

UNITED
NATIONS



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

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

Date: 3 November 2009

Original: English

IN TRIAL CHAMBER II

Before: Judge Kimberly Prost, Presiding
Judge Christophe Flügge
Judge Antoine Kesia-Mbe Mindua

Registrar: Mr. John Hocking

Decision of: 3 November 2009

PROSECUTOR

v.

ZDRAVKO TOLIMIR

PUBLIC

**DECISION ON PROSECUTION'S MOTION FOR ADMISSION OF
EVIDENCE PURSUANT TO RULE 92 *ter* WITH APPENDICES A - C**

Office of the Prosecutor
Mr. Peter McCloskey

The Accused
Zdravko Tolimir

THIS TRIAL CHAMBER of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 (“Tribunal”) is seised of the “Prosecution’s Motion for Admission of Evidence Pursuant to Rule 92 *ter* with Appendices A - C”, filed confidentially on 18 March 2009 (“Motion”),¹ and hereby renders its decision thereon.

I. INTRODUCTION

1. On 30 July 2009, the Accused Zdravko Tolimir (“Accused”) submitted the confidential “Response by Zdravko Tolimir to 92 *ter* Prosecution Motion” (“Response”), which was filed on 24 July 2009.²

2. On 31 July 2009, the Prosecution filed the “Prosecution’s Request for Leave to Reply to the Response by Zdravko Tolimir to the 92 *ter* Prosecution Motion” (“Reply”), whereby it informed the Chamber of its request to withdraw its application under Rule 92 *ter* of the Rules of Procedure and Evidence (“Rules”) with respect to two prospective witnesses.³

3. In the Motion, the Prosecution seeks the admission of written evidence of forty witnesses pursuant to Rule 92 *ter*, along with the exhibits related to the written evidence. Almost all of the forty proposed Rule 92 *ter* witnesses have testified previously in at least one trial before the Tribunal, thirty-four having testified in *Prosecutor v. Popović, et al.* (“*Popović*”). Of the thirty-four witnesses who testified in *Popović*, the Prosecution requests the admission of the transcripts of nineteen witnesses who testified *viva voce*,⁴ as well as the admission of the written evidence of fifteen witnesses who appeared for cross-examination. Three of the fifteen had previously testified *viva voce* in *Prosecutor v. Blagojević and Jokić* (“*Blagojević*”),⁵ two had testified *viva voce* in *Prosecutor v. Krstić* (“*Krstić*”),⁶ while ten had not testified prior to *Popović*.⁷ Finally, the

¹ Appendix A contains a chart outlining the topics and relevance of each witness’ testimony, along with a list of the exhibits submitted in connection with each transcript or witness statement. Appendix B includes an updated Rule 65 *ter* Witness List, and Appendix C consists of a CD containing the evidence itself.

² The Accused was granted an extension of time to file his response until 24 July 2009. Decision on Tolimir’s Motion for Extension of Time Limit for Filing a Response to the Prosecution’s 92 *ter* Motion, 16 June 2009.

³ Witness No. 4 and Witness No. 187, respectively. Accordingly, this Decision will not address the Prosecution’s Motion with respect to these two witnesses. The Prosecution did not advance any substantive arguments in its Reply, but referred instead to the arguments advanced in the Motion.

⁴ Witness No. 15, Witness No. 19, Witness No. 29, Witness No. 30, Witness No. 31, Witness No. 32, Witness No. 34, Witness No. 35, Witness No. 39, Witness No. 43, Witness No. 44, Witness No. 81, Witness No. 82, Witness No. 83, Witness No. 121, Witness No. 131, Witness No. 136, Witness No. 171, and Witness No. 172.

⁵ Witness No. 26, Witness No. 37, and Witness No. 103.

⁶ Witness No. 55 and Witness No. 96.

⁷ Witness No. 42, Witness No. 91, Witness No. 93, Witness No. 95, Witness No. 108, Witness No. 109, Witness No. 112, Witness No. 114, Witness No. 115 and Witness No. 126.

Prosecution submits the transcripts of four witnesses' *viva voce* testimony in *Krstić*, which was admitted pursuant to Rule 92 *bis* (D) in *Popović*.⁸

4. In addition, the Prosecution seeks the admission of the written evidence of two witnesses who have not testified previously before the Tribunal. The Prosecution has submitted the witness statement of one and the transcript of the witness interview of the other.⁹

5. Finally, the Prosecution seeks leave to exceed the word limit for motions,¹⁰ as well as leave to amend its Rule 65 *ter* Witness List in order to reflect recent changes.¹¹ Specifically, the Prosecution seeks leave to (i) withdraw Witness No. 27 and Witness No. 98 from its Rule 65 *ter* list; (ii) convert Witness No. 99 and Witness No. 185 from Rule 92 *bis* witnesses to *viva voce* witnesses; (iii) convert Witness No. 15, Witness No. 42, Witness No. 43, Witness No. 44, Witness No. 60, Witness No. 81, Witness No. 82 and Witness No. 83 from Rule 92 *bis* witnesses to Rule 92 *ter* witnesses; iv) correct several typographical errors outlined in the Motion.¹²

II. APPLICABLE LAW

6. Rule 92 *ter* provides:

- (A) A Trial Chamber *may* admit, in whole or in part, the evidence of a witness in the form of a written statement or transcript of evidence given by a witness in proceedings before the Tribunal, under the following conditions:
- (i) the witness is present in court;
 - (ii) the witness is available for cross-examination and any questioning by the Judges; and
 - (iii) the witness attests that the written statement or transcript accurately reflects that witness' declaration and what the witness would say if examined.
- (B) Evidence submitted under paragraph (A) may include evidence that goes to the proof of the acts and conduct of the accused as charged in the indictment.¹³

The Chamber thus considers that Rule 92 *ter* affords the Chamber discretion as to whether to admit evidence proffered pursuant to this rule.¹⁴

7. Although Rule 92 *ter* does not address the admission of exhibits explicitly, the Tribunal's jurisprudence also provides for the admission of exhibits submitted with the written statement or

⁸ Witness No. 53, Witness No. 59, Witness No. 60 and Witness No. 62.

⁹ Witness No. 33 and Witness No. 137.

¹⁰ Motion, para. 4.

¹¹ Motion, para. 26.

¹² *Ibid.*

¹³ Emphasis added.

transcript which form an “inseparable and indispensable part” of the witness’ testimony.¹⁵ For this requirement to be satisfied, the exhibit must have been discussed within the testimony and it must be shown that, without the document, the witness’ testimony would lose probative value or become incomprehensible.¹⁶

8. Rule 89 (C), which requires that evidence be relevant and have probative value, and Rule 89 (D), which permits the exclusion of evidence if its probative value is substantially outweighed by the need to ensure a fair trial, also apply to the admission of evidence pursuant to Rule 92 *ter*.¹⁷

III. SUBMISSIONS OF THE PARTIES

9. The Prosecution seeks the admission of a variety of written evidence pursuant to Rule 92 *ter*, and indicates a general intent to conduct a limited direct examination in order to clarify or supplement portions of the witnesses’ written evidence.¹⁸ The Prosecution contends that the evidence submitted, much of which was admitted in *Krstić, Blagojević* and/or *Popović*, respectively, is both relevant to and probative of the allegations as charged in the Indictment.¹⁹ In the Prosecution’s view, those proceedings “involved virtually identical events” as those described in the Indictment against the Accused.²⁰

10. Moreover, the Prosecution avers that the requirements of Rule 92 *ter* are met, as the witnesses will be present in court, will attest that their written evidence is accurate and reflects what they would say if examined, and will be available for cross-examination, as well as for questioning by the Chamber.²¹ Accordingly, the Prosecution argues that the Accused will not suffer any prejudice should the Chamber decide to admit this evidence pursuant to Rule 92 *ter*.²²

11. The Prosecution also requests the admission of all exhibits admitted in *Krstić, Blagojević* and *Popović* “as a result of” the prior testimony. According to the Prosecution, these exhibits “form

¹⁴ *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Decision on Motion to Convert *Viva Voce* Witnesses to Rule 92 *ter* Witnesses, 31 May 2007, p. 4.

¹⁵ *Prosecutor v. Đorđević*, Case No. IT-05-87/1-T, Decision on Prosecution’s Motions for Admission of Evidence Pursuant to Rule 92 *ter* (“*Đorđević* First Decision”), 10 February 2009, para. 5; *Prosecutor v. Lukić and Lukić*, Case No. IT-98-32/1-T, Decision on Confidential Prosecution Motion for the Admission of Prior Testimony with Associated Exhibits and Written Statements of Witnesses Pursuant to Rule 92 *ter* (“*Lukić* Decision”), 9 July 2008, para. 15; *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-T, Decision on Admission of Written Statements, Transcripts and Associated Exhibits Pursuant to Rule 92 *bis* (“*Milošević* Decision”), 22 February 2007, p. 3; *Prosecutor v. Popović, et al.*, Case No. IT-05-88-T, Decision on Prosecution’s Confidential Motion for Admission of Written Evidence in Lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis* (“*Popović* Rule 92 *bis* Decision”), 12 September 2006, paras. 22-24.

¹⁶ *Đorđević* First Decision, para. 4; *Lukić* Decision, para. 15; *Milošević* Decision, para. 23.

¹⁷ *Đorđević* First Decision, para. 6; *Lukić* Decision, para. 20.

¹⁸ Motion, footnote 11.

¹⁹ Motion, para. 9.

²⁰ *Ibid.*

²¹ Motion, para. 7.

an integral part of the witness testimony” by virtue of the fact that they were admitted or discussed in previous trials in connection with the proffered witness transcripts or statements.²³

12. The Accused argues that the terms of Rule 92 *ter* do not permit the transcripts or statements to be admitted until the conditions prescribed by the Rule have been fulfilled.²⁴ He also submits that the Prosecution’s request is premature in relation to the exhibits. Citing the practice adopted by the Trial Chamber in *Prosecutor v. Đorđević*, whereby the decision on admitting the exhibits was made only once the witness had appeared for cross-examination,²⁵ the Accused submits that it would be proper to defer any decision on the accompanying exhibits until such time as the relevant witness appears in court.²⁶ In the view of the Accused, this practice is consistent with the fact that the admission of the transcripts/statements pursuant to Rule 92 *ter* is contingent upon the witness’ fulfilment of the Rule 92 *ter* requirements, as well as with the premise that exhibits admitted in relation to witness testimony may be – but are not necessarily – an essential part of the witness testimony.²⁷

IV. DISCUSSION

A. General requirements of Rule 92 *ter*

13. In light of the length and detail of the submissions required by the Motion, the Chamber considers that it would be in the interests of justice to grant the Prosecution’s request for leave to exceed the word limit.²⁸ The Chamber hereby grants such leave.

14. The Chamber is of the view that a precondition for the admission of written evidence pursuant to Rule 92 *ter* is the fulfilment of the requirements set out therein: the witness must (i) be present in court; (ii) be available for cross-examination and questioning by the Judges; and (iii) attest that the written evidence accurately reflects his or her declaration and what he or she would say if questioned directly. The Chamber therefore considers it appropriate to defer the admission of the transcripts/statements until the witnesses appear for cross-examination. Accordingly, all transcripts/statements deemed suitable for admission pursuant to Rule 92 *ter* in the present Decision

²² Motion, para. 12.

²³ Motion, para. 10.

²⁴ Response, para. 8. He also urges the Chamber to exercise caution, submitting that the Prosecution has not stated whether it seeks additional time for direct examination in order to clarify matters addressed in the witnesses’ prior testimony or statements. *Ibid.*, para. 5. The Chamber notes, however, that although the Prosecution has not made a particularised request with respect to each witness, the Prosecution has indicated a general intent to conduct a limited direct examination for the purposes of clarification. *See* para. 9, *supra*.

²⁵ *Prosecutor v. Đorđević*, Case No. IT-05-87/1-T, Decision on Prosecution’s Motion for Admission of Transcripts of Evidence in lieu of *viva voce* Testimony Pursuant to Rule 92 *bis*, 16 March 2009, para. 40.

²⁶ Response, para. 10.

²⁷ Response, para. 14.

will be provisionally admitted, pending the relevant witness' fulfilment of the Rule 92 *ter* conditions at trial.

B. Admission of Statements/Transcripts

15. The Trial Chamber will now address the Prosecution's request with respect to each set of witnesses, noting the Accused's specific objections thereto and the Trial Chamber's corresponding conclusion.

1. Expert Witness

16. The Prosecution proposes the admission of the written evidence of Witness No. 15 pursuant to Rule 92 *ter*. Witness No. 15 is an expert who was involved in the Prosecution's Srebrenica investigation, and has testified *viva voce* in *Krstić, Blagojević, and Popović*, respectively.²⁹ The Prosecution submits the transcript of Witness No. 15's testimony in *Popović*.³⁰ In addition, the Prosecution has submitted each of the expert reports and documents listed in connection with Witness No. 15 in its "Prosecution's Notice of Disclosure of Expert Witness Reports Pursuant to Rule 94 *bis* and Attached Appendices A and B" ("Rule 94 *bis* Notice") as exhibits in the present Motion.

17. Referring to the arguments articulated in the "Notice of Zdravko Tolimir pursuant to Rule 94 *bis* (B)"³¹ ("Rule 94 *bis* Response") and "Zdravko Tolimir's Response to the Prosecution's Motion for Admission of Written Evidence in lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis* Part One" ("Rule 92 *bis* Response Part One"),³² the Accused objects to the admission of Witness No. 15's expert reports, stating that he wishes to cross-examine the witness, and submitting that Witness No. 15's testimony is inadmissible as well.³³ According to the Accused, "the proper procedure to be followed when admitting expert witness evidence is laid down in Rule 94 *bis*," and the expert reports are therefore inadmissible under any other Rule.³⁴ Moreover, he claims, "if the reports by expert witnesses are not acceptable, then the transcripts . . . cannot be either".³⁵

²⁸ Motion, para. 4.

²⁹ Motion para. 14.

³⁰ Motion, Appendix A, p. 1.

³¹ Notice of Zdravko Tolimir Pursuant to Rule 94 *bis* (B), 22 May 2009 (BCS version), 25 June 2009 (English version).

³² Zdravko Tolimir's Response to the Prosecution's Motion for Admission of Written Evidence in lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis* Part One, 8 June 2009 (BCS version), 22 June 2009 (English version).

³³ Response, paras. 23-24.

³⁴ Zdravko Tolimir's Response to the Prosecution's Motion for Admission of Written Evidence in lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis* Part One" ("Rule 92 *bis* Response Part One"), 8 June 2009 (BCS version), 22 June 2009 (English version) para. 76.

³⁵ Rule 92 *bis* Response Part One, para. 83.

18. The Accused also asserts that Witness No. 15 will testify on issues of central importance to the Prosecution's case and "to which there is a very high degree of opposition", and submits that admitting the transcript of Witness No. 15's testimony in *Popović* "would merely introduce confusion and thereby tend to prolong the trial".³⁶

19. Having reviewed the transcript of Witness No. 15's testimony in *Popović*, the Chamber is satisfied that the testimony is relevant to and has probative value in relation to the present case. The Chamber notes that, as mentioned by the Accused, Witness No. 15 is listed in the Rule 94 *bis* Notice.³⁷ However, the Chamber considers that the Accused's reference to the arguments contained in his Rule 92 *bis* Response Part One is misplaced. Unlike Rule 92 *bis*, Rule 92 *ter* requires that the witness appear for cross-examination. Thus, the application of Rule 94 *bis*, which has been held by some Chambers to guarantee the Accused the right to cross-examine expert witnesses where the Accused does not accept the written evidence pursuant to Rule 94 *bis* (C),³⁸ would not conflict with the application of Rule 92 *ter*. Accordingly, the Accused's contention that the admissibility of the transcript of Witness No. 15's testimony in *Popović* depends upon the admissibility of Witness No. 15's expert reports is unsupported.

20. The Chamber therefore considers that it would be appropriate to admit the transcript of Witness No. 15's testimony in *Popović* pursuant to Rule 92 *ter*, and will do so pending fulfilment of the Rule 92 *ter* conditions at trial.

2. United Nations Dutch Battalion Witnesses

21. The Prosecution seeks the admission of the written evidence of two members of the United Nations Dutch Battalion ("DutchBat").³⁹ Witness No. 19 testified *viva voce* in *Krstić, Blagojević* and *Popović*, while Witness No. 26 testified *viva voce* in *Blagojević* and was called for cross-examination in *Popović*.

22. According to the Prosecution, the testimony of Witness No. 19 addressed the issues of the conditions in the Srebrenica enclave prior to its fall, including, *inter alia*, (i) VRS restrictions on humanitarian aid and VRS shelling of the enclave and DutchBat positions; (ii) the conditions and events at Potočari following the fall of the enclave, including the separation of Muslim men, the forcible transfer of Muslim women, elderly men, and children; and (iii) reports of various

³⁶ Response, paras. 25-27.

³⁷ Prosecution's Notice of Disclosure of Expert Witness Reports Pursuant to Rule 94 *bis* and Attached Appendices A and B, 13 March 2009.

³⁸ See, e.g. *Popović* Rule 92 *bis* Decision, para. 52.

³⁹ Witness No. 19 and Witness No. 26. Motion, para. 15.

executions at Potočari.⁴⁰ Similarly, the Prosecution indicates that the testimony of Witness No. 26 pertains to (i) the VRS attack on the Srebrenica enclave; (ii) the conditions and events at Potočari following the fall of the enclave, including the separation of Muslim men, the forcible transfer of Muslim women, elderly men, and children; and (iii) the execution of a Muslim man in civilian clothes at Potočari.⁴¹

23. The Accused has not raised any specific objection to the admission of these transcripts pursuant to Rule 92 *ter*.

24. Having reviewed the transcripts of Witness No. 19 and Witness No. 26 in *Popović*, the Chamber is satisfied that they are relevant and have probative value in relation to the present case. The Chamber therefore considers that it would be appropriate to admit the transcripts of Witness No. 19 in *Popović* and Witness No. 26 in *Popović* and *Blagojević* pursuant to Rule 92 *ter*, and will do so pending fulfilment of the Rule 92 *ter* conditions at trial.

3. UNPROFOR Officers

25. The Prosecution moves for the admission of the written evidence of seven UNPROFOR officers who were present in the Žepa enclave during the time period relevant to the Indictment.⁴² The Accused does not object to any of the UNPROFOR officers individually, but submits that the testimonies of Witness No. 29, Witness No. 30, Witness No. 31 and Witness No. 34 “are [all] of particular significance”, especially in relation to paragraph 60 of the Indictment. The Accused argues that “the importance of the evidence for reaching a decision on the individual criminal liability of an accused is . . . a powerful factor against their admission pursuant to Rule 92 *ter*”.⁴³ Witness No. 29, Witness No. 30, Witness No. 31, Witness No. 32, Witness No. 34 and Witness No. 35 testified *viva voce* in *Popović*.

26. Witness No. 29 was the commander of the UNPROFOR Bosnia-Herzegovina during the time period relevant to the Indictment.⁴⁴ He gave extensive testimony in *Popović* regarding the VRS hierarchy and command, as well as his personal observations and communications with them. In particular, he testified regarding meetings allegedly attended by General Mladić and the Accused in March, April and August 1995,⁴⁵ and gave his opinion regarding the Accused’s level of

⁴⁰ Motion, Appendix A, p. 1.

⁴¹ Motion, Appendix A, p. 2.

⁴² Witness No. 29, Witness No. 30, Witness No. 31, Witness No. 32, Witness No. 33, Witness No. 34 and Witness No. 35. Motion, para. 16.

⁴³ Response, para. 29.

⁴⁴ Appendix A, p. 2.

⁴⁵ Appendix A, pp. 2-3.

involvement in Žepa.⁴⁶ Witness No. 32 travelled with Witness No. 29 to Žepa during the relevant time period,⁴⁷ and was present at meetings between UNPROFOR representatives and VRS officers, including the Accused.⁴⁸

27. Witness No. 30 served as Chief of Staff of UNPROFOR from February to September 1995.⁴⁹ His testimony in *Popović* addressed the structure of the VRS Main Staff and restrictions on UNPROFOR's freedom of movement within the Srebrenica enclave. Witness No. 30's testimony also pertained to his contact with high-ranking members of the VRS, including the Accused.⁵⁰

28. Witness No. 31 served as a liaison between the UNPROFOR and the VRS from April 1995 and was in Žepa from 25 July to 2 August 1995.⁵¹ He gave testimony in *Popović* regarding the conditions in Žepa during the evacuation, as well as the negotiations on prisoner exchanges. Witness No. 30 also testified extensively regarding the personal involvement of the Accused in Žepa.⁵²

29. Witness No. 34 served as a military assistant to the UNPROFOR Sector Sarajevo commander and was in Žepa from 26-28 July 1995.⁵³ He testified that he met with the Accused at 5:20 p.m. on 28 July 1995 at checkpoint 2, and that the Accused had explained that the civilians taken from the last two convoys on the evening of 27 July 1995 and 28 July 1995 were military age men who had lied about their age in order to escape.⁵⁴

30. Witness No. 35 also served with UNPROFOR and was present in Žepa on 20 and 21 July 1995 and again during the transportation.⁵⁵ Witness No. 35 testified that the Accused supervised the transportation of the Žepa Muslim population⁵⁶ and that, when asked, the Accused gave permission for the transport of lightly wounded men of military age on the last bus that left Žepa town in the mid-afternoon of 27 July 1995.⁵⁷

31. Having reviewed the transcripts of these witnesses' testimony in *Popović*, the Chamber is convinced that they are both relevant to and have probative value in relation to the present trial. Moreover, the detailed and extensive nature of these witnesses' testimony in *Popović* makes the

⁴⁶ Appendix A, p. 3.

⁴⁷ Appendix A, p. 4.

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

⁵¹ Appendix A, p. 3.

⁵² Appendix A, pp. 3 – 4.

⁵³ *Ibid.*

⁵⁴ Appendix A, p. 6.

⁵⁵ *Ibid.*

⁵⁶ Appendix A, p.7.

⁵⁷ *Ibid.*

relevant transcripts appropriate for admission under Rule 92 *ter*. While the evidence addresses the alleged acts and conduct of the Accused, it is still appropriate to admit the *Popović* transcripts under this rule, provided that the witnesses appear for cross-examination at trial and fulfil the remaining conditions set out in Rule 92 *ter* at that time.

32. Witness No. 33, on the other hand, has not previously testified before the Tribunal, and the Prosecution submits a witness statement pursuant to Rule 92 *ter*. Witness No. 33 was the UNPROFOR Joint Commission Officer (“JCO”) Commander and travelled to Žepa during the relevant time period as well.⁵⁸ Witness No. 33 was present at meetings attended by General Mladić and the Accused and observed that the Accused and Mladić “appeared to have a close relationship”.⁵⁹ Witness No. 33 also described the transportation of the Bosnian population in Žepa, and stated that the Accused was in charge.⁶⁰

33. Having reviewed Witness No. 33’s statement, the Chamber is convinced that it is both relevant to and has probative value in relation to the present trial. However, the Chamber is of the view that, since Witness No. 33 has not been examined in chief or cross-examined in court previously, and because his evidence is of direct relevance to the Accused, permitting the statement to be admitted in lieu of *viva voce* evidence would not be appropriate.

34. For the reasons set out in the preceding paragraphs, the Prosecution’s request is denied in relation to Witness No. 33, who should be called to testify *viva voce*. The transcripts of the remaining witnesses will be admitted, pending fulfilment of the additional Rule 92 *ter* criteria at trial.

4. Bosnian Muslim Witnesses

35. The Prosecution moves for the admission of the written evidence of thirteen Bosnian Muslim survivors of the events in Srebrenica who have previously testified before the Tribunal.⁶¹ Five of these witnesses testified *viva voce* in *Popović*.⁶² Three were called only for cross-examination in *Popović*, and the Prosecution has submitted their *Popović* transcripts, as well as their *Blagojević* transcript,⁶³ *Krstić* transcript⁶⁴ or *Krstić* witness statement⁶⁵ respectively. The

⁵⁸ Appendix A, pp. 4-5.

⁵⁹ *Ibid.*

⁶⁰ Appendix A, p. 5.

⁶¹ Motion, paras. 18-19.

⁶² Witness No. 39, Witness No. 43, Witness No. 44, Witness No. 81, Witness No. 82 and Witness No. 83.

⁶³ Witness No. 37.

⁶⁴ Witness No. 55.

⁶⁵ Witness No. 42.

remaining five witnesses testified *viva voce* in *Krstić*, and the *Krstić* transcripts proffered pursuant to the instant motion were admitted without cross-examination pursuant to Rule 92 *bis* in *Popović*.⁶⁶

36. The Prosecution submits that these witnesses' testimony concerns their capture, detention, and attempted execution, and therefore goes to proof of the crime base.⁶⁷ The Prosecution also specifies that none of their testimony pertains to the acts and conduct of the Accused.⁶⁸ The Accused has not raised any specific objections to these witnesses.

37. Having reviewed these transcripts and the witness statement, the Chamber is convinced that they are relevant to and probative of the allegations contained in the Indictment. The Chamber is persuaded that it would be appropriate to admit these transcripts and the witness statement pursuant to Rule 92 *ter*, provided that the remaining conditions set out in the Rule are fulfilled when the witness appears for cross-examination at trial. The thirteen transcripts and statements will thus be admitted, pending fulfilment of the additional Rule 92 *ter* criteria at trial.

5. Bosnian Muslim Intercept Operators

38. The Prosecution seeks the admission of the written evidence of ten Bosnian Muslim intercept operators who have previously testified before the Tribunal.⁶⁹ Four of these witnesses testified *viva voce* in *Popović*, and the Prosecution seeks the admission of the relevant *Popović* transcripts.⁷⁰ Three were called only for cross-examination in *Popović*, and the Prosecution has submitted their *Popović* transcripts, as well as either their *Blagojević* transcript⁷¹ or their witness statement,⁷² respectively.

39. According to the Prosecution, these witnesses' testimony pertains to the procedures used to scan and monitor VRS communications; the interception and recording of conversations between Bosnian Serb personnel, including the Accused; and the transcription of such conversations.⁷³ The Accused has not raised any specific objection in relation to these ten witnesses.

40. Having reviewed these transcripts and witness statements, the Chamber is convinced that they are relevant to and probative of the allegations contained in the Indictment. The Chamber is persuaded that it would be appropriate to admit these transcripts and witness statements pursuant to Rule 92 *ter*, provided that the remaining conditions set out in the Rule are fulfilled when the witness

⁶⁶ Witness No. 53, Witness No. 59, Witness No. 60, and Witness No. 62.

⁶⁷ Motion, para. 18.

⁶⁸ Motion, para. 18.

⁶⁹ Motion, para. 20.

⁷⁰ Witness No. 91, Witness No. 93, Witness No. 95, and Witness No. 96.

⁷¹ Witness No. 103.

⁷² Witness No. 108, Witness No. 109, Witness No. 112, Witness No. 114, and Witness No. 115.

appears for cross-examination at trial. The ten transcripts and statements will therefore be admitted, pending fulfilment of the additional Rule 92 *ter* criteria at trial.

6. VRS and MUP Witnesses

41. The Prosecution moves for the admission of seven VRS and MUP witnesses. The testimony of these witnesses addresses, *inter alia*, specific executions in which VRS and MUP forces participated, the operation of VRS security and intelligence organs, and the involvement of the Accused in the operation of such organs, as well as in the process of controlling UNPROFOR and humanitarian aid supplies.⁷⁴ Four of these witnesses testified *viva voce* in *Popović*, and the Prosecution seeks the admission of their *Popović* transcripts here.⁷⁵ One witness was called only for cross-examination in *Popović*,⁷⁶ and thus the Prosecution has submitted both the *Popović* transcript and the witness statement, which was admitted pursuant to Rule 92 *bis* in *Popović*. Finally, the Prosecution seeks the admission of the transcript of one witness' interview with the Prosecution pursuant to Rule 92 *ter*.⁷⁷ The Accused has not raised any specific objection in relation to any of these witnesses.

42. Having reviewed the transcripts and witness statements, the Chamber is convinced that, with two exceptions set out below, they are relevant to and probative of the allegations contained in the Indictment. The Chamber is also persuaded that it would be appropriate to admit the relevant transcripts and witness statements pursuant to Rule 92 *ter*, provided that the remaining conditions set out in the Rule are fulfilled when the witness appears for cross-examination at trial.

43. Witness No. 136 and Witness No. 137 each gave evidence in *Popović* regarding executions which allegedly took place at Bišina. The Chamber notes that the Bišina killings are not a part of the Indictment against the Accused in the present case. Furthermore, the testimony of these witnesses was admitted in *Popović* on reopening only as "relevant and probative as to [the Accused] Popović's knowledge, intent, and 'pattern of conduct' during the period relevant to the executions which are alleged in the Indictment".⁷⁸ Accordingly, the Chamber considers that the Prosecution has failed to demonstrate the relevance of these witnesses' testimony in relation to the present case, and that the Motion should be denied with respect to these two witnesses.

⁷³ Motion, para. 20.

⁷⁴ Motion, para. 21.

⁷⁵ Witness No. 121, Witness No. 131, Witness No. 136, Witness No. 171, and Witness No. 172.

⁷⁶ Witness No. 126.

⁷⁷ Witness No. 137.

⁷⁸ *Prosecutor v. Popović, et al.*, Case No. IT-05-88/T, Decision on Motion to Reopen Prosecution Case, 9 May 2008, para. 39.

44. For these reasons, the Prosecution's request is denied in relation to Witness No. 136 and Witness No. 137. The transcripts of the remaining witnesses will be admitted, pending fulfilment of the additional Rule 92 *ter* criteria at trial.

C. Admission of Exhibits

45. The Chamber is also of the view that as a general matter, exhibits admitted "as a result of" prior testimony are integral and necessary for the Chamber to fully comprehend the transcripts. The Chamber notes, however, that the Prosecution has submitted a number of exhibits, including documents, photos and videos, which were used with the proposed Rule 92 *ter* witnesses in previous trials, but were either admitted through a different witness or ultimately only marked for identification.

46. The Chamber considers that it would be inappropriate to admit exhibits which were not, in fact, admitted "as a result of" the testimony in previous trials, particularly in the absence of a specific showing that such exhibits are essential for the comprehension of the relevant transcripts. Accordingly, exhibits which (i) were admitted through a different witness, (ii) were only marked for identification in previous trials, or (iii) form part of a larger video exhibit which was admitted through a different witness will be marked for identification pursuant to the present Decision.

47. As indicated, subject to the exceptions outlined above, the exhibits admitted as a result of the testimony in previous cases will be admitted in this case once the requirements under Rule 92 *ter* are met. While the Chamber will not entertain any blanket objections to those exhibits during the trial process, the Chamber will hear any specific objections raised by the Accused in relation to a particular exhibit when the Prosecution seeks to tender the relevant transcript/statement and exhibits at trial. A decision on the admission of such exhibits pursuant to Rule 92 *ter* will be made at that time.

V. DISPOSITION

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

1. To grant the Prosecution's request to exceed the word limit;
2. To grant the Prosecution's request to withdraw its Rule 92 *ter* request in relation to Witness No. 4 and Witness No. 187;
3. To grant the Prosecution's request to amend its Rule 65 *ter* Witness List;

4. To provisionally admit the transcripts and/or witness statements of the following proposed witnesses, pending compliance with the conditions stipulated in Rule 92 *ter* of the Rules at trial:

Witness No(s). 15, 19, 26, 29, 30, 31, 32, 34, 35, 37, 39, 42, 43, 44, 53, 55, 59, 60, 62, 81, 82, 83, 91, 93, 95, 96, 103, 108, 109, 112, 114, 115, 121, 126, 131, 171 and 172;

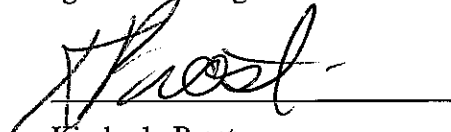
5. To provisionally admit those exhibits which were admitted through the above-mentioned witnesses in previous trials;

6. To mark for identification all exhibits which were discussed but not admitted through the above-mentioned witnesses in previous trials;

ORDERS the Prosecution, upon the witness' appearance in Court, to submit a list of the exhibits which it proposes to admit into evidence in association with the relevant witness, clearly indicating (i) which exhibits were admitted through the relevant witness in previous trials, (ii) which exhibits were discussed with the relevant witness, but admitted through another in previous trials, and (iii) which exhibits were discussed with the relevant witness, but were not admitted in previous trials;

DENIES the Motion in all other respects.

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



Kimberly Prost
Presiding

Dated this 3rd day of November 2009
At The Hague
The Netherlands

[Seal of the Tribunal]