UNITED NATIONS

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

Case No.: IT-95-5/18-T

Date: 26 November 2013

Original: English

IN THE TRIAL CHAMBER

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

Registrar: **Mr. John Hocking**

Decision of: **26 November 2013**

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

DECISION ON ACCUSED'S MOTION FOR ADMISSION OF EVIDENCE OF RADISLAV KRSTIĆ PURSUANT TO RULE 92 *QUATER*

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused

Mr. Radovan Karadžić

Appointed Counsel

Mr. Richard Harvey

THIS TRIAL CHAMBER of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 ("Tribunal") is seised of the Accused's "Motion to Admit Evidence of Radislav Krstić pursuant to Rule 92 *quater*", filed on 25 July 2013 ("Motion"), and hereby issues its decision thereon.

I. Background and Submissions

1. In the Motion, the Accused seeks the admission of the transcript of testimony of Radislav Krstić ("Witness") in his own trial ("Testimony") pursuant to Rule 92 *quater* of the Tribunal's Rules of Procedure and Evidence ("Rules").[1] The Accused submits that the Testimony was heard between 16 October and 2 November 2000.[2] The Witness was Commander of the Drina Corps of the Army of Republika Srpska ("VRS") at the time relevant to the Third Amended Indictment ("Indictment") and gave *viva voce* evidence in the case against him.[3]

2. The Accused submits that the criteria for admission of evidence pursuant to Rule 92 *quater* are satisfied with respect to the Testimony and that it should be admitted.[4] The Accused argues that the Witness was found unavailable to testify by virtue of his suffering from post traumatic stress disorder ("PTSD") and that other Trial Chambers have held that a witness who suffers from PTSD is unavailable within the meaning of Rule 92 *quater*.[5]

3. The Accused argues that the circumstances in which the Testimony was elicited render it reliable for the purpose of admission pursuant to Rule 92 *quater*, as it was given under oath and heard within the procedural safeguards of judicial proceedings, with the opportunity for cross-examination.[6] The Accused further contends that issues relating to the credibility of the Testimony go to its weight and not its admissibility.[7]

4. The Accused claims that the Testimony is of direct relevance and probative value to his defence as it provides evidence that the Witness was not aware of the killings of prisoners from

[1] Motion, paras. 1, 9. The Accused indicates that the transcript of the Testimony bears Rule 65*ter* number 1D07142. *See also infra* para. 15.
[2] Motion, para. 1; *see* para. 15 *infra* for a discussion as to the dates of the Testimony.
[3] Motion, para. 1.
[4] Motion, paras. 3–5, 8.
[5] Motion, paras. 1, 6.
[6] Motion, para. 7.
[7] Motion, para. 7.

Srebrenica. In the Accused's submission, this refutes the allegation that the Accused planned the killings with the Witness or had been informed about them by the Witness.[8]

5. Finally, the Accused submits, in a footnote, that he does not seek the admission of associated exhibits "as virtually all of the relevant documents used during General Krstić's testimony have already been admitted as exhibits in this case".[9]

6. On 6 August 2013, the Office of the Prosecutor ("Prosecution") filed the "Prosecution Response to Motion to Admit Evidence of Radislav Krstić pursuant to Rule 92 *quater* with Public Appendices A to C" ("Response"). In the Response, the Prosecution opposes the admission of the Testimony on the grounds that the Testimony is "manifestly unreliable and thus of such low probative value as to bar its admission" and relates to crucial issues in this case, including evidence on the acts and conduct of the Accused.[10]

7. With respect to the reliability of the Testimony, the Prosecution submits that the Witness "lied during the course of his testimony on issues of critical importance to his own case",[11] arguing that the findings of the Trial Chamber in that case indicate the Testimony is so unreliable and of such low probative value as to bar its admission.[12] The Prosecution points to three such instances: (i) the Witness's knowledge and involvement in the forcible transfers of the Bosnian Muslim civilian population from Potočari;[13] (ii) the Witness's appointment as Drina Corps Commander and its date;[14] and (iii) the Witness's awareness of mass executions of prisoners from Srebrenica.[15] In the Prosecution's submission, not only were the Witness's accounts contradicted by evidence in his case but they are also conflicted by evidence that has been received in these proceedings.[16] The Prosecution further submits that there are other critical issues about which the Witness gave false evidence, including his awareness of the decision made on 9 July 1995 to take Srebrenica, his presence in Potočari on 12 July 1995, and his denial of ordering mass executions of the prisoners.[17]

[8] Motion, para. 8.
[9] Motion, fn. 8.
[10] Response, para. 1. The Prosecution submits that a transcript of the Testimony is available at 65*ter* number 24242. Response, para. 1, fn. 2.
[11] Response, para. 4.
[12] Response, paras. 4–5, 19.
[13] Response, paras. 6–8.
[14] Response, paras. 9–10.
[15] Response, paras. 11, 17.
[16] Response, paras. 6–11.
[17] Response, paras. 12–17.

8. With respect to the relevance of the Testimony, the Prosecution submits that it accepts the Testimony is "broadly relevant to the facts in issue".[18] However, it notes that with respect to the Accused's claim that the Testimony is relevant to refute the allegation that he planned the killings of Bosnian Muslim prisoners with the Witness or had been informed about them by the Witness, the Prosecution does not allege that the Accused was directly informed about the killings by the Witness.[19]

9. In further challenging the probative value of the Testimony, the Prosecution argues that the Witness gave evidence pertaining to the acts and conduct of the Accused, which weighs against admission.[20] It also submits that the critical issues about which the Witness lied in his case also constitute "live and important issues in the prosecution of the Accused".[21] It is submitted that while the Witness was cross-examined at length in his case, the Prosecution is prejudiced by the inability to cross-examine him on relevant testimony and documentary evidence in the current proceedings, including those acquired from the archives of the Drina Corps in December 2004 which were unavailable at the time of the Testimony.[22] The Prosecution therefore argues that in accordance with Rule 89 (D) any "marginal probative value" of the Testimony is outweighed by the overriding need to ensure a fair trial.[23]

10. The Prosecution submits that in the event the Chamber is minded to grant the Motion in whole or in part, all the documents used or admitted during cross-examination of the Witness that form an indispensable and inseparable part of the Testimony and have not previously been admitted in the current proceedings should be admitted into evidence.[24] The Prosecution has identified in Appendix B those exhibits used on cross-examination of the Witness which have not been admitted into evidence in the current case.[25] Finally, it requests that if the Motion is granted in whole or in part, the part of the Testimony that was heard in private session as identified in Appendix C be admitted under seal.[26]

[18] Response, para. 18.
[19] Response, para. 18.
[20] Response, paras. 19–20.
[21] Response, para. 20.
[22] Response, para. 21, submitting that some of these hitherto unavailable documents are relevant to, and contradict, the Witness's assertion that no plan existed in June 1995 for an attack against Srebrenica.
[23] Response, para. 22.
[24] Response, paras. 2, 23.
[25] Response, Appendix B.
[26] Response, para. 24, Appendix C.

II. Applicable Law

11. The Chamber recalls that the pre-Trial Chamber in this case set out the law applicable for admission of evidence pursuant to Rule 92 *quater* in the "Decision on Prosecution Motion for Admission of Testimony of Witness KDZ198 and Associated Exhibits pursuant to Rule 92 *quater*" issued on 20 August 2009 ("KDZ198 Decision").[27] It will therefore not repeat that discussion here. It suffices to reiterate that the evidence of an unavailable witness may be submitted in written form if the Chamber finds: (i) the witness unavailable within the meaning of Rule 92 *quater* (A); (ii) from the circumstances in which the statement was made and recorded that it is reliable; (iii) that the evidence is relevant to the proceedings and of probative value; and (iv) that the probative value of the evidence, which may include evidence pertaining to acts and conduct of an accused, is not outweighed by the need to ensure a fair trial.[28]

12. The Chamber also recalls the non-exhaustive list of factors which can be considered in assessing the reliability of the proposed evidence which pertain to the circumstances in which it was obtained and recorded.[29] These factors include: (i) whether a written statement was given under oath; and (ii) whether it has been subject to cross-examination.[30] Other factors which may be considered include whether the evidence relates to events about which there is other evidence and whether there is an absence of manifest or obvious inconsistencies in the evidence.[31] Even if one or more of these indicia of reliability are absent, the Chamber retains the discretion to admit the evidence and will take into consideration the reliability issues in "determining the appropriate weight to be given to it in its overall consideration of all the evidence in the case".[32]

13. In addition, the Chamber must ensure that the general requirements for the admissibility of evidence set out in Rule 89 of the Rules are met, namely that the proffered evidence is relevant and has probative value and that the probative value is not substantially outweighed by the need to ensure a fair trial.[33]

14. Finally, the Chamber recalls that when a party tenders evidence pursuant to Rule 92 *bis*, *ter*, or *quater*, it may also tender for admission into evidence documents that have been

[27] KDZ198 Decision, paras. 4–10.

[28] KDZ198 Decision, paras. 4–6; Decision on Prosecution Motion for Admission of Testimony of Sixteen Witnesses and Associated Exhibits pursuant to Rule 92 *quater*, 30 November 2009, para. 6. *See Prosecutor v. Popović et al.*, Case No. IT-05-88-AR73.4, Decision on Beara's and Nikolić's Interlocutory Appeals against Trial Chamber's Decision of 21 April 2008 Admitting 92 *quater* Evidence, 18 August 2008 ("Beara and Nikolić Appeal Decision"), para. 30.

[29] KDZ198 Decision, para. 5.

[30] KDZ198 Decision, para. 5.

[31] KDZ198 Decision, para. 5.

[32] KDZ198 Decision, para. 5.

[33] KDZ198 Decision, para. 6.

discussed by the witness in his or her witness statement or previous testimony.[34] Such exhibits should form an "inseparable and indispensable part" of the testimony, meaning that they should not merely have been mentioned during the course of that testimony, but rather have been used and explained by the witness.[35] In the event that the party chooses not to tender associated exhibits and this omission renders the main body of evidence incomprehensible or of low probative value, the Chamber may deny the admission of such evidence.[36]

III. Discussion

A. Preliminary Matters

15. The Chamber notes that the Accused states that the Witness testified in his own case from 16 October to 2 November 2000 and has uploaded into e-court 65 *ter* number 1D07142, which contains the Witness's Testimony elicited on the days identified in the Motion.[37] 65 *ter* number 1D07142 includes the Witness's evidence given in chief and cross-examination, but not in re-examination or during questioning by the Trial Chamber in that case.[38] By contrast, in its Response the Prosecution refers to a different 65 *ter* document, which bears 65 *ter* number 24242,[39] and consists of 1,762 pages of transcript dated 28 July, 27 September, 5, 16–20, 25–27, and 30–31 October, as well as 1–3, 6–8, and 20–22 November 2000, portions of which do not form part of the Witness's testimony as they concern case management sessions, the defence's opening statement, and the evidence of several other witnesses who were interspersed during the Witness's testimony.[40] Having reviewed the relevant transcripts, the Chamber finds that Witness testified in his own case in October 2000 (16–20, 25–27, and 30–31) and November

[34] Decision on Accused's Motion to Admit Evidence of Velibor Ostojić pursuant to Rule 92 *quater*, 23 October 2012 ("Ostojić Rule 92 *Quater* Decision"), para. 9; Decision on Accused's Motion for Admission of Prior Testimony of Thomas Hansen and Andrew Knowles pursuant to Rule 92 *bis*, 22 August 2012 ("Decision on Accused's Rule 92 *bis* Motion"), para. 11.

[35] Decision on Prosecution's Motion for Admission of the Evidence of Milenko Lazić pursuant to Rule 92 *quater* and for Leave to Add Exhibits to Rule 65 *ter* Exhibit List, 9 January 2012, para. 24. *See also Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Decision on Prosecution Motion for Admission of Evidence pursuant to Rule 92 *quater*, 21 April 2008, para. 65.

[36] Decision on Accused's Rule 92 *bis* Motion, para. 11. *See also* Decision on Accused's Motion for Admission of Statement of Rajko Koprivica pursuant to Rule 92 *quater*, 3 October 2012 ("Koprivica Rule 92 *Quater* Decision"), para. 17.

[37] *Supra* para. 1.

[38] The *Krstić* Defence re-examined the Witness on 20 November 2000 (T. 7344 (line 1)–7368 (line 17)) and the Trial Chamber questioned the Witness on 20 and 22 November 2000 (T. 7368 (line 18)–7425 and T. 7550 (line 14)–7586 (line 7).

[39] Response, fn. 2.

[40] The parts unrelated to the Testimony are: T. 5864–5889 (closed session in part) (28 July 2000); T. 5890–5923 (closed session) (27 September 2000); T. 5924–5950 (5 October 2000); T. 5951–5956 (line 9) (16 October 2000); T. 6864 (line 7)–6909 (2 November 2000); T. 6910–7003 (private session in part) (3 November 2000); T. 7004–7099 (private session in part) (6 November 2000); T. 7100–7190 (private session in part) (7 November 2000); T. 7191–7343 (private session in part) (8 November 2000); T. 7426–7538 (private session in part) (21 November 2000); T. 7539–7550 (line 13), 7586 (line 8)–7625 (private session in part) (22 November 2000).

2000 (1, 2 (in part), 20, and 22 (also in part)).[41] The Chamber will thus neither consider 65 *ter* number 1D07142 nor 65 *ter* number 24242 as being accurate representations of the Witness's Testimony. Rather, when referring to the "Testimony" the Chamber refers to the full testimony of the Witness as identified in this paragraph, starting from the Witness taking the oath on 16 October 2000 to the completion of the Testimony upon the Witness answering the last question put to him on 22 November 2000.

16. The Chamber notes that the Accused's failure to indicate the correct dates of the Witness's Testimony and to submit complete transcripts has created an unnecessary workload on the Chamber's part. Furthermore, while it is not the role of the Prosecution to correct the errors of the Defence, the Chamber notes that it was not assisted by the Response which referred to yet another incorrect version of the transcript of the Witness's full testimony. Although these significant deficiencies could have led to the Chamber rejecting the Motion without assessing its merits, the Chamber has decided in the circumstances to examine the Motion.

B. Unavailability

17. The Chamber first observes that the Prosecution does not challenge the unavailability of the Witness or the timeliness of the Motion.

18. The Chamber recalls that on 23 October 2012 it issued a subpoena compelling the Witness to appear for testimony in this case.[42] On 27 March 2013, the Chamber charged the Witness with one count of contempt pursuant to Rule 77(A) of the Rules for having refused to testify on several occasions.[43] On 18 July 2013, the Witness was found, by majority, not guilty of contempt of the Tribunal.[44] The Trial Chamber hearing the contempt case against the Witness opined, by majority, that due to the severity of the Witness's condition, testifying in the *Karadžić* case could possibly aggravate that medical condition and therefore the Witness had a reasonable excuse for his refusal to testify.[45]

[41] The Testimony starts on 16 October 2000 at T. 5956 (line 10) and concludes on 22 November 2000 at T. 7586 (line 7).

[42] Public Redacted Decision on Accused's Motion to Subpoena Radislav Krstić, 23 October 2012 ("*Krstić* Subpoena Decision"); Subpoena *Ad Testificandum*, confidential, 23 October 2012 (originally ordering him to appear in court on 15 January 2013). *See also In the Contempt Case of Radislav Krstić*, Case No. IT-95-5/18-R77.3, Order in Lieu of Indictment, 27 March 2013, para. 1.

[43] *In the Contempt Case of Radislav Krstić*, Case No. IT-95-5/18-R77.3, Order in Lieu of Indictment, 27 March 2013, para. 10, referring to the "Public Redacted Version of 'Decision on Accused's motion to Subpoena Radislav Krstić' Issued on 23 October 2012 ("Subpoena") and the Addendum to the Subpoena.

[44] *In the Contempt Case of Radislav Krstić*, Case No. IT-95-5/18-R77.3, Public Redacted Version of Judgement Issued on 18 July 2013, 18 July 2013 ("*Krstić* Contempt Judgement"), para. 32.

[45] *Krstić* Contempt Judgement, para. 30.

19. The Chamber further recalls the jurisprudence of the Tribunal, according to which if "a witness suffering from [Post Traumatic Stress Disorder] has provided medical documentation indicating that exposure to a stressful event may have 'grave consequences', the witness can be considered 'objectively unavailable' for the purposes of Rule 92 *quater* of the Rules and therefore, not able to give evidence in court".[46] Accordingly, coupled with the information provided by the Accused in the Motion, this Chamber finds that in these circumstances the Witness is unavailable for the purposes of Rule 92 *quater*(A)(i) and is satisfied that this requirement is met. Furthermore, the Chamber finds that the Motion is not untimely as the Witness became unavailable after 27 August 2012.[47]

C. Testimony

20. Having determined that the Witness is unavailable, the Chamber will now examine whether the Testimony satisfies the basic criteria of relevance and probative value enshrined in Rule 89 of the Rules.

i) Relevance

21. The Chamber recalls its *Krstić* Subpoena Decision, in which it examined the relevance of the Witness's prospective testimony and was satisfied that the Witness's evidence was "clearly relevant to a number of issues in the Accused's defence case".[48] In this Motion, the Accused submits that the Witness's Testimony which states the Witness did not know of the execution of prisoners from Srebrenica is relevant to rebut the allegation that the Accused planned the killings with the Witness or had been informed about them by him.[49] The Prosecution does not challenge the relevance of the Testimony but clarifies that it does not allege that the Witness directly informed the Accused of the killings of Bosnian Muslim males.[50]

22. Having conducted its own review of the Testimony, the Chamber is satisfied that it is relevant to numerous issues surrounding a joint criminal enterprise to eliminate the Bosnian

[46] *Prosecutor v. Goran Hadžić*, Case No. IT-04-75-T, Decision on Prosecution Omnibus Motion for Admission of Evidence Pursuant to Rule 92 *quater* and Prosecution Motion for the Admission of the Evidence of GH-083 pursuant to Rule 92 *quater*, 9 May 2013 ("*Hadžić* Decision"), para. 101; *Prosecutor v Mičo Stanišić and Stojan Župljanin*, Case No. IT-08-91-T, Decision Granting in Part Prosecution's Motion for Admission of Evidence of ST020 Pursuant to Rule 92 *quater*, 19 January 2011, para. 17. *See also Krstić* Contempt Judgement, para. 30, fn. 70, citing these decisions; *Prosecutor v Ratko Mladić*, Case No. IT-09-92-T, Decision on Prosecution 92 *quater* Motion (Witness RM-132), 28 June 2013, para. 7.

[47] The Chamber recalls its order that all Rule 92 *quater* motions be filed by the Accused before 27 August 2012. *See* Scheduling Order on Close of the Prosecution Case, Rule 98 *bis* Submissions, and Start of the Defence Case, 26 April 2012, para. 22(v).

[48] *Krstić* Subpoena Decision, para. 9.

[49] Motion, para. 8.

[50] Response, para. 18.

Muslims in Srebrenica by killing the men and boys and forcibly removing the women, young children, and some elderly men as alleged in the Indictment.[51] As a high ranking military officer of the VRS Drina Corps during the period relevant to the Indictment, the Witness testified about, among other things: (i) events in Srebrenica before 1995, including the ABiH's activities,[52] (ii) the lead up to the attack on Srebrenica from January 1995;[53] (iii) the Witness's involvement or lack thereof in the planning of the *Krivaja* 95 Operation and the takeover of Srebrenica;[54] (iv) the participation of Drina Corps personnel, including the Witness and VRS members, in the events in July 1995 and in actions against the Bosnian Muslim column and the Witness's activities in regards to the Žepa operation;[55] (v) the involvement of Drina Corps personnel and others from the VRS in the mass executions and burials;[56] and (vi) events related to Srebrenica from August 1995 onwards.[57] The Chamber also considers that certain portions of the Witness's Testimony are not central issues in the current case, but are relevant for the assessment of the Witness's credibility.[58] The Chamber therefore finds that the Testimony is sufficiently relevant to these proceedings for the purposes of admission pursuant to Rule 92 *quater*.

23. The Chamber notes, however, that certain parts of the Testimony are irrelevant to these proceedings. Mainly related to procedural matters, and testimonies of other witnesses that were interposed during the Witness's testimony, these portions are: T. 6090 (line 5)–6091 (line 11) (18 October 2000); T. 6165–6171 (line 12) (19 October 2000); T. 6317 (line 15)–6327 (line 17) (20 October 2000); T. 6567–6574 (30 October 2000); T. 6820 (line 18)–6824 (1 November 2000); and T. 7344–7349 (line 7) (20 November 2000).[59] The Chamber will therefore not consider these portions for admission.

[51] Indictment, paras. 20–24, 41–47.

[52] *See*, *inter alia*, Testimony, T. 5980–6022 (16 October 2000).

[53] *See*, *inter alia*, Testimony, T. 6025–6089 (17 October 2000); T. 6090–6116 (18 October 2000).

[54] *See*, *inter alia*, Testimony, T. 6116–6162 (18 October 2000); T. 6171–6188 (19 October 2000); T. 6306–6308 (20 October 2000); T. 6370–6403 (25 October 2000); T. 6404–6468 (26 October 2000); T. 6498–6514 (27 October 2000).

[55] *See*, *inter alia*, Testimony, T. 6201–6241 (19 October 2000); T. 6242–6273 (20 October 2000); T. 6441–6452 (26 October 2000); T. 6532–6534, 6550–6563 (27 October 2000); T. 6575–6603, 6606–6628 (30 October 2000); T. 6668–6704 (31 October 2000); T. 6769–6773, 6779–6794 (1 November 2000); T. 7361–7362 (20 November 2000).

[56] *See*, *inter alia*, Testimony, T. 6313–6317 (20 October 2000); T. 6328–6337, 6343–6369 (25 October 2000); T. 6468–6486 (26 October 2000); T. 6487–6498 (27 October 2000); T. 6626–6627 (30 October 2000); T. 6648–6660 (private session in part), 6715–6732 (31 October 2000); T. 6735–6793, 6806–6820 (private session in part) (1 November 2000); T. 6825–6854 (2 November 2000).

[57] *See*, *inter alia*, Testimony, T. 6825–6828 (private session in part), 6831–6845, 6852–6854 (2 November 2000).

[58] *See*, *inter alia*, Testimony, T. 6514–6521, 6538–6550 (27 October 2000); T. 6845–6847 (2 November 2000), concerning Mladić and the Witness's use of derogatory terms; T. 6536–6538 (27 October 2000), concerning the Witness's accommodation during the Fontana Hotel meetings; T. 6587–6589 (30 October 2000), concerning the Witness's knowledge on communication capabilities of the VRS in July 1995.

[59] The Chamber notes that there are other portions of the Testimony that are also procedure-related but are generally very brief. In such circumstances, the Chamber does not consider that redactions are warranted.

ii) Reliability

24. The Accused argues that the proffered evidence is reliable as it was elicited under oath "with procedural safeguards and the opportunity for cross examination" and that "any issues as to the credibility of the testimony go to the weight, not admissibility, of the evidence".[60] The Prosecution submits that despite the conditions under which the Witness's evidence was provided, it is unreliable due to numerous "false defences" on several issues critical to his case, which have been contradicted by evidence adduced in the Witness's own case as well as in the instant case, and are also live and important issues in the prosecution of the Accused. It contends that these have been contradicted by evidence adduced in the Witness's own case as well as in the instant case.[61] It is further argued that the Prosecution is prejudiced by its inability to cross-examine the Witness on relevant testimony and documents, including those which were unavailable to the Prosecution in the *Krstić* case.[62] The Prosecution therefore argues that any marginal probative value of the Testimony is outweighed by the need to ensure a fair trial.[63]

25. The Chamber recalls that to have any probative value the evidence must be *prima facie* reliable and that an overlap exists between the requirements of Rules 89(C) and 92 *quater*(A)(ii).[64] Furthermore, the Chamber has the sole discretion to evaluate the reliability of the proffered evidence.[65] It is thus for the Chamber to assess whether there are inconsistencies within the Testimony or with the documents discussed therein that reach a level which would render it so unreliable or of such low probative value that the Chamber should deny its admission.[66]

26. The Chamber first notes that the Witness's Testimony was given under oath, with the assistance of an interpreter duly qualified and approved by the Registry of the Tribunal, and subject to extensive cross-examination and questioning by the Chamber. As such, the Chamber is satisfied that the way in which the Witness's evidence was elicited presents sufficient indicia of reliability for its admission.

27. The Chamber has reviewed the Testimony in its entirety, in particular the specific areas which the Prosecution claims in its Response are unreliable.[67] The Chamber considers that

[60] Motion, para. 7.
[61] Response, paras. 4–17, 20–21.
[62] Response, para. 21.
[63] Response, para. 22.
[64] Decision on Prosecution's Motion for Admission of The Evidence of KDZ297 (Miroslav Deronjić) pursuant to Rule 92 *Quater*, 23 March 2010, para. 15.
[65] Koprivica Rule 92 *Quater* Decision, para. 15.
[66] *See* Ostojić Rule 92 *Quater* Decision, para. 13.
[67] *See supra* para. 7.

while the Testimony reflects some level of evasiveness and inconsistency, the reliability of the Testimony, in itself, is not undermined to such a level that would warrant denying its admission. Further, the Chamber notes that the challenges by the Prosecution to those portions in the *Krstić* case and the Chamber's questioning of the Witness in that case are on the record and are thus available to this Chamber in assessing the ultimate weight of the evidence. In this instance, the Chamber is of the view that these factors go to the weight to be attributed to the evidence but do not preclude its admission.

28. The Chamber notes that while certain documents were not available at the time of the Witness's Testimony in 2000, they have been used and discussed in the present case.[68] Furthermore, the testimonies of Milomir Savčić and Petar Škrbić, which according to the Prosecution contradict the Witness's evidence regarding the 65th Protection Regiment[69] and the series of events regarding the Accused's signing of the decree appointing the Witness as Commander of the Drina Corps,[70] do not undermine the reliability of the Testimony to such an extent as to warrant its preclusion and any evidence conflicting with the Witness's Testimony will have to be assessed against the totality of the evidence received by the Chamber at the end of trial. Lastly, the Chamber considers that findings of the *Krstić* Trial Chamber in terms of the Witness's credibility and reliability of his evidence[71] are not directly relevant to this Chamber's assessment of the evidence's reliability for the purpose of admission.

29. Accordingly, the Chamber finds that the Witness's Testimony is sufficiently reliable for it to be admitted under Rule 92 *quater*.

iii) Acts and conduct of the Accused

30. The Chamber recalls the Prosecution's submission that the Witness's evidence should not be admitted in the present case as some portions concern the acts and conduct of the Accused and are thus critical to the Prosecution's case.[72] This evidence ranges from descriptions of the Accused's acts and decisions to the Accused's recorded and alleged words: (i) the Presidential decree appointing the Witness as Commander of the Drina Corps;[73] (ii) the

[68] Such documents include P4680, P5284, and P2996 concerning the Witness's involvement in the forcible transfer of the Bosnian Muslim civilians from Potočari; P4485 concerning the Witness's position as Drina Corps Commander; P5073, P138, and P181, and P247 concerning the Witness's knowledge of mass executions; D2080 concerning the Witness's involvement in the decision on 9 July 1995: P5216, P4979, and P4080 concerning a May 1995 plan to attack the Srebrenica and Žepa enclaves.

[69] T. 42273–42274 (31 July 2013).

[70] T. 25977–25989 (8 March 2012).

[71] *Prosecutor v. Krstić*, IT-98-33-T, Judgement, 2 August 2001, para. 722.

[72] Response, paras. 19–20.

[73] Testimony, T. 6256–6258 (20 October 2000).

Accused's interview on 4 August 1995, in which he states that the Witness had planned the *Krivaja* 95 Operation;[74] (iii) a Main Staff report dated 9 July 1995, signed by Zdravko Tolimir, which refers to the Accused's order that combat activities be continued towards Srebrenica and that UNPROFOR and the civilian population be protected;[75] (iv) the Accused's visit to Srebrenica on 4 August 1995;[76] (v) the decision of the Accused to remove Mladić as Commander of the VRS and the collegium meeting on 5/6 August 1995,[77] and (vi) other matters.[78]

31. As previously noted, evidence going to the acts and conduct of the accused is not barred from admission under Rule 92 *quater*, although this may be a factor against admitting such evidence, or parts thereof.[79] Moreover, the admission of evidence under Rule 92 *quater* remains subject to the general requirements for the admission of evidence contained in Rule 89(D), which provides that evidence may be excluded if its probative value is substantially outweighed by the need to ensure a fair trial. Having reviewed the Testimony, the Chamber is of the view that the portions identified above do not bar its admission. Admission of these portions is thus not substantially outweighed by the need to ensure a fair trial.

iv) Conclusion

32. In light of the foregoing the Chamber finds that, save for the portions identified in paragraph 23 above, the Testimony is admissible under Rules 89 and 92 *quater*. The Chamber notes, however, that a decision to admit evidence does not in any way constitute a binding determination as to the weight to be accorded to such evidence at a later stage.[80]

33. Lastly, the Chamber notes that the Witness partly gave evidence in private session. The Chamber therefore orders that a full confidential version of the Testimony, excluding the pages identified in paragraph 23 in this Decision, be uploaded into e-court, together with a redacted public version of the same.

[74] Testimony, T. 6306–6308 (20 October 2000); T. 6381–6403 (25 October 2000), also discussing the directives 7 and 7.1.

[75] Testimony, T. 6181–6184 (19 October 2000); T. 6425–6429 (26 October 2000) concerning P432A (P2276 in this case).

[76] Testimony, T. 6825–6827 (2 November 2000); T. 7362–7363 (20 November 2000), concerning P792 (P2845 in this case).

[77] Testimony, T. 6831–6834 (2 November 2000).

[78] *See* T. 6208 (19 October 2000), concerning Mladić's reference to the Accused's decree that the office of the civilian commissioner in Srebrenica (Deronjić) was to be established; T. 6835 (2 November 2000), concerning the Witness's awareness of the fact that Mladić and the Accused were indicted before the Tribunal.

[79] *Supra* para. 11.

D. Associated Exhibits

34. In the Motion, the Accused does not seek the admission of associated exhibits in conjunction with the Testimony on the grounds that "virtually all of the relevant documents used during General Krstić's testimony have been admitted as exhibits" in the current proceedings.[81] The Prosecution argues that "a number—but not all—" of the documents used or admitted on cross-examination by the Prosecution in that case have been admitted in evidence in this case.[82] Appending a table of 115 documents used during cross-examination of the Witness, the Prosecution requests that those which have not been admitted in this case and are identified as forming an indispensable and inseparable part of the relevant portions of the Testimony be admitted into evidence.[83]

35. The Chamber notes that its own review of the Testimony indicates that contrary to the Accused's assertion, many of the documents used and admitted during the Testimony have not been admitted into evidence in the current proceedings. The Chamber identified 70 documents that were used during direct-examination of the Witness, only 15 of which are in evidence in this case.[84] In addition, only some of the documents are on the revised Rule 65*ter* exhibit list filed on 17 October 2013 ("Exhibit List").[85] Having reviewed the Testimony, in particular the parts in which the remaining 55 documents were used, the Chamber notes that the relevant parts of those documents were either read out to the Witness, or in other instances the Witness sufficiently described their contents, rendering them understandable without having them into evidence. The Chamber therefore considers that they do not form an inseparable and indispensable part of the Testimony, as it can be understood without their admission. The Chamber shall therefore not proceed to further assess whether it should admit these documents without the Accused not having tendered them.

36. With reference to the documents used on cross-examination with the Witness and which are not in evidence in this case, the Prosecution submits that some of these do not form indispensable and inseparable parts of the Testimony. These documents bear the following numbers in the *Krstić* case: P1.E; P28/5.1; P44; P52; P55; P122; P185; P186; P399; P454; P749;

---

[80] Beara and Nikolić Appeal Decision, para. 53.

[81] Motion, para. 9, fn. 8.

[82] Response, para. 23.

[83] Response, para. 23, Appendix B.

[84] According to the Chamber's own analysis, D52 has been admitted in this case as D01993; D54 as D1962; D55 as D1997; D59 as D2079; D65 as D3919; D66 as D2014; D67 as D1062; D78 as D1964; D79/P432 as P2276; D80 as P5221; D96 as D3950; D99 as P167; D109/P649 as P4588; D119 as D1996; D127 as D3959.

[85] According to the Chamber's own analysis, D27 is on the Exhibit List as 65 *ter* number 1D2870 in this case; D29 as 1D29135; D33 as 1D29116; D37 as 1D20863; D41 as 1D20868; D51 as 1D29073; D74 as 1D05377; D98 as 03988; D118 as 1D05468.

P756; P767; P768; P770; P780; P794; and P803.[86] Having reviewed the portions of the Testimony where these documents were used, the Chamber finds that they do not meet the test of forming an indispensable and inseparable part of the Testimony. Accordingly, they will not be admitted into evidence.

37. The Prosecution requests that those documents which have not been admitted in this case and are identified as forming indispensable and inseparable parts of the relevant portions of the Witness's testimony be admitted into evidence.[87] These documents were assigned the following exhibit numbers in the *Krstić* case: P112; P113; P184; P325; P367; P411; P412; P420; P467; P481; P482; P485; P537; P539; P652; P698; P740; P741; P743; P744; P745; P764 (1A an 2A); P769; and P783.[88] The Chamber notes that among these, P112, P113, P325, P367, P411, P412, P420, P467, P481, P482, P485, P537, P539, P652, P698, P740, P741, P743, P744, P764 (1A an 2A), P769, and P783 are in the Exhibit List.[89]

38. Of those documents identified in the previous paragraph, the Chamber considers that only one document meets the test of forming an inseparable and indispensable part of the Testimony. 65 *ter* number 02735 (P769 in the *Krstić* case) is an aerial photograph of Potočari dated 12 July 1995, which was used to question the Witness about the premises depicted therein.[90] This document is, in the Chamber's view, intrinsic to the Testimony and is necessary to the Chamber's understanding of the proffered evidence. Accordingly, the Chamber finds that it is in the interests of justice to exceptionally admit it as an associated exhibit of the Testimony even though it is not tendered by the Accused.

39. As regards the remaining 23 items,[91] the Chamber considers that they do not form an indispensable and inseparable part of the Testimony. These documents were in turn shown to

[86] The Prosecution notes that some of the documents are similar to exhibits in this case. These bore the following exhibit numbers in the *Krstić* case: P55 (P4202 in this case); P185 (Still of P202, photo 93); and P186 (similar still part of P4202, photo 114).

[87] Response, para. 23.

[88] *See* Appendix B.

[89] The following exhibit numbers in the *Krstić* case correspond to the following 65 *ter* numbers in the current case: P112 is 65 *ter* number 02309; P113 is 65 *ter* number 02308; P325 is 65 *ter* number 31578A; P411 is 65*ter* number 02267; P412 is 65*ter* number 02262; P420 is 65*ter* number 6206/18043; P467 is 65 *ter* number 02115; P481 is 65 *ter* number 01990; P482 is 65*ter* number 02315/02316; P485 is 65 *ter* number 02664; P537 is 65 *ter* number 01989/21937; P539 is 65*ter* number 02118; P652 is 65*ter* number 31263; P698 is 65 *ter* number 31315; P740 is 65 *ter* number 02213; P741 is 65 *ter* number 02215; P743 is 65 *ter* number 02311; P744 is 65 *ter* number 02314; P764/1/A is 65 *ter* number 02300, p. 1 (BCS and English); P764/2/A is 65 *ter* number 02300 p.15 (BCS), p. 8 (English); P769 is 65 *ter* number 02739; P783 is 65 *ter* number 02316. P184 and P745 are not in the Exhibit List in the current case. Moreover, although the Prosecution notes that P367 in the *Krstić* case is 65 *ter* number 40319, the Chamber is unable to locate this document in e-court.

[90] Testimony, T. 6640–6641 (30 October 2000).

[91] These items bore the following exhibit numbers in the *Krstić* case: P112; P113; P184; P325; P367; P411; P412; P420; P467; P481; P482; P485; P537; P539; P652; P698; P740; P741; P743; P744; P745; P764 (1A an 2A); and P783.

the Witness briefly, were read aloud or described in detail by the Prosecution and/or the Witness on the record in the transcripts, or were commented on in a limited manner by the Witness. The Testimony is sufficiently comprehensible without admitting these items and thus the Chamber shall not admit them into evidence.

IV. Disposition

40. Accordingly, pursuant to Rules 54, 89, and 92 *quater* of the Rules, the Chamber hereby:

(i) **GRANTS** the Motion and **ADMITS** into evidence the relevant portions of the Testimony in the *Krstić* case as outlined in paragraph 15 of this Decision, with the exception of the portions described in paragraph 23;

(ii) **ORDERS** the Accused to upload into e-court the confidential and public versions of the Testimony, as defined in paragraphs 15 and 23;

(iii) **INSTRUCTS** the Registry to assign exhibit numbers to the confidential and public versions of the Testimony; and

(iv) **ADMITS** 65 *ter* number 02735 into evidence and **INSTRUCTS** the Registry to assign an exhibit number to this document.

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

Judge O-Gon Kwon
Presiding

Dated this twenty-sixth day of November 2013
At The Hague
The Netherlands

[Seal of the Tribunal]