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UNITED
NATIONS

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

Case No.: IT-05-87-T

Date: 13 September 2006

Original: English

IN TRIAL CHAMBER III

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

Registrar: **Mr. Hans Holthuis**

Decision of: **13 September 2006**

PROSECUTOR

v.

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

DECISION DENYING PROSECUTION'S SECOND MOTION FOR ADMISSION OF EVIDENCE PURSUANT TO RULE 92 *BIS*

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Mr. Branko Lukić and Mr. Dragan Ivetić for Mr. Sreten Lukić

Background

1. In the confidential "Prosecution's Second Motion for Admission of Evidence Pursuant to Rule 92 *bis*", filed on 31 July 2006 (the "Motion"), the Prosecution asks the Trial Chamber to admit into evidence certain documents concerning the number of people allegedly displaced within, and forcibly expelled from, Kosovo during the period of time relevant to this case.[1] The Prosecution seeks admission of the material pursuant to Rule 92 *bis* of the Rules of Procedure and Evidence (the "Rules") and proffers the documents through the person (the "Witness") who in 1999 headed the unit of an "international humanitarian organisation"[2] (the "Organisation") responsible for that organisation's operations in the former Yugoslavia.[3] For the purposes of this Decision, the Trial Chamber will not identify the Witness or the Organisation.[4]

2. On 14 August 2006, the Accused filed a confidential "Joint Defence Response to the Prosecution's Second Motion for Admission of Evidence Pursuant to Rule 92 *bis*" (the "Response"), in which the Accused agree to the admission, without cross-examination, of all but one of the proffered documents.[5]

3. A confidential reply followed on 25 August 2006,[6] in which the Prosecution reiterates its request that the Trial Chamber grant the Motion.

Applicable law

4. A party who proffers a written statement or transcript of prior evidence in lieu of a witness's oral testimony must satisfy the requirements of Rule 92 *bis* by demonstrating that the material "goes to proof of a matter other than the acts and conduct of the accused as charged in the

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1 *See* Confidential Prosecution's Second Motion for Admission of Evidence Pursuant to Rule 92 *bis*, 31 July 2006 (the "Motion").

2 This is the term used by the Prosecution in court to describe the Organisation. *See* Transcript of Proceedings, T. 1807 (17 August 2006).

3 *See* Motion, para. 6.

4 *See ibid.*, paras. 2 (The material "was initially made available to the Prosecution under Rule 70 of the Rules by the [Organisation] which employs the witness. The Prosecution has obtained the consent of the [Organisation] to use [the Witness's] evidence in these proceedings. [*See* Annex B, filed in the confidential Corrigendum to Prosecution's Second Motion for Admission of Evidence Pursuant to Rule 92 *bis*, 2 August 2006.] As a necessary precondition to allowing this witness to give evidence, the [Organisation] requires the Prosecution to first seek the admission of [the Witness's] written statement and related material pursuant to Rule 92 *bis*."), 2 n. 1 ("This motion is filed confidentially as protective measures may be required for this witness should [the Witness] have to appear for cross-examination."), 12 ("The Prosecution will apply in due course for protective measures usually required by [the Organisation] for their staff members should this witness be asked to attend for cross-examination."). On 12 September 2006, the Prosecution informed the legal staff of the Trial Chamber that it desires the identities of both the Witness and the Organisation to be confidential.

5 *See* Confidential Joint Defence Response to the Prosecution's Second Motion for Admission of Evidence Pursuant to Rule 92 *bis*, 14 August 2006 (the "Response"), para. 7.

6 *See* Prosecution's Reply to Joint Defence Response to the Prosecution's Second Motion for Admission of Evidence Pursuant to Rule 92 *bis*, 25 August 2006 (the "Reply"). By oral order of the Trial Chamber on 17 August 2006, the Prosecution was given leave to file the Reply on or before 25 August 2006. *See* Transcript of Proceedings, T. 1807-1808 (17 August 2006).

indictment"[7] and by providing, for each written statement, a witness-verified[8] "declaration by the person making the written statement that the contents of the statement are true and correct to the best of that person's knowledge and belief".[9] As for any piece of proffered evidence, Rule 89 obliges the party to show that the material is relevant, probative[10] and bears "sufficient indicia of reliability."[11] Otherwise admissible evidence may be "exclude[d] if its probative value is substantially outweighed by the need to ensure a fair trial."[12]

5. It is not uncommon that proffered written statements contain hearsay. "Although there is no general prohibition against the admission of hearsay evidence in cases before the Tribunal, the fact that the evidence is hearsay, and whether the hearsay is first-hand or more removed, may be relevant to a determination of the probative value of that evidence."[13] "If the hearsay evidence sought to be admitted consists of written statements given by prospective witnesses for the purposes of legal proceedings, then it is admissible only if it complies with Rule 92*bis*".[14] Consonant with the always-applicable Rule 89, the "reliability of [a] hearsay statement is [] relevant to its admissibility, and not just to its weight."[15]

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[7] Rule 92 *bis*(A). *See* Decision on Prosecution's Rule 92 *bis* Motion, 4 July 2006 ("Previous Rule 92 *bis* Decision"), para. 6 ("As the *Milošević* Trial Chamber reasoned, the

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

The Appeals Chamber later adopted this reading".) (*quoting 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* Trial Decision"), para. 22 (citation omitted)).

[8] *See* Rules 92 *bis*(B)(i) and (B)(ii), which require the declaration made by the author of the written statement to be witnessed and verified in writing by a person authorised to do so.

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

[10] *See* Rules 89(C) ("A Chamber may admit any relevant evidence which it deems to have probative value."), 89(F) ("A Chamber may receive the evidence of a witness orally or, where the interests of justice allow, in written form.").

[11] *See Prosecutor v. Delalić et al.*, Case No. IT-96-21-AR73.2, Decision on Application of Defendant Zejnil Delalić for Leave to Appeal Against the Decision of the Trial Chamber of 19 January 1998 for the Admissibility of Evidence, 5 March 1998 (dated 4 March 1998), para. 20 ("The implicit requirement that a piece of evidence be prima facie credible – that it have sufficient indicia of reliability – is a factor in the assessment of its relevance and probative value."); *Prosecutor v. Strugar*, Case No. IT-01-42-T, Decision on the Admissibility of Certain Documents, 26 May 2004 ("*Strugar* Decision"), para. 12 (The "Appeals Chamber has indicated that the reliability of a statement is relevant to its admissibility, and not just to its weight. Indeed, '[a] piece of evidence may be so lacking in terms of the indicia of reliability that it is not "probative" and is therefore inadmissible.' This consideration has been commonly expressed in the case-law as a requirement, said to be implicit in Rule 89(C), that evidence must have 'sufficient indicia of reliability'.") (*quoting*, in first quotation, *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-AR73.5, Decision on Appeal Regarding Statement of a Deceased Witness, 21 July 2000, para. 24).

[12] Rule 89(D).

[13] *Strugar* Decision, para. 13. *See also Prosecutor v. Aleksovski*, Case No. IT-95-14/1-AR73, Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 February 1999, para. 15 ("The absence of the opportunity to cross-examine the person who made the statements, and whether the hearsay is 'first-hand' or more removed, are also relevant to the probative value of the evidence.") (citation omitted).

[14] *Prosecutor v. Milošević*, Case No. IT-02-54-AR73.2, Decision on Admissibility of Prosecution Investigator's Evidence, 30 September 2002 ("*Milošević* Appeals Decision"), para. 18(3).

[15] *Ibid.*, para. 18(2) (citation omitted).

6. Assuming that a piece of proffered written evidence conforms to Rules 92 *bis* and 89,[16] a Trial Chamber must decide whether to exercise its discretion to admit the material[17] into evidence.[18] If the Chamber opts to do so, it must then decide "whether to admit the statement or transcript in whole or in part and whether to require the witness to appear for cross-examination."[19] Where the proffered written "evidence relates to a 'critical element of the Prosecution's case' or, put another way, to a live and important issue between the parties,"[20] the "requirements of a fair trial demand that the accused be given the right to cross-examine the witnesses in order to fully test the Prosecution's case."[21]

Submissions

7. The Prosecution offers five pieces of written material for admission into evidence pursuant to Rule 92 *bis*: a letter, dated 5 February 2002, from the Witness to the then-Deputy Prosecutor of the Tribunal, and four "attachments" to that letter.[22] Attachment One is an undated one-page document apparently generated by the Organisation which provides statistics as to the number of people displaced within, and expelled from, Kosovo between 17 March 1998 and 24 March 1999.

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[16] *See* Previous Rule 92 *bis* Decision, para. 5 ("In general, a Trial Chamber deciding to admit evidence must always ensure, in accordance with Rule 89, that the evidence is relevant, probative and not unduly prejudicial.") (*citing Prosecutor v. Galić,* Case No. IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92 *bis*(C), 7 June 2002 ("*Galić* Appeals Decision"), para. 35 ("[E]vidence is admissible only if it is relevant and . . . has probative value, general propositions which are implicit in Rule 89(C)."); *Prosecutor v. Galić*, Case No. IT-98-29-T, Decision on the Prosecution's Request for Admission of Rule 92 *bis* Statements, 26 July 2002, para. 15 ("In deciding on admission of Rule 92 *bis* statements, the Trial Chamber must further determine whether the statement is relevant evidence which it deems to have probative value, within the meaning of Rule 89(C) and may exclude evidence 'if its probative value is substantially outweighed by the need to ensure a fair trial', pursuant to Rule 89(D).")).

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

[18] Rule 92 *bis*(A) enumerates factors both for and against admission:
(i) Factors in favour of admitting evidence in the form of a written statement include but are not limited to circumstances in which the evidence in question:
(a) is of a cumulative nature, in that other witnesses will give or have given oral testimony of similar facts;
(b) relates to relevant historical, political or military background;
(c) consists of a general or statistical analysis of the ethnic composition of the population in the places to which the indictment relates;
(d) concerns the impact of crimes upon victims;
(e) relates to issues of the character of the accused; or
(f) relates to factors to be taken into account in determining sentence.
(ii) Factors against admitting evidence in the form of a written statement include whether:
(a) there is an overriding public interest in the evidence in question being presented orally;
(b) a party objecting can demonstrate that its nature and source renders it unreliable, or that its prejudicial effect outweighs its probative value; or
(c) there are any other factors which make it appropriate for the witness to attend for cross-examination.

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

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

[21] *Milošević* Trial Decision, para. 25.

[22] *See* Motion, para. 8. *See also ibid.*, para. 6 n. 5 ("The Prosecution does not seek the admission into evidence of Attachment 5 to [the Witness's] statement.").

Attachment Two is an undated three-page document apparently generated by the Organisation titled "Summary of Kosovo Displacement Statistics: [] Estimates 23 March 1999 – 10 June 1999". Attachment Three is an undated collection of 80 one-page documents, each titled "Kosovo Displacement and Return: [] Estimates", spanning 1 April 1999 to 6 July 1999. Attachment Four is a 245-page undated collection of [] "Kosovo Emergency Update[s]", which span 30 March 1999 to 25 August 1999 and many of which contain, in addition to numbers of displaced persons, apparent accounts of the reasons provided by the displaced persons for their displacement. For example, excerpts of four Kosovo Emergency Updates state as follows:

- Around 94,000 Kosovars have fled the province [between] March 24 [and 30, 1999], and relief officials said many more were en route. . . . Relief workers said the majority were women, children and the elderly. Many of the arrivals reported they had been forcibly expelled, often within minutes and often with little more than the clothes they wore, either by army troops, the police or paramilitary. Some said their homes were burned down even as they left their villages and towns.[23]

- Earlier on Monday 12 April [1999] around 100 refugees passed through the Morini [Albania] border crossing. These refugees said that they had fled their village in Orahovac district three weeks ago, when it was attacked and set on fire, and they had been hiding in the forest since then. They believed that some 75 villagers had perished in the fire. Most of these refugees said they had been waiting to cross the border on 7 April [1999], when they were turned back by Yugoslav security forces. They went to Prizren, where they occupied an abandoned apartment building. Without explanation, the police appeared on Sunday, 12 April [1999], and ordered them to leave by midnight or be killed.[24]

- Also on Tuesday, 110 refugees transported by a bus to the border entered through the Tabanovce [Macedonia] crossing. The refugees, who came from the municipalities of Urosevac, Obilic and Glogovac, were taken to Senekos and Stenkovec camps. The refugees told similar stories: Serb forces were emptying villages and were occupying civilian houses and using barns to store artillery and anti-aircraft guns. They also said food was becoming scarce.[25]

- More than 1,500 people from Kosovo entered Montenegro over a four-day period last week. Most of them arrived at the border town of Rozaje by bus from Kosovska Mitrovica, a key town in northern Kosovo. Refugees say Serbian forces have been emptying the town which used to have a population of around 70,000 people.[26]

As the Witness's letter indicates, "These updates set out, *inter alia*, the reasons refugees gave, when interviewed by our staff, for leaving Kosovo."[27] The letter also states that the Organisation "relied on a variety of sources to compile statistical data linked to the Kosovo refugee crisis. In

[23] Motion, Attachment Four, Kosovo Emergency Update, 30 March 1999, p. 1.
[24] Motion, Attachment Four, Kosovo Emergency Update, 13 April 1999, p. 1.
[25] Motion, Attachment Four, Kosovo Emergency Update, 19 May 1999, p. 2.
[26] Motion, Attachment Four, Kosovo Emergency Update, 1 June 1999, p. 2.
[27] Letter from the Witness to Mr. Graham T. Blewitt, 5 February 2002 (the "Letter"), p. 2.

addition to data collected by our [] field staff, we also used, after reviewing it for reliability and accuracy, information obtained from local government officials . . . and non-governmental organisations".[28] The letter, which the Prosecution refers to as the Witness's "statement",[29] was apparently written after the Office of the Prosecutor "asked for [his] assistance to explain data published by [the Organisation] in 1999 regarding refugees from Kosovo."[30] It concludes, "I understand that this letter, and the attached [] published documents to which it refers, may be submitted as evidence before the Tribunal. The information and explanations contained in this letter are true and correct to the best of my knowledge and belief."[31]

8. The Prosecution argues in the Motion that the proffered evidence is admissible because, in addition to satisfying the requirements of Rule 92 *bis*(B),[32] the material "does not contain any reference to any of the Accused"[33] and "is cumulative to [evidence] which will be presented live by other witnesses".[34] The Witness should not be required to attend for cross-examination, says the Prosecution, because the Witness "is not an eyewitness to any individual incident charged in the Indictment nor was [the Witness] present at any of the crime scenes",[35] and because the evidence "deals merely with [] statistical data regarding Kosovo Albanian refugees"[36] and "does not touch upon a 'live and important issue' between the parties."[37]

9. In their Response, the Accused "agree to the admission into evidence of Attachments 1, 2, and 3 only and [the Witness's] 92bis Statement, with redactions to all references to Attachment 4".[38] The Accused additionally agree to admitting this evidence without requiring the Witness to appear for cross-examination.[39] The Accused oppose, however, the admission of Attachment Four for the reasons set out in "all previous submissions made by the Accused in opposition to P473 *As*

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[28] *Ibid.*, p. 1. *See also ibid.*, p. 2 ("Our staff in the refugee camps estimated numbers of refugees. We checked our estimates by assessing the amount of food required each day, and in consultation with other humanitarian organisations working in the camps. Later, we attempted to estimate the number of Kosovars who returned to the province after the NATO forces entered in June 1999. These figures confirmed our initial assessments.").

[29] *See, e.g.*, Motion, para. 6.

[30] Letter, p. 1.

[31] *Ibid.*, p. 4.

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

[33] *Ibid.*, para. 6.

[34] *Ibid.*, para. 7. *See ibid.* (The Witness's "statement and related documentation corroborate in part the evidence that will be provided by expert witness Patrick Ball".), para. 8 (The Witness's "evidence is also cumulative to the expected oral testimony of crime-base witnesses who will describe their deportation from Kosovo."). *See also* Rule 92 *bis*(A)(i)(a) (stating that proffered written evidence is favoured for admission if it "is of a cumulative nature, in that other witnesses will give or have given oral testimony of similar facts").

[35] Motion, para. 11.

[36] *Ibid.*, para. 3. *See also ibid.*, para. 11 (The Witness's "evidence deals with the numbers of displaced persons and refugees, but draws no conclusions as to those responsible for this displacement.").

[37] *Ibid.*, para. 11.

[38] Response, para. 7. The Accused clarify that they "are not agreeing to the accuracy of the statistics compiled by the [Organisation] nor are they agreeing on or commenting on any inferences which may be drawn from those statistics." *Ibid.*, para. 8.

[39] *See ibid.*, para. 7 ("[I]t is unnecessary for [the Witness] to appear for cross-examination.").

Seen, As Told and P438 *Under Orders*."[40] The Accused contend that the attachment is "furthermore inadmissible under Rule 92bis because [it] purport[s] to present evidence which goes to proof of the acts and conduct of the Accused, in particular to the charges of superior authority under Article 7(3) and Joint Criminal Enterprise under Article 7(1) as alleged in the indictment."[41] Finally, the Accused submit that Attachment Four "relates to critical and live issues which are strongly contested by the Accused in relation to the charges against them under Article 7(1) and Article 7(3) of the Statute [regarding] their respective perspectives in politics, the military and the police".[42]

10. The Prosecution replies by advancing three arguments – two of which appear for the first time in the Reply – in support of admitting Attachment Four. The Prosecution first asserts that the Kosovo Emergency Updates that comprise the attachment "contain a type of overview evidence that is generally admissible under the Rules"[43] and that can be provided only in writing given the "limitations of any justice system and, in particular, the time constraints for the presentation of the Prosecution evidence in the instant case".[44] Second, the Prosecution acknowledges that Attachment Four contains hearsay accounts of displaced persons' experiences, but contends that the material should be admitted because it is relevant to certain counts in the Indictment, reliable due to its having been collected contemporaneously by the Organisation's workers and therefore is of sufficient probative value.[45] Third, the Prosecution reaffirms its previous contention that the material in the attachment does not concern the acts and conduct of the Accused.[46] Although the Prosecution repeats its request that the Motion be granted, it states that, "should the Trial Chamber question how these reports were produced or how the information was collected, it should order that this witness be called for cross-examination, rather than exclude [the] evidence".[47]

Discussion

11. It is plain that the Witness's letter was prepared for possible use in litigation at the Tribunal.[48] Consequently, it must meet the requirements of Rule 92 *bis* before the Trial Chamber

[40] *Ibid.*, para. 11.
[41] *Ibid.*, para. 12.
[42] *Ibid.*, para. 13.
[43] Reply, para. 6.
[44] *Ibid.*
[45] *See ibid.*, para. 8.
[46] *See ibid.*, para. 10.
[47] *Ibid.*, para. 9. *See* Motion, para. 12 ("The Prosecution will apply in due course for protective measures usually required by [the Organisation] for their staff members should this witness be asked to attend for cross-examination.").
[48] *See* Letter, pp. 1 ("Dear Mr. Blewitt: Your office has asked for my assistance to explain data published by [the Organisation] in 1999 regarding refugees from Kosovo."), 4 ("I understand that this letter, and the attached [] published documents to which it refers, may be submitted as evidence before the Tribunal.").

can decide whether to admit it into evidence.[49] Having reviewed the material, the Chamber finds that the letter and its attachments do not concern the "acts and conduct of the accused" as defined by the jurisprudence of the Tribunal.[50] With regard to form, the Chamber accepts that the letter is a "written statement" within the meaning of Rules 92 *bis*(A) and (B) despite the fact that it does not superficially resemble the kind of witness statement more routinely proffered for admission under Rule 92 *bis*. The important points are that the letter contains both the opinions of the Witness on matters other than the acts of the Accused, and a declaration that the "information and explanations contained in this letter are true and correct to the best of [the Witness's] knowledge and belief."[51] The Trial Chamber also accepts that the Witness's declaration was properly witnessed as required by Rules 92 *bis*(B)(i) and (B)(ii).[52] As exhibits linked to the letter, the four attachments need not conform to Rule 92 *bis*(B).[53] The letter and its attachments therefore satisfy the requirements of Rule 92 *bis*, and moreover are favoured for admission on account of being "of a cumulative nature, in that other witnesses will give . . . oral testimony of similar facts".[54]

12. Aside from the fact that the Accused raise no objection to the admission of Attachments One, Two and Three, or to the portions of the Witness's letter which relate to them,[55] the Trial Chamber finds that these documents satisfy the requirements of Rule 89. First, the statistical information they contain regarding both the internal and external displacement of Kosovo

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[49] *See supra* note 14 and accompanying text.

[50] *See supra* note 7 and accompanying text.

[51] Letter, p. 4.

[52] The written verification submitted by the Prosecution is an affidavit, on the Organisation's letterhead, of an attorney-at-law. Despite a typographical error noted in a subsequent certification of the attorney, her verification was made on 1 March 2002. The verification attests in full,

> I hereby declare that I have witnessed the declaration made by [the Witness], and confirm that the person who signed the statement is [the Witness], who in 1999 was the Head of the Unit at [the Organisation's] Headquarters responsible for the collection of statistical information relating to operations.
>
> I declare that [the Witness] has stated to me that the contents of the written statement are, to the best of [the Witness's] knowledge and belief, true and correct; and that [the Witness] was informed that if the content of the written statement is not true then [the Witness] may be subject to proceedings for giving false testimony.

The Trial Chamber accepts this written verification, especially given the absence of any clear rule or practice requiring a verification to be made contemporaneously with the declaration of the statement's author that the statement is true and correct to the best of the author's knowledge and belief. *Cf. Prosecutor v. Orić*, Case No. IT-03-68-T, Decision on Defence Motion to Admit the Evidence of a Witness in the Form of a Written Statement Pursuant to Rule 92*bis*, 17 January 2006, p. 2 (admitting a written statement, which lacked a valid witness verification, "with allowance . . . to file a revised written statement . . . which complies with the formal requirements of Rule 92*bis*(B)"); *Prosecutor v. Martić*, Case No. IT-95-11-T, Decision on Prosecution's Motions for the Admission of Written Evidence Pursuant to Rule 92 *bis* of the Rules, 16 January 2006, para. 11 ("The Prosecution has submitted seven written statements which have not been certified in accordance with Rule 92 *bis* (B). . . . The Chamber considers that in order to expedite the proceedings, the Prosecution is allowed to propose written statements for provisional admission pending their certification under Rule 92 *bis* (B).") (citation omitted).

[53] Written statements, proffered along with attached or associated other documents, are admitted pursuant to Rule 92 *bis* without subjecting such other documents to the requirements of Rule 92 *bis*(B). *See, e.g., Prosecutor v. Martić*, Case No. IT-95-11-T, Decision on Prosecution's Motions for the Admission of Written Evidence Pursuant to Rule 92 *bis* of the Rules, 16 January 2006, para. 37 (admitting into evidence "written statements and their associated documents").

[54] Rule 92 *bis*(A)(i)(a). *See supra* note 34 and accompanying text.

Albanians obviously is relevant to certain counts in the Indictment.[56] Second, they are probative insofar as they tend to prove the movement of people within and out from Kosovo,[57] which is a component of the Indictment's counts regarding forced displacement. Third, the material has sufficient indicia of reliability because it is based on data gathered by the Organisation and other government or professional organisations in the area and reviewed for reliability and accuracy,[58] and because it is of a body of information which the Organisation regularly prepares and publishes for public consumption rather than the prosecutor in a criminal proceeding.[59] Moreover, the Accused do not deny the movement of Kosovo Albanians both within and out from Kosovo,[60] which these attachments apparently document. Finally, the Trial Chamber does not consider that the probative value of these documents is "substantially outweighed by the need to ensure a fair trial."[61] Accordingly, the documents are suitable for admission into evidence.

13. The Prosecution submits that Attachment Four contains "a type of overview evidence that is generally admissible under the Rules"[62] but, as the Appeals Chamber has noted, "[w]hether it is appropriate in the particular case for the evidence to be admitted will depend upon the circumstances of that case."[63] The Trial Chamber notes that Attachment Four was admitted in the *Milošević* case, but does not consider that fact dispositive here. The accused in that proceeding represented himself, and neither he nor the *amicus curiae* counsel submitted any written opposition to the prosecution's motion to admit the Witness's evidence.[64] In any event, that Trial Chamber admitted the material without cross-examination because "the witness deals purely with the fact of displacement and not with the reasons for it. . . . The statement will be admitted as evidence of the statistics of displacement and the fact that people were displaced. It will not be admitted as evidence of why they were displaced."[65] This Trial Chamber considers that Attachment Four

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[55] *See* Response, para. 7.

[56] *See* (Redacted) Third Amended Joinder Indictment, 21 June 2006 (the "Indictment"), Count One (Deportation), Count Two (Other Inhumane Acts (Forcible Transfer)), Count Five (Persecutions on political, racial and religious grounds).

[57] *See* Black's Law Dictionary (8th ed. 2004) (defining "probative evidence" as "[e]vidence that tends to prove or disprove a point in issue.").

[58] *See supra* note 28 and accompanying text.

[59] *See* Letter, pp. 1 ("As part of its mandate to protect and coordinate the delivery of humanitarian aid to persons affected by the armed conflict in the former Yugoslavia, [the Organisation] has been responsible to collect from time to time data about the number and condition of displaced persons and refugees so affected. Ordinarily, [the Organisation] publishes that data."), 3 ("Many of our records on the Kosovo crisis, which were published . . . , were made available on our website.").

[60] *See* Response, para. 8 (noting that "the Accused are not agreeing to the accuracy of the statistics compiled by the [Organisation]", but not that the Accused reject the contention that Kosovo Albanians moved both within and out from Kosovo during the period of time relevant to this case).

[61] Rule 89(D). *See Milošević* Appeals Decision, para. 21 ("[W]hat has been called summarising evidence – the summarising of material which is relevant to the issues of the case [–] has been admitted on many occasions in appropriate cases.").

[62] Reply, para. 6.

[63] *Milošević* Appeals Decision, para. 21.

[64] *See Prosecutor v. Milošević*, Case No. IT-02-54-T, Transcript of Proceedings, T. 3558-3559 (22 April 2002).

[65] *Ibid.*, T. 3560 (22 April 2002).

clearly addresses the purported reasons for the displacement of Kosovo Albanians, despite the Prosecution's submission that the Witness's evidence "draws no conclusions as to those responsible for this displacement."[66] If, by this statement, the Prosecution means to offer Attachment Four to show only the fact of displacement, rather than the reasons for it, the Chamber notes that the Prosecution has not asserted that Attachments One, Two and Three are unsuited to this task.

14. The Trial Chamber recently excluded two reports, *Kosovo/Kosova: As Seen, As Told* and *Under Orders: War Crimes in Kosovo*, from evidence for the following reasons:

> With regard to the excerpts of the challenged reports that are based on interviews and statements of persons who were reporting alleged crimes during the indictment period, [] these organisations' careful methods can at best assure the *accuracy* of the process for recording the information contained in the eventual report, not the *reliability* of the material contents for the purposes of use in criminal proceedings. While both the challenged reports use extensive footnotes throughout these excerpts, they do not identify the persons interviewed, leaving the sources of this critical information largely anonymous. Moreover, Ms. Mitchell testified that she was in a supervisory role with regard to the collection and analysis of the information gathered from persons in Albania and Macedonia; she did not state that she ever took any of these statements herself. . . . Not having had the opportunity of hearing any of the persons upon whose statements these excerpts are based, the Chamber is not in a position to assess the reliability of the factual contentions contained therein.[67]

Attachment Four, like the two reports, does not provide the Trial Chamber with any basis for assessing the reliability of its contents. Additionally, the attachment, like the reports, "do[es] not identify the persons interviewed, leaving the sources of [its] critical information largely anonymous." The Witness, like Ms. Mitchell, played "a supervisory role with regard to the collection and analysis of the information gathered from persons" and "did not state [in the letter] that [the Witness] ever took any of these statements". These similarities alone likely would be enough to preclude the Trial Chamber from finding Attachment Four reliable, but there is one salient dissimilarity which underscores the Prosecution's failure to establish the reliability of the attachment in question. Unlike the evidence proffered through Ms. Mitchell and Mr. Abrahams, Attachment Four is not presented along with a substantive description of the Organisation's "methods . . . for recording the [testimonial] information contained in [the attachment]." The methods for calculating the attachment's statistical information are described,[68] but the Witness's

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[66] Motion, para. 11.

[67] Decision on Evidence Tendered Through Sandra Mitchell and Frederick Abrahams, 1 September 2006, para. 21 (emphasis in original; citations omitted).

[68] *See* Motion, para. 6 ("In [the] statement, [the Witness] describes the methodology applied by [the Organisation] to compile statistical data on refugees. [The Witness] also explains the statistics on the number of displaced persons in Kosovo in 1998 and 1999 and on the number of refugees who left Kosovo between January and June 1999.") (citation omitted). *See also* Letter, pp. 1-2.

letter states simply that the Kosovo Emergency "[U]pdates set out, *inter alia*, the reasons refugees gave, when interviewed by our staff, for leaving Kosovo."[69] There is no explanation of the conditions under which the interviews occurred, the amount of time they lasted, the number of people interviewed, the questions asked, the consistency with which the questions were posed or any number of other details which would enable the Trial Chamber to decide upon Attachment Four's reliability. In addition, the fact that the statements in the attachment constitute second-hand, or even more removed, hearsay seriously weakens whatever probative value they might otherwise possess.[70] The Prosecution therefore has not demonstrated that the attachment meets the requirements of Rule 89. Assuming, for the sake of argument, that it were admissible, the Trial Chamber would decline to admit the attachment because under the circumstances fairness would require that those who made the accusations concerning Serb forces – or, at the very least, those who claim to have heard such accusations made – appear for cross-examination, and that is not presented as an option.[71]

15. Attachment Four as proffered therefore is inadmissible, whereas the other attachments, as well as the portions of the Witness's letter which do not refer to Attachment Four, are admissible. The Trial Chamber declines, however, to admit the material into evidence at this time. It is clear from the Prosecution's submissions that it desires the identities of both the Witness and the Organisation to be confidential,[72] but the Prosecution has not asked that the Witness's material be admitted as a confidential exhibit. Given the Tribunal's policy favouring transparency,[73] the Trial Chamber will not admit material into evidence under seal absent good cause being shown pursuant to an applicable rule.

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[69] Letter, p. 2. The Prosecution submits that the "information [was] provided by refugees at border crossings", Reply, para. 4, "shortly after these refugees had experienced traumatic events", *ibid.*, para. 8, but this description is not sufficiently detailed.

[70] *See, e.g., Prosecutor v. Aleksovski*, Case No. IT-95-14/1-AR73, Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 February 1999, para. 15 ("The question "whether [] hearsay is 'first-hand' or more removed" is "relevant to the probative value of the evidence".). *See also supra* note 11 and accompanying text.

[71] *See Milošević* Appeals Decision, para. 22.

[72] In addition to the fact that the Motion and Reply – as well as the Accused's Response – are marked "confidential", the Prosecution has indicated that it desires the identities of both the Witness and the Organisation to be confidential. *See supra* note 4 and accompanying text.

[73] *See, e.g.,* Statute of the Tribunal, art. 20(4) ("The hearings shall be public unless the Trial Chamber decides to close the proceedings in accordance with its rules of procedure and evidence."); Rules 53(A) ("In exceptional circumstances, a Judge or a Trial Chamber may, in the interests of justice, order the non-disclosure to the public of any documents or information until further order."), 69(A) ("In exceptional circumstances, the Prosecutor may apply to a Judge or Trial Chamber to order the non-disclosure of the identity of a victim or witness who may be in danger or at risk until such person is brought under the protection of the Tribunal."), 75(A) ("A Judge or a Chamber may, *proprio motu* or at the request of either party, or of the victim or witness concerned, or of the Victims and Witnesses Section, order appropriate measures for the privacy and protection of victims and witnesses, provided that the measures are consistent with the rights of the accused."); 78 ("All proceedings before a Trial Chamber, other than deliberations of the Chamber, shall be held in public, unless otherwise provided.").

Disposition

16. For the reasons above, pursuant to Rules 54, 89 and 92 *bis*, the Trial Chamber **DENIES** the Motion and **ORDERS** as follows:

(1) Attachment Four and the portions of the Witness's letter which refer to it are inadmissible;

(2) Attachments One, Two and Three, and the portions of the Witness's letter which do not refer to Attachment Four, are admissible but are not admitted into evidence at this time;

(3) The Prosecution may submit a motion to admit the admissible evidence, as either a public or confidential exhibit, pursuant to an applicable rule.

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

Dated this thirteenth day of September 2006
At The Hague,
The Netherlands.

Judge Iain Bonomy
Presiding

[Seal of the Tribunal]