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**UNITED
NATIONS**



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

Case No. IT-05-88-A
Date: 23 May 2014
Original: English

IN THE APPEALS CHAMBER

Before: Judge Patrick Robinson, Presiding
Judge William H. Sekule
Judge Fausto Pocar
Judge Arlette Ramaroson
Judge Mandiaye Niang

Registrar: Mr. John Hocking

Decision of: 23 May 2014

PROSECUTOR

v.

**VUJADIN POPOVIĆ
LJUBIŠA BEARA
DRAGO NIKOLIĆ
RADIVOJE MILETIĆ
VINKO PANDUREVIĆ**

PUBLIC

**PUBLIC REDACTED VERSION OF 2 MAY 2014 DECISION ON
VUJADIN POPOVIĆ'S THIRD AND FIFTH MOTIONS FOR
ADMISSION OF ADDITIONAL EVIDENCE ON APPEAL
PURSUANT TO RULE 115**

The Office of the Prosecutor:

Mr. Peter Kremer QC

Counsel for the Defence:

Mr. Zoran Živanović and Ms. Mira Tapusković for Mr. Vujadin Popović
Mr. John Ostojić for Mr. Ljubiša Beara
Ms. Jelena Nikolić and Mr. Stéphane Bourgon for Mr. Drago Nikolić
Ms. Natacha Fauveau Ivanović and Mr. Nenad Petrušić for Mr. Radivoje Miletić
Mr. Peter Haynes QC and Mr. Simon Davis for Mr. Vinko Pandurević

1. The Appeals 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 ("Appeals Chamber" and "Tribunal", respectively) is seised of two motions filed confidentially with confidential annexes by Vujadin Popović ("Popović") on 15 August 2011 and 2 September 2013, respectively, seeking admission of additional evidence on appeal pursuant to Rule 115 of the Tribunal's Rules of Procedure and Evidence ("Rules").¹ The Office of the Prosecutor ("Prosecution") responded on 14 September 2011 and 26 September 2013, respectively.² Popović replied to the Third Response on 28 September 2011³ and filed a request for leave to reply to the Fifth Response together with his proposed reply on 10 October 2013.⁴ On 4 October 2011, the Prosecution filed a request for leave to file a sur-reply to the Third Motion together with its proposed sur-reply.⁵

I. BACKGROUND

2. On 10 June 2010, Trial Chamber II of the Tribunal ("Trial Chamber") convicted Popović pursuant to Article 7(1) of the Tribunal's Statute ("Statute") of committing genocide, extermination and persecution as crimes against humanity as well as murder as a violation of the laws or customs of war.⁶ The Trial Chamber sentenced him to life imprisonment.⁷

3. Popović appealed his convictions and sentence.⁸ Briefing in relation to Popović's appeal has been complete since 2 May 2011.⁹

¹ Vujadin Popović's [sic] Third Motion Pursuant to Rule 115, 15 August 2011 (confidential with confidential annexes) ("Third Motion"); Vujadin Popović's Fifth Motion Pursuant to Rule 115, 2 September 2013 (confidential with confidential annexes) ("Fifth Motion"). See also Corrigendum to Vujadin Popović's [sic] Third Motion Pursuant to Rule 115, 20 September 2011 (confidential with a confidential annex) ("Corrigendum").

² Prosecution Response to Vujadin Popović's Third Rule 115 Motion, 14 September 2011 (confidential with a confidential annex) ("Third Response"); Prosecution Response to Vujadin Popović's Fifth Rule 115 Motion, 26 September 2013 (confidential) ("Fifth Response").

³ Vujadin Popović's Reply to the Prosecution's Response to the Third Rule 115 Motion, 28 September 2011 (confidential with confidential annexes) ("Third Reply"). See also Vujadin Popović's Corrigendum and Addendum to His Reply to the Prosecution's Response to the Third Rule 115 Motion, 7 October 2011 (confidential with a confidential annex).

⁴ Request for Leave to Reply and Reply to Response to Vujadin Popović's Fifth Rule 115 Motion, 10 October 2013 (confidential) ("Reply Request" and "Fifth Reply", respectively).

⁵ Prosecution Motion for Leave to File Sur-Reply and Sur-Reply to Vujadin Popović's Third Rule 115 Reply, 4 October 2011 (confidential) ("Sur-Reply Request" and "Sur-Reply", respectively).

⁶ *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-T, Judgement, 10 June 2010 (public redacted version; confidential version filed on the same day) ("Trial Judgement"), p. 826. See also Trial Judgement, para. 2104.

⁷ Trial Judgement, p. 826.

⁸ Vujadin Popović's [sic] Notice of Appeal, 8 September 2010 (confidential; public redacted version filed on 25 February 2011); Appeal Brief on Behalf of Vujadin Popović [sic], 21 January 2011 (confidential; public redacted version filed on 14 April 2011).

⁹ Notice of Filing of Prosecution Responses to the Appeals of Vujadin Popović, Ljubiša Beara, Drago Nikolić, Radivoje Miletić and Vinko Pandurević, 4 April 2011 (confidential; public redacted version filed on 3 August 2011), appending Prosecution Response to Popović Appeal (see also Corrigendum to Prosecution Responses to the Appeals of Vujadin Popović, Ljubiša Beara, Drago Nikolić, Radivoje Miletić and Vinko Pandurević, 3 June 2011 (confidential); Second

4. In the Third Motion, Popović requests to admit, as additional evidence on appeal, statements of Franc Kos (“Kos”) [REDACTED] and Dražen Erdemović (“Erdemović” and “Erdemović Statement”, respectively) (collectively, “Statements”) as well as two videos.¹⁰ According to Popović, these materials contradict the Trial Chamber’s findings with respect to the mass executions at a military farm in Branjevo (“Branjevo Military Farm”) and at a cultural centre in Pilica (“Pilica Cultural Centre”) on 16 July 1995 during which 1,000-2,000 Bosnian Muslim men were killed.¹¹ Specifically, Popović contends that the Statements and videos undermine the Trial Chamber’s findings that he was the “lieutenant colonel” who, on 16 July 1995: (i) joined eight members of the 10th Sabotage Detachment in the Standard Barracks and continued with them to the Branjevo Military Farm but left when the buses began to arrive; (ii) returned to the Branjevo Military Farm at 3 p.m. or 4 p.m. and ordered soldiers from the 10th Sabotage Detachment to go to the Pilica Cultural Centre to execute 500 Muslim men detained there; (iii) subsequently left with soldiers from Bratunac who volunteered to go; (iv) instructed Erdemović and other members of the 10th Sabotage Detachment to go to a café in Pilica; and (v) announced “Who remained alive has remained alive” when told by Radenko Tomić, a.k.a. Gargija, that everything was finished.¹² The Prosecution responds that the Third Motion should be dismissed as it fails to meet the requirements of Rule 115 of the Rules.¹³

5. In the Fifth Motion, Popović requests to admit, as additional evidence on appeal, evidence of Kos in the *Karadžić et al.* trial,¹⁴ consisting of a Rule 92 *ter* Statement (“Kos Rule 92 *ter* Statement”) and his *viva voce* testimony (“Kos *viva voce* Testimony”) (collectively, “Kos Testimony”).¹⁵ In line with his submission in the Third Motion, Popović claims that the Kos Testimony contradicts the Trial Chamber’s finding that he was the “lieutenant colonel” present at the Branjevo Military Farm on 16 July 1995.¹⁶ Additionally, Popović submits that the Kos Testimony undermines the Trial Chamber’s credibility assessment [REDACTED].¹⁷ The

Corrigendum to Prosecution Responses to the Appeals of Vujadin Popović, Ljubiša Beara, Drago Nikolić, Radivoje Miletić and Vinko Pandurević, 2 August 2011 (confidential)); Reply Brief on Behalf of Vujadin Popović, 2 May 2011 (confidential; public redacted version filed on 6 July 2011) (see also Corrigendum to Brief in Reply on Behalf of Vujadin Popović [sic] and Notice of Refiling of Vujadin Popović’s [sic] Reply Brief, 18 May 2011 (confidential)).

¹⁰ Third Motion, paras 1, 30. See Third Motion, Annex 1 (Kos Statement), Annex 2 ([REDACTED] Statement), Annex 3 ([REDACTED] Statement), Annex 4 (Erdemović Statement).

¹¹ Third Motion, paras 8, 10.

¹² Third Motion, paras 8, 30.

¹³ Third Response, paras 1-3, 9, 44.

¹⁴ *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T.

¹⁵ Fifth Motion, para. 1 & fn. 1. See also Fifth Motion, Annex A (Kos Rule 92 *ter* Statement), Annex B (Kos *viva voce* Testimony).

¹⁶ Fifth Motion, paras 1, 6.

¹⁷ Fifth Motion, paras 1, 12-16.

Prosecution responds that the Fifth Motion should be dismissed as it fails to meet the requirements of Rule 115 of the Rules.¹⁸

II. APPLICABLE LAW

6. Pursuant to Rule 115 of the Rules, a party may submit a request to present additional evidence before the Appeals Chamber no later than 30 days from the date of filing of the brief in reply unless good cause or, after the appeal hearing, cogent reasons are shown for a delay.¹⁹

7. For additional evidence to be admissible under Rule 115 of the Rules, the applicant must first demonstrate that the additional evidence tendered on appeal was not available to him at trial in any form, or discoverable through the exercise of due diligence. The applicant's duty to act with due diligence includes making appropriate use of all mechanisms of protection and compulsion available under the Statute and the Rules to bring evidence on behalf of an accused before the Trial Chamber. The applicant is therefore expected to apprise the Trial Chamber of all the difficulties he encounters in obtaining the evidence in question.²⁰

8. The applicant must then show that the evidence is both relevant to a material issue and credible. Evidence is relevant if it relates to findings material to the conviction or sentence, in the sense that those findings were crucial or instrumental to the conviction or sentence. Evidence is credible if it appears to be reasonably capable of belief or reliance.²¹

9. The applicant must further demonstrate that the evidence *could* have had an impact on the verdict; in other words, the evidence must be such that, if considered in the context of the evidence presented at trial, it could show that the verdict was unsafe. A decision will be considered unsafe if the Appeals Chamber ascertains that there is a realistic possibility that the Trial Chamber's verdict might have been different if the new evidence had been admitted.²²

10. If the evidence was available at trial or could have been obtained through the exercise of due diligence, it may still be admissible on appeal if the applicant shows that the exclusion of the

¹⁸ Fifth Response, paras 1-2, 12.

¹⁹ Rule 115(A) of the Rules. See also Decision on Vujadin Popović's Fourth Motion for Admission of Additional Evidence on Appeal Pursuant to Rule 115 of the Rules, 7 October 2013 (confidential) ("Decision of 7 October 2013"), para. 5; Decision on Radivoje Miletic's First and Second Motions for Admission of Additional Evidence on Appeal Pursuant to Rule 115, 15 April 2013 ("Decision of 15 April 2013"), para. 5.

²⁰ Decision of 7 October 2013, para. 6; Decision of 15 April 2013, para. 6.

²¹ Decision of 7 October 2013, para. 7; Decision of 15 April 2013, para. 7.

²² Decision of 7 October 2013, para. 8; Decision of 15 April 2013, para. 8.

additional evidence would lead to a miscarriage of justice, in that if it had been admitted at trial, it *would* have affected the verdict.²³

11. In both cases, the applicant bears the burden of identifying with precision the specific finding of fact made by the Trial Chamber to which the additional evidence pertains, and of specifying with sufficient clarity the impact the additional evidence could or would have had upon the Trial Chamber's verdict. A party that fails to do so runs the risk that the tendered material will be rejected without detailed consideration.²⁴

12. Finally, the significance and potential impact of the tendered material shall not be assessed in isolation, but in the context of the evidence presented at trial.²⁵

III. PRELIMINARY MATTERS

A. The Prosecution's Request to File a Sur-Reply

13. In the Sur-Reply, the Prosecution argues that Popović makes a new request in his Third Reply for the admission of two videos and raises a new argument that the videos support the Erdemović Statement.²⁶ The Prosecution submits that it did not have the opportunity to respond to the new request.²⁷ The Prosecution argues that, in the Third Motion, Popović merely promised to manually distribute a video of the British Broadcasting Corporation ("BBC Video") mentioned in the Erdemović Statement, but presented no argument to show how the video would affect the verdict.²⁸ The Prosecution avers that it did not specifically respond to this because "the Erdemović statement was in evidence at trial and mentioned the videos".²⁹ Accordingly, the Prosecution requests that the Appeals Chamber denies the admission of the two videos.³⁰ Popović did not respond to the Sur-Reply Request.

14. The Appeals Chamber recalls that full answers to issues raised in motions should be provided at the response stage and that no provision in the Rules or the Practice Direction authorises a party to file a sur-reply.³¹ However, leave to file a sur-reply may be granted where the

²³ Decision of 7 October 2013, para. 9; Decision of 15 April 2013, para. 9.

²⁴ Decision of 7 October 2013, para. 10; Decision of 15 April 2013, para. 10.

²⁵ Decision of 7 October 2013, para. 11; Decision of 15 April 2013, para. 11.

²⁶ Sur-Reply, paras 1, 4.

²⁷ Sur-Reply, para. 1.

²⁸ Sur-Reply, para. 3. The Prosecution further notes that in the Corrigendum, Popović corrected the reference to the videos but made no argument as to how they would affect the verdict. See Sur-Reply, para. 4. The Prosecution also observes that the reference numbers provided in the Corrigendum for the videos are incorrect. See Sur-Reply, fn. 8.

²⁹ Sur-Reply, para. 3.

³⁰ Sur-Reply, paras 2, 6.

³¹ *Prosecutor v. Ante Gotovina and Mladen Markač*, Case No. IT-06-90-A, Public Redacted Version of 21 June 2012 Decision on Ante Gotovina's and Mladen Markač's Motions for the Admission of Additional Evidence on Appeal,

reply raises a new issue to which the respondent has not already had the opportunity to respond.³² In the present case, the Third Motion is unclear with regard to whether Popović tenders the BBC Video³³ and entirely fails to identify the second video that he seeks to tender.³⁴ Indeed, it was only after the Prosecution filed its Third Response that Popović identified the second video – containing footage from the Srpska Republika News Agency (“SRNA Video”)³⁵ – and presented arguments in support of the admissibility of the BBC Video and the SRNA Video (collectively, “Videos”).³⁶ Consequently, the Prosecution did not have the opportunity to address the admissibility of the Videos in its Third Response. Accordingly, the Appeals Chamber grants the request and accepts the Sur-Reply as validly filed.

B. Popović’s Request to File a Reply

15. In the Fifth Reply, Popović argues that he should be granted leave to reply in order to correct certain alleged misrepresentations made in the Fifth Response.³⁷ The Appeals Chamber notes that where a motion under Rule 115 of the Rules is filed during an appeal from judgement the moving party may file a reply within 14 days of the filing of the response without first seeking leave to file such a reply.³⁸

C. Formal Requirements

16. The Appeals Chamber recalls that motions filed pursuant to Rule 115 of the Rules must include, *inter alia*, “a precise list of the evidence the party is seeking to have presented”.³⁹ The Appeals Chamber notes that the Third Motion does not include the Videos on any such list and as a result lacks sufficient clarity as to whether they were being tendered for admission as additional

2 October 2012 (“*Gotovina and Markač* Decision”), para. 15 (referring to Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings Before the International Tribunal, IT/155 Rev. 4, 4 April 2012 (“Practice Direction”)) and references cited therein; *Prosecutor v. Ljube Bošković and Johan Tarčulovski*, Case No. IT-04-82-A, Decision on Johan Tarčulovski’s Motion for Leave to Present Appellate Arguments in Order Different from that Presented in Notice of Appeal, to Amend the Notice of Appeal, and to File Sur-Reply, and on Prosecution Motion to Strike, 26 March 2009 (“*Bošković and Tarčulovski* Decision”), para. 15 and references cited therein.

³² *Gotovina and Markač* Decision, para. 15 and references cited therein; *Bošković and Tarčulovski* Decision, para. 15 and references cited therein.

³³ See Third Motion, paras 27-28. Although Popović refers to the BBC Video, he does not explicitly state that he seeks its admission pursuant to Rule 115 of the Rules. Moreover, Popović fails to include expressly the BBC Video in the list of the materials he seeks to tender pursuant to Rule 115 of the Rules. See Third Motion, paras 1, 30.

³⁴ See Third Motion, para. 30.

³⁵ Corrigendum, paras 1-2, 4-5; Third Reply, para. 3.

³⁶ Third Reply, paras 3-7.

³⁷ Fifth Reply, para. 1.

³⁸ Practice Direction, para. 14. See also *Prosecutor v. Nikola Šainović et al.*, Case No. IT-05-87-A, Decision on “Defence Request to File a Reply to Confidential Prosecution Response to Šainović’s Second Motion to Admit Additional Evidence”, 12 July 2010, p. 1.

³⁹ Practice Direction on Formal Requirements for Appeals from Judgement, IT/201, 7 March 2002, para. 11(a). See also Decision of 7 October 2013, para. 15; Decision on Vujadin Popović’s Motion for Admission of Additional Evidence on Appeal Pursuant to Rule 115, 20 October 2011 (“Decision of 20 October 2011”), para. 29.

evidence on appeal.⁴⁰ The Appeals Chamber therefore finds that the formal requirements applicable to a motion seeking to present additional evidence on appeal have not been satisfied in relation to the Videos, and will not consider them for the purposes of admission of additional evidence on appeal.⁴¹

IV. DISCUSSION

A. Timeliness

1. Arguments of the Parties

17. In the Third Motion, Popović does not explicitly provide any explanation or justification for seeking to admit the Statements after the expiration of the 30-day time-limit prescribed by Rule 115 of the Rules. Instead, he refers to his previously expressed “intentions to file additional motions pursuant to Rule 115, once he has had the necessary time and resources to review and analyze the abundant post-trial disclosures.”⁴² The Prosecution responds that the Third Motion should be rejected because Popović fails to show good cause for the late filing.⁴³ It contends that “[l]ack of diligence based on unsubstantiated allegations of inadequate defence resources is not good cause.”⁴⁴ Popović replies that he filed the Third Motion in the most reasonable time possible, considering the time and resource constraints of his defence.⁴⁵ He explains that the work on his appeal brief, response brief, and reply brief “limited his ability to review and process the abundant disclosures in merely 30 days after filing the Reply Brief.”⁴⁶ Popović submits that the Prosecution disclosed 62,000 pages of documents and 221 hours of video footage.⁴⁷ He further submits that he had no resources to engage his whole team until his defence received an increase in funding on 29 July 2011.⁴⁸

18. With regard to the Fifth Motion, Popović submits that it was timely filed because the Kos Rule 92 *ter* Statement, taken in March 2013, was only subject to cross-examination one month before the filing of the Fifth Motion, *i.e.* on 31 July and 1 August 2013 at the time of the Kos *viva*

⁴⁰ See *supra*, para. 14.

⁴¹ The Appeals Chamber notes that the request to admit the Videos into evidence is also untimely. See *infra*, para. 20. Cf. Decision of 20 October 2011, fn. 78.

⁴² Third Motion, para. 5. See also Third Motion, para. 6.

⁴³ Third Response, paras 2, 43-44.

⁴⁴ Third Response, para. 43.

⁴⁵ Third Reply, para. 16.

⁴⁶ Third Reply, para. 16.

⁴⁷ Third Reply, para. 16.

⁴⁸ Third Reply, para. 16.

voce Testimony.⁴⁹ The Prosecution makes no submissions with regard to whether Popović has shown good cause for the late filing of the Fifth Motion.

2. Analysis

19. The 30-day time-limit prescribed under Rule 115 of the Rules expired, in this case, on 1 June 2011.⁵⁰ Consequently, for all motions filed after this deadline pursuant to Rule 115 of the Rules, the moving party must “demonstrate that it was not able to comply with the time limit set out in the Rule, and that it submitted the motion in question as soon as possible after it became aware of the existence of the evidence sought to be admitted”.⁵¹

20. The Third Motion was filed on 15 August 2011, two and a half months after the expiration of the deadline. To justify this delay, Popović presents arguments similar to those he raised in his previous Rule 115 motion, which were rejected by the Appeals Chamber.⁵² However, the arguments in the Third Motion are more developed and warrant new consideration.⁵³ The Appeals Chamber notes in this regard that the Third Motion was filed almost two years after the date of the first Prosecution disclosure and almost one year after the date of the last Prosecution disclosure listed by Popović.⁵⁴ It further notes that after the last disclosure approximately four or five months passed before Popović exhausted his funding for support staff.⁵⁵ The Appeals Chamber therefore finds that Popović has failed to demonstrate good cause for the late filing and consequently dismisses the Third Motion.

21. With regard to the Fifth Motion, the Appeals Chamber notes that the Kos Rule 92 *ter* Statement, which memorialises an interview that took place on 6 March 2013, is dated 26 July 2013 and was admitted into evidence in the *Karadžić* trial on 31 July 2013.⁵⁶ The Appeals Chamber further notes that the Kos *viva voce* Testimony is dated 31 July and 1 August 2013.⁵⁷ Popović thus filed the Fifth Motion approximately one month after the Kos Testimony became available. The Appeals Chamber notes that the Prosecution does not argue that Popović has failed to show good cause and would not suffer any prejudice from the timing of the filing of the Fifth Motion. For these

⁴⁹ Fifth Motion, para. 3. According to Popović, in any event, “it would not serve the efficiency or expediency of the proceedings to submit two Rule 115 motions in relation to evidence which, according to the Rules, is inseparable”. Fifth Motion, fn. 13.

⁵⁰ Decision of 7 October 2013, para. 13; Decision of 15 April 2013, para. 28.

⁵¹ Decision of 7 October 2013, para. 13; Decision of 15 April 2013, para. 28.

⁵² Decision of 20 October 2011, fn. 78.

⁵³ *Cf.* Third Reply, para. 16.

⁵⁴ Popović lists Prosecution disclosures “since September 2009” and until 8 September 2010. See Vujadin Popovic’s [*sic*] Motion for Enlargement of Time to File Rule 115 Motion, 10 May 2011 (public with a confidential annex) (“Motion of 10 May 2011”), annex, para. 1 and item 43. See also Motion of 10 May 2011, para. 3.

⁵⁵ The Appeals Chamber notes that the last disclosure listed by Popović was on 8 September 2010 and that Popović submits that funding was exhausted in January 2011. See Motion of 10 May 2011, para. 3 and annex, item 43.

⁵⁶ Fifth Motion, Annex A, pp. 1, 55, Annex B, pp. 42357-42358.

reasons, the Appeals Chamber accepts that the Fifth Motion was filed as soon as possible after the Kos Testimony became available to Popović. In these circumstances, the Appeals Chamber considers that good cause for the late filing of the Fifth Motion has been shown and will accordingly consider it as validly filed.

B. Availability and Due Diligence

1. Arguments of the Parties

22. Popović does not present any arguments in his Fifth Motion on the non-availability at trial of the Kos Testimony.

23. The Prosecution argues that Popović knew the names of the members of the 10th Sabotage Detachment at trial and could have identified, located, and interviewed Kos at that time.⁵⁸ It further argues that more than two years after filing his Third Rule 115 Motion Popović has not attempted to contact Kos directly.⁵⁹

24. Popović replies that Kos was at-large, living under an assumed identity, until approximately five weeks before the Trial Judgement was issued.⁶⁰ Popović therefore submits that, even with the exercise of due diligence, he would not have been able to find Kos at trial.⁶¹

2. Analysis

25. The Kos Testimony concluded on 1 August 2013.⁶² Considering that the *Popović et al.* trial had long since ended at that point in time, the Appeals Chamber is satisfied that the Kos Testimony itself was not available to Popović at trial. However, the Appeals Chamber must determine whether the information contained therein was discoverable at trial through the exercise of due diligence.⁶³ The Appeals Chamber recalls that the applicant's duty to act with due diligence includes making appropriate use of all mechanisms of protection and compulsion available under the Statute and the Rules to bring evidence on behalf of an accused before the Trial Chamber.⁶⁴ Popović claims that even with the exercise of due diligence he would not have been able to find Kos at trial, but does not indicate that he made any attempt to obtain the evidence. For this reason, the Appeals Chamber considers that Popović has failed to demonstrate that the evidence he seeks to tender through the

⁵⁷ Fifth Motion, Annex B.

⁵⁸ Fifth Response, para. 3.

⁵⁹ Fifth Response, para. 3.

⁶⁰ Fifth Reply, paras 1-2.

⁶¹ Fifth Reply, paras 1-2.

⁶² See *supra*, para. 21.

⁶³ See *supra*, para. 7. See also Decision of 7 October 2013, para. 27; Decision of 15 April 2013, paras 30, 32.

⁶⁴ See *supra*, para. 7.

Kos Testimony was not available to him at trial in any form and that he fulfilled his duty to act with due diligence. Accordingly, the Kos Testimony can only be admitted as additional evidence on appeal if the Appeals Chamber is satisfied that its exclusion would lead to a miscarriage of justice, in that if it had been admitted at trial, it *would* have affected the verdict.

C. Relevance and Credibility

26. Popović argues that the Kos Testimony is relevant to the Trial Chamber's findings regarding his participation in the events at the Branjevo Military Farm and at the Pilica Cultural Centre.⁶⁵ Popović further argues that the Kos Testimony was given under oath and subject to cross-examination.⁶⁶ The Prosecution does not specifically challenge the credibility and relevance of the Kos Testimony.

27. With regard to relevance, the Appeals Chamber recalls that it must determine "whether the proposed evidence sought to be admitted relates to a material issue".⁶⁷ The Appeals Chamber observes that the Kos Testimony contains a first-hand account of the killings at the Branjevo Military Farm and ensuing events in Pilica on 16 July 1995. The findings of the Trial Chamber on the involvement of Popović in these events formed part of the basis for his conviction.⁶⁸ The Appeals Chamber is therefore satisfied that the content of the Kos Testimony is sufficiently relevant to a material issue.

28. As for credibility, the Appeals Chamber observes that the Kos Testimony was received into evidence in the *Karadžić* case. The Appeals Chamber notes that the witness solemnly declared that he would speak the truth, was informed of his rights regarding self-incrimination, attested that the Kos Rule 92 *ter* Statement accurately reflected his words and what he would say if examined, and was cross-examined and re-examined.⁶⁹ The Appeals Chamber is satisfied that the Kos Testimony is *prima facie* credible for the purposes of being considered admissible as additional evidence on appeal pursuant to Rule 115 of the Rules.⁷⁰

⁶⁵ Fifth Motion, paras 10-11.

⁶⁶ Fifth Motion, para. 4.

⁶⁷ See Decision of 7 October 2013, para. 34; Decision of 15 April 2013, para. 34.

⁶⁸ See Trial Judgement, paras 1097-1142, 1166-1168, 1175-1181, 1185-1196.

⁶⁹ Fifth Motion, Annex B, pp. 42355-42357, 42359-42426.

⁷⁰ Cf. Decision of 7 October 2013, para. 32; Decision of 15 April 2013, paras 33, 40.

D. Impact on the Verdict

1. Arguments of the parties

29. Popović submits that the Kos Testimony undermines the Trial Chamber's finding that Erdemović's description of the "lieutenant colonel" and his failure to identify Popović in a photo line-up were inaccurate due to trauma and the passage of time, which formed the basis for its finding that Popović was the "lieutenant colonel".⁷¹ In this regard, Popović argues that the Kos Testimony corroborates Erdemović's evidence with regard to the physical description of the "lieutenant colonel".⁷² Popović further argues that Kos confirmed that he was not the "lieutenant colonel" by testifying that he had never seen Popović.⁷³ Popović submits that the Prosecution conceded in the *Karadžić* case that he was not the man who gave the speech at the Pilica café.⁷⁴ Popović also contends that Kos's description of the vehicle belonging to the officer who brought them to the Branjevo Military Farm does not fit the description of the blue Golf car that he was found to have driven.⁷⁵ Popović argues that this shows that there was another lieutenant colonel in Pilica, which undercuts the Trial Chamber's finding that he was the "lieutenant colonel" based on the absence of evidence of any other lieutenant colonel in Pilica at the time.⁷⁶ Popović concludes that the Kos Testimony raises reasonable doubt as to whether he was involved in the Pilica killings, which the Trial Chamber considered as a factor in determining that he had genocidal intent.⁷⁷

30. Popović further submits that Kos revealed [REDACTED] was present at the Branjevo Military Farm on 16 July 1995, thereby contradicting [REDACTED] and, by extension, the Trial Chamber's finding [REDACTED].⁷⁸ Popović argues that this undermines the Trial Chamber's findings based exclusively or principally on [REDACTED], which were instrumental to the Trial Chamber's ultimate determination that Popović participated in a JCE to murder with genocidal intent.⁷⁹

31. The Prosecution responds that Popović has failed to show that the admission of the Kos Testimony into evidence would have affected the verdict.⁸⁰ The Prosecution submits that the Kos Testimony is largely consistent with Erdemović's evidence and does not undermine the Trial

⁷¹ Fifth Motion, paras 5, 7; Fifth Reply, para. 1.

⁷² Fifth Motion, paras 5-7, 10; Fifth Reply, paras 1, 3.

⁷³ Fifth Motion, paras 5-7, 10; Fifth Reply, para. 3.

⁷⁴ Fifth Motion, para. 8. See also Fifth Reply, para. 4.

⁷⁵ Fifth Motion, para. 9.

⁷⁶ Fifth Motion, para. 10.

⁷⁷ Fifth Motion, para. 11.

⁷⁸ Fifth Motion, paras 12-14; Fifth Reply, paras 1, 5.

⁷⁹ Fifth Motion, paras 12-16; Fifth Reply, para. 5.

⁸⁰ Fifth Response, paras 1-2, 4, 8, 12.

Chamber's findings concerning the killings at the Branjevo Military Farm and the Pilica Cultural Centre.⁸¹ The Prosecution argues that the Trial Chamber's finding that Popović was involved in the Pilica executions on 16 July 1995 was based on a body of mutually corroborative and independent evidence.⁸² The Prosecution further argues that Kos's testimony regarding Popović only shows that Kos, like Erdemović, at the time did not know that the "lieutenant colonel" was Popović.⁸³ The Prosecution denies that it conceded that Popović was not the man who gave the speech at the Pilica café, considering that there may have been more than one VRS officer giving a speech at the café.⁸⁴ The Prosecution also argues that the contradictions regarding the description of the car do not affect the finding as to the identity of the "lieutenant colonel".⁸⁵ Finally, the Prosecution argues that Popović has failed to demonstrate that the Trial Chamber's findings or assessment [REDACTED] are undermined by Kos's confused testimony [REDACTED].⁸⁶

2. Analysis

32. The Appeals Chamber observes that the Trial Chamber found that Popović was involved in the executions at Pilica on 16 July 1995 based on evidence other than that concerning the "lieutenant colonel". Specifically, the Trial Chamber noted that Popović was seen at the Kula School around noon, that an intercept places him in the Pilica area at 4:40 p.m. around the time the execution at the Branjevo Military Farm occurred, and that communications within the Zvornik Brigade in the afternoon indicate that Popović needed fuel delivered to Pilica in relation to the executions and burials there or otherwise "his work will stop".⁸⁷ The Appeals Chamber further considers that Popović's involvement in the executions at Pilica is only one of the many findings on which the Trial Chamber relied to reach the conclusion that he was guilty of genocide.⁸⁸ Popović has therefore failed to show that the evidence in the Kos Testimony concerning the "lieutenant-colonel" would have affected the verdict.

33. Regarding [REDACTED], the Appeals Chamber observes that Popović points to several findings of the Trial Chamber that concern him and that are based exclusively on [REDACTED].⁸⁹ However, the Trial Chamber's conclusion that Popović was a participant in the JCE to Murder was

⁸¹ Fifth Response, paras 4, 9.

⁸² Fifth Response, para. 5.

⁸³ Fifth Response, para. 6.

⁸⁴ Fifth Response, para. 7.

⁸⁵ Fifth Response, para. 8.

⁸⁶ Fifth Response, paras 10-11.

⁸⁷ Trial Judgement, para. 1134.

⁸⁸ Trial Judgement, paras 1178-1180. Cf. Fifth Motion, para. 11.

⁸⁹ Fifth Motion, para. 15, referring to [REDACTED].

based on numerous other findings and “abundant evidence” beyond [REDACTED].⁹⁰ Popović has therefore failed to show that the evidence in the Kos Testimony concerning [REDACTED] would have affected the verdict.

34. Accordingly, had the Kos Testimony been admitted at trial, it would not have affected the verdict. Consequently, the Appeals Chamber will not admit the Kos Testimony as additional evidence on appeal pursuant to Rule 115 of the Rules.

35. The Appeals Chamber emphasises that its findings in the present decision pertain strictly to the admissibility of the proposed evidence and not to the merits of the appeals filed by the parties.

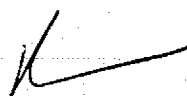
V. DISPOSITION

36. For the foregoing reasons, the Appeals Chamber:

GRANTS the Sur-Reply Request; and

DISMISSES the Third Motion and, Judge Niang concurring, the Fifth Motion in their entirety.

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



Judge Patrick Robinson
Presiding

Dated this twenty-third day of May 2014,
At The Hague,
The Netherlands.

[Seal of the Tribunal]

Judge Mandiaye Niang appends a separate opinion.

⁹⁰ [REDACTED].

SEPARATE OPINION OF JUDGE NIANG

1. On 10 June 2010, Trial Chamber II of the Tribunal convicted Vujadin Popović for genocide, extermination and persecution as crimes against humanity and murder as a violation of the laws or customs of war. It sentenced him to life imprisonment. In pursuing his appeal against the judgement, Popović has filed several motions pursuant to Rule 115 of the Rules of Procedure and Evidence, seeking the admission of additional evidence. The two motions under consideration, and referred to as the Third and Fifth Motions, pertain mainly to the issue of his identification in a crime scene.

2. The Decision dismisses the Third Motion for late filing.¹ The Fifth Motion was filed one month after the evidence had become available. The Decision, while deeming this delay reasonable, partly because the Prosecution did not challenge it, proceeds to conclude that Popović did not establish that the proposed evidence was not available at trial in any form and through his due diligence. The Decision goes further to conclude eventually that such evidence would not have made a difference anyway.² The Fifth Motion is being dismissed on this basis.

3. I write separately, as I would have proceeded differently in disposing of the Fifth Motion. Firstly, I would not have split the issue of late filing and the issue of due diligence. It looks to me awkward to find good cause for the late filing of a motion, only to note subsequently that due diligence was not proved with respect to the evidence tendered through the same motion.

4. This said, I support the conclusion reached about the due diligence. I am of the view that this conclusion is a sufficient support to the decision to warrant no further elaboration.

5. Rule 115 of the Rules provides for a two prong test for the admission of new evidence on appeal: 1) unavailability of the piece of evidence during trial, and 2) relevance and credibility of that piece of evidence combined with its potential to have changed the outcome of the decision.

6. In standing for strict compliance with the Rules, I am not against the Appeals Chamber's doctrine on admission of evidence, somewhat in disregard of the Rule 115 requirements, that *would* avoid miscarriage of justice.³ I however see this doctrine as not purporting to add a third level of scrutiny to the two-prong test clearly outlined in Rule 115. I am not even sure that the judges have the authority, absent an amendment to the Rules, to stretch the legal perimeter of Rule 115 to

¹ Decision, paras 19-20.

² Decision, paras 25, 33.

³ See *Prosecutor v. Goran Jelisić*, Case No. IT-95-10-A, Decision on Request to Admit Additional Evidence, 15 November 2000, p. 3.

include an additional routine element: a “would” test, as the practice seems to be evolving towards.⁴ When the law suffers no ambiguity, judges must show total deference thereto. The “would” test is meant to be of exceptional use. I view it as a test confined to operate as an “ultimate security valve” in cases where the proposed additional evidence would be so compelling, at first glance, that dismissing it on account of its tardiness would go against natural justice. In other words, the “would” test should only be set on motion in situations where it would almost certainly succeed.

7. There is no doubt that, in order to ascertain the weight of the proposed additional evidence – namely whether its exclusion would cause a miscarriage of justice – the judges must look at it. But this duty of anticipation is to be carried out silently. It does not need to be spelt out in the decision.

8. In the present case, the additional evidence proposed does not reach the threshold that would warrant the opening up of the “security valve”. Therefore, I would have remained within the precincts of Rule 115 of the Rules, and denied the motion on that basis alone. Judges resort to their inherent jurisdiction to fill a legal gap. I see no gap here.

9. The summary approach I advocate would have been all the more appropriate in the circumstances, for it would have ensured consistency. The “would” test was not called for when addressing the Third Motion. So the decision rightly stopped at the “late filing issue”. Not doing the same with respect to the Fifth Motion, while considering similar types of evidence, seems to me inconsistent.

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



Judge Mandiaye Niang

Done this second day of May 2014,
At The Hague,
The Netherlands.

[Seal of the Tribunal]

⁴ See, e.g., Decision on Vujadin Popović’s Fourth Motion for Admission of Additional Evidence on Appeal Pursuant to Rule 115 of the Rules, 7 October 2013 (confidential), para. 9; *Édouard Karemera and Matthieu Ngirumpatse v. The Prosecutor*, Case No: ICTR-98-44-A, Decision on Karemera’s and Ngirumpatse’s Motions Under Rules 68 and 115 of the Rules, 6 February 2014, para. 9.