



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-03-69-T
Date: 29 October
2010
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IN TRIAL CHAMBER I

Before: Judge Alphons Orie, Presiding
Judge Michèle Picard
Judge Elizabeth Gwaunza

Registrar: Mr John Hocking

Decision of: 29 October 2010

PROSECUTOR

v.

**JOVICA STANIŠIĆ
FRANKO SIMATOVIĆ**

PUBLIC

**DECISION ON PROSECUTION MOTION FOR ADMISSION
OF EVIDENCE OF STEVAN TODORVIĆ PURSUANT TO
RULE 92 *QUATER***

Office of the Prosecutor

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I. PROCEDURAL HISTORY

1. On 21 May 2007, the Prosecution filed a motion for the admission of evidence of Stevan Todorović pursuant to Rule 92 *quater* of the Rules of Procedure and Evidence of the Tribunal (“Motion” and “Rules” respectively).¹ The Prosecution sought the admission of the transcript of Todorović’s *viva voce* testimony in the case of *Prosecutor v. Slobodan Milošević* (Case No. IT-02-54-T) (“*Milošević* case”) and 17 associated exhibits listed in Confidential Annex A of the Motion (“Exhibits”) (together “Proffered Evidence”).² The Prosecution simultaneously requested that the protective measures granted to Todorović in the *Milošević* case be lifted.³ On 5 July 2010 the Prosecution filed its Update on the Status of Protective Measures, in which it noted that, if the Chamber granted the Motion, the Prosecution still intended to redact evidence given by Todorović in closed session.⁴

2. On 9 July 2007, the Simatović Defence opposed the Motion (“Simatović Response”).⁵ On 9 July 2007, the Stanišić Defence opposed the Motion and simultaneously requested leave to exceed the word limit (“Stanišić Response”).⁶ On 16 July 2007, the Prosecution requested leave to reply and simultaneously replied to both the Simatović Response and the Stanišić Response (“Reply to Simatović Response” and “Reply to Stanišić Response”).⁷ The Prosecution was granted leave to reply to the Simatović Defence and the Stanišić Defence on 16 September 2009 and 11 March 2010 respectively.⁸

3. On 15 July 2009, the Prosecution notified the parties of the existence of some 280 documents relating to Todorović’s participation in crimes in Bosanski Šamac (“Additional

¹ Prosecution’s Motion for Admission of Evidence of Witness B-1244 Pursuant to Rule 92 *quater* and Request Regarding Protective Measures for Witness B-1244 with Confidential Annexes, 21 May 2007.

² Motion, paras 1, 22, Confidential Annex A.

³ Motion, para. 3.

⁴ Prosecution Update on the Status of Protective Measures (Confidential), 5 July 2010, p. 39.

⁵ Simatović Defence Response to the Prosecution’s Motion for Admission of Evidence of Witness B-1244 Pursuant to Rule 92 *quater* and Request Regarding Protective Measures for Witness B-1244, 9 July 2007. The Chamber notes that on 29 May 2007, the Simatović Defence requested that the time limit for filing responses to a number of Prosecution motions for the admission of written evidence, including the Motion, be postponed: see Simatović Defence Motion to Postpone Deadline for Filing Response on Prosecution Motions for Admission of Written Evidence Pursuant to Rule 92 *bis*, 92 *ter* and 92 *quater*, 29 May 2007, paras 1, 12. The Chamber granted this request in part on 1 June 2007, extending the deadline for responses by both the Simatović Defence and the Stanišić Defence to 9 July 2007: see Decision on Several Applications to Modify Terms of the Work Plan and Order Following a Rule 65 *ter* Conference, 1 June 2007, para. 7.

⁶ Stanišić Defence Response to Prosecution Motion for Admission of Evidence of Witness B-1244 Pursuant to Rule 92 *quater* (Confidential), 9 July 2007, paras 2-3.

⁷ Prosecution Request for Leave to Reply and Reply to the Accused Stanišić’s Responses to the Prosecution’s Motions Pursuant to Rule 92 *quater*, 16 July 2007; Prosecution Leave to Reply and Consolidated Reply to Simatović’s Responses to the Prosecution Motions for Admission of Evidence pursuant to Rule 92 *quater*, 16 July 2007.

⁸ See Decision on Prosecution’s Motion for Admission of Evidence of Witnesses Unavailable Pursuant to Rule 92 *quater*, 16 September 2009; Decision on Prosecution Motion for Admission of Evidence of Witness B-179 Pursuant to Rule 92 *quater*, 11 March 2010 (“Witness B-179 Decision”).

Documents”).⁹ The Additional Documents were disclosed to the Defence on 20 January 2010.¹⁰ On 22 June 2010, the Chamber granted the Stanišić Defence leave to file a renewed response to the Motion.¹¹ On 13 July 2010 the Stanišić Defence filed this response (“Further Stanišić Response”), adding fresh grounds of opposition to the Motion on the basis of the Additional Documents.¹² On 19 July 2010, the Prosecution requested leave to reply to the Further Stanišić Response.¹³ The reply was filed on 20 July 2010 (“Reply to Further Stanišić Response”).¹⁴

4. On 31 August 2010, the Prosecution filed a corrigendum to the Motion (“Prosecution Corrigendum”),¹⁵ in which it indicated that, if the protective measures granted to Todorović in the *Milošević* case were rescinded by the Chamber, it no longer proposed to redact those parts of his testimony which were given in closed session.¹⁶ It also offered corrected 65 *ter* numbers for seven of the Exhibits.¹⁷ In this regard, the Chamber notes that the Rule 65 *ter* number for Exhibit 476 Tab 16 in the *Milosević* case (Record of witness interview, cited as 65 *ter* 3835) provided in Confidential Annex A to the Motion is also incorrect, and should be listed as 65 *ter* 4709.¹⁸ It notes that the Exhibit with Rule 65 *ter* number 4698 has been marked for identification since the date of filing of the Motion as P1523. It further notes that the following Exhibits have been admitted into evidence since the date of filing of the Motion: 65 *ter* 1658 (P1417), 65 *ter* 2580 (P1428), 65 *ter* 3761 (P223), 65 *ter* 4546 (D126), 65 *ter* 1660 (P1429), and 65 *ter* 31 (P141).¹⁹ As a result, the Chamber considers the Motion as it relates to the admission of these latter Exhibits to be moot.

⁹ See Further Response to Prosecution Motion for Admission of Evidence of Witness B-1244 Pursuant to Rule 92 *quater* (Confidential) with Confidential Annexes A and B, 19 July 2010, para. 2.

¹⁰ Ibid.

¹¹ Ibid.

¹² Ibid.

¹³ Prosecution Motion for Leave to Reply to Further Defence Response to Prosecution Motion for Admission of Evidence of Witness B-1244 Pursuant to Rule 92 *quater* (Confidential) with Confidential Annexes A and B.

¹⁴ Prosecution Reply to Further Defence Response to Prosecution Motion for Admission of Evidence of Witness B-1244 Pursuant to Rule 92 *quater* (Confidential) with Confidential Annexes A and B, 20 July 2010.

¹⁵ Corrigendum to Motion for Admission of Evidence of Witness B-1244 Pursuant to Rule 92 *quater* (Confidential), 31 August 2010.

¹⁶ Prosecution Corrigendum, para. 4.

¹⁷ Prosecution Corrigendum, para. 2.

¹⁸ See Confidential Annex A to Motion, 21 May 2007, p. 14 and Confidential Annex A to Prosecution’s Submission of its Reviewed 65 *ter* Exhibit List, 1 May 2009.

¹⁹ The Chamber notes that an unmarked version of 65 *ter* 113 has also been admitted into evidence since the date of filing of the Motion as P1418.

II. SUBMISSIONS OF THE PARTIES

A. Prosecution

(a) Protective Measures

5. The Prosecution submits that the protective measures granted to Todorović in the *Milošević* case are no longer necessary and requests that the Chamber lift them.²⁰ It notes that these protective measures were rescinded in *Prosecutor v. Vojislav Šešelj* (Case No. IT-03-67-T) (“*Šešelj* case”) on 17 February 2010.²¹ It submits that, although the Chamber is not bound by this decision, in the present case as in the *Šešelj* case the death of Todorović renders rescission appropriate.²²

(b) Admissibility of Proffered Evidence

6. The Prosecution argues that the Proffered Evidence fulfils the requirements for admissibility under Rule 92 *quater*.²³ The Prosecution submits that Todorović is deceased and is therefore “unavailable” within the meaning of the Rule.²⁴ The Prosecution further submits that the Proffered Evidence bears sufficient indicia of reliability to secure its admission.²⁵ Firstly, it points out that Todorović’s testimony was given under oath.²⁶ Secondly, it argues that Todorović was subjected to “extensive” cross-examination by Slobodan Milošević, whose interest in challenging the Proffered Evidence was “very similar” to that of the Accused in the present case, and that further cross-examination was conducted by the *amicus curiae*.²⁷ Both cross-examinations are submitted to have been “highly effective”.²⁸ While the Prosecution acknowledges that the Accused in the present case will not have the opportunity to cross-examine Todorović if the Motion is granted, it submits that restrictions on the right to cross-examination have been accepted by the Tribunal in its jurisprudence.²⁹ It therefore contends that the admission of the Proffered Evidence would not constitute a violation of the rights of the Accused.³⁰

7. The Prosecution further submits that the Proffered Evidence will in large part be corroborated by other documentary and testimonial evidence in the present case, meaning that the Defence will have the opportunity to test the Proffered Evidence by cross-examining other

²⁰ Motion, para. 3.

²¹ Prosecution Corrigendum, paras 4-5.

²² Ibid.

²³ Motion, paras 2, 7.

²⁴ Motion, paras 2, 7, Confidential Annex B.

²⁵ Motion, para. 2; Reply to Further Stanišić Response, para. 11.

²⁶ Motion, para. 7.

²⁷ Motion, paras 7, 15-16; Reply to Further Stanišić Response, para. 7.

²⁸ Reply to Stanišić Response, para. 15.

²⁹ Reply to Stanišić Response, para. 12.

³⁰ Reply to Stanišić Response, paras 11-12.

witnesses.³¹ To the extent that the Proffered Evidence may contain hearsay, the Prosecution submits that this is an issue which does not affect its admissibility, but only the weight it should be given by the Chamber.³²

8. Similarly, with regard to the Additional Documents, the Prosecution submits that these do not affect the admissibility of the Proffered Evidence, as Todorović's credibility is relevant only to the weight the Proffered Evidence should be given by the Chamber.³³ In addition, the Prosecution submits that Todorović was specifically cross-examined by Milošević in relation to his plea agreement, and that the existence of such an agreement is not a sufficient ground for determining that Todorović's evidence is unreliable.³⁴

9. The Prosecution acknowledges that some parts of the Proffered Evidence relate to the acts and conduct of the Accused as charged in the Indictment.³⁵ However, it submits that these parts are not as significant or extensive as the Defence argues.³⁶ In addition, it submits that the conclusion that parts – even substantial parts – of the Proffered Evidence relate to the acts and conduct of the Accused as charged in the Indictment does not preclude their admission under Rule 92 *quater*.³⁷ The Prosecution argues that the non-admission of these parts would deprive the Chamber of “exceptionally reliable, relevant and probative evidence”.³⁸

B. Simatović Defence

(a) Protective Measures

10. The Simatović Defence does not expressly address the Prosecution request for the lifting of protective measures in relation to Todorović. It simply requests that the Motion be rejected in its entirety.³⁹

(b) Admissibility of Proffered Evidence

11. The Simatović Defence does not challenge the unavailability of Todorović. The Simatović Defence, however, contests the Prosecution's submission that the Proffered Evidence has been

³¹ Motion, paras 8, 17, Confidential Annex A; Reply to Further Stanišić Response, para. 8.

³² Reply to Stanišić Response, paras 8, 14.

³³ Reply to Further Stanišić Response, paras 1, 3, 9.

³⁴ Reply to Further Stanišić Response, paras 4-6.

³⁵ Motion, paras 2, 10.

³⁶ Reply to Stanišić Response, paras 9-10.

³⁷ Motion, paras 2, 6, 10-11; Reply to Stanišić Response, paras 5, 10.

³⁸ Motion, para. 19.

³⁹ Simatović Response, para. 13.

subjected to extensive cross-examination. It submits that Milošević, who was not a legal professional, conducted his defence on political rather than legal grounds.⁴⁰ Furthermore, it submits that the role played by the *amicus curiae* in cross-examination was limited, and that cross-examination did not reveal whether the Proffered Evidence, particularly as it relates to the acts and conduct of the Accused as charged in the Indictment, was direct or hearsay evidence.⁴¹ The Simatović Defence submits that the reliability of the Proffered Evidence is further decreased by the fact that no judgement was rendered in the *Milošević* case.⁴²

12. The Simatović Defence argues that, as a significant portion of the Proffered Evidence relates to the acts and conduct of the Accused as charged in the Indictment, it is not in the interests of justice to admit it.⁴³ In particular, the Simatović Defence emphasises that these parts of the Proffered Evidence are not corroborated by other evidence.⁴⁴

C. Stanišić Defence

(a) Protective measures

13. The Stanišić Defence does not address the Prosecution request for the lifting of protective measures in relation to Todorović.

(b) Admissibility of Proffered Evidence

14. The Stanišić Defence does not challenge the unavailability of Todorović.⁴⁵ However, the Stanišić Defence submits that the Proffered Evidence is inadmissible under Rule 92 *quater*. First, it submits that the admission of the Proffered Evidence would deny the Accused his right to cross-examine a critical Prosecution witness.⁴⁶ It argues that this would constitute a violation of the Accused's right to a fair trial.⁴⁷

15. The Stanišić Defence further submits that the Proffered Evidence is not sufficiently reliable to be admitted under Rule 92 *quater*.⁴⁸ It argues that reliability in prior proceedings before the Tribunal does not equate to reliability in the present proceedings, as the *Milošević* case is "legally

⁴⁰ Simatović Response, paras 7-8.

⁴¹ Simatović Response, paras 7, 9.

⁴² Simatović Response, paras 7, 11.

⁴³ Simatović Response, paras 5-6, 8.

⁴⁴ Simatović Response, paras 9-10.

⁴⁵ Stanišić Response, para. 7.

⁴⁶ Stanišić Response, paras 2, 12, 25-28, 31.

⁴⁷ Stanišić Response, paras 2, 4-6.

⁴⁸ Stanišić Response, paras 2, 7.

distinct” from the case against the Accused.⁴⁹ In addition, it notes that the proceedings in the *Milošević* case were not the subject of a final adjudication on the merits and have not been subject to appeal.⁵⁰ The Stanišić Defence further submits that the Additional Documents demonstrate Todorović’s general bad character and hence the unreliability of his testimony.⁵¹ It argues that effective cross-examination on the Additional Documents would have exposed this unreliability, and hence submits that simply placing the Additional Documents before the Chamber is no substitute for cross-examination.⁵²

16. In addition, the Stanišić Defence argues that Rule 92 *quater* should not allow for the admission of evidence which relates to a “live and important issue between the parties”, particularly where the prior cross-examination to which the evidence was subjected was not of a high standard or where the evidence is uncorroborated.⁵³ The Stanišić Defence submits that, in this instance, only the “marginal or less contentious” elements of the Proffered Evidence are substantially corroborated and the cross-examination to which Todorović was subjected was inadequate.⁵⁴ It places particular emphasis on the fact that a number of issues critical to the case against the Accused Stanišić were not touched upon in cross-examination.⁵⁵ It submits that, under these circumstances and given that the Proffered Evidence is “pivotal to the Prosecution case”, it is inadmissible in the absence of an opportunity for the Accused Stanišić to cross-examine Todorović.⁵⁶

17. The Stanišić Defence submits that a wide view of what constitutes the “acts and conduct of the accused” should be taken due to the breadth of the Indictment.⁵⁷ It argues that, as a member of the alleged Joint Criminal Enterprise (“JCE”), “the deeds and behaviour of the Accused are the direction of the acts and conduct of others within the JCE”.⁵⁸ On the basis of this interpretation, it argues that the Proffered Evidence deals far more extensively with the acts and conduct of the Accused than is submitted by the Prosecution.⁵⁹

18. The Stanišić Defence argues that under Rule 92 *quater*, the Chamber retains a discretion to exclude evidence even where it satisfies the threshold tests for admissibility.⁶⁰ The Stanišić Defence therefore submits that, even if the Proffered Evidence is found to be admissible, the Chamber

⁴⁹ Stanišić Response, para. 8.

⁵⁰ Stanišić Response, para. 17.

⁵¹ Further Stanišić Response, paras 3, 5-13.

⁵² Further Stanišić Response, paras 16-17.

⁵³ Stanišić Response, paras 21-25.

⁵⁴ Stanišić Response, paras 23, 28, 30-33.

⁵⁵ Stanišić Response, paras 30-31; Further Stanišić Response, paras 14-16.

⁵⁶ Stanišić Response, paras 21-22, 25.

⁵⁷ Stanišić Response, para. 19.

⁵⁸ Stanišić Response, para. 20.

⁵⁹ Stanišić Response, paras 19-20, 34-36.

⁶⁰ Stanišić Response, para. 13.

should exercise its discretion to exclude it based on, *inter alia*, the extent to which it relates to the acts and conduct of the Accused; its centrality to the Prosecution case; and the inadequacy of the prior cross-examination to which it was subjected.⁶¹

III. APPLICABLE LAW

A. Protective Measures

19. Rule 75 *ter* (F) of the Rules states that, once protective measures have been ordered in respect of a witness in any proceedings before the Tribunal, these measures will continue to have effect *mutatis mutandis* in any other proceedings before the Tribunal unless and until they are rescinded, varied or augmented in accordance with the procedures set out by that Rule.

B. Leave to Reply

20. Rule 126 *bis* provides that, unless otherwise ordered by a Chamber, a response to a motion must be filed within fourteen days of the filing of the motion. A reply to such a response must be filed within seven days of the filing of the response, with the leave of the relevant Chamber.

C. Admissibility of Proffered Evidence

21. The admissibility of evidence of unavailable persons is governed by Rule 92 *quater*, which provides that:

(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.

22. A decision on the admissibility of evidence under Rule 92 *quater* involves the consideration of four main questions. One is whether the general criteria of admissibility set out in Rule 89 (C) are satisfied: namely, that the evidence is relevant and has probative value.⁶² Another is whether the threshold requirements for admissibility under Rule 92 *quater* (A) are met. This involves asking

⁶¹ Stanišić Response, paras 14-18, 22, 37.

⁶² See also *Prosecutor v. Gotovina et al.*, Case No. IT-06-90-T, Decision on the Admission of Statements of Four Witnesses Pursuant to Rule 92 *quater*, 24 July 2008 ("First Gotovina Decision"), para. 4; *Prosecutor v. Gotovina et al.*, Case No. IT-06-90-T, Decision on the Admission of Statements of two Witnesses and Associated Documents Pursuant to Rule 92 *quater*, 16 January 2009 ("Second Gotovina Decision"), para. 4.

whether the Chamber is satisfied that the witness is “unavailable” within the meaning of the Rule, and whether the Chamber finds, from the circumstances in which the witness’s statement was made and recorded, that the statement is reliable. The Tribunal’s jurisprudence establishes that, in assessing the reliability of a statement under Rule 92 *quater* (A)(ii), it is relevant to consider factors such as whether the statement (a term which includes prior testimony) was given under oath; whether it was taken with the assistance of an interpreter duly qualified and approved by the Registry of the Tribunal; and (in the case of written statements only) whether it was signed by the witness with an accompanying acknowledgement that it is true to the best of the witness’s recollection.⁶³

23. If the evidence is found to satisfy these threshold requirements, a further question is whether or not it will be admitted in the exercise of the Chamber’s discretion under Rule 92 *quater*. The existence of this discretion is evident from the structure and wording of the Rule.⁶⁴ Rule 92 *quater* (B) establishes that, in exercising its discretion, the Chamber will consider the extent to which the evidence relates to the acts and conduct of the accused as charged in the indictment, and that this may be a factor weighing against its admission. The Chamber may also consider issues of reliability going beyond the circumstances in which the witness’s statement was made and recorded, such as the occurrence, extent and quality of prior cross-examination; whether the statement, particularly an un-sworn statement which was not subject to cross-examination, is corroborated by other evidence; and whether the statement contains any “manifest or obvious inconsistencies”.⁶⁵ Factors such as the witness’s overall credibility and the extent to which his or her statement contains hearsay evidence may also be taken into account. The Chamber may also consider the relevance of the witness’s statement to the case.

⁶³ *Prosecutor v. Milan 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* Decision”), para. 7; *Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84-T, Decision on Prosecution’s Motion for Admission of Evidence Pursuant to Rule 92 *quater* and 13th Motion for Trial-Related Protective Measures, 7 September 2007 (“*Haradinaj* Decision”), para. 8; Second *Gotovina* Decision, para. 13; *Prosecutor v. Gotovina et al.*, Case No. IT-06-90-T, Decision on the Admission of a Witness Statement Pursuant to Rule 92 *quater*, 5 March 2009 (“Third *Gotovina* Decision”), para. 10; Decision on Prosecution’s Motion for Admission of Evidence of Witnesses Unavailable Pursuant to Rule 92 *quater*, 16 September 2009 (“16 September 2009 Decision”), para. 11; Witness B-179 Decision, para. 28 and fn 60 thereto.

⁶⁴ Rule 92 *quater* provides that evidence “may” be admitted if it satisfies the criteria set out in sub-Rule (A). It goes on to provide that, where evidence goes to proof of the acts and conduct of the accused as charged in the indictment, this “may be a factor” against admission. As such, it is clearly contemplated both that evidence which fulfils the requirements of sub-Rule (A) may nonetheless be excluded by the Chamber in the exercise of a residual discretion; and that, in exercising this discretion, factors other than the one specifically mentioned in sub-Rule (B) may be taken into account.

⁶⁵ See also *Milutinović* Decision, para. 7; *Haradinaj* Decision, para. 8; Second *Gotovina* Decision, para. 13; Third *Gotovina* Decision, para. 10; 16 September 2009 Decision, para. 11; Witness B-179 Decision, para. 28 and fn 60 thereto.

24. With regard to whether evidence relates to the acts and conduct of the accused as charged in the indictment, the Chamber recalls that the Trial Chamber in the *Milošević* case has held (in the context of Rule 92 *bis*⁶⁶) that the phrase “acts and conduct of the accused”:

[i]s a plain expression and should be given its ordinary meaning: deeds and behaviour of the Accused. It should not be extended by fanciful interpretation. No mention is made of acts and conduct by alleged co-perpetrators, subordinates or, indeed, of anybody else. Had the rule been intended to extend to acts and conduct of alleged co-perpetrators or subordinates it would have said so.⁶⁷

25. The Appeals Chamber later confirmed the Trial Chamber’s interpretation, pointing out the

[...] clear distinction drawn in the jurisprudence of the Tribunal between (a) the acts and conduct of those others who commit the crimes for which the indictment alleges that the Accused is individually responsible, and (b) the acts and conduct of the Accused as charged in the indictment which would establish his responsibility for the acts and conduct of those others. It is only a written statement which goes to proof of the latter acts and conduct which Rule 92 *bis*(A) excludes from the procedure laid down in that Rule.⁶⁸

26. Where the breadth of the indictment allows, evidence going to the acts and conduct of the accused as charged in the indictment includes evidence of acts and conduct of the accused on which the Prosecution relies to show that the accused was a superior to those who actually did commit the crimes charged.⁶⁹ In addition, in the specific situation of a JCE, it also includes evidence upon which the Prosecution relies to establish that the accused participated in the JCE, or shared with the person who actually committed the crimes charged the required intent for those crimes.⁷⁰ Such shared intent can be inferred from a statement which indicates the presence of the accused during the occurrence of crimes committed by individuals other than the accused.⁷¹

27. With regard to the other factors which may be relevant to the exercise of the Chamber’s discretion under Rule 92 *quater*, the Chamber notes that, even where consideration of these factors does not lead it to deny the admission of evidence, it may take them into account later in determining the weight the evidence should ultimately be given. In particular, with regard to the issue of corroboration, the Chamber recalls that the *Galić* Appeals Chamber has held (in the context of Rule 92 *bis*) that, where an accused is not given the opportunity to cross-examine a witness, that

⁶⁶ The Chamber has previously held that, as evidence tendered and admitted pursuant to Rule 92 *quater* would previously have been subject to Rule 92 *bis*, it is appropriate to draw upon Tribunal jurisprudence interpreting this Rule to the extent that it still applies to Rule 92 *quater*, including in relation to the definition of “acts and conduct of the Accused”: see e.g., Witness B-179 Decision, para. 31 and the footnotes thereto.

⁶⁷ *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, para. 22 (citation omitted).

⁶⁸ *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. 9.

⁶⁹ *Galić* Appeals Decision, para. 10.

⁷⁰ *Ibid.*

⁷¹ *Galić* Appeals Decision, para. 13.

witness's statement may lead to a conviction only if there is other evidence which corroborates its contents.⁷²

28. The remaining question in determining the admissibility of evidence under Rule 92 *quater* is whether it should be excluded in the exercise of the Chamber's discretion under Rule 89 (D), which involves determining whether its probative value is substantially outweighed by the need to ensure a fair trial.⁷³ The rights of an accused to a fair trial and to cross-examination of witnesses against him or her are enshrined in Articles 20 and 21 of the Statute respectively.

29. Exhibits which accompany transcripts or written statements, and which form an inseparable and indispensable part of the witness's testimony, can be admitted into evidence.⁷⁴ The Chamber has previously held in this regard that the witness needs to have discussed the relevant exhibits and that, without them, the transcript or the written statement must be incomprehensible or of lesser probative value.⁷⁵

IV. DISCUSSION

A. Preliminary Matters

30. In regards to the Stanišić Defence's request for leave to exceed the word limit in relation to the Stanišić Response, the Chamber considers that the scope of the Motion justified such a request and accordingly finds that leave should be granted.

31. In regards to the Prosecution's request for leave to reply to the Further Stanišić Response, the Chamber considers that the new arguments raised by the Stanišić Defence warranted a reply by the Prosecution.

⁷² Galić Appeals Decision, fn. 34.

⁷³ See also First *Gotovina* Decision, para. 4; Second *Gotovina* Decision, para. 4.

⁷⁴ *Prosecutor v. Vujadin 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, para. 33; *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, p. 4.

⁷⁵ Decision on Prosecution's Motion for the Admission of Written Evidence of Slobodan Lazarević Pursuant to Rule 92 *ter* with Confidential Annex, 16 May 2008, para. 19. See also *Prosecutor v. Mladen Naletilić and Vinko Martinović*, Case No. IT-98-34-PT, Decision Regarding Prosecutor's Notice of Intent to Offer Transcripts Under Rule 92 *bis*(D), 9 July 2001, para. 8; *Prosecutor v. Paško Ljubičić*, Case No. IT-00-41-PT, Decision on Prosecution's Motion on Admission of Transcripts Pursuant to Rule 92 *bis* (D), 23 January 2004, p. 5; *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-T, Decision on Confidential Prosecution Motion for the Admission of Prior Testimony with Associated Exhibits and Written Statements of Witnesses pursuant to Rule 92 *ter*, 9 July 2008, para. 15.

B. Protective Measures

32. Rule 75(F)(i) of the Rules provides that protective measures ordered in previous proceedings before the Tribunal continue to have effect in subsequent proceedings “unless and until they are rescinded, varied, or augmented” in accordance with the procedure set out in the Rules. The Chamber notes that the protective measures granted to Todorović in the *Milošević* case have since been lifted by the Trial Chamber in the *Šešelj* case.⁷⁶ The Prosecution’s submission appears to be that this rescission will not have effect in the present case unless this Chamber so orders.⁷⁷ This amounts to a submission that, where protective measures ordered by a Trial Chamber are rescinded, varied or augmented by a subsequent Trial Chamber, a *second* subsequent Trial Chamber before which a witness testifies should take as its starting-point the measures ordered by the original Trial Chamber.

33. The Chamber in the present case does not adopt this approach. Rather, it considers the intention behind the Rule to be that, in the interests of certainty and consistency, each Trial Chamber before which a witness appears takes as its starting-point the measures ordered by the Trial Chamber which has most recently ruled on that witness’s protective measures.⁷⁸ If a party or the Trial Chamber considers that these measures should again be rescinded, varied or augmented – for example, in order to revert to the measures ordered by the original Trial Chamber – an application to this effect may be made, or the Trial Chamber may make an order *proprio motu*, in accordance with the Rules.⁷⁹ In the present situation, therefore, the Chamber considers that it should take as its starting-point the decision of the Trial Chamber in the *Šešelj* case rescinding Todorović’s protective measures. The Chamber notes that the Prosecution does not seek the imposition of any protective measures for Todorović. Furthermore, as Todorović was “single” and is now deceased, the Chamber sees no reason to depart *proprio motu* from the decision of the *Šešelj* Trial Chamber.⁸⁰

⁷⁶ *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, Decision on Prosecution’s Motion for Admission of Evidence of Stevan Todorović (VS-1008) pursuant to Rule 92 *quater* of the Rules of Procedure and Evidence, 17 February 2010 (“*Šešelj* Protective Measures Decision”).

⁷⁷ Prosecution Corrigendum, paras 4-5.

⁷⁸ As an example of this approach, see the Chamber’s proceedings in relation to Witness JF-023: see T. 3910-3911; Prosecution Update on the Status of Protective Measures, 5 July 2010; *Prosecutor v. Milan Martić* (Case No. IT-95-11-T), Decision on Prosecution’s Motion for Variation of Protective Measures, 17 March 2006; *Prosecutor v. Slobodan Milošević* (Case No. IT-02-54-T), Decision on Eighth Prosecution motion for Protective Measures for Sensitive Source Witnesses Testifying During the Croatia Phase of the Trial, 16 October 2002.

⁷⁹ See Rule 75 (A), (G), (I) and (J).

⁸⁰ See Motion, Confidential Annex B; *Šešelj* Protective Measures Decision, para. 18. The Chamber repeats the term “single” as employed in the *Šešelj* Protective Measures Decision, where it was used without explanation; the Chamber understands it to suggest that Todorović had no surviving partner who might be prejudiced by the rescission of the protective measures granted in the *Milošević* case.

C. Admissibility of Proffered Evidence

34. The Stanišić and Simatović Defence have submitted that admitting the Proffered Evidence would constitute a violation of the Accused's right to cross-examination. The Chamber recalls that this right is not absolute, and may be limited in accordance with the Rules – including Rule 92 *quater*, which specifically envisages the admission of evidence without the possibility of cross-examination – and associated jurisprudence.⁸¹ As such, the Chamber does not consider that the inability of the Accused to cross-examine Todorović is itself enough to render the Proffered Evidence inadmissible.

35. With regard to Rule 89 (C) of the Rules, the Chamber is satisfied that the Proffered Evidence is clearly relevant to the present case as it relates to such topics as the strategic importance of Bosanski Šamac; the identity and roles of members of the detachments present in that municipality during the Indictment period; the training of Serb volunteers in the camp near Ilok and the role of the Serbian MUP in that training; the role of the troops trained at the Ilok camp in the takeover of Bosanski Šamac; and the detention and treatment of non-Serbs following the takeover.

36. The Chamber finds that Todorović is deceased and is therefore satisfied that he is unavailable within the meaning of Rule 92 *quater* (A)(i).

37. With regard to Rule 92 (A)(ii), the Chamber notes that Todorović testified under oath before the Trial Chamber hearing the *Milošević* case.⁸² It also notes that Todorović testified pursuant to a plea agreement, which is a circumstance under which his testimony was given and recorded and is therefore relevant to its admissibility under Rule 92 *quater* (A)(ii). The Chamber does not accept that the existence of a plea agreement is enough to render a witness's testimony unreliable within the meaning of that sub-Rule.⁸³ It notes that much of the Proffered Evidence is or is reasonably expected to be corroborated by other evidence,⁸⁴ and that when Todorović was cross-examined on his plea agreement no specific evidence was elicited which would support a conclusion that the agreement had a significant adverse impact on the reliability of his testimony.⁸⁵ The Chamber finds that the Proffered Evidence, from the circumstances in which it was made and recorded, is reliable, and is satisfied that it meets both the threshold criteria for admissibility under Rule 92 *quater* (A).

⁸¹ *Prosecutor v. Milan Martić*, Case No. IT-95-11-AR73.2, Decision on Appeal against the Trial Chamber's Decision on the Evidence of Witness Milan Babić, 14 September 2006, para. 12.

⁸² *Milošević* case, T. 23423.

⁸³ See also *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, Confidential Decision on Prosecution's Motion for Admission of Evidence of VS-1008 Pursuant to Rule 92 *quater* of the Rules of Procedure and Evidence, 17 February 2010, para. 20.

⁸⁴ See *infra*, para. 42.

⁸⁵ See *Milošević* case, T. 23492-23499, 23552-23554.

38. The Chamber then turns to the issue of the exercise of its discretion under Rule 92 *quater*. First, in assessing whether the Proffered Evidence goes to proof of the acts and conduct of the Accused as charged in the Indictment, the Chamber recalls that the Accused are alleged to have participated in a JCE with numerous individuals including members of the Serb forces by, *inter alia*:

- a. directing and organising the financing, training, logistical support and other substantial assistance or support to special units of the Republic of Serbia DB and other Serb Forces;⁸⁶ and
- b. giving practical assistance, encouragement or moral support to persons who carried out the crimes of persecution, deportation, forcible transfer and murder [...] with the knowledge required.⁸⁷

39. In this context, the Chamber considers that some portions of the Proffered Evidence relate to the acts and conduct of the Accused as charged in the Indictment. For example, the portions of Todorović's testimony which concern the visit of the Accused Simatović to the training camp near Ilok, and to his interaction with Dragan Đorđević (known as "Crni") – allegedly a member of the Serbian Radical Party and of the special units of the Serbian DB (specifically, the Red Berets) who participated in the takeover of Bosanski Šamac – relate to the acts and conduct of Simatović as charged in the Indictment.⁸⁸ Similarly, the portions of the testimony which concern the acts of the Accused Stanišić in relation to the release of Dragan Đorđević relate to his acts and conduct as charged in the Indictment.⁸⁹ However, the Chamber does not consider that the Proffered Evidence relates to the acts and conduct of the Accused as charged in the Indictment to an extent or degree which would militate against its admission.⁹⁰

40. Secondly, in assessing the broader considerations of reliability which are relevant to the exercise of the Chamber's discretion, the Chamber notes that Todorović was cross-examined in the *Milošević* case by both Slobodan Milošević and the *amicus curiae*.⁹¹ Topics covered in cross-examination included the plea agreement reached with the Prosecution, and its potential effect on his testimony;⁹² his position and place in the relevant chain of authority;⁹³ and the extent of his

⁸⁶ Indictment, para. 15(c).

⁸⁷ Indictment, para. 16.

⁸⁸ See *Milošević* case, T. 23424-23437, 23442-23443, 23456-23457, 23461-23462, 23518-23521; see also Indictment, paras 46-50.

⁸⁹ See *Milošević* case, T. 23475-23478, 23530-23532.

⁹⁰ See *Prosecutor v Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Prosecution's Motion for Admission of the Evidence of KDZ172 (Milan Babić) Pursuant to Rule 92 *quater*, 13 April 2010, paras 34-35; *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-T, Decision on the Prosecution Motion for Admission of a Written Statement Pursuant to Rule 92 *quater* of the Rule (Hasan Rizvić), 14 January 2008, para. 13.

⁹¹ *Milošević* case, T. 23489-23551.

⁹² *Milošević* case, T. 23492-2393, 23499, 23553.

interaction with both Accused in Belgrade.⁹⁴ The Chamber considers that the fact that the Proffered Evidence has been tested by cross-examination is a significant factor in favour of its admission under Rule 92 *quater*.

41. Both the Simatović and the Stanišić Defence have questioned the adequacy of the cross-examination to which the Proffered Evidence was subjected. The Chamber has previously held that, in general, the quality of prior cross-examination is a factor to be considered when weighing a witness's evidence rather than when determining its admissibility.⁹⁵ As noted above, however, the extent and quality of cross-examination may be relevant to the exercise of the Chamber's discretion under Rule 92 *quater*.⁹⁶ In this case, the Chamber recognises that there were a limited number of topics relevant to the case against the Accused on which Todorović was not extensively cross-examined: for example, the role played by the Serbian DB in the training camp near Ilok. However, given the other indicia of reliability borne by the Proffered Evidence and the fact that cross-examination on a variety of topics of general relevance to the case against the Accused did occur, the Chamber does not consider that this militates against admission of the Proffered Evidence.

42. The Prosecution has presented and/or expects to present corroborating documentary and/or testimonial evidence relating to the majority of Todorović's testimony, including the roles of Dragan Đorđević, Srećko Radovanović and Slobodan Miljković; the involvement of the Serbian MUP in training volunteers from both Serbia and Bosanski Šamac; and the involvement of these volunteers in the takeover of Bosanski Šamac.⁹⁷ The Chamber considers that the majority of the Proffered Evidence has been or is expected to be corroborated by the materials identified by the Prosecution, and that this weighs strongly in favour of its admission under Rule 92 *quater*. However, it appears that several incidents relevant to the case against the Accused – such as the alleged visit of the Accused Simatović to the training camp at Ilok and the alleged role of the Accused Stanišić in releasing Dragan Đorđević – has not been, and is not expected to be, corroborated. The Chamber will take the lack of corroboration into account in assessing the weight the Proffered Evidence as it relates to these incidents should be given.⁹⁸

⁹³ *Milošević* case, T. 23509-23510.

⁹⁴ *Milošević* case, T. 23530 (Stanišić), 23519, 23541 (Simatović).

⁹⁵ Witness B-179 Decision, para. 38.

⁹⁶ See *supra*, para. 23.

⁹⁷ Motion, Confidential Annex A.

⁹⁸ See also *supra*, para. 27 and fn 72 thereto.

43. With regard to the absence of a final judgement in the *Milošević* case, the Chamber does not consider that the lack of final adjudication in a case in which evidence was previously admitted weighs against the admission of that evidence under Rule 92 *quater*.⁹⁹

44. With regard to Todorović's credibility the Chamber notes that, while the Additional Documents appear to reflect adversely on Todorović's general character, they do not appear to specifically undermine his credibility as a witness to an extent that would incline the Chamber to deny admission of the Proffered Evidence. However, the Chamber notes that, as Todorović's credibility remains relevant to the weight the Proffered Evidence should be given, either Defence team may wish to tender the Additional Documents, or a selection of them, into evidence.

45. With regard to the issue of hearsay, the Chamber has previously held that hearsay evidence is not inadmissible as such.¹⁰⁰ However, as noted above, the extent to which a statement consists of hearsay evidence may be relevant to the exercise of the Chamber's discretion under Rule 92 *quater*.¹⁰¹ In this case, the Chamber notes that it has not been clearly established whether or to what extent the Proffered Evidence consists of hearsay. The Chamber does not consider the mere possibility that it may do so to militate against its admission.

46. In exercising its discretion under Rule 92 *quater*, the Chamber has considered all the factors which weigh against admission of the Proffered Evidence, including the fact that portions of the Proffered Evidence relate to the acts and conduct of the Accused as charged in the Indictment and the challenge to Todorović's credibility. However, for the reasons set out above, the Chamber does not consider that these factors, even taken together, militate in this direction. Furthermore, the Chamber considers that the relevance of the Proffered Evidence to the present case¹⁰² and its strong indicia of reliability – namely, the fact that Todorović was subjected to cross-examination on a range of topics relevant to the case against the Accused, and the fact that most of the Proffered Evidence has been and is expected to be corroborated by other evidence in the present case – are powerful factors in favour of its admission. The Chamber finds that, on balance, these factors outweigh the countervailing considerations discussed above. As a result, the Chamber is inclined to admit the Proffered Evidence in the exercise of its discretion under Rule 92 *quater*.

47. Due to its relevance and the indicia of reliability discussed above, the Chamber is satisfied that the Proffered Evidence has probative value and so satisfies the requirements of Rule 89 (C) of the Rules. For the purposes of Rule 89 (D), the Chamber considers this probative value to be

⁹⁹ See also Witness B-179 Decision, para. 37.

¹⁰⁰ Witness B-179 Decision, para. 40 and fn 80 thereto.

¹⁰¹ See *supra*, para. 23.

¹⁰² See *supra*, para. 35.

significant.¹⁰³ The Chamber notes that the only fair trial issue raised by the Stanišić and Simatović Defence is the potential violation of the Accused's right to cross-examination. For the reasons set out above,¹⁰⁴ the Chamber does not consider the Accused's inability to cross-examine Todorović to be a sufficient ground for concluding that the probative value of the Proffered Evidence is outweighed by the need to ensure a fair trial.

48. The Chamber considers that the majority of the Exhibits were discussed in Todorović's prior testimony in the *Milošević* case, such that the testimony would be incomprehensible or of lesser probative value without them. The exceptions are the Exhibits with Rule 65 *ter* numbers 4519 and 4686. In his prior testimony, Todorović agreed that these documents appeared to be authorisations for the solicitation of assistance for Bosanski Šamac, without further discussing them.¹⁰⁵ No indication was given that he was or should have been able to authenticate them or otherwise speak to their form or contents. As a result, the two Exhibits do not add to the probative value of the Proffered Evidence. For this reason, the Chamber considers that all Exhibits, except those with 65 *ter* numbers 4519 and 4686, form an inseparable and indispensable part of the Proffered Evidence and will be admitted into evidence.¹⁰⁶

III. DISPOSITION

For the foregoing reasons and pursuant to Rules 89, 75, 92 *quater* and 126 *bis*, the Chamber:

GRANTS the Stanišić Defence leave to exceed the word limit;

GRANTS the Prosecution leave to reply to the Further Stanišić Response;

GRANTS the Motion in part;

DENIES admission of the associated exhibits with 65 *ter* numbers 4519 and 4686, without prejudice to their being tendered by the Prosecution through a bar table motion;

ADMITS into evidence publicly:

- 1) Todorović's testimony in the *Milošević* case: T. 23423-23561;

¹⁰³ See supra, paras 35, 40-46.

¹⁰⁴ See supra, para. 34.

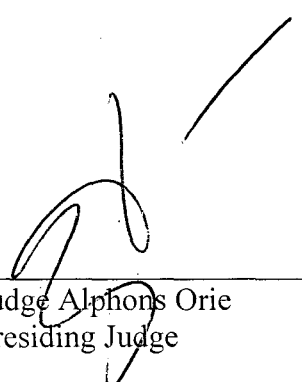
¹⁰⁵ *Milošević* case, T. 23464.

¹⁰⁶ With regard to the Exhibit with Rule 65 *ter* number 113, the Chamber notes that the B/C/S version currently in eCourt does not include the markings made by Todorović. As these markings form part of the Exhibit as it was discussed by Todorović in his prior testimony (see *Milošević* case, T. 23477-23478), the Chamber invites the Prosecution to upload a marked version of this document into eCourt, and will deal at a future housekeeping session with the replacement of the unmarked B/C/S version with the marked one.

- 2) the associated exhibits with Rule 65 *ter* numbers 4520, 2888, 4536, 3706, 4683, 113, 3804 and 4709; and
- 3) the associated exhibit currently marked for identification as P1523; and

REQUESTS the Registrar to assign exhibit numbers to the admitted documents in (1) and (2) above and to inform the parties and the Chamber of the exhibit numbers so assigned.

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



Judge Alphons Orié
Presiding Judge

Dated this twenty-ninth day of October 2010
At The Hague
The Netherlands

[Seal of the Tribunal]