37]

(B) The Defence Responses

18. The six Defence responses—while greatly varied in approach and largely inconsistent with regard to specific proposed witnesses[38]—collectively challenge the Prosecution's request with regard to each proposed Rule 92 *bis* witness. The Trial Chamber has reviewed each of the Defence responses and considered each objection.

(C) Defence Objections to the Form of the Proposed Witness Statements

19. The Prosecution has proposed the admission of written statements of eight witnesses that do not appear to have testified previously before the Tribunal. Several of the Accused object to the

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[30] *Ibid.* para. 23.

[31] *Galić* Appeal Decision, *supra* note 18, para. 16. *See* also *Milošević* Decision, *supra* note 19, 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").

[32] *Galić* Appeal Decision, *supra* note 18, para. 15.

[33] *Sikirica* Decision, *supra* note 28, para. 4.

[34] Motion, para. 13.

[35] Motion, para. 14.

[36] Motion, para. 14.

[37] Motion, para. 18.

[38] For example, the Borovčanin Response does not object to the evidence of thirty of the proposed witnesses being admitted without cross-examination. Borovčanin Response, paras. 61(a) and (g). The Miletić/Gvero and Beara Responses, alternatively, object to the admission of the evidence of every proposed witness.

form of these proposed witness statements, noting that they do not meet the formal requirements of Rule 92 *bis*(B).[39]

20. The Prosecution does not dispute the objection. In the Motion, the Prosecution notes that if the statements are provisionally admitted by the Trial Chamber, it will arrange for certification of the statements in accordance with Rule 92 *bis*(B).[40] This approach is also described by the Prosecution in its Reply. There, the Prosecution requests to be permitted to proceed in this manner, explaining this approach is "[i]n the interest of saving substantial costs to the Tribunal, both financially and in human resources," and noting it will mitigate the risk of expending resources for certifying statements which the Trial Chamber may ultimately decline to admit under Rule 92 *bis*.[41]

21. The Trial Chamber will generally proceed in the fashion suggested by the Prosecution. The eight proposed witness statements will each be dealt with below, with the Trial Chamber provisionally admitting certain of them, subject to the Prosecution providing the Trial Chamber and the Defence teams with the statements in a form which fully satisfies the requirements of Rule 92 *bis*(B). Should any statement so provided fail to fully satisfy the requirements of Rule 92 *bis*(B), it will not be admitted.

(D) The Exhibits Proposed to be Admitted With the Transcripts and Written Statements

22. The Prosecution has moved the admission of all exhibits admitted in *Krstić* and *Blagojević* "as a result of the prior testimony" tendered by the Prosecution pursuant to Rule 92 *bis*(D).[42] The Prosecution asserts this is appropriate because the exhibits "form an integral part of the witness testimony."[43] Moreover, it asserts, this is important as transcript testimony "may be rendered incomprehensible or incomplete if read without reference to the related exhibits."[44]

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[39] *See, e.g.*, Popović Response, paras. 8–9; Nikolić Response, para. 9; Miletić/Gvero Response, paras 21–26.
[40] Motion, para. 4; Reply, para. 23.
[41] Reply, para. 23.
[42] Motion, para. 27.
[43] Motion, para. 27 (citing *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).
[44] Motion, para. 27.

23. The jurisprudence of the Tribunal supports the Prosecution's request,[45] and the Trial Chamber finds it appropriate to admit the exhibits that were admitted in the previous trials "as a result of the prior testimony."[46] The Trial Chamber notes that none of the Accused has made a generalized objection to the admission of the exhibits in this manner, although several of them have objected to some of the individual exhibits for specific reasons. Those individual objections are addressed and answered below in the discussion that follows. Accordingly, unless specifically addressed and excluded in the remainder of this Decision, the exhibits are admitted.

24. Additionally, the Trial Chamber agrees with the Prosecution's submission that transcripts read in the absence of the exhibits to which the witness referred cannot be fully evaluated for relevance and probative value. Ultimately, each exhibit that was shown to a witness during testimony in the earlier trial should be before the Trial Chamber as it evaluates the transcript. This includes exhibits shown to the witness, which were tendered and admitted with the testimony of other witnesses in the previous trial. In this regard, it is unfortunate that the Prosecution has not provided the Trial Chamber with all the exhibits in this latter category.[47] Where such exhibits have not been provided—or at least identified and cross-referenced as exhibits to be tendered in this trial through another witness—the Trial Chamber may be conducting only a partial evaluation. In that event, any resulting deficiency in the evidence must be construed against the Prosecution.

25. The Trial Chamber finds that the same principles outlined above also apply to items such as photographs, maps or other documents referenced in and attached to written statements proposed for admission pursuant to Rule 92 *bis*(A). Accordingly, any such items provided with the written statements proposed in the Motion are admitted.

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[45] *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 ("*Blagojević* Decision of 12 June 2003"); *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. *But see Prosecutor v. Martić*, Case No. IT-95-11-T, Decision on Prosecution's Motions for Admission of Transcripts Pursuant to Rule 92 *bis*(D) and of Expert Reports Pursuant to Rule 94 *bis*, 13 January 2006, para. 47 (construing Rule 92 *bis*(D) to exclude documents other than transcripts and finding it more appropriate for the Prosecution to separately seek the admission of documents supporting the transcripts "under examination in court, pursuant to the general principles regulating the admissibility of evidence before this Tribunal").

[46] Motion, para. 27.

[47] This issue was first raised by the Trial Chamber at the 6 July 2006 Status Conference and addressed again at the Pre-trial Conference of 13 July 2006. T. 185–191 (6 July 2006), T. 250–252 (13 July 2006). In response to the Trial Chamber's directions, the Prosecution produced a new CD on 20 July 2006, which purported to contain all the exhibits. The new CD includes many of the referenced exhibits, but some are still missing.

(E) The Proposed 92 *bis* Witnesses

26. The Trial Chamber will address each of the witnesses in the groupings in which they are arranged in the Motion, noting the specific Defence objections, any relevant Prosecution reply, and the Trial Chamber's conclusion.

(i) OTP Witness / Prosecution Research Officer

27. The Prosecution proposes the admission of the previous testimony of Witness No. 7, a former Prosecution Research Officer who was involved in the Prosecution's investigation of intercepted military communications received from the Army of Bosnia-Herzogovina (ABiH) and the State Security Service of BiH. The testimony describes the Prosecution's investigation of the intercepted communications and the manner in which the Prosecution judged the reliability of the intercepts.

28. This witness testified in *Krstić* and the testimony was admitted without cross-examination in *Blagojević* pursuant to Rule 92 *bis*(D).[48] Having reviewed the transcript, the Trial Chamber finds that the evidence is relevant and has probative value. In this case, however, the Trial Chamber must address a fundamental concern that was not at issue in *Blagojević*. Here, some of the written evidence implicates directly the acts and conduct of some of the Accused. This is the result of the single exhibit tendered in *Krstić* through the testimony of this witness, which the Prosecution proposes should be admitted with the transcript in this trial. The exhibit is a binder which collects together several different intercepted communications, some of which refer directly to some of the Accused in this case. Additionally, during the testimony, the witness references certain of the intercepts. The binder appears to have been put together by the witness to demonstrate the methods used to measure the reliability of intercepts rather than for the substantive content of any of them. Indeed, the Prosecution contends that admitting this testimony would not violate Rule 92 *bis*(D) as the evidence "goes only to the process involved in corroborating the information contained in the communications in order to determine their authenticity."[49]

29. Miletić, Gvero and Popović all object to the admission of the transcript on the basis that it would violate Rule 92 *bis*(D) as parts of the transcript go to the acts or conduct of the Accused.[50] Considering the Prosecution's explanation of the purpose of this exhibit, it is unfortunate that the Prosecution has not undertaken to identify for the Trial Chamber where the intercepts within the

[48] *Prosecutor v. Blagojević & Jokić*, Case No. IT-02-60-T, Decision on Prosecution's Motions for Admission of Expert Statements, 7 November 2003 ("*Blagojević* Decision of 7 November 2003"), para. 34 (citations omitted).
[49] Motion, Annex A, p. 1.
[50] Popović Response, para. 35; Miletić/Gvero Response, paras. 28–29.

binder are to be tendered as individual exhibits in this trial through the testimony of other witnesses. In that instance, Witness No. 7 would merely be pointing out certain aspects of evidence already appropriately before the Trial Chamber in its own right, and the safeguards in Rule 92 *bis* would not be offended by the admission of the transcript—or the exhibit—in lieu of oral evidence. Even in its Reply, however, the Prosecution does not answer this question. Instead, it simply asserts that another Trial Chamber has already found the evidence appropriate for admission pursuant to Rule 92 *bis*(D).[51]

30. Without clarification by the Prosecution the Trial Chamber must proceed as though the transcript of this witness is the sole basis of admission for the intercepts included in the binder. Accordingly, those individual intercepts within the exhibit which implicate the acts or conduct of any of the Accused are not admissible. Neither are those portions of the transcript which reference these intercepts or otherwise implicate the acts or conduct of any of the Accused. Miletić and Gvero claim the transcript is "empty of substance without these exhibits" and should not be admitted.[52] The Trial Chamber is persuaded, however, that the testimony remains relevant and has probative value. As so redacted, the transcript is admissible.

31. Having decided that the evidence is admissible pursuant to Rule 92 *bis*(D), the Trial Chamber must determine whether, in the exercise of its discretion, the evidence should be admitted. The Prosecution submits this evidence provides "relevant background information concerning the origin and authenticity of the intercepts to be introduced at trial."[53] The Trial Chamber does not believe there is any overriding public interest in this witness testifying fully live. Nor does the Trial Chamber have reason to question the reliability of the evidence or to believe that its prejudicial effect outweighs its probative value. Accordingly, the Trial Chamber is persuaded that it is appropriate to admit this evidence pursuant to Rule 92 *bis*(D).

32. Whether the witness should be required to appear for cross-examination is the final question. It is apparent that evidence of intercepted communications will play an important role in the Prosecution's case against the Accused. This was highlighted by the Prosecution's repeated reference to such communications during its opening statement and by Defence statements in response that the reliability of at least some of the communications will be challenged.[54] Having reviewed the testimony and the exhibit provided, the Trial Chamber is persuaded that this evidence relates to a "live and important issue between the parties, as opposed to a peripheral or marginally

[51] Reply, para. 14.
[52] Miletić/Gvero Response, para. 28.
[53] Motion, Annex A, p. 1.
[54] *See, e.g.*, T. 385–386 (21 August 2006), T. 564–565 (23 August 2006).

relevant issue."[55] Thus, the Trial Chamber finds it appropriate to require this witness to appear at trial for cross-examination.

(ii) Expert Witnesses

33. The Prosecution proposes to admit transcript testimony of five expert witnesses, all of whom testified in *Krstić*. As a preliminary matter, the Trial Chamber notes that for one of these experts—Witness No. 14—the Prosecution still has not provided two of the exhibits tendered in *Krstić* with the expert's live testimony. These missing exhibits are reports authored by the expert and at least one of them figures prominently in the transcript testimony. In the absence of these particular exhibits, the Trial Chamber simply does not have the information necessary to evaluate whether admission of this expert's transcript is appropriate. Accordingly, without prejudice to the Prosecution making a new request which includes the necessary exhibits, the Prosecution's request regarding Witness No. 14 is denied.

34. With regard to the remaining four experts, the Trial Chamber recalls that the *Blagojević* Trial Chamber was asked to admit the same transcripts without cross-examination pursuant to Rule 92 *bis*(D). In granting the Prosecution's request, that Trial Chamber noted:

> This expert evidence deals with exhumations of mass graves and forensic examination to determine the gender, age and cause of death of the exhumed people from these mass graves. The Trial Chamber is satisfied of the relevance and probative value of these reports and transcripts to these proceedings. The Trial Chamber is further satisfied that none of the information contained in the statements or transcripts dealing with forensic evidence relates to the acts and conduct of the accused as charged in the Indictment.[56]

Having reviewed the transcripts and exhibits, and considering the charges facing the Accused in the Indictment, the Trial Chamber is similarly satisfied of the relevance and probative value of this evidence to this trial. The Trial Chamber is also satisfied that nothing in the evidence relates to the acts and conduct of the Accused as charged in the Indictment. Accordingly, the evidence is admissible pursuant to Rule 92 *bis*(D).

35. Unlike *Blagojević*, however, where it appears the Defence did not object to the admission of the transcripts,[57] the Accused in this case oppose the admission of this evidence under Rule 92 *bis*(D), alleging the Prosecution has inappropriately failed to comply with Rule 94 *bis*. Nikolić states that he is unable to take a position on this aspect of the Motion, claiming the prior testimony of experts "cannot be admitted pursuant to Rule 92 *bis*(D) unless the Prosecution first requests that

[55] *Milošević* Decision, *supra* note 19, paras. 24–25.
[56] *Blagojević* Decision of 7 November 2003, *supra* note 48, para. 35.
[57] *Ibid.* para. 35.

the expert reports they prepared be admitted into evidence in accordance with Rule 94 *bis*. Then, and only if the Experts reports are admitted into evidence without cross-examination, can the Prosecution seek to have their prior testimony admitted in written form."[58] Borovčanin makes the same argument.[59] Pandurević objects to admitting the evidence of two of the five experts, noting *inter alia*, that the Prosecution should seek admission of the experts' reports under Rule 94 *bis*.[60] None of the Accused points to any jurisprudence of the Tribunal supporting these assertions.

36. The relationship between Rule 92 *bis*(D) and Rule 94 *bis* where experts are concerned has played a prominent role in some decisions taken by various chambers of the Tribunal. In *Prosecutor v. Galić*, the Appeals Chamber rejected the argument that Rule 92 *bis* could not be applied to expert witnesses.[61] It reasoned:

> Rule 94 *bis* contains nothing which is inconsistent with the application of Rule 92 *bis* to an expert witness. Indeed, Rule 92 *bis* expressly contemplates that witnesses giving evidence relating to the relevant historical, political or military background of a case (which is usually the subject of expert evidence) will be subject to its provisions. There is nothing in either Rule which would debar the written statement of an expert witness, *or the transcript of the expert's evidence in proceedings before the Tribunal*, being accepted in lieu of his oral testimony where the interests of justice would allow that course in order to save time, with the rights of the other party to cross-examine the expert being determined in accordance with Rule 92 *bis*. Common sense would suggest that there is every reason to suggest that such a course ought to be followed in the appropriate case.[62]

37. In *Prosecutor v. Milošević*, the Prosecution moved to admit the written statement of an expert witness pursuant to Rule 92 *bis*(A).[63] In denying the Prosecution's motion, the Trial Chamber noted that the proper procedure to be followed in calling the evidence of an expert was set out in Rule 94 *bis*.

38. The *Blagojević* Trial Chamber also dealt specifically with the applicability of Rule 92 *bis* to the written evidence of expert witnesses. There—unlike here—the Prosecution submitted reports of the expert witnesses under both Rule 94 *bis* and Rule 92 *bis*(B) or (D).[64] The Trial Chamber began

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[58] Nikolić Response, para. 8.

[59] Borovčanin Response, paras. 18, 20, 30, 40, and 60.

[60] Pandurević Response, paras. 7, 9.

[61] *Galić* Appeal Decision, *supra* note 18, paras. 38-42.

[62] *Ibid.* para. 40 (emphasis added).

[63] *Prosecutor v. Milošević*, Case No. IT-02-54-T, Decision on Prosecution's Application for Admission of Written Statement of Dr. Berko Zečević Pursuant to Rule 92 *bis*(A), 9 September 2003 ("*Milošević* Decision of 9 September 2003").

[64] *Blagojević* Decision of 7 November 2003, *supra* note 48, para. 18. There, the Prosecution explained that it considered Rule 92 *bis* to be "another means" of having certain expert reports or previous expert testimony admitted without calling the expert to testify live.

its analysis by noting that standard practice before the Tribunal had been to tender and admit expert reports through Rule 94 *bis*.[65]

39. Noting there was certainly some overlap between the Rules, the *Blagojević* Trial Chamber distinguished the *Galić* Appeals Decision on the grounds that it dealt with a particular, narrow situation—the admission of the statement of a deceased expert.[66] The Trial Chamber then looked at the provisions of Rule 92 *bis* and compared them to Rule 94 *bis*(C), the provision which permits the admission of expert statements without live testimony where the statement is so accepted by the opposing party. The Trial Chamber stated:

> [T]he *argumentum e contrario* of the provision of Rule 94 *bis*(C) is that in cases where the opposing party does not accept the statement of the expert witness on grounds not to be considered unreasonable, the statement can only be admitted into evidence after the expert has been called and has testified in person.[67]

Thus, the *Blagojević* Trial Chamber decided, Rule 92 *bis* is *lex generalis* for the admission of witness statements and Rule 94 *bis* is *lex specialis* for expert witness statements.[68] Accordingly, it would analyze reports tendered under both Rules only under Rule 94 *bis*.[69] At the same time, however, for transcripts of previous live testimony submitted exclusively under Rule 92 *bis*(D), it would refer only to that Rule.[70]

40. Although it did not cite *Blagojević*, the Trial Chamber in *Prosecutor v. Mrkšić, Radić and Šljivančanin*, came to a virtually indistinguishable conclusion.[71] As in *Blagojević*, the Prosecution disclosed expert witness statements to the Defence pursuant to Rule 94 *bis* and moved for their admission under Rule 92 *bis*(A). The Trial Chamber noted that, at least in the case where the evidence to be led from an expert witness is disputed, it would be preferable to apply Rule 94 *bis*.[72] Thus, where the Defence did not accept the proposed evidence without question, the Trial Chamber did not admit the statements without the witnesses appearing for live testimony.[73]

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[65] *Ibid.* para. 20.

[66] *Ibid.* para. 25.

[67] *Ibid.* para. 26. In addition, the Trial Chamber noted that in deciding upon the need for cross-examination, it would exercise the discretion provided for in Rule 92 *bis*(E) "in light of Rule 94 *bis*(C)." *Ibid.* para. 27.

[68] *Ibid.* para. 28.

[69] *Ibid.* para. 28.

[70] *Ibid.* n. 55.

[71] *Prosecutor v. Mrkšić, Radić and Šljivančanin*, 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 ("*Mrkšić* Decision").

[72] *Ibid.* para. 10.

[73] *Ibid.* para. 10.

41. Finally, in *Prosecutor v. Martić*, both expert reports and transcripts of the same experts' previous live testimony before the Tribunal were at issue. The Prosecution tendered the reports pursuant to Rule 94 *bis*, and the transcripts pursuant to Rule 92 *bis*(D), and the Defence complained that it was improper for the Prosecution to combine the use of the two Rules in this manner.[74] The Trial Chamber noted the limited jurisprudence on this issue, including *Blagojević*. It concurred, however, with the conclusion reached by the Appeals Chamber in *Galić* that Rule 92 *bis* could be applied to experts. Rejecting the Defence argument, the Trial Chamber stated "it was not improper for the Prosecution to activate for the expert witnesses the said two procedures."[75] The Trial Chamber then analyzed the two different types of expert evidence separately, judging the transcripts only under Rule 92 *bis*(D), and the reports only under Rule 94 *bis*.

42. Ultimately, none of the various chambers that have explored the relationship between 92 *bis* and 94 *bis* seem to have faced the precise situation here. In the present case, the Prosecution has not formally filed expert reports pursuant to Rule 94 *bis*, but has tendered transcripts of prior live expert testimony pursuant to Rule 92 *bis*(D), and has asked that the expert's reports be admitted as exhibits integral to the transcripts because they were used during the previous oral testimony.

43. It seems clear that the admissibility of the *transcripts* is governed solely under Rule 92 *bis*(D), without regard to the filing of reports pursuant to Rule 94 *bis* or whether the Defence opposes admission of the reports pursuant to Rule 94 *bis*(C). This approach is consistent with the jurisprudence of the Tribunal. It is certainly in harmony with the *Galić* Appeal Decision. Although there the Appeals Chamber dealt with the written statement of an expert witness that had died before trial, neither its holding nor its reasoning was limited to such a narrow situation. Indeed, its inclusion of a reference to "the transcript of the expert's evidence in proceedings before the Tribunal" would seem to indicate that it was announcing a principle with wider application.[76]

44. This approach is also consistent with *Blagojević*; that Trial Chamber noted it would consider transcripts tendered only under Rule 92 *bis*(D) solely on the basis of that Rule.[77] Moreover, it is also in harmony with the approach of the *Martić* Trial Chamber. Nor is it inconsistent with the *Milošević* Decision or the *Mrkšić* Decision. Both of those Decisions involved written statements of experts rather than transcripts of previous testimony before the Tribunal.

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[74] *Prosecutor v. Martić*, Case No. IT-95-11-T, Decision on Prosecution's Motions for Admission of Transcripts Pursuant to Rule 92 *bis*(D) and of Expert Reports Pursuant to Rule 94 *bis*, 13 January 2006 ("*Martić* Decision").

[75] *Ibid.* para. 23.

[76] *Galić* Appeal Decision, *supra* note 18, para. 40.

[77] *Blagojević* Decision of 7 November 2003, *supra* note 48, n. 55.

45. For the foregoing reasons, the Trial Chamber rejects Nikolić's assertion that transcripts of prior expert testimony cannot be admitted pursuant to Rule 92 *bis*(D) unless the Prosecution first moves the admission of the expert's report(s) under Rule 94 *bis* and the Defence accepts the reports without cross-examination. The two Rules have no such relationship. Borovčanin and Pandurević's similar arguments are likewise without merit.

46. As previously noted, the Trial Chamber has found the transcripts to be admissible pursuant to Rule 92 *bis*(D). The Trial Chamber must still determine whether, in the exercise of its discretion, it is appropriate to admit the evidence in whole or in part.

47. Pandurević objects to admitting the transcript testimony of Witness No. 10 on the grounds that the previous testimony contains inadmissible material. Specifically, Pandurević argues, this includes the witness "being invited to speculate on matters that go beyond his expertise as a forensic pathologist, and include, *inter alia*, firearms and ballistics expertise."[78] Additionally, Pandurević objects to unspecified, allegedly irrelevant evidence elicited by judicial questioning.[79]

48. Having reviewed the transcript, the Trial Chamber is not satisfied that Pandurević has identified a legitimate basis upon which to exclude the evidence. He has pointed out no specific passages of the transcript that offend Rule 89. Nor has the Trial Chamber been able to discern any "inadmissible" testimony. Moreover, contrary to Pandurević's assertion, the witness does not appear to testify about issues beyond his expertise. Rather, he testifies to the effects of bullets on the human body, and draws conclusions—where reasonably possible—about directions from which bullets were fired at people, matters well within the expertise which qualifies him to testify as an expert in the first instance. Nor is the Trial Chamber able to identify any "wholly irrelevant" testimony elicited by judicial questioning in the transcript.

49. In considering whether the transcripts should be admitted, the Trial Chamber recalls that several factors must be considered. The Prosecution asserts that the evidence of all five experts is cumulative within the meaning of Rule 92 *bis* in that it is corroborated by the evidence of Witness No. 2 who will testify *viva voce* at trial. Additionally, the Prosecution asserts, "the fact that mass executions took place following the fall of Srebrenica is not an issue in dispute."[80]

50. Although they do not object to the admission of the transcripts but simply request to cross-examine these experts, Miletić and Gvero reject the Prosecution's assertion that the transcript

[78] Pandurević Response, para. 6.
[79] Pandurević Response, para. 6.
[80] Motion, Annex A, pp. 2–5.

testimony is cumulative to the evidence of Witness No. 2. They argue that this witness "who is not [a] forensic pathologist or anthropologist but an investigator cannot give the evidence of the same character as forensic pathologists and anthropologists."[81] This misconstrues the factor listed in the Rule, however. Rule 92 *bis*(A)(i)(a) defines "cumulative nature" to mean that "other witnesses will give or have given oral testimony *of similar facts*."[82] Nothing in the Rule requires the "other witnesses" to be similarly situated in terms of background, qualification, expertise or any other manner. Reviewing the summary of Witness No. 2's expected testimony provided in the Prosecution's Pre-trial Brief, it seems clear the witness will testify to remarkably similar facts.[83] Thus, the Trial Chamber is persuaded that the evidence of all four proposed 92 *bis* experts is cumulative within the meaning of Rule 92 *bis*.[84]

51. The Trial Chamber is mindful that it must consider whether "there are any other factors which make it appropriate for the witness[es] to attend for cross-examination."[85] In this case, at least one such factor seems particularly compelling. The manner in which the Prosecution has sought the admission of the transcripts in this case has deprived the Accused of any opportunity to seek cross-examination of these particular experts by invoking Rule 94 *bis*(C), a provision which on its face seems to grant an opposing party a not inconsiderable right to demand live cross-examination of expert witnesses.

52. Were the Trial Chamber to ignore Rule 94 *bis* in exercising its discretion under Rule 92 *bis*, this would nullify whatever right is secured by Rule 94 *bis* wherever an expert has testified previously before the Tribunal. This, the Trial Chamber is unwilling to do. Accordingly, although the Trial Chamber has the discretionary authority to admit the transcripts pursuant to Rule 92 *bis*(D), the Trial Chamber considers in this instance that it has no discretion on the question of whether cross-examination should be required. Because the Accused in this case have not accepted

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[81] Miletić/Gvero Response, para. 32.

[82] Rule 92 *bis*(A)(i)(a) (emphasis added).

[83] Prosecution's Pre-trial Brief, Annex B, pp. 1–2.

[84] Moreover, even if this evidence was indisputably not cumulative, this would not bar its admission under Rule 92 *bis*(D). As Another Trial Chamber of this Tribunal recently observed:

> [T]he Accused appear to believe that a prerequisite of admitting written evidence under Rule 92 *bis* is that the evidence corroborate that of a *viva voce* witness. To be clear, there is no requirement that written evidence proffered pursuant to Rule 92 *bis* corroborate, be within the scope of or "add something to" the evidence of *viva voce* witnesses. Nor, for that matter, must one piece of written evidence corroborate other written evidence. Cumulative evidence and corroborative evidence may be preferred, but a preference is not a requirement. Rule 92 *bis* does not require that proffered evidence be cumulative or corroborative of either *viva voce* or other written evidence.

Prosecutor v. Milutinović et al., Case No. IT-05-87-PT, Decision on Prosecution's Rule 92 *bis* Motion, 4 July 2006, para. 13 (citations omitted). The Trial Chamber agrees that the general preference of Rule 92 *bis* for oral testimony of similar facts cannot be construed as a foundational requirement.

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

this written evidence pursuant to Rule 94 *bis*(C), the evidence may not be admitted against the Accused without permitting the Defence to cross-examine the experts at trial.[86]

53. As for the expert reports themselves, the Trial Chamber is of the view that Rule 94 *bis* is the rule applicable to their admission. Therefore, where expert reports have not been accepted by the Accused, the reports may not be admitted against the Accused without permitting the Defence to cross-examine the experts at trial pursuant to Rule 94 *bis*(C).

54. Here, however, the Prosecution proposes the admission of expert reports, not under Rule 94 *bis*, but as an "integral part" of the transcripts admitted pursuant to Rule 92 *bis*(D).[87] In principle, this should not be possible. However, because these experts will appear at trial and the Accused will have the same opportunity to cross-examine the experts regarding any aspects of these reports as they would be accorded by the direct application of Rule 94 *bis*, the Trial Chamber is satisfied that it is appropriate in this case to admit the reports.

(iii) United Nations Dutch Battalion Witnesses

55. The Prosecution proposes to admit the written evidence of seven Dutch Battalion witnesses, six through transcripts of previous testimony in either *Krstić* or *Blagojević*, and one through a written statement. This evidence relates directly to events occurring in and around Srebrenica and Potočari in July 1995, as well as to various specific acts alleged in the Indictment. Accordingly, the Trial Chamber finds that this evidence is relevant and probative within the meaning of Rule 89. In moving admission of the evidence pursuant to Rule 92 *bis*, the Prosecution asserts that all of this evidence is cumulative in that it will be corroborated in large part by four Dutch Battalion witnesses who will testify at trial.[88]

56. The Trial Chamber begins its analysis of this evidence by observing that—without a certain amount of explanation or redaction—the prior transcripts of five of the proposed witnesses fail the threshold inquiry of Rule 92 *bis*(D) by implicating directly the acts or conduct of one of the Accused. Five of the witnesses refer to a certain "Nikolić."[89] Nikolić notes in his response that this

[86] The Trial Chamber is mindful that one of the Accused in this case has sought to invoke Rule 94 *bis* despite the fact that the Prosecution has not formally proceeded under that Rule. In response to the Prosecution's Provisional Witness List, filed *confidentially* on 16 December 2005, the Popović Defence filed "The Notice of Vujadin Popović Pursuant to Rule 94 *bis*", on 16 January 2006. In that notice, Popović announced that he wished to cross-examine all the expert witnesses listed on the Prosecution's Provisional Witness List.

[87] The Prosecution has stated its intention to file expert reports for each of these experts pursuant to Rule 94 *bis*(A). *See supra* note 14, and accompanying text.

[88] According to the Prosecution's Revised List of Witnesses, attached as Annex D to the Motion, the Prosecution intends to call four Dutch Battalion personnel for live testimony. *See* Motion, Annex D, p. 1.

[89] Witness No(s). 22, 23, 24, 25 and 28.

is "MOMIR NIKOLIĆ and it is the understanding of the Defence in requesting the Trial Chamber to admit [this] evidence in written form, that this is recognized by the Prosecution."[90] Unfortunately, the Prosecution did not reply to this invitation. Given this, the Trial Chamber cannot assume that the references are not to the Accused. Accordingly, this evidence is only admissible under Rule 92 *bis* with the references to "Nikolic" redacted, or with some formal acknowledgment by the Prosecution that the references are not to the Accused.[91] With such clarification, the evidence of six of the seven witnesses "goes to proof of [matters] other than the acts and conduct of the accused" and is, accordingly, admissible under Rule 92 *bis*(D).

57. The sole exception here is Witness No. 22. This witness testified previously in *Blagojević* and it is the transcript of the testimony from that trial that the Prosecution proposes for admission here. Among other things, the testimony describes the infrastructure of communication within UNPROFOR, the deterioration of conditions in the Srebrenica enclave, and the witness's interactions with VRS officers. The last of these is of concern. The witness describes his participation in three meetings at the Hotel Fontana with General Mladić and other VRS officers, occurring on 11 and 12 July 1995. Although the witness does not name any of the Accused, the Trial Chamber observes that the Prosecution alleges Popović was present at the third of these meetings.[92] Thus, without naming him, the witness describes an event in which Popović participated. These meetings appear to play a prominent role in the Prosecution's theory of this case. This surely implicates the acts or conduct of one of the Accused. Accordingly, this portion of the witness's testimony is not appropriate for admission pursuant to Rule 92 *bis*. Additionally, for the reasons that follow, the Trial Chamber is not persuaded that admitting the transcript with this portion of the testimony redacted would be appropriate.

58. Nikolić, Miletić, and Gvero each object to the admission of the transcript and assert the witness should be required to give live testimony. Nikolić argues that because this witness "was at the heart of the events" and "had access to most if not all of the key players" there is an overriding public interest in his live testimony.[93] Given the command position of this witness, Nikolić also asserts, the evidence cannot be truly cumulative. Moreover, the focus of any cross-examination in

[90] Nikolić Response, para. 10.

[91] The references to "Nikolić" in all five transcripts are fleeting. Accordingly, the Trial Chamber is convinced that redaction can be accomplished without any diminution to the relevance or probative value of the prior testimony. Should the Prosecution feel differently about redaction, a formal acknowledgement that these references are not to the Accused would accomplish the same objective. Alternatively, the Prosecution may withdraw its request to proceed under Rule 92 *bis* and call the witnesses at trial.

[92] Indictment, paras. 41(a)(i), 59 and 79(a)(i); Prosecution's Pre-trial Brief, para. 153.

[93] Nikolić Response, para. 15.

this case would be "different from that which was conducted in the *Blagojević* Case."[94] Likewise, Miletić and Gvero argue the witness's testimony is not cumulative of any other witness and that the witness must have "some knowledge of the situation in [the] Srebrenica enclave that any other witness cannot have."[95] Additionally, they point out that the witness was called in *Blagojević* not by the Prosecution, but by the defence. Thus, the cross-examination in that case was not conducted with any interest common to the Defence in this case. Citing similar reasons, Borovčanin and Popović – while not objecting to the admission of the witness's transcript – both argue that cross-examination is appropriate. In reply, the Prosecution again asserts that the testimony is cumulative "to the live testimony already to be provided by four other DutchBat soldiers."[96]

59. The Trial Chamber is persuaded that the prior testimony of this witness is, indeed, cumulative in that live witnesses will give oral testimony of similar facts. While this is certainly a factor in favour of admission, however, it is not the only factor to be considered, nor is it by any means dispositive. The Trial Chamber recalls that it must be cognizant of "any other factors which make it appropriate for the witness to attend for cross-examination."[97] Here, at least one such factor is present. This witness is unique among all the proposed 92 *bis* witnesses that have testified previously before the Tribunal, in that this witness alone was called as a defence witness, subject to cross-examination by the Prosecution rather than by any accused. Indeed, the witness does not appear to have ever been extensively cross-examined by any party having a motive even remotely similar to the Accused in this case. This weighs against admission without cross-examination.

60. Thus, were the Trial Chamber to admit the witness's transcript from the *Blagojević* trial pursuant to Rule 92 *bis*(D), there would still be reason to require the witness to attend for cross-examination at trial. This, coupled with the fact that a portion of the transcript is simply inadmissible pursuant to Rule 92 *bis*(D), persuades the Trial Chamber that it is appropriate to deny the Prosecution's request *in toto* with regard to this witness. If the Prosecution wishes to rely upon his evidence, he must appear *viva voce*.

61. Having determined that the evidence of the remaining six Dutch Battalion witnesses is admissible pursuant to Rule 92 *bis*(A) and (D), the Trial Chamber must still determine whether it is appropriate to admit the evidence in whole or in part and whether any of the six witnesses should be called for cross-examination.

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[94] Nikolić Response, para. 15.
[95] Miletic/Gvero Response, para. 38.
[96] Reply, para. 18.
[97] Rule 92 *bis*(A)(ii)(c).

62. Witness No. 23, Witness No. 24, Witness No. 25 and Witness No. 26 have all testified previously before the Tribunal.[98] For each of these four witnesses, Miletić and Gvero object to the admission of that previous testimony, noting that it cannot be considered cumulative as "no one of the witnesses who are called to testify *viva voce* speak about nine bodies allegedly found near the stream in Potočari."[99] Moreover, they assert, even if the witnesses were cross-examined previously, the earlier cross-examination had a different focus because Miletić and Gvero are not charged for the mass executions "but with the opportunistic killings."[100] In the alternative, should the Trial Chamber decide to admit the transcripts, Miletić and Gvero argue that the witnesses should each be required to appear for cross-examination.

63. Miletić and Gvero's assertion that no live witness will testify regarding nine bodies found near a stream in Potočari appears directly related to the allegation contained in paragraph 31.1(b) of the Indictment. Unfortunately, the Trial Chamber is not in a position to know whether Miletić and Gvero's assertion that no live witness will testify to this allegation is factually correct. This is because the Prosecution did not respond to this issue in its Reply, simply re-stating its previous assertion that the testimony is cumulative "to the live testimony already to be provided by four other DutchBat soldiers."[101]

64. Assuming *arguendo* the correctness of Miletić and Gvero's assertion, however, the Trial Chamber recalls that being cumulative is not a foundational requirement for admission under Rule 92 *bis*.[102] Having reviewed the witness summaries appended to the Prosecution's Pre-trial Brief, the Trial Chamber is persuaded that several Dutch Battalion witnesses will give live testimony of facts largely similar to those included in each of the four proposed transcripts. Under the circumstances, the Trial Chamber does not consider that there is any overriding public interest in the live testimony of these witnesses, nor do any of the Accused suggest the testimony is unreliable or that its prejudicial effect outweighs its probative value. The four transcripts are appropriate for admission in this case.

65. Even though the Trial Chamber is admitting the prior testimony of these four witnesses, however, there is still the question whether any of them should be required to appear for cross-examination. Each of the witnesses was cross-examined by the accused in the earlier trials, but Miletić and Gvero imply that the focus of cross-examination here would be different as "this event

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[98] Witness No. 23 testified in *Krstić*. Witness No. 24 and Witness No. 25 both testified in *Krstić* and their testimony was admitted in *Blagojević* without cross-examination. Witness No. 26 testified in *Blagojević*.

[99] Miletić/Gvero Response, para. 39.

[100] Miletić/Gvero Response, para. 39.

[101] Reply, para. 18.

[102] *See* note 84, *supra*.

... [is a] pivotal element" for them because they are charged with responsibility for the opportunistic killings alleged in the Indictment.[103] The Trial Chamber rejects this argument with regard to Witness No. 26 for the simple reason that it lacks a factual predicate. A review of this witness's prior testimony in *Blagojević* reveals that the witness never testified to seeing the nine bodies.

66. The other three witnesses in question all testified to seeing the nine bodies. It appears that no witness scheduled for *viva voce* testimony in this trial actually saw the nine bodies. The Trial Chamber considers this to be a factor favouring cross-examination of one of those who did. The Prosecution's assertion that these transcripts are cumulative to *viva voce* testimony of the other Dutch Battalion witnesses—although technically correct—is somewhat misleading as concerns this factual allegation. The Trial Chamber has reviewed the witness summaries of the four Dutch Battalion witnesses to be called for *viva voce* testimony in this case. None of the four includes a reference to the nine bodies allegedly found in Potočari.[104] Where the factual allegation itself appears in the Prosecution's Pre-Trial Brief, there is one supporting citation to evidence of a *viva voce* witness—Witness No. 18. Reviewing that supporting material, however, it is not clear that Witness No. 18 actually saw the bodies. Rather, he appears to have been told about them by Witness No. 24. It would be strange indeed for a witness's own hearsay statement—offered *viva voce* through another witness—to serve as the "cumulative nature" factor favouring admission of the witness's written evidence on the same point, at least where cross-examination is denied. This sort of circular bootstrapping cannot be what Rule 92 *bis* envisions as fair.

67. Having reviewed the three transcripts at issue, the Trial Chamber is persuaded that it is appropriate to require Witness No. 25 to appear for cross-examination on this limited issue. This witness testified extensively to discovering and photographing the bodies. Additionally, the photographs that the witness took were admitted with the testimony in *Krstić*—and without cross-examination in *Blagojević*—and are being admitted here as an integral part of the previous testimony. The opportunity to cross-examine Witness No. 25 on this issue will ensure that the previous testimony of the other two Dutch Battalion witnesses at issue will, indeed, be cumulative to live testimony subject to cross-examination.

[103] Miletić/Gvero Response, para. 39.

[104] The Trial Chamber has also reviewed that section of the Prosecution's Proofing Chart which purports to list the witnesses relevant to the paragraph of the Indictment where this allegation appears. No reference to the nine bodies is found in the Pre-trial Brief witness summaries for any of the witnesses listed in the Proofing Chart as providing *viva voce* evidence regarding this paragraph.

68. Popović does not object to the admission of the previous testimony of Witness No. 24 or Witness No. 26,[105] but he asserts it is appropriate for the Trial Chamber to require both witnesses to appear for cross-examination. Popović notes that Witness No. 24 testified in *Krstić* that "Serbs 'pushed the people to go to the buses' implying use of force to evacuate them from [the] enclave."[106] Likewise, Popović notes that Witness No. 26 testified similarly in *Blagojević* and that he is, accordingly, entitled to cross-examine the witness because he "denies the Forcible Transfer charge."[107] Considering the charges in the Indictment, the Trial Chamber is satisfied that these two witnesses should appear for cross-examination on this limited issue.

69. With regard to the final two proposed Dutch Battalion witnesses—Witness No. 27[108] and Witness No. 28[109]—Miletić and Gvero request cross-examination, although they provide no specific reasons supporting the request. Having reviewed the materials provided, the Trial Chamber is persuaded that the evidence of these witnesses is cumulative to the evidence to be provided by the five Dutch Battalion witnesses to be called live at trial,[110] as well as to the evidence of the other three Dutch Battalion witnesses whom the Trial Chamber is requiring to appear for cross-examination. The Trial Chamber is not persuaded that any of the evidence is unreliable or that its prejudicial effect outweighs its probative value. Additionally, the Trial Chamber does not find it necessary to require Witness No. 22, Witness No. 27, or Witness No. 28 to appear for cross-examination.

70. Finally, Witness No. 27's statement does not conform strictly to the requirements of Rule 92 *bis*(B). Accordingly, the statement is only provisionally admitted by the Trial Chamber, pending its receipt in a form which strictly complies with the requirements of Rule 92 *bis*(B).

(iv) United Nations Canadian Battalion Personnel

71. The Prosecution proposes to admit the written statement of Witness No. 29, a United Nations Canadian Battalion officer. The statement details the activities of the Canadian Battalion in Srebrenica from Summer to late Fall of 1993. It also describes the treatment of the Muslim civilian

[105] Popović does object to thirteen lines of testimony in the transcript which relate directly to the reason he believes cross-examination is necessary. Popović Response, para. 37. The testimony at issue does not implicate the acts or conduct of any Accused. Additionally, Popović will have the opportunity to cross-examine the witness directly on this issue.

[106] Popović Response, para. 42.

[107] Popović Response, para. 37.

[108] The evidence of this witness appears in a statement rather than in previous testimony.

[109] This witness testified in the *Blagojević* trial.

[110] Now including Witness No. 22.

population during this period, including shelling directed at civilians and peacekeepers. Nothing in the statement implicates the acts or conduct of any Accused.

72. Popović, Pandurević, Borovčanin and Nikolić all object to the admission of this statement on relevance grounds. Popović states the evidence is "not relevant for the period when the crimes from the indictment took place."[111] Pandurević asserts the statement is "irrelevant to the charges faced by the accused on this indictment."[112] Borovčanin argues the statement "is redundant and it is against the principle of judicial economy that it be taken into consideration even for admission under Rule 92 *bis*(A) and (B)".[113] Finally, Nikolić objects that the statement is "superfluous, redundant and only serves to confuse the issues to be litigated."[114] The Prosecution states this evidence relates to the historical, political, and military "background to the core issues in the case."[115]

73. Having reviewed the statement and considered the arguments of the Parties, the Trial Chamber is not satisfied of the relevance and probative value of this statement to the charges facing the Accused in the Indictment at this time. Accordingly, the Trial Chamber is not satisfied that the evidence is appropriate for admission pursuant to Rule 92 *bis*(A).

(v) Bosnian Muslim Witnesses

74. The Prosecution proposes to admit the evidence of fourteen persons it identifies as Bosnian Muslim Witnesses. Each of the statements or transcripts details personal experiences in Srebrenica or Potočari during time periods relevant to the charges in the Indictment.[116] Accordingly, the Trial Chamber finds that this evidence is relevant and probative within the meaning of Rule 89. In moving admission of the evidence pursuant to Rule 92 *bis*, the Prosecution asserts that this evidence

> goes to proof of the crime base and victim impact that underlies the Indictment's charges. Indeed, a great deal of these witnesses' evidence has *already* been deemed proper for submission under Rule 92bis, as the *Blagojević* Trial Chamber admitted much of it under the Rule *without cross-examination* ... Although some of these witnesses provide first hand accounts of crimes, they do not testify to the direct acts and conduct of the Accused.[117]

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[111] Popović Response, para. 11.
[112] Pandurević Response, para. 10.
[113] Borovčanin Response, para. 21.
[114] Nikolić Response, para. 24.
[115] Motion, Annex A, p.8.
[116] The previous testimony of Witness No. 64 does not relate to the witness's personal experience of the events, but describes the witness's experience as a therapist helping women and children who survived the event. Accordingly, it is appropriate that the witness appears with this group.
[117] Motion, paras. 22–23 (emphasis in original).

75. With one exception, the Trial Chamber observes that the evidence of these fourteen witnesses does not go to the acts or conduct of the Accused. Witness No. 56 testified in both *Krstić* and *Blagojević*, and was subjected to extensive cross-examination on both occasions. Among other things, this witness testimony describes the conditions in Potočari at the time the Srebrenica enclave fell and the state of the refugees there. What is of concern to the Trial Chamber, however, is that the witness—similar to Witness No. 22 above—also describes his participation in two meetings at the Hotel Fontana with General Mladić and other officers, occurring on 11 and 12 July 1995. Although the witness does not name any of the Accused, the Trial Chamber observes that the Prosecution alleges Popović was present at the second of these meetings.[118] Thus, without naming him, the witness describes an event in which Popović participated. These meetings appear to play a prominent role in the Prosecution's theory of this case. This surely implicates the acts or conduct of one of the Accused. Accordingly, the witness's testimony is not appropriate for admission pursuant to Rule 92 *bis*.[119]

76. The remaining thirteen Bosnian Muslim Witnesses do not mention any of the Accused by name. Nor do any of them describe acts or conduct of unidentified persons that could be the Accused. Nor do they appear to describe specific individual events at which the Prosecution alleges any of the Accused was personally present at the time described. Accordingly, the evidence of all thirteen is admissible pursuant to Rule 92 *bis*.

77. In a written statement, Witness No. 51 describes fleeing from Srebrenica, and the witness's ultimate escape and survival. Witness No. 53 testified in *Krstić* and described the executions at Branjevo Military Farm.[120] Witness No. 55 testified in *Krstić* and described the executions at Nezuk.[121] The written statement of Witness No. 60 describes the execution of Muslim men near Nova Kasaba. The written statement of Witness No. 61 describes personal experiences in the Srebrenica enclave in July 1995 and later being called to identify the remains of a brother-in-law.

78. The Prosecution submits this evidence "goes to proof of the 'crime base', the existence of which is not in dispute...[and] also describes the impact of crimes perpetrated by VRS soldiers on victims."[122] In addition, the Prosecution asserts, this evidence is cumulative in that "testimony regarding the consistent pattern of separations, detentions and mass executions will be

[118] Indictment, paras. 41(a)(i), 59 and 79(a)(i); Prosecution's Pre-trial Brief, para. 153.

[119] Because the Trial Chamber denies the Prosecution's request with regard to this witness, the various specific Defence objections to his testimony are moot and will not be addressed further.

[120] This testimony was admitted in *Blagojević* without cross-examination.

[121] This testimony was admitted in *Blagojević* without cross-examination.

corroborated" by the *viva voce* testimony of several witnesses.[123] Additionally, the Prosecution notes, the testimony is based upon personal knowledge and—for two of these witnesses—has been tested for reliability and credibility under cross-examination in *Krstić*.

79. The Trial Chamber is persuaded that the evidence is relevant to "the impact of crimes upon victims."[124] Indeed, it is precisely the type of "crime base" evidence whose admission Rule 92 *bis* was designed to facilitate.[125] Additionally, the Trial Chamber does not consider that there is any overriding public interest in the live testimony of these five witnesses, or that the evidence is unreliable, or that its prejudicial effect outweighs its probative value. Accordingly, the evidence is admitted.

80. Miletić and Gvero request to cross-examine each of these witnesses should the Trial Chamber exercise its discretion to admit the evidence. They give no specific reason why cross-examination is warranted, however. Having reviewed the evidence, the Trial Chamber is unable to discern any value to requiring any of these five witnesses to appear for cross-examination.

81. For a second group of five witnesses, the Defence objections are more clearly defined. Witness No. 52 testified in *Krstić* and described the executions at Petkovci Dam. Witness No. 54 testified in *Krstić* and described the executions at Luke School. Witness No. 58 testified in *Krstić* and described fleeing to Potočari and the state of the refugees there. Witness No. 59 testified in *Krstić* and described, *inter alia*, seeing busloads of Muslim men heading towards Cerska Valley, hearing shooting, and seeing empty buses returning. Witness No. 63 testified in *Krstić* and described being forced to leave home due to shelling, gathering with other refugees at the UNPROFOR base, and being parted from her husband and eldest son.[126] The *Krstić* testimony of each of these witnesses was admitted in *Blagojević* without cross-examination.

82. In addition to being proof of the crime base and describing the impact of crimes on victims, the Prosecution asserts this evidence is cumulative in that "testimony regarding the consistent

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[122] Motion, Annex A, p. 9. In addition, the Prosecution asserts the evidence of Witness No. 61 is corroborative of the testimony of three *viva voce* witnesses expected to testify regarding "the Trnovo/Skorpions Unit executions." Motion, Annex A, p. 15. Three witnesses are listed specifically: Witness No(s). 5, 44 and 162.

[123] Motion, Annex A p. 10–11. The Prosecution lists specifically Witness No. 36, Witness No. 39, Witness No. 72, Witness No. 38 and Witness No. 41. Reviewing the witness summaries provided in the Prosecution's Pre-trial Brief appears to support the Prosecution's assertion.

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

[125] *See Galić* Appeal Decision, *supra* note 18, para. 16.

[126] Popović requests cross-examination of this witness, noting that in her testimony, the witness describes hearing a voice say "Popović, look out for this one!" during the separations in Potočari. Popović Response, para. 36. Popović states he cannot accept the transcript unless the Prosecution acknowledges this reference is not to the Accused. In its Reply, the Prosecution agreed to this redaction. Reply, para. 13. Accordingly, lines 15–17 of page 5754 of the transcript are not admitted.

pattern of separations, detentions and mass executions will be corroborated" by the *viva voce* testimony of several witnesses.[127] Additionally, the Prosecution notes, the testimony is based upon personal knowledge, and its reliability and credibility has been tested under cross-examination in *Krstić*. The Trial Chamber is persuaded that the evidence is relevant to the impact of the crimes upon victims and is "crime base" evidence. The Trial Chamber is also persuaded the testimony is cumulative within the meaning of Rule 92 *bis*. The Trial Chamber does not consider that there is any overriding public interest in the live testimony of these witnesses, or that their testimony is unreliable, or that its prejudicial effect outweighs its probative value. Accordingly, the evidence is admitted.

83. Miletić and Gvero request that the Trial Chamber require each of these five witnesses to appear for cross-examination. This is necessary, they argue, because in *Krstić* the members of the Main Staff were not involved and the witnesses were not cross-examined on "some issues that were not so important in the previous cases and that are crucial in the present case (humanitarian situation)."[128] This request for cross-examination does not, in the estimation of the Trial Chamber, provide a reasonable basis for requiring any of these witnesses to appear for cross-examination. Having reviewed the transcripts in light of the charges facing the Accused in the Indictment in this case, the Trial Chamber is unable to discern any value to requiring the appearance of any of these witnesses for the reason urged by Miletić and Gvero.

84. For four of these five witnesses the Trial Chamber does not find "any other factors which make it appropriate for the witness[es] to attend for cross-examination."[129] The exception is Witness No. 54. Having reviewed the Motion, the Indictment, and the witness summaries provided in the Prosecution's Pre-trial Brief, the Trial Chamber is concerned that this witness appears to be the only witness that will give evidence in respect of paragraph 30.5 of the Indictment. Accordingly, the Trial Chamber finds it appropriate to require Witness No. 54 to appear for cross-examination at trial.

85. Popović also requests to cross-examine Witness No. 59, noting the witness "gave different distance from place where he was watching the executions and the place where the executions took

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[127] Motion, Annex A, p. 10–11. The Prosecution lists specifically Witness No. 36, Witness No. 39, Witness No. 72, Witness No. 38 and Witness No. 41. Reviewing the witness summaries provided in the Prosecution's Pre-trial Brief appears to support the Prosecution's assertion. In addition, the Prosecution asserts the evidence of Witness No. 58 is cumulative because several witnesses will testify *viva voce* regarding the treatment of the refugees at Potočari. Motion, Annex A, p. 14. The Prosecution lists specifically Witness No. 18, Witness No. 19, Witness No. 20, Witness No. 21 and Witness No. 43. Reviewing the witness summaries provided in the Prosecution's Pre-trial Brief appears to support the Prosecution's assertion

[128] Miletić/Gvero Response, para. 47.

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

place."[130] For the same reason, Popović also wishes to cross-examine Witness No. 60.[131] In its Reply, the Prosecution states it has difficulty understanding Popović's assertions and characterises his argument as unpersuasive to the extent it concerns "minor and immaterial inconsistencies in the testimony."[132] The Trial Chamber is unable to agree with Popović's implicit argument that the testimony is unreliable. Having reviewed the transcripts, the Trial Chamber is not persuaded that either of these witnesses should be required to appear for cross-examination on this issue. The Trial Chamber is mindful that a decision to admit evidence pursuant to Rule 92 *bis* does not establish the weight to be accorded the evidence in the final analysis. To the extent the evidence of any of these witnesses is internally inconsistent, or is challenged by independent evidence, the Accused will have the opportunity to bring this to the Trial Chamber's attention.

86. In a written statement, Witness No. 57 describes the shelling of the witness's house in the Srebrenica enclave on 25 May 1995. The statement also describes the death of the witness's nine year old sister as a result of the shelling and the witness's own serious injuries. The Prosecution asserts this evidence is proof of the crime base and describes the impact of crimes on victims. Moreover, it asserts, the evidence is relevant to "the VRS weakening of the enclave immediately prior to the events of July 1995."[133] Popović characterises it as irrelevant.[134] Nikolić concedes the statement has some limited relevance but objects to its admission in this case on the grounds it is "superfluous, redundant and only serves to confuse the issues to be litigated."[135] Miletić and Gvero request cross-examination of the witness should the Trial Chamber decide to admit it.[136]

87. The Trial Chamber observes that the shelling incident described in the statement appears to be directly relevant to the Indictment,[137] and is persuaded that the statement is relevant to the crime base charged in the Indictment and the impact of the crimes on victims. Additionally, the Trial Chamber does not consider that there is any overriding public interest in the live testimony of this witness, or that the testimony is unreliable, or that its prejudicial effect outweighs its probative value. Having reviewed the statement, the Trial Chamber is unable to discern any value to requiring this witness to appear for cross-examination.

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[130] Popović Response, paras. 44–45.
[131] Popović Response, paras. 44–45.
[132] Reply, para. 12.
[133] Motion, Annex A, p. 14.
[134] Popović Response, para. 11.
[135] Nikolić Response, para. 24.
[136] Miletić/Gvero Response, paras. 23, 57.
[137] Indictment, para. 52.

88. The statements of Witness No. 51, Witness No. 57, Witness No. 60, and Witness No. 61 do not conform strictly with the requirements of Rule 92 *bis*(B). Accordingly, the statements are only provisionally admitted by the Trial Chamber, pending receipt in a form which strictly complies with the requirements of Rule 92 *bis*(B).

89. As several of the Accused point out, the "statement" of Witness No. 62 is not a statement, but rather an Information Report that appears to have been drafted by a Prosecution investigator. It does not purport to include the witness's own words. Having reviewed the brief document provided, it is clear to the Trial Chamber that the Prosecution has not provided enough information to permit the Trial Chamber to analyse whether this witness's eventual statement would be appropriate for admission under Rule 92 *bis*(A). Accordingly, the Prosecution's request with regard to this witness is denied.

90. Witness No. 64 testified in *Krstić* and this testimony was admitted in *Blagojević* without cross-examination. The testimony described the witness's work with women and children traumatized by the events in Srebrenica. The witness described the exceptionally high level of trauma existing for many of them even five years after the events. In addition to being proof of the crime base and describing the impact of crimes on victims, the Prosecution asserts this evidence has been fully tested under cross-examination in *Krstić*.

91. Appended to the witness's testimony in *Krstić* are eighteen witness statements of individuals whose lives were directly impacted by the events in Srebrenica in July 1995. These statements were admitted in *Krstić* with the testimony of this witness, although nowhere in her testimony does the witness refer to any of the statements specifically. Miletić and Gvero assert these statements were admitted in *Krstić* "pursuant to Rule 94 *ter* that was in force at that time" and "cannot be admitted in the present case through the testimony of [this witness] under Rule 92 *bis*."[138] Furthermore, they argue, the testimony has no substance without the exhibits and, therefore, the transcript should not be admitted. Popović, on the other hand, requests cross-examination, noting the witness was not actually cross-examined in *Krstić*.[139] In its Reply, the Prosecution fails to respond to Miletić and Gvero's argument regarding Rule 94 *ter*, and (incorrectly) claims that the witness was cross-examined in *Krstić*.[140]

92. The Trial Chamber is persuaded that the witness's testimony is relevant to the impact of the crimes charged in the Indictment upon victims, and is "crime base" evidence. Additionally, the

[138] Miletić/Gvero Response, para. 49.
[139] Popović Response, para. 46.
[140] Reply, para. 13.

Trial Chamber does not consider that there is any overriding public interest in the live testimony of this witness. Nor is there any reason to believe the testimony is unreliable or that its prejudicial effect outweighs its probative value. Accordingly, the transcript will be admitted pursuant to Rule 92 *bis*(D). Additionally, the Trial Chamber sees no need to require this witness to appear for cross-examination in this case. The Trial Chamber is mindful that the witness was not actually cross-examined in *Krstić* as the Defence chose not to ask her any questions when presented with the opportunity. Nevertheless, Popović, Miletić and Gvero have failed to identify any issues warranting cross-examination. Having reviewed the transcript and considered the issues in this case, the Trial Chamber is unable to discern any specific reason this witness should be required to appear for cross-examination.

93. With regard to the eighteen statements appended to the testimony, however, the Trial Chamber can only agree—at least partially—with Miletić and Gvero's objection. These statements do appear to have been admitted in *Krstić* pursuant to [then] Rule 94 *ter*, a rule which, in its relatively short life, had a different purpose and object than Rule 92 *bis*—and was, in fact, deleted at the same time Rule 92 *bis* was adopted. At the time Rule 94 *ter* was invoked in *Krstić*, it provided:

> To prove a fact in dispute, a party may propose to call a witness and to submit in corroboration of his or her testimony on that fact affidavits or formal statements signed by other witnesses in accordance with the law and procedure of the State in which such affidavits or statements are signed. These affidavits or statements are admissible provided they are filed prior to the giving of testimony by the witness to be called and the other party does not object within seven days after completion of the testimony of the witness through whom the affidavits are tendered. If the party objects and the Trial Chamber so rules, or if the Trial Chamber so orders, the witnesses shall be called for cross-examination.

94. The fundamental differences between Rule 94 *ter* and Rule 92 *bis* are manifold and they are not simply interchangeable. Had the Prosecution moved the admission of each of these exhibits under Rule 92 *bis*(A) directly—describing how each of them meets the requirements of the rule—rather than indirectly as "an integral part of the witness testimony",[141] the Trial Chamber would be conducting a different analysis. The problem with the Prosecution's approach in this instance is that it is difficult to conceive of any exhibit that is never referenced by a witness during testimony as being *integral* to that testimony. These exhibits certainly are not, as the witness's testimony regarding observations of the long-term traumatic impact upon the victims stands alone. This is also precisely why the Trial Chamber cannot accept Miletić and Gvero's assertion that, without the exhibits, the testimony of Witness No. 64 "has no substance."[142] To the contrary, the testimony has

[141] Motion, para. 27.

[142] Miletić/Gvero Response, para. 49.

precisely the kind of substance which Rule 92 *bis* was designed to facilitate. The exhibits are not admitted.

(vi) Intercept Operators

95. The Prosecution proposes to admit written evidence of eight ABiH soldiers that were involved in intercepting VRS communications at times relevant to the charges in this case. In general, each of the witnesses describes the methods and procedures used by ABiH intercept operators during times relevant to the crimes charged in the Indictment. Additionally, specific communications which they personally intercepted and transcribed are described. The Prosecution asserts this evidence provides relevant background information and is cumulative to the *viva voce* testimony to be provided by at least five witnesses.[143] Moreover, the Prosecution asserts this evidence is "akin 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 documents themselves."[144] Having reviewed the transcripts, statements and exhibits provided, the Trial Chamber is persuaded that the evidence is relevant and possesses probative value within the meaning of Rule 89.

96. The eight proposed witnesses are most easily dealt with in two groups: those four witnesses whose testimony or exhibits refer specifically to any of the Accused, and those four which do not.

97. Witness No. 75 testified in *Blagojević*. Witness No. 77 testified in both *Krstić* and *Blagojević*. Witness No. 79 testified in *Krstić* and this testimony was admitted in *Blagojević* without cross-examination. Witness No. 81 does not appear to have testified previously before the Tribunal, and his evidence appears in a written statement. The evidence of all four witnesses is similar, however, in that none of it—or the exhibits accompanying it—references any of the Accused. Accordingly, the evidence of all four of these witnesses is admissible pursuant to Rule 92 *bis*(A) and (D). The Trial Chamber is mindful that the final paragraph of the written statement of Witness No. 81 includes a reference to an intercepted conversation in which Beara allegedly participated. The statement does not describe the contents of this specific intercepted conversation nor is the intercept appended to the statement. In fact, the Prosecution does not propose the admission of any intercepted communications with the written statement of Witness No. 81. Nevertheless, the Trial Chamber does not accept the last paragraph of the statement.

[143] Motion, Annex A, p. 20. The Motion lists: Witness No. 68, Witness No. 69, Witness No. 70, Witness No. 71 and Witness No. 72. Reviewing the summaries for these witnesses provided in the Prosecution's Pre-trial Brief reveals that they are all expected to testify to similar facts.

[144] Motion, para. 25.

98. The Trial Chamber is persuaded that this evidence is cumulative within the meaning of Rule 92 *bis*. Additionally, the Trial Chamber does not consider there to be any overriding public interest in the live testimony of these four witnesses whose evidence does not reference any of the Accused. Nor does the Trial Chamber have any reason to believe the evidence is unreliable or that its prejudicial effect outweighs its probative value. Accordingly, the written evidence of three of these four witnesses is admitted pursuant to Rule 92 *bis*(A) and (D). As with the other written statements provided by the Prosecution, the statement of Witness No. 81 does not conform strictly to the requirements of Rule 92 *bis*(B). Accordingly, this statement is only provisionally admitted by the Trial Chamber, pending its receipt in a form which strictly complies with the requirements of Rule 92 *bis*(B).

99. Miletić and Gvero request cross-examination of all eight of the intercept operators, asserting that the "intercepts of the conversations involving the Main Staff might have required different techniques than intercepts between brigades or between corps and brigades."[145] Thus, they argue, earlier cross-examinations have not fully covered their interests. This unsupported argument regarding possible "different techniques" is too vague to be persuasive. Moreover, the Trial Chamber notes that the Accused will have the opportunity to explore this area in cross-examination of at least nine intercept operators that will be called *viva voce*.[146]

100. None of the other Accused seeks to cross-examine Witness No. 75 and this witness is not required to appear for cross-examination in this case.

101. Popović requests to cross-examine Witness No. 77, although he fails to identify any issues he believes require cross-examination.[147] Popović argues generally that cross-examinations conducted in earlier cases focused on different issues, noting for example that in *Krstić*, cross-examination "went to proof innocence of [G]eneral Krstić and to shift the burden of responsibility to [Popović] and other officers of security and Main Staff."[148] Unfortunately, Popović fails to explain what specific issues in the testimony of this witness must be approached differently during cross-examination in this trial in light of the charges he faces in the Indictment. Because the Trial Chamber is unable to discern any reasoned basis why cross-examination of this witness is warranted, this witness will not be required to appear.

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[145] Miletić/Gvero Response, para. 52.

[146] These include the five intercept operator witnesses identified by the Prosecution as well as the four proposed intercept operators for whom the Trial Chamber is denying the Prosecution's Rule 92 *bis* request. *See*, paragraph 105, *infra*.

[147] Popović Response, para. 48.

[148] Popović Response, para. 26, *see also*, paras. 23–25, 27–30.

102. Popović also requests to cross-examine Witness No. 79. He states that the witness avoided answering some questions during the earlier cross-examination, and he complains that the witness's immediately subsequent private session testimony has not been disclosed to him.[149] The Trial Chamber is concerned that the testimony of Witness No. 79 was not provided. This matter was brought to the Prosecution's attention at the 6 July 2006 Status Conference.[150] In the newest CD supplied by the Prosecution, however, the missing pages have still not been included. Accordingly, the Trial Chamber is unable to fully evaluate the transcript and, thus, unable to consider the Prosecution's request to admit the transcript of Witness No. 79 pursuant to Rule 92 *bis*(D) at this time.

103. Popović objects to the introduction of certain of the exhibits attached to the prior testimony of Witness No. 77 on the grounds "they are almost unreadable and not translated in English the Trial Chamber cannot understand them."[151] Having reviewed the exhibits proposed for admission with the transcripts of all the intercept operator witnesses, and considered the charges at issue in this case, the Trial Chamber is not persuaded that it is appropriate to admit any of the exhibits admitted in earlier trials with the testimony of these witnesses at this time. It is apparent to the Trial Chamber that the reliability of the intercepted communications to be tendered by the Prosecution in this case will be a contentious issue. The Trial Chamber finds it appropriate to defer any ruling on the admissibility of intercepted communications until such time as the issue can be addressed in a comprehensive fashion. Accordingly, such exhibits are not admitted at this time, but marked for identification.

104. The second group of four intercept operator witnesses—Witness No. 74, Witness No. 78, Witness No. 80 and Witness No. 82—are also similarly situated to each other, in that it appears each of them either mentions one of the Accused by name during the witness's testimony, or else one or more of the exhibits tendered with the transcript mentions one of the Accused by name. These references appear to implicate the acts and conduct of the Accused in violation of Rule 92 *bis*(D).

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[149] Popović Response, para. 39.

[150] T. 190 (6 July 2006).

[151] Popović Response, para. 48. The exhibits in question appear to be copies of entire notebooks of handwritten transcriptions in B/C/S of intercepted communications made by this witness, and appear to have been admitted with the witness's earlier testimony not for their substantive content but simply to provide a context to the individual, translated intercepts also admitted through the witness's testimony. The Prosecution notes in its Reply that it has provided, or will provide, translations for each exhibit it intends to introduce into evidence through these witnesses. Reply, para. 22.

105. For each of these witnesses, the Prosecution states the testimony is "primarily directed at authenticating intercepts, and is not concerned with the content of the intercepts."[152] Thus, the Prosecution argues, the testimony will be relied on only to authenticate the intercepts and to outline the procedural and technical aspects of obtaining the intercepts. The problem with the Prosecution's approach, however, is that Rule 92 *bis* is concerned with the content of the evidence. Where that content implicates the acts or conduct of the Accused as charged in the Indictment, the evidence is inadmissible under the Rule, regardless of the purpose for which it is tendered. That the underlying transcript merely provides the vehicle by which the offending material is introduced is of no regard. Accordingly, the written evidence is inadmissible under Rule 92 *bis*(D).

(vii) Zvornik Brigade Witnesses

106. The Prosecution proposes to admit the prior testimony of three former members of the Zvornik Brigade. Each of the three testified in *Blagojević*. Each was subject to cross-examination in that case. They all testified to their personal involvement in burial operations at various execution sites. For each of them, the Prosecution asserts the evidence is relevant "to the crime base and primary burial operation."[153] Additionally, the Prosecution claims the evidence is corroborative of live testimony to be offered at trial.[154] Having reviewed the transcripts provided, the Trial Chamber is persuaded that two of them—Witness No. 145 and Witness No. 146—do not implicate the acts or conduct of any of the Accused. Accordingly, they are admissible pursuant to Rule 92 *bis*(D).

107. The prior testimony of Witness No. 144 presents a concern. During that testimony, the witness was shown an exhibit purporting to be a Zvornik Brigade Engineering Summary Report dated 30 December 1995. The witness testified that the exhibit shows the name of Accused Pandurević as the author, although the witness testified that he was not familiar with Pandurević's signature and could not identify the signature on the document as Pandurević's. The Prosecution contends that this mention of Pandurević's name does not implicate the acts or conduct of the Accused.[155] On its face, this assertion is correct. The particular problem in this instance, however, is with the exhibit to which the testimony refers. If this exhibit is to be authenticated and tendered through some other *viva voce* witness in this trial, then the reference is not problematic. The transcript witness would simply be looking at a document already before the Trial Chamber, and

[152] Motion, Annex A, pp. 17–20.

[153] Motion, Annex A, p. 21.

[154] The Motion lists all three as being corroborative of the testimony of Witness No. 119. Additionally, the testimony of one of them—Witness No. 144—is listed as corroborative of the live testimony of Witness No. 129. *See*, Motion, Annex A, p. 21

[155] Motion, Annex A, p. 21.

commenting upon something easily observable on the document's face, while offering no opinion as to the authenticity of the signature. Conversely, if this document is not to be authenticated and tendered through some other *viva voce* witness in this trial, but proposed to be admitted with this transcript, then Rule 92 *bis*(D) mandates this portion of the testimony and the exhibit itself are inadmissible. Unfortunately, the Trial Chamber cannot complete its analysis because the Prosecution has been less than clear in its request. Although it appears from the transcript provided that the exhibit in question was not tendered or admitted through the testimony of this witness, the exhibit appears on the original CD provided by the Prosecution with the Motion, seemingly as one of the exhibits for which the Prosecution seeks admission with the transcript. Strangely, in the second version of the CD, the exhibit appears twice for this transcript, now also listed as an exhibit shown to the witness, but admitted through another witness or not admitted.

108. As the Prosecution has not clearly demonstrated the admissibility of this portion of the transcript, the Trial Chamber can only treat it as inadmissible, and the offending portion will be redacted.[156] Additionally, the exhibit will not be admitted with the transcript. This excision renders moot Pandurević's argument that the witness's evidence implicates Pandurević's acts or conduct, either directly or "in relation to [his] alleged liability under Article 7(3)."[157] The remaining portions of the transcript do not implicate the acts or conduct of any Accused, and are admissible pursuant to Rule 92 *bis*(D).

109. Despite the Nikolić[158] and Pandurević[159] objections, the Trial Chamber is persuaded that the evidence of these three witnesses is cumulative within the meaning of Rule 92 *bis*.[160] Additionally, the Trial Chamber does not have any reason to believe the evidence is unreliable or that its prejudicial effect outweighs its probative value. For all these reasons, the Trial Chamber rejects Miletić and Gvero's wholly unexplained objection to these transcripts,[161] all three of which are admitted pursuant to Rule 92 *bis*(D).

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[156] Nineteen lines of the transcript need to be redacted, beginning with line 10 on page 5402.

[157] Pandurević Response, para. 12.

[158] Nikolić Response, paras. 19–20.

[159] Pandurević Response, para. 12.

[160] Nikolić asserts—with no explanation—that the testimony of Witness No. 144 and Witness No. 146 "stands alone and ... is not cumulative in character." Nikolić Response, para. 19. Likewise, with no explanation, Pandurević asserts the evidence of Witness No. 144 is not cumulative in nature. Pandurević Response, para. 12. In addition to the witnesses indicated in the Motion, the Prosecution replies that the evidence of these two witnesses is "purely cumulative of the evidence already provided through survivors, forensic evidence, satellite imagery and other documentary evidence." Reply, para. 25.

[161] In their Response, Miletić and Gvero state they will take no position if the testimony is not to be used against them specifically, otherwise, the Defence position "shall be interpreted as opposition to their admission." Miletić/Gvero Response, para. 54. In reply, the Prosecution states that "all of the testimonies are probative of the joint criminal

110. Pandurević requests cross-examination of Witness No. 144 on the grounds that his interests "in relation to a member of the Zvornik Brigade are quite different from those of the accused in [Blagojević]."[162] Likewise, Nikolić states that he has a specific interest in cross-examination and notes that the focus of his cross-examination will be different than the earlier trial.[163] Nikolić makes the identical argument in requesting cross-examination of Witness No. 146. Having reviewed the transcripts and considered the charges at issue for the Accused in this case, the Trial Chamber also believes that these witnesses should be required to appear for cross-examination.

111. None of the Accused has requested to cross-examine Witness No. 145. Having reviewed his testimony in *Blagojević*, the Trial Chamber also sees no reason to require this witness to appear for cross-examination.

(viii) 10th Sabotage Detachment Witness

112. The Prosecution proposes to admit the previous testimony of one former member of the 10th Sabotage Detachment. Witness No. 151 testified in *Krstić* and this testimony was admitted in *Blagojević* without cross-examination pursuant to Rule 92 *bis*(D). In the testimony, the witness describes his involvement in the assault on Srebrenica and participation in the executions at Branjevo Military Farm. The evidence does not implicate the acts or conduct of any Accused as charged in the Indictment,[164] and is admissible pursuant to Rule 92 *bis*(D).

113. The Prosecution asserts this witness's testimony is proof of the "crime base, the existence of which is not in dispute", and that it is cumulative within the meaning of Rule 92 *bis*.[165] The Trial Chamber is persuaded that this is correct. In considering the reliability of the evidence, however, the Trial Chamber must consider the only Defence objection to the admission of the transcript. Miletić and Gvero note that in its Pre-trial Brief, the Prosecution wrote "[d]ue to the knowledge and possible involvement in Srebrenica crimes of many of the VRS and MUP members, as well as of the Bosnian Serb civilians, their testimony may become less than credible in certain areas."[166]

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enterprise to forcibly remove the Muslim population, and other issues, and are therefore relevant to the case against Miletić and Gvero." Reply, para. 4.

[162] Pandurević Response, para. 13.

[163] Nikolić Response, para. 19.

[164] Pandurević is mentioned by name during the *Krstić* testimony. The witness is shown a photograph (P-157) and asked whether he recognizes any of the individuals in it. He states "I recognized on that day only General Mladić. I didn't know the other people, and I never met Mr. Krstić. The same applies to the person on Mladić's right-hand side, I never met him but I heard of the surname Pandurević in the Drina unit." Page 3102 lines 7–11. This testimony would not appear to implicate any relevant acts or conduct of Pandurević as charged in the Indictment. In this regard, the Trial Chamber finds it notable that none of the Accused—including Pandurević—objects to the transcript on this basis.

[165] Motion, Annex A, p. 22. The Motion lists specifically the live testimony of Witness No. 42.

[166] Miletić/Gvero Response, para. 55; Prosecution's Pre-trial Brief, Annex B, p. 53.

Thus, Miletić and Gvero argue, because this witness was involved in the events in Srebrenica, he "obviously cannot be regarded as reliable."[167]

114. The Prosecution's candid general statement cannot be presumed to contradict its specific assertion that it believes *this* witness's testimony "is reliable and probative and is appropriate for admission under Rule 92 *bis* without cross-examination."[168] Given the personal involvement of this witness, however, in the events at issue in the Indictment, the Trial Chamber is not satisfied that it is appropriate to admit the transcript of this witness's prior testimony pursuant to Rule 92 *bis*, even with cross-examination. The Prosecution's request is denied.

(F) Rule 89(F)

115. As outlined above, the Trial Chamber is denying the Prosecution's request *in toto* with regard to six witnesses, all of them on the basis that their prior testimony—or the exhibits tendered with that prior testimony—implicate directly the acts or conduct of one or more of the Accused.[169] Additionally, the Trial Chamber is admitting the transcript and associated exhibits of several witnesses subject to redaction for the same reason.[170]

116. The Trial Chamber notes that, unlike Rule 92 *bis*, Rule 89(F) permits the Trial Chamber to receive a witness's evidence in written form without prohibiting evidence going to the acts or conduct of the accused.[171] Because the Prosecution has not sought the admission of this evidence pursuant to Rule 89(F), the Trial Chamber has conducted no such admissibility analysis. Thus, the Trial Chamber's decision denying admission pursuant to Rule 92 *bis*(D) is without prejudice to the Prosecution moving the admission of these transcripts pursuant to Rule 89(F).

[167] Miletić/Gvero Response, para. 55.

[168] Motion, Annex A, p. 22.

[169] Witness No. 22, Witness No. 56, Witness No. 74, Witness No. 78, Witness No. 80 and Witness No. 82.

[170] Witness No. 7, Witness No. 23, Witness No. 24, Witness No. 25, Witness No. 28.

[171] *See Prosecutor v. Milošević*, Case No. IT-02-54-AR73.4, Decision on Interlocutory Appeal on the Admissibility of Evidence-in-Chief in the Form of Written Statements, 30 September 2003; *Prosecutor v. Limaj, Bala & Musliu*, Case No. IT-03-66-T, Decision on the Prosecution's Motions to Admit Prior Statements as Substantive Evidence, 25 April 2005, paras. 15–16.

III. DISPOSITION

For the foregoing reasons, and pursuant to Rule 89 and Rule 92 *bis* of the Rules, the Trial Chamber **DECIDES**:

1. By majority, to admit, in whole, the transcripts of the following proposed witnesses without requiring the witnesses to appear for cross-examination (Judge Agius, dissenting, solely as to whether the witnesses should be required to appear for cross-examination):

Witness No(s). 52, 53, 55, 58, 59, 64, 75 and 77.

2. To admit, in whole, the transcript of the following proposed witness without requiring the witness to appear for cross-examination:

Witness No. 145.

3. To admit, in whole, the transcripts of the following proposed witnesses provided the witnesses appear for cross-examination at trial:

Witness No(s). 10, 13, 26, 54 and 146.

4. By majority, to admit, in whole, the transcripts of the following proposed witnesses provided the witnesses appear for cross-examination (Judge Prost, dissenting, solely as to whether the witnesses should be required to appear for cross-examination):

Witness No(s). 11 and 12.

4. By majority, to admit, in part, the transcripts of the following proposed witnesses without requiring the witnesses to appear for cross-examination (Judge Agius, dissenting, solely as to whether the witnesses should be required to appear for cross-examination):

Witness No. 23, except for page 2119 lines 11–25, page 2120 lines 1–20, page 2165 line 25, page 2166 line 1, page 2180 lines 20–25, page 2181 lines 1–4, and page 2193 lines 1–11.

Witness No. 28, except for page 6082 lines 2–8, page 6097 lines 2–25, page 6099 lines 14–25, page 6100 lines 1–22, and page 6102 lines 13–20.

Witness No. 63, except for page 5754 lines 15–17.

5. To admit, in part, the transcripts of the following proposed witnesses provided the witnesses appear for cross-examination at trial:

Witness No. 7, except for page 8949 lines 20–25, page 8950 lines 1–2, page 8952 line 17, page 8991 lines 15–24, page 8992 lines 1–22, page 8997 lines 15–25, page 8998 lines 1–10, page 9001 lines 3–25, and page 9002 lines 1–10.

Witness No. 24, except for page 3403 lines 17–25, and page 3404 lines 1–7.

Witness No. 25, except for page 1524 lines 14–25, and page 1525 lines 9–25.

Witness No. 144, except for page 5402 lines 10–25, and page 5403 lines 1–3.

6. By majority, to provisionally admit the written statements of the following witnesses, subject to the Prosecution providing the written statements in a form which fully complies with Rule 92 *bis*(B), without requiring the witnesses to appear for cross-examination (Judge Agius, dissenting, solely as to whether the witnesses should be required to appear for cross-examination):

Witness No(s). 27, 51, 57, 60 and 61.

Witness No. 81 (except for the last paragraph of the statement).

7. To admit all exhibits provided to the Trial Chamber which are proposed by the Prosecution for admission—except the exhibits listed below—with all protective measures established in the earlier trials remaining in effect.

The following exhibits are not admitted:

Witness No. 64 (all exhibits).

Witness No. 144 (exhibits D-12/3bis, D-12/3a and D-12/3b).

The following exhibits are not admitted at this time, but marked for identification:

Witness No. 7 (all documents appearing in the exhibit notebook).

Witness No. 75 (all exhibits).

Witness No. 77 (all exhibits).

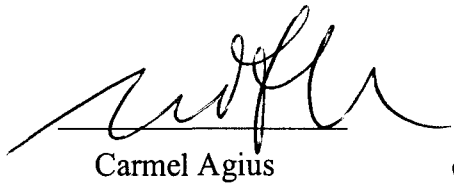
8. To deny the Prosecution's request *in toto* with respect to the following witnesses:

Witness No(s). 14, 22, 29, 56, 62, 74, 78, 79, 80, 82 and 151.

9. In all other respects, the Motion is denied.

10. Within thirty days of the issuance of this Decision, the Prosecution shall provide the Trial Chamber and the Registry with a list of all exhibits admitted by the Trial Chamber in this Decision, clearly identifying the protective measures in place for each exhibit, including those portions of the transcript testimony which occurred in private session and those exhibits admitted confidentially.

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



Carmel Agius
Presiding

A separate opinion by Judge Kimberly Prost is appended to this Decision.

Dated this twelfth day of September 2006
At The Hague
The Netherlands

[Seal of the Tribunal]

SEPARATE OPINION OF JUDGE KIMBERLY PROST

1. My divergence from the majority centres on the relationship between Rule 92 *bis* and Rule 94 *bis* and the "right" to cross-examination of the experts. It is apparent that both rules were adopted in order to expedite the trial process in appropriate cases, by allowing for the introduction of evidence without the need for live testimony. And yet the effect of combining the application of the two rules as outlined by the majority is quite the opposite. It serves to significantly impair the discretion accorded the Trial Chamber under Rule 92 *bis* any time an expert witness is involved. I do not read the two rules as requiring such an interpretation.

2. Whatever the practice may be, Rule 94 *bis* by its plain wording does not address an expert report *per se* as a separate evidentiary concept with distinct rights and protections surrounding its introduction into evidence. In fact, there is only one reference to an expert report in the entire Rule and that is with regard to challenging "the relevance of all or parts of the report."[1] In fact what Rule 94 *bis* mandates is that, where a party intends to call any expert witness, the full *statement of that witness* must be disclosed within prescribed time limits. This triggers an opportunity for the other party to accept the statement, seek cross-examination of the expert, or challenge qualifications or relevance. If the evidence is accepted, it may be admitted without the need for a live witness. In essence, the Rule prescribes a disclosure and notice regime which may ultimately result in the introduction of expert evidence in a written form. Given this interpretation therefore, I differ from the majority in that I do not read Rule 94 *bis* as according a "right" to cross-examination in the case of all expert witnesses. Rather to me the purpose of the rule—importantly adopted before the introduction of Rule 92 *bis*—is to facilitate expeditious proceedings by providing for a special regime for the *possible* introduction of expert witness statements without live testimony. It is only where that is the procedure being followed by the relevant party that a "right" to cross-examination may exist.

3. While I agree with the majority that Rule 94 *bis* is a rule *lex specialis* applicable when a written statement of an expert witness is involved, whether intentionally or by inadvertence, that is not what the Prosecution seeks to introduce in this instance. Rather, they seek the admission of the *transcript* of the evidence of a witness (already unanimously admitted by the Trial Chamber) along with the exhibits to that testimony which form an integral part of it. That such exhibits include in this instance a report authored by an expert does not, in my view, change the nature of the Prosecution's request nor bring into play the separate regime of Rule 94 *bis*. Just as Rule 94 *bis* is

[1] Rule 94 *bis*(B)(iii).

lex specialis to a *statement* of an expert witness, Rule 92 *bis*(D) is a specialized provision relating to the introduction of a *transcript* of evidence given by the witness on a previous occasion.

4. I find further support from the content of the two rules for the position that transcripts of previous expert testimony should be considered under Rule 92 *bis*(D) only. By its own terms, Rule 94 *bis* does not apply to prior transcripts, as it pertains only to "statement[s]".[2] As is apparent from the language of Rule 92 *bis*, "written *statements* in lieu of oral testimony"[3] and "transcript[s] of evidence given by a witness in proceedings before the Tribunal"[4] are two distinct creatures, each governed by separate sections of the Rule. Written statements within the ambit of Rule 94 *bis* will certainly be the former, but are by definition excluded from the latter category.

5. I am, therefore, of the opinion that the determination as to whether both the transcripts and any exhibits related thereto are admissible, and whether cross-examination should be mandated, should be made solely under Rule 92 *bis*(D) and (E). I believe this is consistent with the Appeals Chamber's reasoning in the *Galic* Decision.

> Rule 94 *bis* contains nothing which is inconsistent with the application of Rule 92 *bis* to an expert witness....There is nothing in either Rule which would debar the written statement of an expert witness, or the transcript of the expert's evidence in proceedings before the Tribunal, being accepted in lieu of his oral testimony where the interests of justice would allow that course in order to save time, *with the rights of the other party to cross-examine the expert being determined in accordance with Rule 92 bis.*[5]

It is instructive that the Appeals Chamber said cross-examination rights would be determined in accordance with Rule 92 *bis*. Conspicuously absent is any hint that the discretion accorded the Trial Chamber under Rule 92 *bis*(E) is limited in any way by the application of Rule 94 *bis*. Unlike the situation involved where the expert's written report is tendered pursuant to Rule 94 *bis* or Rule 92 *bis*(A) (or both), a report tendered in the manner urged by the Prosecution here will always be attended by previous oral testimony that was subject to cross-examination. And the safeguards built into Rule 92 *bis*(A), (D) and (E) and the discretion accorded to the Trial Chamber will always ensure that—where necessary to fully protect the rights of the Accused—cross– examination of the underlying testimony and any reports associated to it will be available.

6. As I have concluded that the Prosecution's request should be governed solely with reference to Rule 92 *bis*, I would admit the expert reports as an integral part of the testimony of the witness. I then move to a consideration under 92 *bis*(E) as to whether any of the four experts should be

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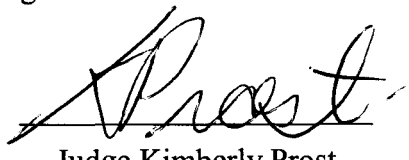
[2] Rule 94 *bis*(A), (B) and (C).
[3] Rule 92 *bis*(A).
[4] Rule 92 *bis*(D).

required to appear for live cross-examination at trial. On this issue, I would draw a distinction between those two experts for whom the proffered reports were available and subject to cross-examination during the *Krstic* trial, and those two experts for whom the Prosecution tendered updated reports with the *Krstic* transcripts in the *Blagojevic* trial. These latter reports were not subjected to cross-examination in the *Krstic* trial because they did not yet exist. It would, in my opinion, be unfair to admit such reports without the Accused having the opportunity to cross-examine the authoring experts. I would exercise the discretion accorded in Rule 92 *bis*(E) and require these two experts to appear at trial for cross-examination. I would limit cross-examination, however, to the substance of the reports that were not subjected to cross-examination in the *Krstić* trial. As to the remaining two experts, the defence have not identified any specific reasons as to why their evidence, previously tested, should be subject to cross-examination nor does my consideration of the proposed testimony demonstrate any justification for the same. I would therefore allow the introduction of this evidence without the need for cross-examination.

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



Judge Kimberly Prost

Dated this twelfth day of September 2006
At The Hague
The Netherlands

[Seal of the Tribunal]

[5] *Prosecutor v. Galic*, Case No. IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92 *bis*(C), 7 June 2002, para. 40 (emphasis added).