

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-05-87/1-T
Date: 11 February 2009
Original: English

IN TRIAL CHAMBER II

Before: Judge Kevin Parker, Presiding
Judge Christoph Flügge
Judge Melville Baird

Registrar: Mr John Hocking, Acting Registrar

Decision: 11 February 2009

PROSECUTOR

v.

VLASTIMIR ĐORĐEVIĆ

PUBLIC

**DECISION ON PROSECUTION'S MOTION FOR ADMISSION
OF TRANSCRIPTS OF EVIDENCE OF FORENSIC
WITNESSES IN LIEU OF *VIVA VOCE* TESTIMONY
PURSUANT TO RULE 92*BIS***

The Office of the Prosecutor:

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1. This decision of Trial Chamber II (“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 in respect of “Prosecution’s Motion for Admission of Transcripts of Evidence of Forensic Witnesses in Lieu of *Viva Voce* Testimony pursuant to Rule 92*bis* with Confidential Annex A” filed by the Office of the Prosecutor (“Prosecution”) on 28 October 2008 (“Motion”). In this Motion the Prosecution seeks an order from the Chamber admitting into evidence pursuant to Rule 92*bis* of the Rules of Procedure and Evidence (“Rules”) the transcripts of testimonies given in the case of *Prosecutor v Milutinović et al* (Case No. IT-05-87-T) of four forensic witnesses and associated exhibits used during their testimonies in the *Milutinović* case. Counsel for Vlastimir Đorđević (“Defence”) responded on 11 November 2008 requesting that the Motion be denied or, in the alternative, that the Chamber admit the transcripts and statements and require that the witnesses be called for cross-examination. It requests that the Chamber postpone its decision regarding the admissibility of the associated exhibits until the witnesses appear for cross-examination.¹ On 18 November 2008 the Prosecution filed a Reply.²

I. SUBMISSIONS

2. The Prosecution seeks admission of transcripts of testimony given in the *Milutinović* case by Professor Dr Branimir Aleksandrić, Professor Dr Dušan Dunjić, Dr Gordana Tomašević and Jon Sterenberg, and associated exhibits used during the evidence of these witnesses, as listed in Annex A to the Motion. It is submitted that the proposed evidence constitutes crime-base evidence and that none of it goes to proof of acts and conduct of the Accused.³ The Prosecution further argues that the proposed evidence is relevant as it relates to Counts 3, 4 and 5 of the Indictment and that its reliability has been tested in the *Milutinović* case where the six accused had the opportunity to challenge it and to test the witnesses’ credibility.⁴ In the Prosecution’s submission, all four witnesses have testified in open session in the *Milutinović* case and, accordingly, there is no longer an overriding public interest in the oral presentation of the proposed evidence and, further, presenting the same evidence again orally would be counter to the overriding public interest in an

¹ *Prosecutor v Đorđević*, Case No. IT-05-87/1-PT, “Vlastimir Đorđević’s Response to Prosecution’s Motion for Admission of Transcripts of Evidence of Forensic Witnesses in Lieu of *Viva Voce* Testimony pursuant to Rule 92*bis* with Confidential Annex A”, 11 November 2008 (“Response”).

² *Prosecutor v Đorđević*, Case No. IT-05-87/1-PT, “Prosecution’s Reply to Vlastimir Đorđević’s Response to Prosecution’s Motion for Admission of Transcripts of Evidence of Forensic Witnesses in Lieu of *Viva Voce* Testimony pursuant to Rule 92*bis* with Confidential Annex A”, 18 November 2008 (“Reply”). Leave to file the Reply was sought on 17 November 2009 (*Prosecutor v Đorđević*, Case No. IT-05-87/1-PT, “Prosecution’s Request for Leave to Reply to Vlastimir Đorđević’s Response to Prosecution’s Motion for Admission of Transcripts of Evidence of Forensic Witnesses in Lieu of *Viva Voce* Testimony pursuant to Rule 92*bis* with Confidential Annex A”) and was granted by the Chamber.

³ Motion, para 5.

expeditious trial.⁵ The Prosecution further argues that none of the proposed witnesses should be required to appear for cross-examination as they are crime-base witnesses whose evidence does not go to a critical element of the Prosecution case.⁶ Further, it is submitted that the Defence has indicated that it has no objections with respect to 14 of the proposed associated exhibits. The Prosecution also notes that the transcripts it seeks to tender have not yet been included in the Prosecution Rule 65*ter* exhibit list and moves for leave to add them to the list.⁷

3. The Defence submits that the proposed evidence should not be admitted in written form as it goes to proof of acts and conduct of the Accused by references to acts and conduct of units allegedly subordinated to the Accused;⁸ and further that it goes to proof of “live and important issues of the case” such as whether incidents forming the foundation of the Indictment have occurred.⁹ It is the Defence submission that Rule 92*bis* is not an appropriate avenue for introducing complex forensic evidence and that cross-examination is necessary to ensure that issues of importance to the Defence have been examined and that the rights of the Accused have been respected.¹⁰ Further, the Defence argues that the need for cross-examination is even greater given the expert-like qualifications of the witnesses and that the need to ensure the expeditious conduct of the proceedings cannot override the need to ensure the rights of the Accused.¹¹ Finally, it is submitted that the proposed associated exhibits comprise a great amount of complex documents and reports, almost tantamount to expert reports, which cannot be adequately introduced into evidence without cross-examination. The Defence accordingly submits that the Chamber should postpone its decision on admissibility of the associated exhibits until cross-examination of the respective witness. The Defence opposes the addition of new documents to the Prosecution’s Rule 65*ter* list and requests that it be given the opportunity to supplement its submission in this respect at a later stage.¹²

II. LAW

4. The admissibility of evidence, whether in oral or in written form, is governed by Rule 89(C) of the Rules which provides that a Chamber may admit any relevant evidence which it deems to have probative value. Pursuant to Rule 89(D) evidence will not be admitted if its probative value is

⁴ Motion, paras 12, 13.

⁵ Motion, paras 17-19.

⁶ Motion, paras 20-23. See also Reply, para 7 where the Prosecution submits that none of the proposed witnesses was called as an expert witness in the *Milutinović et al* case.

⁷ Motion, paras 24-29. It is submitted that the Defence was put on notice of the Prosecution’s intention to rely on these documents during the trial, Reply, paras 5, 6.

⁸ Response, paras 9, 11-13.

⁹ Response, paras 9, 10.

¹⁰ Response, p 1 and paras 14-19.

¹¹ Response, paras 20-22.

substantially outweighed by the need to ensure a fair trial. By Rule 89(F) evidence may only be received in written form where the interests of justice allow this.

5. Rule 92*bis* of the Rules allows for the admission in whole or in part of written statements or a transcript of evidence in lieu of oral testimony of a witness provided that the proposed written statement or transcript goes to proof of a matter other than the acts and conduct of the accused as charged in the indictment. "Acts and conduct of the accused" is understood as a "plain expression" that "should be given its ordinary meaning: deeds and behaviour of the accused."¹³ Hence, Rule 92*bis* excludes a written statement that goes to proof of any act or conduct of the accused upon which the prosecution relies to establish that the accused (a) committed any of the crimes charged; (b) planned, instigated or ordered the crimes; (c) otherwise aided and abetted the alleged perpetrators; (d) was the superior of the perpetrators; or (e) knew or had reason to know that those crimes were about to be or had been committed by his subordinates; or (f) failed to take reasonable steps to prevent such acts or to punish those who carried out those crimes.¹⁴ Further, where the prosecution case relies on a joint criminal enterprise, Rule 92*bis*(A) also excludes any written statement which goes to proof of any act or conduct of the accused upon which the prosecution relies to establish that the accused (g) had participated in that joint criminal enterprise, or (h) shared with the person who actually did commit the crimes charged the requisite intent for those crimes.¹⁵

6. Rule 92*bis* lists some of the facts in favour of and against admitting evidence in written form. Further, while a written statement or transcript which goes to proof of a matter other than the acts and conduct of the accused is not inadmissible *per se*, pursuant to Rule 92*bis* the Chamber must determine, as a matter of discretion, whether or not it will admit the proposed written statement or transcript. Where the evidence is pivotal to the prosecution case, or where the person whose acts and conduct the written statement describes is closely proximate to the accused, the Chamber may be persuaded that it would not be fair to the accused to permit the evidence to be given in written form.¹⁶

7. Nevertheless, by Rule 92*bis*(C) the Chamber also has a discretion to require a witness, whose written statement or transcript is admitted, to appear in court for cross-examination. This discretion is to be exercised bearing in mind the overriding obligation of the Chamber to ensure a

¹² Response, paras 23-26.

¹³ *Prosecutor v. Slobodan 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.

¹⁴ *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-AR73.2, "Decision on Interlocutory Appeal concerning Rule 92 *bis*(C)", 7 June 2002 (*Galić* Appeals Decision), para 10.

¹⁵ *Galić* Appeals Decision, para 10.

¹⁶ *Galić* Appeals Decision, para 13.

fair trial under Articles 20 and 21 of the Statute.¹⁷ An important consideration in this regard is whether the evidence in question relates to a “critical element of the Prosecution’s case, or to a live and important issue between the parties, as opposed to a peripheral or marginally relevant issue.”¹⁸ It may also be determinative whether the witness has given a consistent account of the material events in a previous statement or evidence. If not, fairness may require that the defence be given an opportunity to cross-examine the witness.

8. In the present Motion the Prosecution seeks to have admitted written evidence dealing with forensic, medical and other specialized information. While this is permissible pursuant to Rule 92*bis* and the jurisprudence¹⁹, the specialized nature of the proposed written evidence is a factor to be taken into account in determining whether the witness should be required to appear in court for cross-examination.

III. DISCUSSION

9. At the outset the Chamber notes that four transcripts proposed for admission in the present Motion have not been included in the Prosecution’s Rule 65*ter* exhibit list submitted on 1 September 2008.²⁰ The purpose of the Rule 65*ter* exhibit list is to give notice to the Defence that the Prosecution intends to rely on the document at trial which will allow the Defence to prepare its case accordingly.²¹ The Chamber notes that the four transcripts at issue are related to written statements and associated documents that have been included in the Prosecution’s Rule 65*ter* exhibit list, that the witnesses to whom these documents pertain have been on the Prosecution’s Rule 65*ter* witness list, and, further, that the Defence was notified of the Prosecution’s intention to use these documents during the trial at the time of the filing of the present Motion, *i.e.* well before the start of the trial. In these circumstances the Chamber is persuaded that there will be no prejudice to the Defence by the late addition of these four documents to the Prosecution Rule 65*ter* exhibit list.

¹⁷ *Prosecutor v. Duško Sikirica, Damir Došen and Dragan Kolundžija*, “Trial Chamber Decision” 23 May 2001 (“*Sikirica* Decision”), para 4; *Prosecutor v Pavle Strugar*, Case No. IT-01-42-T, “Decision on Prosecution Request to Admit Written Statements pursuant to Rule 92 *bis*”, 22 January 2004, (“*Strugar* Decision”), para 9.

¹⁸ *Milošević* Trial Decision, paras 24-25.

¹⁹ *See Prosecutor v Vujadin 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*”, 12 September 2006, paras 43-44.

²⁰ These documents are: transcript of Branimir Aleksandrić’s testimony in the *Milutinović* case, Rule 65*ter* number 05065; transcript of Dušan Dunjić’s evidence in the *Milutinović* case, Rule 65*ter* number 05086; transcript of Jon Sterenberg’s evidence in the *Milutinović* case, Rule 65*ter* number 05096; transcript of Gordana Tomasević’s evidence in the *Milutinović* case, Rule 65*ter* number 05097.

²¹ *Prosecutor v Bošković and Tarčulovski*, Case No. IT-04-82-T, “Decision on Prosecution’s Fifth Motion to Amend its Exhibit List and on its Second Motion to Remove Witnesses from its Witness List”, 20 April 2007, para 3.

A. Dušan Dunjić

10. The Prosecution seeks to tender pursuant to Rule 92bis the transcript of Dušan Dunjić's evidence given in the *Milutinović* case, a statement given by the witness to the Office of the Prosecutor on 9 and 11 May 2006 and received as an exhibit in the *Milutinović* case and a large number of associated exhibits. Dušan Dunjić is a professor of forensic medicine; in the summer of 2001 he served as the head of the Forensic Institute in Belgrade. His written statement and the transcript of his evidence contain information about his participation in exhumations of human remains discovered at two sites at the "Maj 13" barracks in Batajnica, Serbia, a training centre belonging to the Ministry of Interior. Exhumations at the first site, known as Batajnica 1, commenced on 1 June 2001 and were conducted by a team of experts from the Institute for Forensic Medicine in Belgrade. The remains of at least 36 human bodies were exhumed. The remains were examined on the ground and a report was compiled for each individual autopsy that was conducted. The presence of high temperature and its traces on the bones were established. Samples of bones were taken from each individual body for DNA testing and were kept secured at the Forensic Institute until November 2001 when they were delivered by the witness to Dr Antonio Alonso at the National Institute of Toxicology in Madrid for DNA testing. Samples were also handed to representatives of the International Commission on Missing Persons ("ICMP"). After the identification procedure was completed the remains were repatriated to Kosovo. The second site at the "Maj 13" training ground, known as Batajnica 2, was discovered in July 2001. The witness participated in the exhumations together with a district prosecutor, an investigating judge and an investigator from the Office of the Prosecutor of the ICTY. The remains of not less than 269 bodies were exhumed. The witness headed the team conducting the exhumations and compiled a full report of the work of the forensic team.

11. The Accused is charged with acts of murder allegedly committed by forces of the FRY and Serbia in Kosovo from 1 January 1999 until 20 June 1999. Attached to the Indictment are schedules with lists of hundreds of persons who are alleged to have been killed at various places in Kosovo. The proposed evidence is relevant to these charges in the Indictment. Further, in view of the qualifications of the witness, his position at the time and his official role in the exhumations and in the follow-up activities, the Chamber is satisfied that the proposed written statement and transcript are of sufficient probative value to be admitted into evidence. The proposed evidence does not go to proof of acts and conduct of the Accused as charged in the Indictment, and, therefore, may be admitted in written form pursuant to Rule 92bis.

12. Written statements that do not go to proof of acts and conduct of the accused, however, while not inadmissible *per se*, in certain circumstances may be "so pivotal to the case that it would

be unfair to the accused to admit it in the form of a written statement under Rule 92bis²² or to admit them without the opposing party being given the opportunity to cross-examine. In particular, the requirements of a fair trial require that an accused be given an opportunity to cross-examine the witness if the evidence in question relates to a “critical element of the Prosecution’s case, or to a live and important issue between the parties, as opposed to a peripheral or marginally relevant issue.”²³

13. The proposed evidence of Dušan Dunjić, while not going directly to proof of acts and conduct of the Accused, does deal with important aspects of the Prosecution case. Allegations of killings form the basis of Counts 3 and 4 of the Indictment and are relied on in support of Count 5 of the Indictment. Also of potential significance is the suggestion in the proposed evidence that the exhumation sites were located on property belonging to the Ministry of Interior. The issues of whether the alleged acts (of killings) occurred, and whether Accused’s subordinates were involved in these acts, appear to be live issues between the parties.²⁴ The witness was cross-examined by counsel for one of the accused in the *Milutinović* case, but it is not presently clear whether the case of the present Defence has been adequately raised with the witness. In the view of the Chamber, in these circumstances the fairer course, at least at this early stage of this trial, is only to admit the written statement and transcript of Dušan Dunjić if the witness is made available for cross-examination.

14. Proposed for admission with Dušan Dunjić’s written statement and transcript are 59 documents, including forensic reports, photographs, list of names of persons who are said to have been killed in Suva Reka municipality and other documents relevant to the exhumation procedures. Seven of these documents have already been admitted into evidence pursuant to the Chamber’s oral decision of 26 January 2009 to admit into evidence documents agreed by the parties.²⁵ The Motion with respect to these seven documents is, therefore, moot. Some of the remaining documents were put to the witness in the *Milutinović* case. They contain complex, forensic information. Considering the nature of these documents and the need for the Defence to be allowed to cross-examine the witness, the Chamber is of the view that the question of their admissibility should be decided when the witness appears for cross-examination.

²² *Prosecutor v. Radoslav Brđanin and Momir Talić*, “Public Version of the Confidential Decision on the Admission of Rule 92bis Statements”, 1 May 2002 (“*Brđanin* Trial Decision”), para 14. *Galić* Appeals Decision, para 15.

²³ *Milošević* Trial Decision, paras 24-25. *Prosecutor v. Duško Sikirica, Damir Došen and Dragan Kolundžija*, Trial Chamber Decision of 23 May 2001 (“*Sikirica* Decision”), para 4. *Strugar* Decision, para 9.

²⁴ See Response, paras 9-10.

²⁵ These are documents bearing Rule 65ter numbers: 02395; 02396; 02397; 02398; 02400; 02407; 02410.

B. Branimir Aleksandrić

15. The Prosecution seeks to tender a written statement given by Branimir Aleksandrović to the Office of the Prosecutor on 2 June 2006 and the transcript of the witness's evidence in the *Milutinović* case as well as six associated documents. Branimir Aleksandrović is a forensic medical expert who in 2001 succeeded Professor Dunjić as head of the Institute for Forensic Medicine in Belgrade. The proposed written statement and transcript contain information about the witness taking over the work on the exhumation sites in Batajnica from Professor Dunjić. The team consisted of forensic experts from Serbia and Montenegro, an anthropologist and archeologist from the ICMP. The proposed evidence describes the mechanism adopted for conducting exhumations and autopsies at sites referred to as Batajnica 3 and Batajnica 5 and the collection of samples for DNA analysis. The proposed evidence also contains information about objects found at the sites, including a large number of burnt tires found underneath and over the bodies, and the presence of bullet and shell cases and fir cones among the bodies.

16. The proposed evidence is relevant to the allegations of murder charged in Counts 3, 4, and 5 of the Indictment. In view of the witness's qualifications and his official role in the exhumations the Chamber accepts the reliability of the proposed evidence for present purposes. Further, the proposed evidence does not go to proof of acts and conduct of the Accused and in principle is admissible in written form. Considering, however, that this evidence is proposed as proof of allegations forming the basis of several counts of the Indictment and that these allegations are disputed by the Defence, the Chamber is of the view that as a matter of fairness the Defence should be given the opportunity to cross-examine the witness. The Chamber notes that while the Defence will have the opportunity to cross-examine another witness, Dušan Dunjić, regarding exhumations conducted at Batajnica, the proposed evidence of Branimir Aleksandrović refers to different exhumation sites and different time periods and therefore is unlikely to be cumulative to that of Dušan Dunjić.

17. The Prosecution further seeks to tender with the written statement and transcript of Branimir Aleksandrović six autopsy reports and related photo documentation from exhumations conducted at the Batajnica 3 and Batajnica 5 sites. These documents have been admitted into evidence pursuant to the Chamber's oral decision of 26 January 2009 and the Motion with respect to them is, therefore, moot.²⁶ The Chamber notes, however, that two of these documents, namely document Rule 65*ter* number 02413, a document of over 900 pages, and document Rule 65*ter* number 02418, a report of over 300 pages, have been provided without an English translation. The Prosecution

should upload on eCourt English translations as soon as possible and inform the Chamber and the Defence accordingly.

C. Jon Sterenberg

18. The Prosecution also seeks to tender an “Expert Report on Exhumations: Batajnica, Petrovo Selo, Derventa Canyon, Lake Perucac” (“Expert Report”) issued by the ICMP and authored by Jon Sterenberg as well as the transcript of Jon Sterenberg’s evidence given in the *Milutinović* case, a written statement given by this witness to the Office of the Prosecutor on 20 and 21 September 2006 and three associated documents, namely an Addendum to the Expert Report, a Methodology Report 2001-2006, and Notices of DNA Report. Jon Sterenberg, the head of the Excavation and Examination Division of ICMP, is an archaeologist who since 1997 has been involved with forensic recovery related to the former Yugoslavia. The proposed Expert Report contains information about excavations in which the ICMP was involved at the following sites: Batajnica 1, 2, 3, 4, 5, 6, and 7; Petrovo Selo I and Petrovo Selo II in eastern Serbia; and at Derventa Canyon on Lake Perucac in western Serbia. The report describes the time period during which the excavations were conducted, the persons who participated in the excavations at each site, the number of human remains recovered from each site, the ICMP’s observations with respect to each site, observations made with respect to the individual bodies recovered including observations of evidence of gunshot wounds, anthropological analysis, keeping of records and preservation of the remains, and ICMP methodology. Jon Sterenberg was present at the excavations at Batajnica 3, 4, 5, 6 and 7. The report was prepared by him on the basis of work done by ICMP staff.

19. In view of the charges of murder included in the Indictment, and considering the qualifications of the witness and the role he and his organisation had in the excavations, the Chamber is persuaded that the proposed evidence is relevant and probative and thus meets the requirements of Rule 89 of the Rules. The Chamber is also satisfied that the proposed written statement, transcript and Expert Report do not go to proof of acts and conduct of the Accused. The issues whether crimes alleged in the Indictment have occurred and whether alleged subordinates of the Accused participated in these alleged crimes appear to be live issues between the parties. These allegations are an important part of the Prosecution case. In light of the above and considering further the technical nature of the proposed Expert Report, transcript and written statement, the Chamber is persuaded that it will not be fair to admit this evidence without the Accused being given the opportunity to cross-examine the witness. The Chamber notes, in this respect, that while other witnesses whose written evidence is also proposed for admission in the present Motion deal with

²⁶ These documents are documents bearing the following Rule 65ter numbers: 02413; 02414; 02415; 02416; 02417; and

events described in the Expert Report, the information included in the Expert Report, written statement and transcript of Jon Sterenberg differs in nature and covers a wider range of issues from the evidence of these other witnesses.

D. Gordana Tomašević

20. The Prosecution further seeks to tender a transcript of Gordana Tomašević's evidence in the *Milutinović* case, two written statements given by this witness to the Officer of the Prosecutor dated 3 and 5 March 2003 and 25 July 2006, respectively, nine attachments to the witness's statement consisting of documents referred to in the proposed evidence and a forensic report comprising findings of individual autopsies performed in Kosovska Mitrovica in the presence of the witness. Gordana Tomašević is a forensic medicine specialist employed by the Military Medical Academy in Belgrade. Her written statements and transcript deal with her account of being sent to Kosovo in May 1999 as part of an expert team, a meeting there with Generals Pavković and Lazarević at which General Pavković explained to the witness and the rest of the expert team that their role was to take sanitary and technical measures in relation to animal and human corpses, about an order of General Pavković to the expert team to attend an abandoned house in Staro Čikatovo where 12 carbonized human bodies were found, and about external examinations and, in some cases, exhumations conducted by the expert team in May and June 1999 at the following sites in addition to Staro Čikatovo: Ljubenić, Peć municipality (14 bodies), Malo Ribare, Lipljan municipality (25 bodies), and Izbica, Srbica municipality (101 bodies, examinations conducted in Kosovska Mitrovica). It is her account that in most cases the bodies were in advanced stages of decomposition, death having occurred some months earlier.

21. In view of the allegations included in Counts 3, 4, and partly in Count 5 of the Indictment and considering the witness's qualifications and the official role she performed in the forensic examination the Chamber is satisfied that the proposed evidence meets the requirements of Rule 89 of the Rules. The Chamber is further satisfied that the proposed evidence does not go directly to proof of acts and conduct of the Accused and, therefore, in principle, may be admitted in written form. While this evidence is not inadmissible *per se*, in the view of the Chamber, the fairness of the trial requires that the Accused be given the opportunity to cross-examine the witness. In this respect that the proposed evidence goes to proof of allegations that form the basis of three counts of the Indictment, allegations disputed by the Defence. Further, the proposed evidence deals with the conduct of individuals alleged to have been participants with the Accused in the joint criminal enterprise alleged in the Indictment.

02418.

22. Turning next to the documents proposed for admission with the written statements and the transcript of Gordana Tomašević's evidence, the Chamber notes that the proposed documents appear to be relevant and of probative value and are, therefore, in principle admissible. Considering, however, that these documents are closely related to the witness's expected evidence and that some of them are of a technical nature, the Chamber is of the view that the question of their admission should be considered when the witness appears in court for cross-examination.

23. The Chamber notes that in this case the Prosecution has not given consideration to the application of Rule 94*bis* to these witnesses. The decision of the Chamber is nevertheless consistent with the result that would have followed if Rule 94*bis* had been applied.

For the foregoing reasons and pursuant to Rules 89 and 92*bis* of the Rules the Chamber:

GRANTS leave to the Prosecution to add documents identified as P05065, P05086, P05096, and P05097 to its Rule 65*ter* exhibit list;

GRANTS the Motion **IN PART** and **DECIDES**:

- (1) To admit into evidence the written statements and transcripts of Dušan Dunjić, Branimir Aleksandrić, Jon Sterenberg, and Gordana Tomasević;
- (2) The admission into evidence of the above written statements and transcripts is subject to these witnesses respectively being available for cross-examination;
- (3) To treat the Motion as moot in so far as it seeks admission of documents bearing the following Rule 65*ter* numbers: 02395; 02396; 02397; 02398; 02400; 02407; 02410; 02413; 02414; 02415; 02416; 02417; 02418;
- (4) To make no decision at this stage of the proceedings in so far as the Motion seeks the admission into evidence of the remaining documents listed in Annex A as exhibits.

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

Dated this eleventh day of February 2009
At The Hague
The Netherlands



Judge Kevin Parker
Presiding

[Seal of the Tribunal]