

**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: 25 November 2009

Original: English

IN TRIAL CHAMBER II

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

Registrar: Mr. John Hocking

Decision of: 25 November 2009

PROSECUTOR

v.

ZDRAVKO TOLIMIR

PUBLIC

**DECISION ON PROSECUTION'S MOTION FOR ADMISSION OF
EVIDENCE PURSUANT TO RULE 92 QUATER**

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 to Admit the Evidence of Bojanović, [B-161 from *Prosecutor v. Milošević*, Case No. IT-02-54-T] (“B-161”) and Deronjić Pursuant to Rule 92 *quater* with Confidential Appendices A and B”, filed confidentially on 17 March 2009 (“Motion”),¹ and hereby renders its decision thereon.

I. SUBMISSIONS OF THE PARTIES

1. In the Motion, the Prosecution requests that the Chamber admit the prior testimony of three deceased persons, Ljubo Bojanović, B-161² and Miroslav Deronjić (“three deceased”). Specifically, the Prosecution requests the admission of Ljubo Bojanović’s testimony and related documents in *Prosecutor v. Blagojević and Jokić* (“*Blagojević*”),³ B-161’s testimony and related documents in *Prosecutor v. Milošević* (“*Milošević*”),⁴ and Miroslav Deronjić’s testimony and related documents in *Blagojević*⁵ pursuant to Rule 92 *quater* of the Rules of Procedure and Evidence (“Rules”). B-161 died on 27 April 2006,⁶ while Bojanović and Deronjić died during the course of the *Popović et al.* trial.⁷ The Prosecution also requests the admission of all documents that were relied upon in the prior testimony of the three deceased.⁸

2. The Prosecution submits that the three deceased persons’ evidence meets the requirements for admissibility under Rule 92 *quater* because Bojanović, B-161 and Deronjić are unavailable, their prior testimony is reliable, and the interests of justice support the admission of the transcripts

¹ On 10 November 2009, the Prosecution filed the confidential “Corrigendum to Prosecution’s Motion to Admit the Evidence of Bojanović, [B-161] and Deronjić Pursuant to Rule 92 *quater*” (“First Corrigendum”), containing the death certificates of the three proposed Rule 92 *quater* witnesses. On 13 November 2009, the Prosecution filed the confidential “Second Corrigendum to Prosecution’s Motion to Admit the Evidence of Bojanović, [B-161] and Deronjić Pursuant to Rule 92 *quater*” (“Second Corrigendum”), and on 16 November 2009, the Prosecution filed the confidential “Third Corrigendum to Prosecution’s Motion to Admit the Evidence of Bojanović, [B-161] and Deronjić Pursuant to Rule 92 *quater*” (“Third Corrigendum”), each of which contained the unredacted transcript of Bojanović.

² The pseudonym B-161 was granted to the witness in the *Milošević* case, and it continues to apply here *mutatis mutandis*, pursuant to Rule 75 (F) (i).

³ *Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-T, BT. 11668–11751 (8 July 2004); BT. 11752–11775 (9 July 2004) (“Bojanović’s testimony”). See also, Appendix A indicating Bojanović’s prior testimony and related documents (“Bojanović’s exhibits”).

⁴ *Prosecutor v. Milošević*, Case No. IT-02-54-T, MT. 21002–21104 (private session in portions) (22 May 2003); MT. 21105–21134 (private session in portions) (23 May 2003); MT.23619–23683 (closed session) (2 July 2003) (“B-161’s testimony”). See also, Appendix A indicating B-161’s prior testimony and related documents (“B-161’s exhibits”).

⁵ *Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-T, BT. 6131–6207 (19 January 2004), BT. 6216–6300 (20 January 2004), BT. 6305–6392 (21 January 2004), BT. 6398–6510 (22 January 2004) (“Deronjić’s testimony”). See also, Appendix A indicating Deronjić’s prior testimony and related documents (“Deronjić’s exhibits”).

⁶ Motion, para. 3. The First Corrigendum includes the death certificate of B-161.

⁷ *Ibid.*, para. 3. The First Corrigendum also includes the death certificates of Bojanović and Deronjić, respectively.

⁸ Motion, para. 1.

in their entirety.⁹ Moreover, with limited exception,¹⁰ this testimony does not relate to or mention the acts or conduct of the Accused.¹¹

3. Finally, in view of the detailed discussion of Rule 92 *quater*, relevant jurisprudence, and its application to the transcripts and exhibits required by the instant Motion, the Prosecution seeks leave to exceed the word limit.¹²

4. On 24 July 2009, the Accused Zdravko Tolimir (“Accused”) submitted the confidential “Response of Zdravko Tolimir to the Prosecution’s Motion to Admit the Evidence of Bojanović, [B-161] and Deronjić Pursuant to Rule 92 *quater*” (“Response”), which was filed confidentially on 4 August 2009.¹³

5. The Accused concedes that the transcripts at issue were given under oath, but submits that “in practice many testimonies are shown to be extremely unreliable despite the fact that they were given under oath, and numerous judgements of the Tribunal note untruthful testimonies and emphasise that the circumstances surrounding evidence of particular witnesses warrant approaching them with extreme caution”.¹⁴ The Accused submits that this is particularly true in relation to the transcripts of B-161 and Deronjić, whose “truthfulness has been challenged to such an extent that other Trial Chambers did not see fit to trust them”.¹⁵

6. In the view of the Accused, the reliability of written evidence must be evaluated not only in accordance with formal criteria, such as whether the testimony was made under oath or whether the witness was cross-examined, but also according to the content of the evidence itself, as well as the character of the witness.¹⁶ He submits that such a contextual evaluation is particularly necessary when analysing the reliability and resulting probative value of indirect or hearsay evidence.¹⁷ The Accused further urges the Chamber to consider “whether a statement has been subject to cross-examination” while bearing in mind that evidence which is contextual in one case may not be contextual in another, which could, in turn, affect the Chamber’s analysis of the sufficiency of the cross-examination conducted.¹⁸

⁹ Motion, para. 5.

¹⁰ See footnote 46, *infra*.

¹¹ Motion, para. 5.

¹² Motion, para. 7.

¹³ The Accused was granted an extension of time to file his response until 24 July 2009. Decision on Tolimir’s Urgent Motion for Extension of Time Limit for Filing a Response to the Prosecution’s 92 *quater* Motion, 17 July 2009.

¹⁴ Response, para. 6.

¹⁵ Response, para. 8.

¹⁶ Response, paras. 12 and 14.

¹⁷ Response, para. 13.

¹⁸ Response, para. 10.

7. Finally, the Accused submits that in principle, the elicitation of *viva voce* evidence must be preferred, wherever possible, over the admission of evidence through other means. Moreover, in his view, “if there any doubts as to reliability, the transcript and relevant statements must not be admitted”.¹⁹

8. The Trial Chamber will now proceed to summarise the specific submissions of the parties with regard to each proposed witness.

1. Ljubomir Bojanović

9. The Prosecution submits the transcript of Ljubo Bojanović’s testimony in *Blagojević* pursuant to Rule 92 *quater*.²⁰ The Prosecution argues that Bojanović’s testimony is sufficiently reliable, as it was provided under oath when he testified as a Defence witness and was cross-examined in *Blagojević*.²¹

10. The Prosecution also states that Bojanović’s testimony does not concern the acts and conduct of the Accused, as it pertains to the organisation of the Zvornik Brigade; the role of the Commander and security organ; the tasks, duties and responsibilities of the Duty Operations Officer; an entry in the Duty Operations Officer’s Notebook on 23 July 1995, as well as several other documents from the same date;²² and the acts and conducts of one of the accused in *Popović*.²³

11. The Prosecution argues that Bojanović’s evidence is cumulative, as his testimony regarding the documents from 23 July 1995 will be corroborated by the testimony of Witnesses No. 142 and No. 6 and that his evidence regarding the 15 July Interim Combat report is corroborated by Witness No. 143.²⁴

12. Noting that the Trial Chamber in *Blagojević* only relied on Bojanović’s evidence to support one “undisputable fact” in its judgement, and suggesting that that Chamber did not “tak[e] [Bojanović’s testimony] into consideration” for one of the purposes for which the Prosecution now offers it,²⁵ the Accused submits that Bojanović’s evidence is unreliable.²⁶ He asserts that the fact

¹⁹ Response, para. 16.

²⁰ The Accused objects that the Prosecution has submitted only a redacted version of the transcript rather than the full version. Response, para. 24.

²¹ Motion, para. 22.

²² Motion, para. 25.

²³ These acts and conduct include Vinko Pandurević’s departure for Srebrenica in early July, Pandurević’s return to Zvornik on 15 July 1995, and Pandurević’s dictation of the Interim Combat Report of 15 July 1995. Motion, para. 23.

²⁴ Prosecution Rule 92 *quater* Motion, paras. 26-27.

²⁵ Specifically, the Accused suggests that Bojanović’s evidence was not taken into consideration in *Blagojević* when establishing “the role of the Commander and security organ and the tasks, duties and responsibilities of the Duty

that the Prosecution has submitted corroborating evidence “can only reveal that the[se] witnesses . . . are unreliable given that [the Prosecution] seeks to amass material in order to strengthen its position”.²⁷

13. The Accused also highlights that the Prosecution has proposed the admission of the corroborative testimony of Witnesses No. 6, 142 and 143 pursuant to Rule 92 *bis*, without cross-examination and submits that “such a state of affairs blatantly contradicts the elementary requirements of a fair trial”.²⁸

14. The Accused further contends that Bojanović’s testimony is irrelevant. In particular, he submits that the transcript provides evidence of “circumstances and explanations which unambiguously demonstrate the irrelevance of th[e] [23 July 1995] entry” in the Duty Operations Officer’s notebook.²⁹ Finally, he submits that the “evidence of this witness is wholly irrelevant”³⁰ and that the Prosecution’s request should be denied.

2. B-161

15. The Prosecution submits the transcript of B-161’s testimony in *Milošević*, which includes his observations at a crime site and his description of an encounter and conversation with one of the accused in *Popović*.³¹ In this regard, it does not concern the acts and conduct of the Accused in this case.³²

16. The Prosecution contends that this testimony is sufficiently reliable, as B-161 testified under oath and was cross-examined extensively regarding both of these aspects of his testimony during the *Milošević* trial.³³ According to the Prosecution, this testimony is also corroborated by Witness No. 173, Witness No. 169 and Witness No. 155.³⁴

17. The Accused submits that a large part of the transcript, as well as two of the statements submitted in the Motion in connection with B-161’s testimony in *Milosević* are irrelevant to the present case.³⁵ While he submits that the cross-examination in *Milošević* was conducted “in light of

Operations Officer”, which is one of the purposes for which the Prosecution now offers Bojanović’s transcript. *See* Response, para. 20 and Motion, para. 23.

²⁶ Response, para. 20.

²⁷ Response, para. 21.

²⁸ Response, para. 21.

²⁹ Response, para. 23.

³⁰ Response, para. 24.

³¹ Motion, para. 31.

³² Motion, para. 35.

³³ Motion, para. 32.

³⁴ Motion, paras. 33-34.

³⁵ Response, para. 30.

the basic interest S. Milošević had in his case”, and primarily pertained to the acts of Serbian authorities rather than to the events in Srebrenica,³⁶ the Accused asserts that these statements nevertheless establish the unreliability of B-161’s testimony in *Milošević*.³⁷ For example, the Accused argues that B-161’s statement in *Milošević* that he did not inform anyone about what he had seen at the crime site or about his conversation with one of the accused in *Popović* is “utterly unreliable in light of the seriousness of what he allegedly saw and heard”, particularly since B-161 testified that, on other occasions, he had contacted persons he considered responsible for “incidents of smaller proportions”.³⁸

18. The Accused further questions B-161’s credibility, as B-161 “was implicated in both legal and illegal activities at the border crossing between Serbia and Republika Sprska . . . [and] was owed large amounts of money and . . . was close to members of criminal groups”.³⁹ He also claims that the circumstances surrounding B-161’s death “are especially problematic”.⁴⁰

19. Finally, the Accused questions the authenticity of B-161’s second statement to the OTP. He claims that because B-161’s first statement to the Prosecution does not mention events in July 1995, the portion of his second statement which pertains to Srebrenica “appears to be inserted” and “indicates that the statement was drafted for . . . the purposes of the Prosecution with incriminations worded with surgical precision”.⁴¹

20. As a result of these circumstances, the Accused contends, B-161’s testimony must be considered unreliable and lacking in probative value.⁴² Finally, the Accused submits that if B-161’s testimony were to be admitted, he would need to conduct an investigation into the circumstances “linked with this witness . . . [which] involves a high degree of risk”.⁴³

3. Miroslav Deronjić

21. The Prosecution submits the testimony of Miroslav Deronjić in the *Blagojević* case pursuant to Rule 92 *quater*.⁴⁴ In the Prosecution’s view, Deronjić’s testimony is sufficiently reliable to merit

³⁶ Response, paras. 34-35.

³⁷ Response, paras. 30-33.

³⁸ Response, para. 31.

³⁹ Response, para. 40.

⁴⁰ Response, para. 41.

⁴¹ Response, para. 44.

⁴² Response, paras. 29, 38.

⁴³ Response, para. 46.

⁴⁴ Motion, para. 37.

admission pursuant to Rule 92 *quater*, as Deronjić testified, was cross-examined by Defence Counsel and was questioned by the Trial Chamber in *Blagojević*.⁴⁵

22. The Prosecution asserts that Deronjić's testimony pertains primarily to his knowledge of and involvement in the forcible transfer of the Bosnian Muslim population of Srebrenica and the killings of military-aged men, as well as the whereabouts of several of the accused in *Popović* during the relevant time period.⁴⁶ In particular, Deronjić's testimony concerns several meetings with Beara on 13 and 14 July 1995,⁴⁷ which the Prosecution states were the "subject of extensive cross-examination in the *Blagojević* trial".⁴⁸

23. Although the Prosecution admits that there are inconsistencies in Deronjić's testimony, the Prosecution argues that such inconsistencies should go to the weight afforded to his testimony rather than to its admissibility.⁴⁹

24. The Accused asserts that Deronjić's evidence is unreliable and therefore inadmissible.⁵⁰ Noting that the Appeals Chamber in *Krstić* called Deronjić's reliability as a witness into question,⁵¹ the Accused submits that Deronjić's evidence was "the product of his cooperation with the Office of the Prosecution while negotiating a plea agreement".⁵² In the view of the Accused, the circumstances surrounding Deronjić's testimony in *Blagojević* were complicated by the fact that Deronjić had concluded a plea agreement with the Prosecution and might have "harboured expectations" that his cooperation would be taken into account in the determination of his sentence.⁵³

25. The Accused also claims that the cross-examination conducted by Defence Counsel in *Blagojević* cannot be considered effective, as it was not done at the instruction of Blagojević himself.⁵⁴ The Accused further submits that it would be improper to admit Deronjić's testimony as to his personal opinion regarding, *inter alia*, the possibility of Bosnian Muslim civilians remaining

⁴⁵ Motion, para. 39.

⁴⁶ Motion, para. 38. The Prosecution specifies, however, that the Accused's name is mentioned several times in one of the OTP interviews with Deronjić and in questions during cross examination. Motion, para. 41.

⁴⁷ Motion, para. 42.

⁴⁸ Motion, para. 42.

⁴⁹ Motion, para. 40.

⁵⁰ Response, para.47.

⁵¹ *Ibid.*, referring to *Prosecutor v. Radislav Krstić*, Case No IT-98-33-A, Appeals Chamber Judgement, 19 April 2004, para. 94 ("[t]he Appeals Chamber is hesitant to base any decision on Mr. Deronjić's testimony without having corroborating evidence. The discrepancies in the evidence given by Mr. Deronjić and the ambiguities surrounding some of the statements he made [. . .] caution the Appeals Chamber against relying on his evidence alone").

⁵² Response, paras. 47-49.

⁵³ Response, para. 51.

⁵⁴ Response, para. 51.

in Srebrenica and the ability of the VRS to establish control over Srebrenica.⁵⁵ Similarly, he argues that it would be “unacceptable” to admit Deronjić’s uncorroborated testimony regarding alleged conversations with Karadžić and Beara.⁵⁶

26. Finally, the Accused argues that admitting Deronjić’s evidence pursuant to Rule 92 *quater* would create uncertainty regarding the probative value afforded to the evidence, thereby delaying the proceedings by necessitating a challenge to Deronjić’s credibility.⁵⁷ Urging the Chamber to deny the Prosecution’s request with respect to Deronjić, the Accused submits that “burdening the case file with the evidence of Miroslav Deronjić would inflict irreparable damage on account of its unreliability and probative value . . . [as it] does not meet a single admissibility requirement”.⁵⁸

II. APPLICABLE LAW

27. Rule 92 *quater*, entitled “Unavailable Persons”, provides as follows:

(A) The evidence of a person in the form of a written statement or transcript who has subsequently died, or who can no longer with reasonable diligence be traced, or who is by reason of bodily or mental condition unable to testify orally may be admitted, whether or not the written statement is in the form prescribed by Rule 92 *bis*, if the Trial Chamber:

(i) is satisfied of the person’s unavailability as set out above; and

(ii) finds from the circumstances in which the statement was made and recorded that it is reliable.

(B) If the evidence goes to proof of acts and conduct of an accused as charged in the indictment, this may be a factor against the admission of such evidence, or that part of it.

Thus, Rule 92 *quater* requires that the Chamber be satisfied of the fulfilment the two conditions set out therein, the unavailability of the person whose written statement or transcript is sought to be admitted, and the reliability of the evidence at issue.⁵⁹

28. The Chamber must also ensure that the general requirements for admissibility of evidence in Rule 89 are satisfied. The proffered evidence must be relevant and have probative value as required by Rule 89(C). The Chamber must further consider whether the probative value of the

⁵⁵ Response, para. 52.

⁵⁶ Response, para. 52.

⁵⁷ Response, para. 53.

⁵⁸ Response, para. 54.

⁵⁹ See, e.g., *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 (“*Popović* Decision”), para. 29; *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, Decision on the Prosecution Motion for Admission of Evidence Pursuant to Rules 92 *bis* and *quater* of the Rules, 2 November 2006 (“*Prlić* Decision”), para. 8; *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 *quater*, 16 February 2007 (“*Milutinović et al.* Decision”), para. 4; *Prosecutor v. Rasim Delić*, Case No. IT-04-83-PT, Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 *Quater*, 9 July 2007 (“*Delić* Decision”), p. 4.

evidence is substantially outweighed by the need to ensure a fair trial under Rule 89(D) and thereby not unduly prejudicial.⁶⁰

29. Trial Chambers have identified the following factors as relevant to the assessment of the reliability of the evidence to be admitted pursuant to Rule 92 *quater*: (a) the circumstances in which the statement was made and recorded, including (i) whether the statement was given under oath; (ii) whether the statement was signed by the witness with an accompanying acknowledgement that the statement is true to the best of his or her recollection; (iii) whether the statement was taken with the assistance of an interpreter duly qualified and approved by the Registry of the Tribunal; (b) whether the statement has been subject to cross-examination; (c) whether the statement, in particular an unsworn statement never subject to cross-examination, relates to events about which there is other evidence; and (d) other factors, such as the absence of manifest or obvious inconsistencies in the statements.⁶¹

30. The Chamber also notes that Rule 92 *quater* (B) specifically provides that, if the proffered evidence goes to proof of acts and conduct of the accused, that may be a factor against the admission of such evidence, or part of it. The Chamber considers that this provision is inflected with concern for ensuring a fair trial and the reliability of the evidence. This provision counsels cautious scrutiny with respect to evidence going to proof of acts and conduct of the accused but also contemplates the admission of statements by deceased persons containing such evidence.

31. The Chamber further notes that when testimony is admitted pursuant to Rule 92 *quater*, exhibits accompanying such testimony may be admitted as well. Those exhibits must “form an inseparable and indispensable part of the testimony”, however.⁶²

III. DISCUSSION

32. The Chamber notes that the “Practice Direction on the Length of Briefs and Motions” provides that motions, responses and replies shall not exceed 3,000 words. The Chamber recalls that

⁶⁰ See, e.g., *Prosecutor v. Karadžić*, Decision on Prosecution Motion for Admission of Testimony of Witness KDZ198 and Associated Exhibits Pursuant to Rule 92 *Quater*, 20 August 2009 (“*Karadžić Decision*”), para. 6; *Popović Decision*, para. 30; *Milutinović et al. Decision*, paras. 4, 6, referring, *inter alia*, to *Prosecutor v. Galić*, Case No. IT-98-29-T, Decision on the Prosecutor’s Second Motion for the Admission into Evidence of Written Statement by Deceased Witness Bajram Šopi, Pursuant to Rule 92 *bis*(C), 18 April 2002 (“*Galić Decision*”), p. 3. See also *Delić Decision*, p. 4.

⁶¹ *Karadžić Decision*, para. 5; *Popović Decision*, para. 31; *Milutinović et al. Decision*, para. 7, referring, *inter alia*, to *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-AR73, Decision on Prosecutor’s Appeal on Admissibility of Evidence, 16 February 1999; *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, (“*Kordić and Čerkez Appeals Decision*”), para. 27; *Galić Decision*, pp. 3–4. See also, *Delić Decision*, p. 4; *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 on 21 April 2008 Admitting 92 *Quarter* Evidence, 18 August 2008, para. 30.

a party seeking authorisation to exceed this limit must do so in advance and “provide an explanation of the exceptional circumstances that necessitate this oversized filing”.⁶³ While the Prosecution has requested such leave, the Accused has not, and both the Motion and the Response exceed the prescribed limit.⁶⁴ The Chamber therefore reminds the Accused of the propriety of compliance with the Practice Direction. In light of the length and detail of the submissions required by the Motion, however, the Chamber considers that it would be in the interests of justice to permit both parties to exceed the word limit.

33. Turning to the merits, the Chamber has been provided with the death certificates of all three of the witnesses. The death certificate of Bojanović, which was issued by the municipality of Istočna Ilidža, indicates that he died on 20 January 2007 in the town of Kasindo, Republika Srpska.⁶⁵ Deronjić’s death certificate, issued by the Surgical Clinic in Växjö, Sweden, indicates that he died on 19 May 2007 in Växjö.⁶⁶ According to B-161’s death certificate, issued by the civil service of Matična Služba, Serbia, he died on 27 April 2006 in Belgrade-Zemun, Serbia.⁶⁷ On the basis of these documents, the Chamber is satisfied that the three deceased are unavailable persons within the meaning of Rule 92 *quater*.

34. As a general comment on the reliability of the proposed evidence, the Chamber notes that each of the transcripts proffered by the Prosecution contains the sworn testimony of one of the three deceased witnesses, given in previous trials before this Tribunal. The witnesses were examined, cross-examined and re-examined, all under oath.

35. Even so, the Chamber will examine specific indicia of reliability with regard to each of the three transcripts. In this respect, the Chamber notes that the various factors will be considered collectively when determining the ultimate reliability of a statement. The absence of one or more of these factors would not automatically lead to a transcript’s exclusion, as the existence of other factors may compensate for it. The Chamber stresses that where such evidence is admitted, the absence of one or more indicia of reliability will be taken into consideration when attributing the ultimate weight to that evidence.⁶⁸

⁶² *Karadžić Decision*, para. 7; *Popović Decision*, para. 33.

⁶³ Practice Direction on the Length of Briefs and Motions, 16 September 2005, Section (C) 5 of IT/184 Rev. 2, paras. 5, 7.

⁶⁴ The Motion counts 4,943 words, and the Response counts 4,768 words.

⁶⁵ First Corrigendum, Annex C.

⁶⁶ First Corrigendum, Annex A.

⁶⁷ First Corrigendum, Annex B.

⁶⁸ See also *Popović Decision*, para. 41; *Delić Decision* p. 5, and *Milutinović Decision*, paras. 8–12.

1. Ljubomir Bojanović

36. Bojanović, who occupied different posts in the Zvornik Brigade between 1992 and 1995, testified under oath and was cross-examined in *Blagojević* on 8 and 9 July 2004.⁶⁹ His testimony addresses various aspects of the organisation and structure of the Zvornik Brigade in 1995, particularly in relation to the role of the Command and the security organ,⁷⁰ as well as the duties and responsibilities of the Duty Operations Officer.⁷¹ He also testified about the whereabouts of one of the accused in Popović during the relevant time period.⁷² The Chamber is therefore satisfied that Bojanović's evidence is relevant to the instant case in accordance with Rule 89 (C).

37. In considering whether the transcript of Bojanović's testimony in *Blagojević* is reliable for the purposes of Rule 92 *quater*, the Chamber notes, firstly, that Bojanović gave his testimony under oath and was subjected to cross-examination by the Prosecution. In contrast to the assertion of the Accused, however, the Chamber considers that any conclusions regarding the reliability of Bojanović's testimony drawn merely on the basis of the frequency with which the Trial Chamber in *Blagojević* cited to it in its judgement would be improperly speculative. Moreover, the Chamber notes that there is nothing in the text of Rule 92 *quater* which prohibits the Prosecution from offering Bojanović's testimony in the present case for a purpose different to that for which it was used in *Blagojević*. Finally, there are no apparent inconsistencies in the testimony to which the Chamber's attention has been directed by either of the parties.

38. In relation to the question of whether Bojanović's evidence relates to events about which there is other evidence, the Chamber notes that, as highlighted by the Prosecution, the Trial Chamber in *Popović* held that Bojanović's evidence was corroborated by several witnesses in that case,⁷³ some of whom also appear on the Prosecution's Rule 65 *ter* list in this case. The Chamber observes, however, that the Prosecution's Rule 92 *quater* motion in *Popović* was filed considerably later on in the proceedings,⁷⁴ in contrast to the present case, where the Chamber renders its decision prior to the start of trial. Accordingly, the Chamber considers that it is not presently in a position to fully assess the extent to which the evidence submitted in the instant Motion will be corroborated

⁶⁹ *Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-T, BT. 11668–11751 (8 July 2004); BT. 11752–11775 (9 July 2004).

⁷⁰ See BT. 11674–11736 (8 July 2004).

⁷¹ See BT. 11689–11702 (8 July 2004).

⁷² He also testified regarding his entry in the duty officer notebook on 23 July 1995 in which he wrote "Skelani have two injured Turks (they cut themselves with glass) I told them to kill them since Bratunac doesn't want to take them." *Ibid.*, BT. 11760 (9 July 2004). Bojanović testified about witnessing the arrival of a telegram from the Main Staff in July 1995 in which Nikolić complained about the commander's interference in their affairs and stated that the security organ should straighten out their relations and carry on with its duties and tasks without much involvement on the part of the commander. *Ibid.*, BT. 11683 (8 July 2004).

⁷³ *Popović* Decision, para. 25.

by other evidence throughout the course of the trial. Therefore, the Chamber will attribute the appropriate weight to Bojanović's evidence in due course, bearing in mind the fact that a conviction may not be based on the uncorroborated evidence of an unavailable witness.

39. On the basis of the indicia presently before it, the Chamber is satisfied that Bojanović's evidence is sufficiently reliable to permit its admission under Rule 92 *quater*, and that its probative value is not substantially outweighed by the need to ensure a fair trial under Rule 89 (D). The Chamber reiterates, however, that it will attribute appropriate weight to the evidence in due course, as it becomes apparent which of the evidence presented during the course of the trial serves to corroborate the evidence admitted pursuant to Rule 92 *quater*.

2. B-161

40. The relevant portion of B-161's testimony concerns events at a crime site and an event pertaining to the acts and conduct of two of the accused in the *Popović* case, including one of the alleged subordinates of the Accused in the present case. The Chamber thus considers that this portion of B-161's testimony is relevant to the case against the Accused in accordance with Rule 89 (C).

41. With regard to the reliability of B-161's evidence, the Chamber notes that the witness testified under oath. His account of the relevant events was subjected to cross-examination, and his credibility was generally questioned by the accused, Milošević. Those challenges are clearly reflected in the record of those proceedings.⁷⁵ While the Accused asserts that the cross-examination in the *Milošević* trial was conducted in a manner particular to Milošević's own interests, the Chamber notes that the Accused's argument that B-161's failure to inform others about the relevant events implies a lack of credibility was, in fact, a challenge advanced by Milošević.⁷⁶ Further, the two statements of B-161 were used by Milošević during cross-examination.

42. The Chamber considers that the question of the extent to which previous cross-examination probed the witness's account is an issue properly considered in the context of the weight to be attributed to the evidence, rather than in relation to its admissibility.⁷⁷ In this regard, the Chamber is of the view that any arguments levied by the Accused regarding B-161's character should more properly be taken into consideration when assessing his ultimate credibility and the weight to be attributed to his evidence.

⁷⁴ The Prosecution's Rule 92 *quater* motion in *Popović* was filed on 29 January 2008. The Prosecution rested its case in *Popović* on 7 February 2008.

⁷⁵ See, e.g. MT. 21105-21108 (23 May 2003).

⁷⁶ *Ibid.*

⁷⁷ *Popović* Decision, para. 51.

43. The Chamber also emphasises that, as mentioned above, corroboration is simply a factor to take into consideration as to the reliability of the evidence and not a requirement for admissibility under Rule 92 *quater*. Therefore, a lack of corroboration does not automatically preclude the admission of the evidence if the Chamber is otherwise satisfied that the evidence is sufficiently reliable to merit admission under Rule 92 *quater*.

44. Moreover, the Chamber considers that it will be better placed to fully evaluate the extent to which other evidence corroborates B-161's evidence as the trial proceeds. In particular, the Chamber notes that some of the evidence which the Prosecution claims is corroborative of B-161's evidence has been submitted in connection with the Prosecution's motion under Rule 92 *bis*. The Chamber stresses that the extent to which B-161's evidence is, in fact, corroborated by such evidence, as well as the extent to which the corroborating evidence is challenged by cross-examination, will be considerations in the Chamber's assessment of the weight, if any, to be attributed to B-161's evidence.

45. Having considered all of the factors outlined above, however, the Chamber is satisfied that B-161's evidence is sufficiently reliable for admission pursuant to Rule 92 *quater*, and that its probative value is not substantially outweighed by the need to ensure a fair trial under Rule 89 (D). The Chamber reiterates that it will take into account the scope of previous cross-examination, evidence regarding B-161's character, and the extent to which B-161's testimony has been corroborated by other evidence to be adduced in this case when assessing the weight, if any, to be attributed to B-161's evidence.

3. Miroslav Deronjić

46. Deronjić, who served as President of the SDS branch in the municipality of Bratunac, Civilian Commissioner for the Serbian municipality of Srebrenica, and President of the War Presidency of the municipality of Srebrenica-Skelani in 1995,⁷⁸ testified about the acts and conduct of the several accused in *Popović*, including the whereabouts of Pandurević and Borovčanin in July 1995 and Beara's alleged visit to and conversation with Deronjić's in his office in Bratunac in the evening of 13 July 1995.⁷⁹ The Chamber therefore considers that Deronjić's evidence is relevant to the present case in accordance with Rule 89 (C).

47. Regarding the reliability of Deronjić's evidence, the Chamber notes that Deronjić took an oath and was cross-examined. While, as the Prosecution concedes, Deronjić's evidence contains a

⁷⁸ Miroslav Deronjić, BT. 6373 (21 January 2004); BT. 6136-6137 (19 January 2004); BT. 6138, 6143 (19 January 2004).

number of inconsistencies, admissions of prior false statements, and includes uncorroborated claims, the Chamber considers that Deronjić was cross-examined extensively on these issues. In particular, such cross-examination covered his encounters with two of the accused in *Popović*, both of whom are alleged by the Prosecution to have been members of the same joint criminal enterprise as the Accused in this case.⁸⁰ In the Chamber's view, Deronjić responded to the challenges to the truthfulness and reliability of his evidence and the transcript clearly reflects those challenges and his responses.⁸¹ In these circumstances, the Chamber is satisfied that the inconsistencies in the testimony of Deronjić must be considered when assessing the weight to be attributed to the evidence, but do not preclude its admission. Moreover, the claims that cross-examination was conducted by a counsel not acting under the direction of the Accused will also be considered in assessing the weight to be assigned to the testimony.

48. With respect to the Accused's argument that it would be "unacceptable" to admit Deronjić's testimony to the extent that it is uncorroborated, the Chamber reiterates that corroboration is simply a factor to take into consideration for the reliability of the evidence, rather than a requirement for admissibility under Rule 92 *quater*. Again, the Chamber considers that it will be better placed to consider the extent to which Deronjić's testimony is or is not corroborated as the trial proceeds. In particular, the Chamber notes that some of the evidence which may corroborate Deronjić's evidence has been submitted in connection with the Prosecution's motion under Rule 92 *bis*. The Chamber stresses that the extent to which Deronjić evidence is, in fact, corroborated by such evidence, as well as the extent to which the corroborating evidence is challenged by cross-examination, will be considerations in the Chamber's assessment of the weight, if any, to be attributed to Deronjić's evidence. The Chamber will consider all these points when making its assessment on the degree of corroboration of Deronjić's evidence and the weight, if any, to be attributed to it.

49. The Chamber also notes that Deronjić's testimony contains references to the Accused, as well as his acts and conduct, and is mindful that the uncorroborated testimony of an unavailable witness may not be a basis for conviction. Accordingly, in accordance with Rule 92 *quater* (B), the Chamber considers that the fact that Deronjić's testimony contains such references is a factor in its consideration of whether to admit the transcript, though such references do not preclude its admission.

⁷⁹ See, e.g. Miroslav Deronjić, BT. 6430 (22 January 2004), BT. 6377 (21 January 2004), BT. 6440- 6441 (22 January 2004).

⁸⁰ Miroslav Deronjić, BT. 6441, 6444 (22 January 2004).

⁸¹ *Ibid.*

50. Having considered all of the indicia before it, the Chamber is satisfied that Deronjić's evidence bears sufficient indicia of reliability for the purpose of admission pursuant to Rule 92 *quater*, and that its probative value is not substantially outweighed by the need to ensure a fair trial under Rule 89 (D).

51. With regard to the documents that the Prosecution seeks to be admitted together with the Deronjić's testimony in *Blagojević*, the Chamber notes that during Deronjić's testimony, parts of his prior statements and transcripts in the *Milošević*, *Nikolić* and *Krstić* cases were used to challenge his credibility. This does not mean, however, that those earlier transcripts and statements in their entirety should also be admitted in these proceedings pursuant to Rule 92 *quater*. For this to be considered, each of the statements and transcripts would need to be submitted individually under Rule 92 *quater*.

52. As mentioned above, exhibits accompanying testimony admitted under Rule 92 *quater* may also be admitted pursuant to the Rule, so long as they form an inseparable and indispensable part of the testimony. In this regard, the Chamber considers that only those documents which were used and explained by the witness in court are admissible pursuant to Rule 92 *quater*. Therefore, the Chamber finds that only those portions of Deronjić's prior statements and transcripts specifically referenced in court shall be admitted. This will include any parts read in, which automatically will be part of the record, and any portion of Deronjić's prior statements and transcripts in the *Milošević*, *Nikolić* and *Krstić* cases which were used for impeachment purposes but were not read out *verbatim* and thus do not appear in the *Blagojević* transcript. In relation to the latter category of excerpts, they will be admitted, provided that the Prosecution identifies them and provides a copy to the Chamber.

4. Conclusion

53. For the foregoing reasons, the Chamber concludes that the proffered evidence is admissible under Rule 92 *quater* and Rule 89. The Chamber notes that, as always, a decision on admissibility must be distinguished from a determination as to the weight to be given to any piece of evidence. In this instance, the Chamber will bear in mind in particular the absence of the opportunity to cross-examine in the current trial when evaluating this evidence and deciding on the weight to be attributed to the transcripts, in accordance with the jurisprudence of the Tribunal.⁸²

⁸² See *Popović* Decision, para. 66; *Prosecutor v. Galić*, Case No. IT-98-29-AR73.2, Decision on Interlocutory Appeal concerning Rule 92 *bis* (C), 7 June 2002, fn. 34, referring to Judgements of the European Court for Human Rights. See also *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, para. 7; *Milutinović* Decision, para. 13; *Prosecutor v. Prlić et al.*, Case No. IT-04-74-AR73.6, Decision on Appeals Against Decision Admitting Transcript of Jadranko Prlić's Questioning into Evidence, 23 November 2007, paras. 50-61.

IV. DISPOSITION

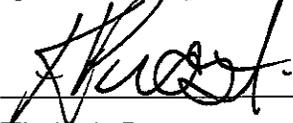
For the foregoing reasons, pursuant to Rule 89 and Rule 92 *quater* of the Rules, the Trial Chamber **DECIDES:**

1. To grant the Prosecution's request to exceed the word limit;
2. To admit the testimony of Bojanović, B-161 and Deronjić;
3. To admit the exhibits submitted with Bojanović's testimony and B-161's testimony;
4. With regard to Deronjić's exhibits:
 - (i) only those documents which were used and explained by the witness in court, as well as those portions of his prior statements and transcripts in the *Milošević, Nikolić* and *Krstić* cases which were specifically referenced in court shall be admitted;
 - (ii) the Prosecution shall identify and file those portions of the transcripts from the *Milošević, Nikolić* and *Krstić* cases that were used for impeachment purposes but were not read out *verbatim* and thus do not appear in the *Blagojević and Jokić* transcript;

INSTRUCTS the Registrar to assign a pseudonym in this case to the witness referred to in Case No. IT-02-54 as B-161;

DENIES the Motion in all other respects.

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



Kimberly Prost
Presiding

Dated this 25th day of November 2009
At The Hague
The Netherlands

[Seal of the Tribunal]