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-95-5/18-T

Date: 13 April 2010

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IN THE TRIAL CHAMBER

Before: **Judge O-Gon Kwon, Presiding Judge**
Judge Howard Morrison
Judge Melville Baird
Judge Flavia Lattanzi, Reserve Judge

Registrar: **Mr. John Hocking**

Decision of: **13 April 2010**

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

DECISION ON PROSECUTION'S MOTION FOR ADMISSION OF THE EVIDENCE OF KDZ172 (MILAN BABIĆ) PURSUANT TO RULE 92 *QUATER*

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused

Mr. Radovan Karadžić

Appointed Counsel

Mr. Richard Harvey

THIS TRIAL CHAMBER of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 ("Tribunal") is seised of the "Prosecution's Motion for Admission of the Evidence of KDZ172 Pursuant to Rule 92 *quater*," filed on 10 June 2009 ("Motion"), and "Prosecution's Further Submissions for Admission of the Evidence of KDZ172 Pursuant to Rule 92 *quater*", filed on 15 October 2009 ("Prosecution's Further Submission"), and hereby issues its decision thereon.

I. Background and Submissions

1. In its Motion, the Office of the Prosecutor ("Prosecution") seeks the admission of oral testimony and 309 associated exhibits given by KDZ172, Milan Babić, in the *Slobodan Milošević*, *Krajišnik,* and *Martić* trials, as well as his witness statement of 29 March 2004 prepared for the purposes of the *Krajišnik* trial, pursuant to Rule 92 *quater* of the Tribunal's Rules of Procedure and Evidence ("Rules").[1] The Prosecution generally argues that Babić is deceased, that he previously testified under oath in three proceedings, that he was subject to extensive cross-examination, and that his evidence is relevant, of probative value, and reliable.[2]

2. The Accused filed his "Response to Prosecution 92 *quater* Motion: Milan Babić" on 4 August 2009 ("Response"). He opposes the Prosecution's Motion on five grounds: (i) Rule 92 *quater* violates his rights under Article 21(4)(e) of the Statute "to examine, or have examined, the witnesses against him";[3] (ii) in the circumstances of this case, the cumulative effect of the Prosecution's motions for judicial notice of adjudicated facts and motions for the admission of evidence pursuant to Rules 92 *bis* and *quater* shifts the burden of proof from the Prosecution to the Accused, in violation of his right to a fair trial;[4] (iii) the evidence of Babić is unreliable because he testified under the explicit expectation to be treated more "leniently" by the Prosecution and the Tribunal;[5] (iv) the nature of the evidence relates to the acts and conduct of the Accused and to critical issues of the Prosecution's case in a way that it bars admission;[6] and (v) the evidence is of an extremely prejudicial nature to the Accused.[7] The Accused relies on a decision in the *Šešelj* case, where the Trial Chamber refused to admit Babić's evidence precisely because it directly alleged the responsibility of the accused, Šešelj, and because Šešelj would be

[1] Motion, para. 1.
[2] Motion, para. 2.
[3] Response, para. 2.
[4] Response, para. 3.
[5] Response, paras. 4, 7.
[6] Response, para. 4.
[7] Response, para. 13.

deprived of his right to cross-examine the witness.[8] The Accused further submits that if the Chamber is satisfied that this evidence is admissible in the present case pursuant to Rule 92 *quater*, it should redact inconsistent statements, statements relating to acts and conduct of the Accused, and statements that discuss critical issues of the Prosecution's case.[9]

3. Upon receiving leave from the Chamber,[10] the Prosecution filed the "Prosecution Reply to 'Response to Prosecution 92*quater* Motion: Milan Babić'" on 14 August 2009 ("Reply"), addressing the arguments raised in the Response. The Prosecution argues that: (i) Rule 92 *quater* does not violate the Statute of the Tribunal or shift the burden of proof onto the defendant; (ii) the Accused incorrectly claims that evidence critical to the Prosecution's case cannot be admitted under Rule 92 *quater*; (iii) the *Šešelj* Decision is irreconcilable with binding Appeals Chamber jurisprudence; (iv) Babić's evidence is *prima facia* reliable for the purposes of admission; and (v) there is no basis for ruling separately on the admission of individual elements of the evidence.[11]

4. Following the Status Conference held on 20 August 2009, the Trial Chamber issued its "Order for Further Submissions Concerning Prosecution's Motions for Admission of Rule 92 *quater* Evidence" on 21 August 2009 ("Order"), in which it instructed the Prosecution to file a written submission identifying only those portions of Babić's evidence which it seeks to have admitted into evidence pursuant to Rule 92 *quater*, bearing in mind the requirements of relevance and non-repetition.[12] The Chamber specifically noted that a significant portion of his evidence "covers events in Croatia that do not appear to be directly relevant to this case."[13] The Chamber also allowed the Accused an opportunity to respond.[14]

5. On 15 October 2009, the Prosecution filed the Prosecution's Further Submission, in which it narrowed the scope of the evidence of Babić that it seeks to admit to those parts it considers directly relevant to these proceedings,[15] and also reduced the number of associated exhibits it seeks to tender from 309 to 233, 85 of which are transcripts of intercepted telephone conversations, two of which are Babić's declarations relating to those and other intercepted conversations, one of which is his witness statement, and 145 of which are "documentary

[8] Response, para. 12.
[9] Response, para. 14.
[10] Decision on Prosecution Requests for Leave to Reply: Rule 92 *quater* Motions, 11 August 2009.
[11] Reply, paras. 2–8.
[12] Order, para. 7.
[13] Order, para. 3.
[14] Order, para. 7.
[15] Prosecution's Further Submission, para. 1.

exhibits".[16] The Prosecution argues that Babić's evidence on events in Croatia is directly relevant to this trial as it reveals a similar method of planning and implementing a similar objective of forcible ethnic separation in relation to both Croatia and Bosnia and Herzegovina ("BiH"). Further, the Prosecution argues that the Accused and other participants in the "overarching" joint criminal enterprise ("JCE") alleged in the Third Amended Indictment ("Indictment") were involved in the planning and implementation of this similar objective in Croatia. This shows, according to the Prosecution, their knowledge and intent in relation to goals, plans, and crimes in BiH.[17] The Prosecution further submits that the evidence relating to Croatia will provide the Chamber with important background and contextual information.[18] The Prosecution's Further Submission makes no specific mention of Babić's witness statement of 29 March 2004, prepared for the purposes of the *Krajišnik* trial, other than tendering the statement as an associated exhibit.[19] Therefore, the Trial Chamber shall analyse this witness statement as an associated exhibit only.

6. Having received an extension of time to file a response to the Prosecution's Further Submission,[20] the Accused filed his "Supplemental Submissions: Rule 92 *quater* Motion: Babić and Deronjić" on 30 November 2009 ("Accused's Further Submission"). The Accused reiterates his previous argument that the application of Rule 92 *quater* to this evidence violates his right to a fair trial.[21] He also requests that, in the event the Chamber finds the evidence admissible, it admit specific segments of Babić's testimony in the *Slobodan Milošević*, *Krajišnik*, and *Martić* cases that were not tendered by the Prosecution in the Prosecution's Further Submission. These segments relate to (i) evidence discrediting Babić as a witness, (ii) evidence reflecting favourably on the Accused, (iii) evidence justifying the actions of the Serbs in Croatia, and (iv) evidence relating to Ratko Mladić's failure to follow orders of his superiors.[22] He also argues that 40 of the 76 excluded associated exhibits, should be admitted

[16] Prosecution's Further Submission, para. 19, footnote 27. The Chamber notes that the Prosecution submits that it has removed 73 documents and is tendering 223. However, going by the Appendix B of the Prosecution's Further Submission, the actual number of removed documents is 76 while the number of tendered documents is 233.

[17] Prosecution's Further Submission, para. 4.

[18] Prosecution's Further Submission, para. 15.

[19] Prosecution's Further Submission, Appendix B.

[20] Decision on Motion for Extension of Time to File Response: Rule 92 *quater* Submissions (Babić & Deronjić), 12 November 2009; Decision on the Accused's Second Submission for Extension of Time to File Response: Rule 92 *quater* Submissions (Babić & Deronjić), 26 November 2009.

[21] Accused's Further Submission, para. 2.

[22] Accused's Further Submission, para. 3, Annex A.

into evidence by the Chamber.[23] This brings the total of associated exhibits that shall be considered by the Chamber to 273.

III. Discussion

7. The Trial Chamber has set out the applicable law, and a discussion of the first two of the Accused's arguments against the operation of Rule 92 *quater* in the "Decision on Prosecution Motion for Admission of Testimony of Witness KDZ198 and Associated Exhibits pursuant to Rule 92 *quater*" issued on 20 August 2009 ("KDZ198 Decision"), and it will not repeat that discussion here.[24] The Chamber reiterates, however, that the evidence of an unavailable witness may be submitted in written form if the Chamber finds: (i) the witness unavailable within the meaning of Rule 92 *quater*(A), (ii) from the circumstances in which the statement was made and recorded that it is reliable, (iii) the evidence relevant to the proceedings and of probative value, and (iv) that the probative value of the evidence, which may include evidence pertaining to acts and conduct of an accused, is not outweighed by the need to ensure a fair trial.[25] The Chamber will therefore only address whether the evidence now sought to be admitted meets the requirements of Rules 89 and 92 *quater*, and the remaining arguments made by the Accused against the admission of Babić's evidence pursuant to these Rules.

8. The Accused does not challenge the status of Babić as "unavailable" pursuant to Rule 92 *quater* (A)(i), and the Trial Chamber accepts he is in fact deceased and therefore unavailable based on the submission of a copy of the witness's death certificate by the Prosecution.[26] The Chamber notes that, prior to his death, Babić testified in the *Slobodan Milošević*, *Krajišnik*, and *Martić* cases under oath and was subject to cross-examination.

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[23] Accused's Further Submission, Annex A pp. 10–11. While the Accused lists document number 14557 three times in the list of associated exhibits he argues should be admitted into evidence, the Chamber has found that the document he lists as having Rule 65 *ter* number 14557 (referring to exhibit P352.132 in the *Slobodan Milošević* case) is, in fact, document number 14556, and the second document he lists as having Rule 65 *ter* number 14557 (referring to exhibit P352.140 in the *Slobodan Milošević* case) is, in fact, document number 14577. The third document he lists with Rule 65 *ter* number 14557 (referring to exhibit P352.129 in the *Slobodan Milošević* case) is the accurate number and has been left alone. Furthermore, the Accused also lists document with a Rule 65 *ter* number 14567 and notes that it has been admitted into evidence in the *Slobodan Milošević* case as exhibit P352.147. However, P352.147 rather has Rule 65 *ter* number 14565. Given that the Prosecution is already tendering document number 14567 in its Further Submission, the Chamber will assume that the Accused wanted it to consider the document with Rule 65 *ter* number 14565.

[24] KDZ198 Decision, paras. 4–10.

[25] KDZ198 Decision, paras. 4–6; Decision on Prosecution Motion for Admission of Testimony of Sixteen witnesses and Associated Exhibits Pursuant to Rule 92 *quater*, 30 November 2009, para. 6. *See Prosecutor v. Popović et al.*, Case No. IT-05-88-AR73.4, Decision on Beara's and Nikolić's Interlocutory Appeals Against Chamber's Decision on 21 April 2008 Admitting 92 *quater* Evidence, 18 August 2008 ("*Popović* Appeal Decision"), para. 30.

[26] Motion, Appendix A.

9. In light of the position taken by the Prosecution and the Accused as regards the relevance of Babić's testimony to this particular case, the Chamber considers that it is in the interests of fairness to review all the transcripts of Babić's testimony from the previous proceedings, in their entirety, to determine whether they meet the standard for admission under Rule 92 *quater* and which portions, if any, should be so admitted. The Chamber will then consider the admissibility of the associated exhibits requested by both the Prosecution and the Accused in their Further Submissions.

A. The Evidence of Babić

10. Milan Babić was a senior Serb political figure in Croatia in the early 1990s. From May 1990 until April 1994, Babić was the President of the Municipal Assembly in Knin. He also served as the President of the Serbian Democratic Party in Krajina from November 1992 until August 1995. From 29 May until 19 December 1991, Babić was the President/Prime Minister of the Serbian Autonomous Region of Krajina ("SAO Krajina"). On 19 December 1991, SAO Krajina proclaimed itself Republika Srpska Krajina ("RSK"), and Babić served as its President until 15 February 1992. Babić then became the Minister of Foreign Affairs of the RSK government in April 1994 until he was elected Prime Minister of the RSK government in July 1995. He held that position until the beginning of August 1995.

11. Upon learning that his name was mentioned in the indictment against Slobodan Milošević, Babić contacted the Prosecution and testified against Milošević in 2002. In 2003, the Prosecution indicted him,[27] and in 2004 he pleaded guilty to the crime of persecution and was sentenced to 13 years' imprisonment.[28] Babić also testified in the *Krajišnik* and *Martić* cases. He committed suicide while in custody at the United Nations Detention Unit on 5 March 2006.

12. In his testimony, Babić describes the rise of Serb nationalism in Croatia in the early 1990s and Slobodan Milošević's plans for a greater Serbian state throughout Yugoslavia. He further discusses the Serbs in Krajina receiving financial and military support from Serbia, Serbian media in Croatia controlled by Milošević exaggerating events to skew public opinion, the activities of Serb paramilitaries throughout Croatia, and Croatian aggression against Serbs. Babić also discusses the activities of multiple alleged members of the "overarching" JCE such as Slobodan Milošević, Ratko Mladić, Jovica Stanišić, Franko Simatović, Vojislav Šešelj, and Željko Ražnatović ("Arkan"). Much of Babić's testimony involves discussion of telephone

[27] *Prosecutor v. Babić*, Case No. IT-03-72-S, Indictment, 6 November 2003.
[28] *Prosecutor v. Babić*, Case No. IT-03-72-S, Sentencing Judgement, 29 June 2004.

intercepts between the Accused and high-ranking Serbian leaders, such as Milošević, discussing plans for Croatia and the rest of Yugoslavia.

B. Errors by the Parties

13. Before beginning its analysis of the relevant evidence, the Chamber notes that both the Prosecution and the Accused have apparently made some numbering errors in their submissions, which have in some cases not been able to be resolved by the Chamber itself. For example, the Prosecution tenders into evidence one portion of the transcript from *Slobodan Milošević* that it describes as T.13979 line 3 to T.13976 line 10. Considering the numbering, the Chamber believes this to be in error and has not analysed these pages.

14. The Chamber notes that the Accused's Further Submission also contains several page numbering errors. In some instances, the Chamber has been able to ascertain the page numbers likely intended by the Accused based on his description of the evidence and logical starting and ending lines. For example, with respect to Babić's evidence from the *Slobodan Milošević* trial, where the Accused argues that lines T.13644 line 2 to T.13549 line 16 of the relevant transcript should be admitted, the Chamber considers that the end page is likely to be T.13649 line 16 instead. Also from *Slobodan Milošević*, with respect to transcript pages T.14035 line 25 to T.19038 line 19 is likely to be T.14038 line 19, as Babić's testimony does not go to T.19038. Similarly, with the portion of transcript from *Krajišnik* referred to as starting at T.3353 line 14 to T.3535 line 11, the Chamber is of the view that it should start at T.3533 line 14.

15. However, the Chamber has not been able to ascertain the page numbers from the *Slobodan Milošević* transcript likely intended by the Accused for the following segments, where either the description submitted by the Accused does not match the transcript's content or the numbers are clearly incorrect: T.13456 line 12 to T.13550 line 4; T.13483 line 9 to T.13487 line 1; T.13487 line 15 to T.13488 line 1; T.13488 lines 15 to 24; T.13657 line 2 to T.13576 line 20; T.13950 line 2 to T.13961 line 10; and T.14067 line 7. The Chamber had the same difficulty with the following segment from the *Krajišnik* transcript: T.3359, lines 13 to 24. Thus, the Chamber shall not analyse, at this time, the evidence presented in those segments of Babić's testimony.

C. Relevance of Babić's Evidence

16. Having determined that Babić is unavailable, the Chamber will now consider whether his evidence meets the basic conditions of relevance and probative value enshrined in Rule 89. With respect to the relevance of the tendered evidence, the Chamber recalls its "Decision on

Second Prosecution Motion for Judicial Notice of Adjudicated Facts," ("Adjudicated Facts Decision"), filed on 9 October 2009, where it noted that "it does not appear clear to the Chamber how facts dealing with military campaigns in Croatia could show the continued participation of officials of the [Yugoslav People's Army ("JNA")] and [Territorial Defence ("TO")] in a JCE to permanently remove Bosnian Muslims and Bosnian Croats from Bosnian Serb claimed territory in BiH."[29] The Chamber then stated:

> [E]ven if the facts in question did show the integration of certain paramilitary or volunteer groups into the regular Serb forces' war effort and the continued co-operation of JCE members from the [Socialist Federal Republic of Yugoslavia ("SFRY")] with JCE members from the targeted regions (as also claimed by the Prosecution), this could still only relate to the aforementioned military campaigns in Croatia and would not imply that the situation in BiH was the same.[30]

17. The Chamber remains unsatisfied that the actions of alleged JCE members in Croatia alone, which would have frequently occurred before the period covered by the Indictment, are relevant and of probative value to the present case. Simply because one alleged JCE member committed an act in Croatia does not mean that he did the same in BiH. Therefore, the Chamber shall admit the testimony tendered by the Prosecution and the Accused only if it falls into one of the categories discussed below.

(i) Evidence considered to be relevant

18. Evidence that relates directly to the Accused, or is needed to understand such evidence, is, in the Chamber's view, relevant to this case. The direct actions of the Accused, even if concerning Croatia, are relevant as they may reveal his state of mind and attitude towards other ethnic groups in the region and may also provide background information to the Counts in the Indictment. In addition, the Accused's early interactions with alleged high-ranking members of the JCE are relevant to his later involvement with the same individuals in the context of events in BiH. Similarly, evidence reflecting favourably on the Accused is clearly relevant to this case.[31] The evidence that relates to the alleged JCE members' plans for Yugoslavia beyond just

[29] Adjudicated Facts Decision, para. 27.

[30] Adjudicated Facts Decision, para. 27.

[31] The transcript pages tendered by the Prosecution that relate directly to the Accused or are needed to understand such evidence are as follows: *Slobodan Milošević* T.12878 line 22 to T.12899 line 7; T.13034 line 15 to T.13059 line 12; T.13062 line 11 to T.13069 line 9; T.13079 line 3 to T.13097 line 20; T.13118 line 11 to T.13152 line 6; T.13193 line 2 to T.13205 line 20; T.13207 line 22 to T.13227 line 15; T.13235 line 2 to T.13241 line 12; T.13269 line 16 to T.13270 line 20; T.13272 line 1 to T.13366 line 6; T.13411 line 14 to T.13413 line 1; T.13578 line 11 to T.13581 line 24; T.13784 line 23 to T.13789 line 11; T.13811 line 23 to T.13814 line 9; T.14057 line 16 to T.14059 line 17; T.14101 line 21 to T.14105 line 11; *Krajišnik* T.3327 line 15 to T.3330 line 9; T.3351 line 24 to T.3353 line 1; T.3390 line 6 to T.3397 line 23; T.3399 line 9 to T.3415 line 4; T. 3531 line 6 to 3533 line 13; T.3562 line

Croatia is also relevant as it shows their overall plans for the region, including BiH.[32] The evidence that relates to events in BiH is similarly relevant as incidents which occurred in BiH could be used to prove Counts in the Indictment.[33] However, the alleged JCE members' plans specific to Croatia are not relevant. Evidence that relates to Ratko Mladić acting without orders is also relevant to this case, even if it concerned Croatia, and may be favourable to the Accused, as Mladić was the Accused's subordinate during the Indictment period.[34] The evidence that relates to Babić's background, credibility, or character, is clearly relevant to the Trial Chamber's determination of the weight to give Babić's evidence, should it be admitted.[35] One category of evidence going to Babić's credibility concerns the issue of the level of control he had over Krajina. According to the Accused, this is relevant to his credibility as it seems that he sometimes portrayed himself as more of a background player than somebody who was directly involved in the events in Croatia in early 1990s.[36]

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14 to T.3573 line 23; T.3610 line 17 to T.3614 line 8; *Martić* T.1438 line 5 to T.1442 line 14; T.1480 line 2 to T.1481 line 3; T.1483 line 3 to T.1484 line 16; T.1491 line 1 to T.1494 line 21; T.1498 line 3 to T.1507 line 3; T.1641 line 19 to T.1644 line 10; and T.1670 line 18 to T.1672 line 24. The transcript pages tendered by the Accused that relate directly to him or are needed to understand such evidence are as follows. *Slobodan Milošević* T.13810 line 23 to T.13811 line 23; T.13813 line 10 to T.13814 line 16; T.14035 line 25 to T.14038 line 19; *Krajišnik* T.3533 line 14 to T.3535 line 11; T.3448 line 11 to T.3449 line 7; *Martić* T.1623 line 2 to T.1626 line 15; and T.1629 line 21 to T.1631 line 3.

[32] The transcript pages tendered by the Prosecution that relate to the alleged JCE members' plans for Yugoslavia beyond just Croatia are as follows: *Slobodan Milošević* T.13011 line 14 to T.13023 Line 12; T.13115 line 2 to T.13118 line 10; T.13465 line 2 to T.13467 line 20; T.13663 line 13 to T.13664 line 4; T.13665 line 20 to T.13674 line 9; T.13685 line 15 to T.13687 line 4; T.13700 line 11 to T.13704 line 7; *Krajišnik* T.3450 line 4 to T.3454 line 5; T.3455 line 12 to T.3471 line 24; *Martić* T.1382 line 2 to T.1385 line 6; and T.1414 line 8 to T.1416 line 20.

[33] The transcript pages tendered by the Prosecution relating to events in BiH are as follows: *Slobodan Milošević* T. 13244 line 5 to T.13248 line 25; T.13264 line 17 to T.13266 line 10; *Martić* T.1531 line 9 to T.1535 line 24.

[34] The transcript pages tendered by the Accused relating to Ratko Mladić acting without orders are as follows: *Slobodan Milošević* T.13369 lines 2 to 21; and *Martić* T.1586 lines 2 to 14.

[35] The transcript pages tendered by the Prosecution relating to Babić's background, credibility, or character are as follows: *Slobodan Milošević* T.12855 line 17 to T.12874 line 1; T.13418 line 19 to T.13419 line 15; T.13454 line 18 to T.13455 line 20; T.13468 line 13 to T.13469 line 3; T.13475 line 20 to T.13478 line 20; T.13595 line 18 to T.13599 line 7; T.13644 line 20 to T.13649 line 16; T.13743 line 19 to T.13745 line 1; T.14009 line 1 to T.14009 line 16; and *Martić* T.1329 line 7 to T.1340 line 9. The transcript pages tendered by the Accused relating to Babić's background, credibility, or character are as follows: *Slobodan Milošević* T.13416 line 12 to T.13417 line 24; T.13424 line 2 to T.13425 line 25; T.13426 line 24 to T.13427 line 21; T.13428 line 22 to T.13429 line 8; T.13442 lines 1 to 24; T.13448 line 17 to T.13450 line 11; T.13462 line 17 to T.13464 line 10; T.13469 line 15 to T.13471 line 13; T13509 line 7 to T.13515 line 9; T.13519 line 1 to T.13524 line 6; T.13602 lines 14 to 18; T.13609 line 23 to T.13613 line 1; T.13665 lines 1 to 19; T.13717 line 15 to T.13716 line 6; T.13752 line 1 to T.13753 line 22; T.13774 line 19 to T.13779 line 1; T.13806 line 13 to T.13808 line 24; T.13821 line 6 to T.13824 line 15; T.13853 line 21 to T.13855 line 23; T.13889 line 18 to T.13890 line 8; T.13897 line 5 to T.13898 line 22; T.13943 line 22 to T.13945 line 1; T.14062 line 24 to T.14063 line 8; T.14075 line 19 to T.14077 line 11; T.14077 line 12 to T.14080 line 2; T.14087 lines 15 to 23; *Krajišnik* T.3326 lines 14 to 20; T.3353 line 2 to T.3354 line 17; T.3359 lines 13 to 24; T.3376 line 21 to T.3377 line 6; T.3574 lines 21 to T.3575 line 2; T.3588 lines 2 to 10; *Martić* T.1472 line 1 to T.1474 line 2; T.1476 lines 4 to 20; T.1560 lines 14 to 17; T.1612 line 8 to T.1614 line 8; and T.1836 line 12 to T.1846 line 21.

[36] The transcript pages tendered by the Accused relating to Babić having more than merely formal control in Krajina are as follows: *Slobodan Milošević* T.14039 line 20 to T.14040 line 19; T.14069 line 6 to 21; and *Martić* T.1609 line 12 to T.1610 line 16.

(ii) Evidence considered to be irrelevant

19. Those parts of Babić's evidence discussing specific armed clashes between Serb and Croat forces, clashes involving Serb or Croat police in Croatia, or aggression by Croats against Serbs are irrelevant to this case, and are therefore inadmissible. As expressed earlier by this Chamber, the intricacies of the Serb and Croatian conflict purely in Croatia are beyond the scope of this trial, which should be limited to the events in BiH.[37] Similarly, the evidence of peaceful actions by Serbs in Croatia is not relevant to this case as it has little bearing on what occurred in BiH.[38] The Chamber further considers that evidence of financial, military, or advisory support from Serbia or Slobodan Milošević to Krajina only is not relevant to this case as it is not Milošević, or Serbia, that is on trial here.[39] The Chamber further considers evidence of Serbian media activities in Croatia not to be relevant to the Counts in the Indictment.[40] The Chamber also considers that evidence pertaining to events solely limited to Croatia, such as the set up of a parallel government structure in Krajina, the vote in SAO Krajina to join Serbia, and the transfer of Croats to Croat-controlled territory, is not relevant to this case. As stated above, the

[37] The Chamber shall not admit the following transcript pages tendered by the Prosecution which contain evidence of armed conflicts between Serb and Croat forces, clashes involving Serb or Croat police in Croatia, or aggression from Croats against Serbs: *Slobodan Milošević* T.13227 line 16 to T.13235 line 1; T.13256 line 17 to T.13262 line 17; T.13389 line 10 to T.13391 line 8; T.13396 line 21 to T.13397 line 6; T.13488 line 10 to T.13489 line 13; T.13650 line 6 to T.13651 line 16; T.13867 line 14 to T.13867 line 24; T.13871 line 7 to T.13876 line 5; T.13877 line 18 to T.13881 line 1; T.13906 line 24 to T.13907 line 20; T.13956 line 9 to T.13958 line 5; T.13962 line 1 to T.13965 line 21; T.13981 line 5 to T.13982 line 17; T.14020 line 17 to T.14022 line 4; T.14093 line 20 to T.14101 line 20; *Martić* T.1580 line 13 to T.1581 line 12; T.1596 line 12 to T.1597 line 2; and T.1604 line 10 to T.1605 line 25. The Chamber shall not admit the following transcript pages tendered by the Accused that contain evidence of armed conflicts between Serb and Croat forces, clashes involving Serb or Croat police in Croatia, or aggression from Croats against Serbs: *Slobodan Milošević* T.13677 line 14 to T.13678 line 12; T.13691 line 3 to T.13692 line 13; T.13835 line 24 to T.13838 line 8; T.13867 line 25 to T.13871 line 6; T.13902 line 4 to T.13903 line 2; T.13941 line 22 to T.13942 line 3; T.13947 line 11 to T.13948 line 11; T.13952 line 19 to T.13954 line 10; T.13977 line 10 to T.13978 line 21; T.13990 line 15 to T.13991 line 24; T.13993 line 12 to T.13994 line 7; T.14005 line 10 to T.14006 line 15; T.14006 line 16 to T.14007 line 16; T.14010 line 18 to T.14015 line 7; T.14017 lines 7 to 21; T.14019.19 to T.14020 line 2; T.14030 lines 5 to 14; T.14031 line 21 to T.14033 line 8; *Krajišnik* T.3487 lines 1 to 15; T.3492 lines 3 to 7; *Martić* T.1689 line 15 to T.1691 line 13; T.1696 lines 18 to 21; T.1723 lines 14 to 24; T.1765 line 15 to T.1769 line 23; T.1779 line 15 to T.1780 line 2; T.1789 line 14 to T.1790 line 15; T.1797 line 24 to T.1798 line 10; T.1860 line 13 to T.1861 line 22; T.1865 line 18 to T.1866 line 14; T.1870 lines 3 to 21; T.1872 line 1 to T.1873 line 13; T.1874 line 3 to T.1879 line 6; T.1882 line 10 to T.1883 line 19; and T.1901 line 22 to T.1902 line 6.

[38] The Chamber shall not admit the following transcript pages tendered by the Accused of peaceful actions by Serbs in Croatia: *Milošević* T.13266 lines 11 to 25; T.13657 line 1 to T.13658 line 24; T.13694 line 8 to T.13698 line 21; and *Martić* T.1821 lines 5 to 10.

[39] The Chamber shall not admit the following transcript pages tendered by the Prosecution relating to evidence of financial, military, or advisory support from Serbia or Slobodan Milošević to Krajina only: *Slobodan Milošević* T.12946 line 3 to T.12947 line 1; T.12947 line 22 to T.12959 line 25; T.12960 line 1 to T.12971 line 25; T.12974 line 1 to T.12982 line 1; T.13100 line 4 to T.13101 line 10; T.13102 line 4 to T.13113 line 2; T.13175 line 22 to T.13185 line 19; T.13760 line 24 to T.13763 line 15; *Martić* T.1447 line 19 to T.1448 line 11; T.1526 line 3 to T. 1529 line 7; and T.1567 line 4 to T.1576 line 25.

[40] The Chamber shall not admit the following transcript pages tendered by the Prosecution relating to evidence of Serbian media activities in Croatia: *Slobodan Milošević* T.12984 line 16 to T.13011 line 13; T.13945 line 8 to T.13946 line 1; T.14084 line 22 to T.14085 line 23; and *Martić* T.1467 line 17 to T.1471 line 24.

intricacies of what occurred in Croatia is beyond the scope of the Prosecution's case as stated in the Indictment.[41]

20. Finally, the Chamber notes that there are portions of Babić's testimony in the three cases that are repetitive. Such repetitive testimony shall not be admitted into evidence in this case.[42] Furthermore, some portions of Babić's testimony contain excessive and unnecessary detail, such as the lengthy description of his own opposition to the Vance Plan focusing on Krajina, the naming of the Presidents of the SFRY Presidency from 1990-1991, and his reasons for revealing his identity to the public. Accordingly, none of that testimony shall be admitted into evidence.[43]

21. In addition to these categories, the Chamber shall not admit the following portion of the transcript from the *Slobodan Milošević* case suggested for admission by the Accused: T.13642 lines 3 to 15.[44] It consists solely of allegations against Babić made by Milošević and does not include Babić's response. Thus, it is of little probative value. The Chamber shall also not admit T.13912 line 25 to T.13913 line 5 from the *Slobodan Milošević* case because these contain Milošević's cross-examination of Babić about a letter sent from the president of the municipality of Petrinja to Arkan asking for assistance. Babić stated he had no knowledge of this letter and therefore this section of his testimony has little probative value.

D. Reliability of Babić's evidence in *Slobodan Milošević*, *Krajišnik*, and *Martić*

22. It is understood that, to have any probative value, evidence must be *prima facie* reliable.[45] There is thus an overlap between the requirements of Rule 89(C) and Rule 92 *quater*(A)(ii). The Chamber will discuss the reliability of the relevant parts of Babić's evidence below, before reaching its conclusion on the probative value of that evidence and whether that probative value is substantially outweighed by the need to ensure a fair trial. In

[41] The Chamber shall not admit the following transcript pages tendered by the Prosecution pertaining to events solely limited to Croatia: *Slobodan Milošević* T. 12866, line 5 to T. 12874, line 1; T. 12876, line 18 to T. 12878, line 21; T.12899 line 8 to T.12944 line 12; T.13153 line 7 to T.13155 line 22; T.13189 line 2 to T.13193 line 1; T. 13267 to T. 13269, line 15; T. 13408, line 18 to T. 13411, line 13; T.13502 line 23 to T.13507 line 25; T.13534 line 3 to T.13538 line 9; T.13550 line 15 to T.13561 line 8; T.13581 line 25 to T.13588 line 17; T.14064 line 12 to T.14066 line 3; *Krajišnik* T.3333 line 7 to T.3344 line 2; T.3379 line 2 to T.3382 Line 16; *Martić* T.1392 line 10 to T.1393 line 2; T.1646 line 4 to T.1647 line 9; T.1653 line 10 to T.1656 line 5.

[42] The Chamber shall not admit the following testimony tendered by the Prosecution it considers repetitive: *Slobodan Milošević* T.13794 line 23 to T.13805 line 22; T.13883 line 10 to T.13887 line 4; *Martić* T.1358 line 1 to T.1363 line 16; T.1488 line 23 to T.1489 line 13.

[43] The Chamber considers that the following testimony tendered by the Prosecution contains excessive details that are unnecessary to the case, such as a lengthy description of Babić's opposition to the Vance Plan focusing on Krajina, Babić naming the Presidents of the SFRY Presidency from 1990–1991, and Babić's reasons for revealing his identity to the public. This testimony shall not be admitted into evidence: *Slobodan Milošević* T.13616 line 12 to T.13638 line 4; T.13654 line 14 to T.13654 line 25; T.13690 line 7 to T.13691 line 2; T.13969 line 1 to T.13970 line 14; T.14046 line 13 to T.14049 line 12; and *Martić* T.1424 line 18 to T.1427 line 8.

[44] Accused's Further Submission, Annex A, p. 4.

doing so, the Chamber will first consider the relevant portions of his evidence in the *Slobodan Milošević*, *Krajišnik*, and *Martić* trials. It will then conclude on what portions of that evidence, if any, should be admitted before addressing the relevant associated exhibits.

23. The Prosecution argues that Babić's evidence is reliable as it was elicited under oath, was subjected to extensive and multiple cross-examinations often dealing with issues likely to be relevant to the Accused, contains no manifest inconsistencies, and has been evaluated and accepted by other Chambers as reliable. The Prosecution also submits that there exists corroborative evidence in relation to substantial parts of Babić's evidence, including parts pertaining to the acts and conduct of the Accused, and that his evidence has already been admitted under Rule 92 *quater* in another case.[46]

24. In his Response, the Accused submits that Babić's evidence is unreliable because he testified under the explicit expectation of being treated more "leniently" by the Prosecution and the Tribunal.[47] In his Further Submission, the Accused also points to several portions of Babić's evidence which, according to him, reveal inconsistencies and thus make him an unreliable witness.[48]

25. The evaluation of reliability remains in the sole discretion of the Chamber.[49] In assessing reliability for the purposes of Rule 92 *quater*(A)(ii), a number of factors may be considered, and those factors may vary from case to case.[50] Thus, the Chamber may consider the circumstances in which the evidence was generated, whether it was subject to cross-examination, whether there is other evidence which relates to the same events described by the witness, and other factors, including whether there are manifest inconsistencies in the evidence.[51]

26. The Chamber has reviewed Babić's testimony in *Slobodan Milošević, Krajišnik*, and *Martić*, and finds that the circumstances in which it was given present adequate indicia of reliability. The testimony was elicited with the safeguards of a judicial proceeding, namely: it

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[45] *See Prosecutor v. Popović et al.*, Case No. IT-05-88-AR73.2, Decision on Joint Defence Interlocutory Appeal Concerning the Status of Richard Butler as an Expert Witness, 30 January 2008, para. 22.

[46] Motion, paras. 2, 10–14.

[47] Response, paras. 4, 7.

[48] Accused's Further Submission, Annex A, pp. 6–7.

[49] *Prosecutor v. Prlić et al.*, Case No. IT-04-AR73.16 Decision on Jadranko Prlić's Interlocutory Appeal Against the Decision on Prlić Defense Motion for Reconsideration of the Decision on Admission of Documentary Evidence, 3 November 2009, para. 27.

[50] *Popović* Appeal Decision, para. 44.

[51] KDZ198 Decision, para. 5; *Popović* Appeal Decision, para. 30.

was given under oath, with the assistance of an interpreter duly qualified and approved by the Registry of the Tribunal, and subject to cross-examination and re-examination.

27. In addition, looking at Babić's overall evidence in the *Slobodan Milošević*, *Krajišnik*, and *Martić* cases, the Chamber notes that the few examples of inconsistencies pointed out by the Accused in his Further Submission all relate to Babić's political views, as well as his views on the status of SAO Krajina – not one of these examples relates to the Accused himself. Furthermore, the mentioned inconsistencies are not such that they cast doubt on the entirety of Babić's evidence for the purposes of admission under Rule 92 *quater*. Instead, they, together with the rest of his evidence, can be weighed at the final stages of this case, when the Chamber will have the entirety of both the Prosecution and the Defence evidence before it.

28. Furthermore, the Chamber is unconvinced by the Accused's argument that Babić's testimony is unreliable merely because he was seeking to be treated leniently by the Prosecution. Babić testified under oath on three occasions and was extensively cross-examined each time. During his cross-examination in the *Slobodan Milošević* case, he was asked about his motives for testifying and explained why he accepted to do so.[52] In addition, the mere fact that a potential witness was previously an accused before this Tribunal, does not mean that he should be considered unreliable as a default. Instead, it is for the Trial Chamber to determine, in light of all of the circumstances, including any inconsistent statements, whether or not his evidence is sufficiently reliable to be admitted under Rule 92 *quater*.

29. Having said that, the Chamber rejects the Prosecution's assertion that the evaluation of Babić's *viva voce* evidence by prior Chambers supports its reliability for the purposes of admission. Each Trial Chamber of the Tribunal is obliged to evaluate evidence itself and this Chamber attributes no weight to this fact in assessing the reliability of Babić's former testimony.

30. With respect to the issue of corroboration, the Chamber is not, at this stage of the proceedings, in a position to assess the extent to which other evidence relates to the same events described by Babić and corroborates his testimony. Once again, however, the Chamber notes that corroboration is simply a factor to take into consideration as to the reliability of the evidence and not a requirement for admissibility under Rule 92 *quater*.[53] The Chamber cannot base a conviction on the uncorroborated evidence of a deceased witness.

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[52] *Slobodan Milošević*, T. 13475–13478 (25 November 2002).

[53] *Prosecutor v. Popović* et al., Case No. IT-05-88-T, Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 *quater*, 21 April 2008 ("*Popović* Trial Decision"), para. 52; *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 *quater*, 16 February 2007, para. 10–11.

31. For all these reasons, the Trial Chamber is satisfied that the relevant parts of Babić's evidence outlined above are sufficiently reliable for them to be considered of probative value and to satisfy the requirements of Rule 92 *quater*. Having determined that this evidence is relevant, reliable, and of probative value, the Chamber must now consider whether its probative value is substantially outweighed by the need to ensure a fair trial.

E. Evidence going to acts and conduct of the Accused

32. The Accused argues that Babić's evidence should not be admitted in the present case as the majority of it is concerned with the Accused's acts and conduct and is thus critical to the Prosecution case. According to the Accused, this evidence ranges from descriptions of his acts and decisions, to literal quotes of his alleged words. Specifically, Babić claimed that the Accused said he "would chase [the Muslims] into the river valleys in order to link up all the Serb territories in Bosnia and Herzegovina."[54] Other topics covered by Babić concerned (i) the position of the Accused in the Serb political elite in the former Yugoslavia and his contact with Slobodan Milošević; (ii) the Accused's alleged influence on the rise of Serb nationalism and the formation of Serb Autonomous Regions in Croatia and BiH; (iii) the Accused's alleged support for the idea to unite all Serbs in one state; (iv) the alleged involvement of the Accused in the arming of Serbs in Croatia and BiH; (v) the Accused's alleged political strategy to "wait for Izetbegović to make the wrong political move and that is when accounts would be settled"; (vi) the military organisation and operations of the Serbs in Croatia and BiH and the Accused's alleged role therein; and (vii) the Accused's alleged participation in attempts to have Milan Martić released after his arrest in Otoka.[55] The Accused also discusses how Babić's evidence has been assessed for admission in other cases before this Tribunal, and notes that in the *Šešelj* case, the admission of his evidence under Rule 92 *quater* was denied on the basis that it directly alleged Šešelj's responsibility.[56] In its Reply, the Prosecution argues that the decision in *Šešelj* is irreconcilable with binding Appeals Chamber jurisprudence and provides no reasoning with reference to the applicable Rules.[57]

33. The Chamber has previously held that evidence going to the acts and conduct of the accused is not barred from admission under Rule 92 *quater*, although this may be a factor against admitting that evidence, or parts thereof. Similarly, proposed Rule 92 *quater* evidence is

[54] *Slobodan Milošević*, T. 13054–13055 (19 November 2002); *Krajišnik*, T.3404 (3 June 2004).

[55] Response, paras. 9–10.

[56] Response, para. 11–12. *See Prosecutor v. Šešelj*, Case No. IT-03-67-T, Redacted Version of the "Decision on the Prosecution's Consolidated Motion Pursuant to Rules 89(F), 92 *bis* and 92 *quater* of the Rules of Procedure and Evidence Filed Confidentially on 7 January 2008", 21 February 2008 ("*Šešelj* Decision"), paras. 49–50.

[57] Reply, paras. 3–4.

not necessarily excluded on the basis that it goes to critical issues of the Prosecution's case.[58] This is because the admission of evidence under Rule 92 *quater* remains subject to the general requirements for the admission of evidence contained in Rule 89, which provides, in sub-paragraph (D), that evidence may be excluded if its probative value is substantially outweighed by the need to ensure a fair trial.[59] In light of this, the Chamber does not consider that the *Šešelj* Decision relied upon by the Accused is very helpful, as the *Šešelj* Chamber seems to have decided in principle to dismiss the entire testimony of a deceased witness when some of it "directly alleges the responsibility of the Accused." The *Šešelj* Chamber stated that this was "in the interests of justice", noting that Šešelj would have no opportunity to cross-examine such witnesses.[60] This Trial Chamber respectfully differs from this view as Rule 92 *quater* specifically accounts for situations where cross-examination of evidence going to acts and conduct is impossible and then provides a number of other factors that need to be balanced before such evidence can be admitted. Thus, rather than taking the *Šešelj* approach, the Chamber will proceed to consider these factors.

34. Having analysed Babić's evidence in the *Slobodan Milošević, Krajišnik*, and *Martić* cases, the Chamber notes that there are a number of portions relating to the acts and conduct of the Accused. For example, as stated by the Accused, his position in the Serb political elite and his contacts with Slobodan Milošević are discussed throughout Babić's testimony. The Accused's status amongst the Serb political elite is relevant and of high probative value. Such evidence, however, is not necessarily unduly prejudicial to the Accused. Thus, the probative value of admitting it is not substantially outweighed by the need to ensure a fair trial.

35. The Accused's alleged influence on the rise of Serb nationalism and the formation of Serb Autonomous Regions in Croatia and BiH is described frequently throughout Babić's testimony, such as when he discussed the Accused and Slobodan Milošević's plan to unite SAO Krajina and Bosanska Krajina.[61] This evidence is relevant and of high probative value as it provides information relating to the Accused's state of mind, and his motives. The evidence by itself does not implicate the Accused in any of the crimes alleged in the Indictment and thus is not unduly prejudicial. Therefore, the probative value of such evidence is not substantially outweighed by the need to ensure a fair trial.

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[58] KDZ198 Decision, paras. 4, 13.

[59] *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 ("Martić Appeal Decision"), para. 14.

[60] *Šešelj* Decision, paras. 41, 49–50. The *Šešelj* Chamber later denied the Prosecution's application for certification to appeal the *Šešelj* Decision. *See Prosecutor v. Šešelj*, Case No. IT-03-67-T, Decision on Prosecution Motion for Certification to Appeal the Decision of 7 January 2008, paras. 15, 25.

[61] *Martić*, T. 1480 (16 February 2006).

36. The Accused's alleged support for the idea to unite all Serbs in one state is also suggested throughout Babić's testimony, such as when he discussed the Accused and Slobodan Milošević's plan to force Slovenia and Croatia to leave Yugoslavia while part of Croatia occupied by the JNA would remain in Yugoslavia.[62] Such evidence is both relevant and of high probative value as background information to the Indictment. This evidence by itself, however, does not implicate the Accused directly in any of the actual crimes alleged in the Indictment and thus is not unduly prejudicial. Therefore, the probative value of such evidence is not substantially outweighed by the need to ensure a fair trial.

37. The alleged involvement of the Accused in the arming of Serbs in Croatia and BiH is also discussed by Babić during his testimony, such as his evidence concerning an intercepted telephone conversation wherein he claims the Accused was discussing in code the transfer of weapons from Vojvodina to other places within Yugoslavia.[63] This evidence is relevant as background information to the Counts in the Indictment and has probative value. Such probative value exceeds any prejudice to the Accused, as the arming of Serbs in BiH does not, by itself, prove his involvement in the commission of the crimes alleged in the Indictment. Therefore, the probative value of the evidence is not substantially outweighed by the need to ensure a fair trial.

38. The Accused's alleged political strategy to "wait for Izetbegović to make the wrong political move and that is when accounts would be settled" is discussed in Babić's testimony.[64] This evidence is relevant as background information to the Counts in the Indictment and has probative value. In addition, it is not unduly prejudicial, as Babić never explicitly states what was meant by "accounts would be settled." Therefore, the probative value of this evidence is not substantially outweighed by the need to ensure a fair trial.

39. The military organisation and operations of the Serbs in Croatia and BiH and the Accused's alleged role therein were discussed by Babić in his testimony, such as when he mentioned the Accused telling Slobodan Milošević that he should deploy the army on the borders with Croatia.[65] This information is relevant as it shows the Accused's interaction with other alleged JCE members, and has probative value. Such evidence, however, does not directly inculpate the Accused on the Counts of the Indictment and thus is not overly prejudicial. Therefore, the probative value of such evidence is not substantially outweighed by the need to ensure a fair trial.

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[62] *Slobodan Milošević*, T. 13046 (19 November 2002).
[63] *Slobodan Milošević*, T. 13137–13147 (20 November 2002).

40. The Accused's alleged participation in attempts to have Milan Martić released after his arrest in Otoka in BiH is discussed at length by Babić.[66] This evidence is relevant and of probative value as it shows co-ordination between the Accused and alleged high-level JCE members, such as Slobodan Milošević. However, as this evidence refers to no crimes alleged in the Indictment, it is not overly prejudicial. Therefore, the probative value of such evidence is not substantially outweighed by the need to ensure a fair trial.

41. The Chamber notes, however, that there are two portions of Babić's evidence that relate to the Accused's acts and conduct and are extremely prejudicial to him, but have either not been subject to cross-examination or the cross-examination was poor. For example, Babić claimed that the Accused said to him, in front of Milošević, that he would chase the Muslims into the river valleys in order to link up all Serb territories in BiH.[67] This is of high relevance as it relates to the permanent removal of Bosnian Muslims as alleged in the Indictment and potentially shows the Accused's attitude toward the Muslim population. For these same reasons, the statement is also highly prejudicial to the Accused. While Babić was cross-examined on this particular statement in the *Slobodan Milošević* case, when Milošević put to Babić that this was never said in his presence and accused Babić of inventing it, this cross-examination was brief and inconclusive. Milošević, as a self-represented accused, launched into a speech and was interrupted by the Presiding Judge who instructed Babić to respond to the question. Once Babić denied that he invented the incident, the Presiding Judge stopped further cross-examination.[68] Accordingly, taking into account that this is evidence of acts and conduct of the Accused that is highly prejudicial to him and that was cross-examined poorly, and despite the Chamber's view that Babić's evidence is sufficiently reliable to satisfy the requirements of Rule 92 *quater* and that it cannot enter a conviction based on uncorroborated evidence of a deceased witness, the Chamber, by majority, Judge Kwon dissenting, considers that the probative value of admitting this portion of Babić's evidence is substantially outweighed by the need to ensure a fair trial. Accordingly, this part of his evidence, namely the transcript from *Slobodan Milošević*, T. 13054, line 12 to T. 13056, line 14 and from *Krajišnik*, T. 3402, line 21 to T. 3404, line 24, shall not be admitted into evidence.

42. In addition, during his testimony in the *Slobodan Milošević* case Babić listened to one telephone intercept and identified the Accused as one of the interlocutors. According to the

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[64] *Slobodan Milošević*, T. 13055 (19 November 2002).
[65] *Slobodan Milošević*, T. 13058 (19 November 2002).
[66] *Slobodan Milošević*, T. 13272–13324 (22 November 2002).
[67] *Slobodan Milošević*, T. 13054–13055 (19 November 2002); *Krajišnik*, T. 3402–3404 (3 June 2004).
[68] *Slobodan Milošević*, T. 13810–13812 (3 December 2002).

intercept, the Accused stated to his interlocutor, Gojko Đogo, the following: "I think that they[69] should be beaten if they start the war … . They will disappear, that is … . They will disappear, that people will disappear from the face of the earth if they, if they insist now. Their only chance was to accept what we had offered them."[70] Later, in the same intercept, the Accused stated, "This is not normal, they will, they will disappear! Sarajevo will be a melting pot in which 300,000 Muslims will die. They are not normal. I'll have to tell them openly now: people don't push your fuckin' luck – there are three, four hundred thousand armed Serbs in Bosnia-Herzegovina."[71] The evidence provided by Babić in relation to this intercept is clearly relevant to the present case. It is, however, highly incriminatory and thus highly prejudicial to the Accused. Furthermore, Babić was not cross-examined on his evidence surrounding this intercept or the contents of the intercept itself. While the Chamber is satisfied that Babić's evidence is sufficiently reliable to meet the requirements of Rule 92 *quater* and reiterates that it cannot enter a conviction based on uncorroborated evidence of a deceased witness, it considers, by majority, Judge Kwon dissenting, that this part of Babić's testimony, having not been cross-examined, is of such a highly prejudicial nature that admitting it under Rule 92 *quater*, without any chance for cross-examination, would impact the Accused's fair trial rights. As such, the probative value of admitting this portion of Babić's evidence is substantially outweighed by the need to ensure a fair trial. Thus, the Chamber shall not admit the transcript from *Slobodan Milošević*, T.13069 line 10 to T.13079 line 2.

43. Based on the above discussion, the Chamber rejects the Accused's arguments that none of Babić's evidence should be admitted in this case. Rather, the Chamber is satisfied that the probative value of the relevant portions of Babić's evidence is not substantially outweighed by the need to ensure a fair trial subject to the exceptions set out above in paragraphs 41–42. The Chamber emphasises again, however, that it cannot base a conviction upon evidence of acts and conduct of an accused or evidence pivotal to the Prosecution case which has not been cross-examined nor corroborated.[72] It is for both parties to make submissions in their final briefs as to the appropriate weight to be attributed this evidence, and the extent to which the opposing party has proffered corroborative evidence throughout the course of the trial.

44. Finally, the Chamber notes, in light of the approach taken below with respect to the tendered intercepted conversations and their admission, that those parts of the intercepts played in court to Babić and/or read into the admitted portions of the transcript, do not form a part of

[69] According to Babić, the Accused was referring to the Muslims.
[70] *Slobodan Milošević*, T. 13072 (20 November 2002); item with Rule 65 *ter* number 30335.
[71] *Slobodan Milošević*, T. 13074 (20 November 2002); item with Rule 65 *ter* number 30335.
[72] *Martić* Appeal Decision, paras. 19–20.

Babić's answers and, as such, will have no probative value until such time as the intercepts themselves are admitted into evidence in this case.

F. Associated exhibits

45. In addition to the transcripts of Babić's testimony, the Prosecution has tendered 309 associated exhibits. As stated above in paragraph 5, the Prosecution later withdrew 76 associated exhibits following the Chamber's Order, but the Accused requested that 40 of the 76 be admitted nevertheless, as they may be favourable to his case. Many of these exhibits are telephone intercepts of conversations between the Accused and various senior members of the Serb leadership in Yugoslavia. Many of the other exhibits are official documents pertaining to the Krajina. Others involve Babić's criminal trials at the Tribunal and in Croatia.

46. The Chamber reiterates that associated exhibits should form an "inseparable and indispensable part" of the testimony, meaning that they should not merely have been mentioned during the course of that testimony, but rather have been used and explained by the witness.[73] It follows that such exhibits should also satisfy the requirements of relevance and probative value contained in Rule 89, and that their probative value must not be substantially outweighed by the need to ensure a fair trial.[74]

47. The Chamber notes that it will consider both those associated exhibits tendered by the Prosecution for admission into evidence in this case, and those associated exhibits which the Accused has indicated he would wish to have admitted if Babić's evidence is accepted by the Chamber for admission.

48. The Chamber first recalls that it has denied admission of a number of portions of Babić's evidence because it either deemed it irrelevant or such that its probative value was outweighed by the need to ensure a fair trial.[75] The following documents tendered by the parties were either discussed in those portions of Babić's evidence or were discussed in the portions of testimony that the Prosecution withdrew from the Motion in accordance with the Prosecution's Further Submission: Rule 65 *ter* numbers 00026, 01761, 01767, 01770, 01776, 01777, 01779, 01780, 01785, 01786, 01787, 01791, 03719, 05266, 06090, 06092, 06095, 06096, 06097, 06098, 06099, 06100, 06101, 06102, 06106, 06117, 06118, 07436, 07639, 08380, 14458, 14459, 14463, 14464, 14469, 14471, 14472, 14473, 14475, 14477, 14479, 14480, 14482, 14483, 14488, 14490, 14491, 14493, 14497, 14498, 14500, 14501, 14502, 14503, 14505, 14506, 14509, 14512, 14514, 14515,

[73] *Popović* Trial Decision, para. 65.
[74] KDZ198 Decision, para. 7.
[75] *See* above, paras. 19–21, 41–42.

14516, 14517, 14518, 14520, 14521, 14522, 14523, 14524, 14525, 14526, 14527, 14528, 14529, 14530, 14531, 14532, 14533, 14534, 14535, 14536, 14538, 14539, 14540, 14541, 14542, 14543, 14547, 14549, 14551, 14555, 14556, 14557, 14558, 14559, 14560, 14562, 14563, 14564, 14566, 14567, 14569, 14575, 14577, 14579, 14582, 14584, 14585, 14586, 14594, 14596, 14597, 14606, 14612, 14613, 14614, 14615, 14623, 14624, 14626, 18216, and 18218. As these documents do not form an inseparable and indispensable part of the admitted evidence, they shall not be admitted into evidence in this case.

(i) Letters, maps, laws, and official documents

49. The following laws, letters, maps, and official documents tendered by the Prosecution are discussed in the transcript sections being admitted in this Decision: Rule 65 *ter* numbers 06067, 06085, 06104, 06105, 06108, 06113, 06115, 06119, 06120, 06121, 06629, 14460, 14462, 14465, 14468, 14476, 14484, 14485, 14486, 14487, 14495, 14496, 14499, 14504, 14513, 14544, 14550, 14552, 14578, 14587, 14608, 14610, 14616, 14618, and 17239. Whether or not they are relevant, of probative value, indispensable to and inseparable from Babić's evidence, as well as whether their probative value is substantially outweighed by the need to ensure a fair trial is discussed separately for each item below.

50. The document with Rule 65 *ter* number 06067 is a proposal prepared by the National Assembly of Republika Srpska for the integration of Republic of Serbia, Republic of Montenegro, Republika Srpska, and Republic of Serbian Krajina. It was admitted in the *Slobodan Milošević* case as exhibit P352.032. Given that it concerns the territory of Republika Srpska and the plans of the Bosnian Serb leadership it is undoubtedly relevant to the present case. However, while the document was briefly mentioned by the Prosecution, it was not put to the witness, and there was no discussion of it. Accordingly, it does not form an indispensable and inseparable part of Babić's testimony and, therefore, shall not be admitted into evidence.

51. The document with Rule 65 *ter* number 06085 is a decision on joining SAO Krajina to the Republic of Serbia. It was admitted into evidence as exhibit P352.035 and P352.036 in the *Slobodan Milošević* case and was used with the witness to show Milošević's reaction to this decision, and to outline his political goals regarding Serbs in the former Yugoslavia.[76] Given that Milošević is an alleged member of the overarching JCE alleged in the Indictment, this document and the discussion surrounding it bear some relevance to the case and are also of

[76] This document was also admitted in the *Martić* case as exhibit 144, as part of Babić's Rule 89(F) witness statement. However, neither the statement, nor the portion of the transcript where this document was discussed (T. 1820) were tendered for admission by the Prosecution. *See* Prosecution's Further Submission, Appendix A, p. 25724.

probative value. It was discussed in Babić's testimony during both direct and cross-examination and is therefore an indispensable and inseparable part of that testimony. The Chamber is also of the view that the probative value of this document is not substantially outweighed by the need to ensure a fair trial. It shall, therefore, be admitted into evidence.

52. The document with Rule 65 *ter* number 06104 is a declaration on unification of the Community of Municipalities of Bosanska Krajina and SAO Krajina. The document with Rule 65 *ter* number 06105 is the contract on co-operation concluded between SAO Krajina and the Community of Municipalities of Bosnian Krajina. Both documents were admitted in the *Slobodan Milošević* case as P352.047 and P352.046 respectively, and in the *Martić* case as exhibits 197 and 198 respectively. Given that they both concern Bosnian Serb territory and its possible unification with SAO Krajina, they are relevant to the present case. In both the *Slobodan Milošević* and *Martić* cases they were discussed briefly and were also provided to Babić for authentication purposes and as background to the events he had described during his testimony. As a result, the documents are an indispensable and inseparable part of Babić's testimony, and the Chamber considers that their prejudicial effect is minimal. Thus, their probative value is not substantially outweighed by the need to ensure a fair trial. They shall, therefore, be admitted into evidence.

53. The document with Rule 65 *ter* number 06108 is a Prijedor declaration, signed by Momčilo Krajišnik and Mile Paspalj, about the uniting of the Republic of Srpska Krajina and Republika Srpska. This document was admitted in the *Slobodan Milošević* case as P352.107. While potentially relevant to the present case, this declaration was mentioned by the Prosecution in direct examination only briefly when Babić was asked to authenticate it. There was no discussion of the document itself or its content. As a result, it does not form an indispensable and inseparable part of Babić's testimony and shall not be admitted at the present time.

54. The document with Rule 65 *ter* number 06113 shows Amendments I–IV of the Constitution of the Republic of Srpska Krajina. This document was admitted into evidence in the *Slobodan Milošević* case as P351.074. It was mentioned in passing by the Prosecution during its direct examination of Babić, who made no substantive comments on it. Accordingly, given that his evidence can be understood without this document, the Chamber is of the view that it does not form an indispensable and inseparable part of it, and it shall not be admitted at the present time.

55. The document with Rule 65 *ter* number 06115 is an order to mobilise the Territorial Defence and Volunteers Units of SAO Krajina. This document was admitted in the *Slobodan*

Milošević case as P352.038 and was discussed in the context of Milošević's plans for the various regions in the former Yugoslavia. However, given that it concerns mobilisation of Serbian forces in Croatia, it does not appear to be relevant to the present case and, for that reason, shall not be admitted into evidence.

56. The document with Rule 65 *ter* number 06119 is a stamped request by Babić to the European Community Ministerial Council to recognise the Republic of Serbian Krajina. It was admitted into evidence in the *Slobodan Milošević* case as P351.071.1.[77] The document with Rule 65 *ter* number 14544 is a stamped letter signed by Babić, dated 23 December 1991, requesting recognition of the Republic of Serbian Krajina by the European Community. It was admitted into evidence in the *Slobodan Milošević* case as exhibit P351.071.2.[78] While both these documents were mentioned during the admitted portion of Babić's evidence, the Chamber is of the view that they are not relevant to the present case as they concern matters that go solely to events in Croatia, in particular the set up of a parallel government structure in the Republic of Serbian Krajina. Therefore, they shall not be admitted into evidence.

57. The document with Rule 65 *ter* number 06120 is a letter signed by Babić, among others, and sent to the President of the Assembly of Republic of Srpska Krajina and the President of the Assembly of Republika Srpska. This letter was admitted in the *Slobodan Milošević* case as P352.028 but was mentioned only in passing by the Prosecution during Babić's testimony in order to provide context for discussion, and was not discussed by the witness at all. Because it cannot be said that it is an indispensable and inseparable part of Babić's testimony, the Chamber shall not admit this document into evidence.

58. The document with Rule 65 *ter* number 06121 is a statement issued by the Inter-Republic Commission for the preparation of the plan and documents relative to the unification of the Republic of Serbian Krajina and Republika Srpska, admitted in the *Slobodan Milošević* case as P352.029. As the previous document, it was mentioned only in passing by the Prosecution during Babić's testimony in order to provide context, and was not discussed by the witness at all. For that reason, the Chamber shall not admit it into evidence.

59. The document with Rule 65 *ter* number 06629 is a letter, sent in late December 1990, from the Accused to Babić, where the former congratulates the latter on the proclamation of SAO Krajina. It was admitted into evidence in the *Slobodan Milošević* case as P352.045, and in

[77] This document was also admitted in the *Martić* case as exhibit 168, as part of Babić's Rule 89(F) witness statement. However, this statement has not been tendered for admission by the Prosecution.

[78] This document was also admitted in the *Martić* case as exhibit 169, as part of Babić's Rule 89(F) witness statement. However, this statement has not been tendered for admission by the Prosecution.

the *Martić* case as exhibit 196. In both those cases it was discussed with the witness in direct examination, and forms an indispensable and inseparable part of his testimony. Since the letter was written by the Accused and shows some of his views on the unity of Serbs in the former Yugoslavia, the Chamber considers it to be relevant to the present case. Despite the fact that it deals with the acts and conduct of the Accused, it was written prior to the start of the conflict in Bosnia, and was signed by the Accused personally. Accordingly, the probative value of this document is not substantially outweighed by the need to ensure a fair trial. It shall, therefore, be admitted into evidence.

60. The document with Rule 65 *ter* number 14462 consists of two typewritten and signed letters, one from Slobodan Milošević to Babić, and the other a response from Babić to Milošević. These letters were admitted in the *Slobodan Milošević* case as P352.080, in the *Martić* case as exhibit 230.[79] In both cases they were discussed extensively by Babić during direct examination and in cross-examination in order to show the attitudes of both Babić and Milošević towards the Vance plan, and the disagreement between the two in that regard. As such, the letters, and the evidence surrounding them are not only relevant to the Accused, who was also involved in negotiations of the Vance plan, but also go to the credibility of Babić. They also form an indispensable and inseparable part of Babić's testimony, and their probative value is not substantially outweighed by the need to ensure a fair trial. The Chamber shall, therefore, admit document 14462 into evidence, but notes that it is a duplicate of the document with Rule 65 *ter* number 14460 also tendered by the Prosecution. Accordingly, the document with Rule 65 *ter* number 14460 shall not be admitted into evidence.

61. The document with Rule 65 *ter* number 14465 is an official reaction from Krajina's Serbian Democratic Party Main Board Presidency to the above mentioned letter from Slobodan Milošević to Babić, admitted in the *Slobodan Milošević* case as P352.081. Its exhibit number was mentioned in passing by the Prosecution during the discussion of the two letters contained in document 14462 but there was no discussion of the document itself or its contents. For that reason, document 14465 does not form an indispensable and inseparable part of Babić's testimony and it shall not be admitted into evidence.

62. The document with Rule 65 *ter* number 14468 is a letter from the General Secretary of the SFRY Presidency to Milan Martić, dated 21 February 1992. It was admitted into evidence in the *Slobodan Milošević* case as exhibit P352.031, in relation to various plans for unification of

[79] They were also admitted in evidence in the *Krajišnik* case as exhibits D18 and D19. However, the portion of the transcript where these are discussed (T. 3583) has not been tendered for admission by the Prosecution. *See* Prosecution's Further Submission, Appendix A, p. 25725.

Serb territories into one state. As such, the letter is relevant to the present case, and, its contents were discussed by Babić during his direct examination, forming an indispensable and inseparable part of his testimony. The prejudicial effect of the document, as well as the evidence surrounding it, is minimal. Thus, its probative value is not substantially outweighed by the need to ensure a fair trial. It shall, therefore, be admitted into evidence.

63. The document with Rule 65 *ter* number 14476 is a decision issued in March 1990 by the Croatian Secretariat for Judicature and Administration granting a request from the Serbian Democratic Party to be entered into the Register of Social Organisations of Croatia. This document was admitted into evidence in the *Slobodan Milošević* case as exhibit P351.002 and was discussed in relation to Babić's testimony about the creation of the said party in Croatia and in BiH.[80] In that regard, Babić also talked about different factions within the party and their connections to the Accused. Accordingly, this document is relevant to the present case. It was referred to in both *Slobodan Milošević* and *Martić* cases during Babić's direct examination and cross-examination, and forms an indispensable and inseparable part of his testimony. Given that it is an official document which does not have much connection to the Accused, its probative value is not substantially outweighed by the need to ensure a fair trial. It shall, therefore, be admitted into evidence.

64. The documents with Rule 65 *ter* numbers 14484 (Decision on establishing Secretariat for Internal Affairs of Serb Autonomous Region of Krajina), 14485 (Decision to appoint Milan Martić as Secretary for the Interior of SAO Krajina issued by the Executive Council of SAO Krajina in Knin), 14486 (Minutes of the conference of the Executive Council of SAO Krajina held in Knin on 4 January 1991), and 14487 (Decree on the internal organisation and work of the Secretariat for Internal Affairs, issued by the Executive Council of SAO Krajina) were admitted into evidence in the *Slobodan Milošević* case as exhibits P352.050, P352.051, P352.052, and P352.053 respectively.[81] However, while being mentioned by the Prosecution during parts of Babić's testimony that have been admitted in the present case by virtue of this decision, they were not discussed by Babić, or authenticated by him, in the course of those portions of his testimony.[82] Accordingly, the Chamber is of the view that these do not form an indispensable and inseparable part of the Babić's admitted testimony. Furthermore, they also do

[80] This document was also admitted in the *Martić* case as exhibit 138, as part of Babić's Rule 89(F) witness statement. However, neither the statement, nor the portion of the transcript where this document was discussed (T. 1706) were tendered for admission by the Prosecution. *See* Prosecution's Further Submission, Appendix A, p. 25724.

[81] Three of the four were also admitted into evidence in the *Martić* case but the portions of transcript where they are discussed (T. 1398, T. 1400, and T. 1405) were not tendered for admission by the Prosecution. *See* Prosecution's Further Submission, Appendix A, p. 25724.

[82] *Slobodan Milošević*, T. 13319 (22 November 2002).

not appear to be relevant to the present case. For those reasons, the Chamber shall not admit these documents into evidence.

65. The document with Rule 65 *ter* number 14495 is a code cable regarding Bihać and the situation in the Republic of Srpska Krajina, dated 3 August 1995, which was admitted in the *Slobodan Milošević* case as exhibit P352.104. It refers to Republika Srpska and the Bosnian Serbs, as well as their relationship with the Republic of Srpska Krajina, and was used in cross-examination to attack Babić's credibility.[83] For that reason, it is both relevant to the present case, and forms an indispensable and inseparable part of Babić's evidence. The probative value of this document is not substantially outweighed by the need to ensure a fair trial and it shall, therefore, be admitted into evidence.

66. The document with Rule 65 *ter* number 14496 is the full text of the Vance Plan, which was admitted in the *Slobodan Milošević* case as exhibit P355. Throughout the portions of Babić's evidence deemed relevant by this Chamber, there is considerable discussion of the Vance Plan and Babić's position in relation to it. Among other thing, it goes to Babić's credibility in his dealings with the international community on one hand and Milošević on the other. For that reason this document is both relevant to the present case, and forms an indispensable and inseparable part of Babić's testimony. The probative value of this document is not substantially outweighed by the need to ensure a fair trial. It shall, therefore, be admitted into evidence.

67. The document with Rule 65 *ter* number 14499 is the Constitution of the Republic of Serbian Krajina, admitted in the *Slobodan Milošević* case as exhibit P351.068.[84] This document was only briefly referred to during Babić's direct examination and was not discussed in any detail nor is it necessary for the understanding of his evidence. Accordingly, the document does not form an indispensable and inseparable part of Babić's testimony, and shall not be admitted into evidence.

68. The document with Rule 65 *ter* number 14504 is a newspaper interview with Babić in which he discusses his political views and plans, which was admitted into evidence in the *Martić* case as exhibit 195.[85] As it goes to Babić's political views and motives, the Chamber considers

[83] This document was also discussed during Babić's examination-in-chief at T. 13261 (21 November 2002), however, that portion of the transcript has not been admitted into evidence by the Chamber.

[84] This document was also admitted in the *Martić* case as exhibit 166 but was not discussed by Babić during his evidence in that case. Rather, it was admitted as part of his Rule 89(F) witness statement, which has not been tendered for admission here.

[85] It was also admitted into evidence in the *Slobodan Milošević* case as exhibit P352.026. However, the portion of Babić's evidence where this document is discussed was not submitted for admission by either of the parties.

it relevant to the present case. Furthermore, it was discussed with Babić during his testimony in *Martić* and forms an indispensable and inseparable part of it. Given that this document was sought for admission by the Accused, its probative value is not substantially outweighed by the need to ensure a fair trial. For that reason, it shall be admitted into evidence.

69. The document with Rule 65 *ter* number 14513 is an order signed by Babić in July 1991 for the release of a policeman from Zadar. It was admitted into evidence in the *Slobodan Milošević* case as P352.168. The document goes to Babić's credibility and, as such, is relevant to this case. Furthermore, given that it was discussed by Babić during his testimony, if forms an indispensable and inseparable part of it. Finally, since the document is not related to the Accused but rather to Babić alone, and its admission was requested by the Accused, the Chamber is of the view that its probative value is not substantially outweighed by the need to ensure a fair trial. Accordingly, it shall be admitted into evidence

70. The document with Rule 65 *ter* number 14550 is a document signed by Milan Martić in July 1995, announcing the agreement reached by officials of the Republic of Serbian Krajina, including Milan Babić, with United Nations representatives regarding the involvement of the Republic's troops in BiH. It was admitted into evidence in the *Slobodan Milošević* case as exhibit P352.096. As it deals with events in BiH in July1995, the Chamber is of the view that the document is relevant to the present case. Furthermore, it was discussed with Babić during his testimony and thus forms an indispensable and inseparable part of it. Given that it is an official document which does not have direct connection to the Accused, its probative value is not substantially outweighed by the need to ensure a fair trial. It shall, therefore, be admitted into evidence.

71. The document with Rule 65 *ter* number 14552 is a combat report to the Territorial Defence Supreme Commander of SAO Krajina, dated 6 August 1991, which was admitted into evidence in the *Slobodan Milošević* case as exhibit P352.067[86] in order to show that the reports of clashes between Serbs and Croats in Croatia would go to various individuals, including Franko Simatović (Frenki). While this document was mentioned during the admitted portion of Babić's evidence, the Chamber is of the view that it is not relevant to the present case as it concerns matters that go solely to events in Croatia. In addition, the admission of this document is not necessary for the purpose of understanding the portion of Babić's evidence where the

[86] This document was also admitted into evidence in the *Martić* case as exhibit 38, but the portion of his evidence where it is discussed (T. 1519) has not been tendered by the Prosecution. *See* Prosecution's Further Submission, Appendix A, p. 25724.

document is discussed. Thus, it is not an indispensable and inseparable part of Babić's testimony and shall not be admitted into evidence.

72. The document with Rule 65 *ter* number 14578 is a decision, signed by Milan Babić on 15 November 1991, appointing Milan Vojnović as commander of the Petrinja Territorial Defence. This was one of the documents withdrawn by the Prosecution in its Further Submission, which the Accused then submitted should be admitted into evidence as it may be favourable to his case. The Chamber first notes that, even though the Prosecution's Further Submission states that this document was admitted in the *Martić* case as exhibit 222, this does not appear to be the case.[87] In addition, while the Chamber was able to locate the reference to this document in the *Slobodan Milošević* case, where it was admitted as P352.142,[88] it would appear that it is not actually relevant to the portions of evidence admitted above, nor is it an indispensable and inseparable part of them.[89] In fact, the document that was discussed by Babić in the admitted portion of his evidence was P352.143, which is discussed in the paragraph below. Accordingly, the document with Rule 65 *ter* number 14578 shall not be admitted into evidence.

73. The document with Rule 65 *ter* number 14587 is an order to the troops of SAO Krajina, issued by Babić on 26 December 1991, instructing them to be combat ready to attack Zagreb, which was admitted into evidence in the *Slobodan Milošević* case as P352.143. Because it goes to Babić's credibility and his political views it is relevant to the present case. As noted in the preceding paragraph, it was discussed by Babić at length in the portion of the evidence the Chamber admitted at the request of the Accused and thus forms an indispensable and inseparable part of it. Given that this document solely concerns Babić and that its admission was requested by the Accused, its probative value is not substantially outweighed by the need to ensure a fair trial. Accordingly, it shall be admitted into evidence.

74. The document with Rule 65 *ter* number 14608 is a letter, dated 2 August 1994, from the Ministry of Defence of the Republic of Serbian Krajina to the President of the Republic of Serbian Krajina. It was admitted into evidence in the *Slobodan Milošević* case as exhibit P352.093 and concerns deliveries of oil into Republic of Serbian Krajina and Republika Srpska. The contents of the document, and the events described within it, are discussed in detail with Babić during his direct examination. The document is therefore both relevant to the present case

[87] Exhibit 222 is, in fact, an order signed by Babić in July 1991, ordering the release of a prisoner.

[88] *See Slobodan Milošević*, T. 13433–13435 (25 November 2002).

[89] These were portions that the Accused considered to be relevant and which the Chamber decided to admit in this case, namely: T. 13424 line 2 to T. 13425 line 25; T. 13426 line 24 to T. 13427 line 21; T. 13428 line 22 to T.

and an indispensable and inseparable part of Babić's testimony. The Chamber is also of the view that the probative value of this document is not substantially outweighed by the need to ensure a fair trial. It shall, therefore, be admitted into evidence.

75. The document with Rule 65 *ter* number 14610 is the judgement of the Military Court in Split, Croatia, issued against Babić, who was tried *in absentia* in relation to "political crimes". It was admitted in the *Slobodan Milošević* case as exhibit P352.169 and Babić was presented with it during direct examination and confirmed its content. Given that this document is relevant to Babić's credibility, it is clearly relevant to the present case. As an official document with no relation to the Accused, its probative value is not substantially outweighed by the need to ensure a fair trial, and it shall, therefore, be admitted into evidence.

76. The document with Rule 65 *ter* number 14616 is a letter from Goran Hadžić, Chairman of the Coordination Committee of Slavonija, Baranja, and Western Srem, to the President of the Republic of Serbian Krajina and others, dated 25 May 1995, which was admitted in the *Slobodan Milošević* case as exhibit P352.033. However, it was only mentioned by the Prosecution in passing and was not put to Babić for comment. Accordingly, the Chamber is of the view that this document is not an indispensable and inseparable part of Babić's testimony and, for that reason, it shall not be admitted into evidence.

77. The document with Rule 65 *ter* number 14618 is a pamphlet containing the platform of the Serbian Democratic Party, admitted in the *Slobodan* Milošević case as exhibit P351.001 and in the *Krajišnik* case as P137. Given that the Accused was the President of the Serbian Democratic Party in BiH, this document is relevant to the present case. Furthermore, it was discussed in depth by Babić during direct examination and thus forms an indispensable and inseparable part of his testimony. The prejudicial effect of this official document, which makes no mention of the Accused, is minimal. Thus, its probative value is not substantially outweighed by the need to ensure a fair trial and it shall, therefore, be admitted into evidence.

78. The document with Rule 65 *ter* number 17239 is a letter to Ratko Mladić from Colonel Smiljanić outlining their disagreement over a particular event. It was admitted into evidence in the *Slobodan Milošević* case as exhibit P352.111 and in the *Martić* case as exhibit 206, in the context of a discussion of the supply of weapons to local Serbs in Croatia and BiH. Accordingly, the document is relevant to the present case. It clearly forms an indispensable and

13429 line 8. It appears that it was document P352.143 that was mainly referred to by Babić in this portion of the evidence, rather than P352.142.

inseparable part of Babić's testimony, and its probative value is not substantially outweighed by the need to ensure a fair trial. It shall, therefore, be admitted into evidence in this case.

(ii) Babić's history with the Tribunal

79. The documents with Rule 65 *ter* numbers 14602 (Milan Babić's plea agreement and the factual basis for it), 14619 (indictment against Milan Babić issued by the Tribunal), and 14620 (sentencing judgement against Milan Babić) relate to Babić's history as one of the persons accused of serious crimes before this Tribunal. They were admitted into evidence in the *Martić* case as exhibits 174, 173, and 175 respectively. The plea agreement was also admitted into evidence in the *Krajišnik* case as P152. Since these documents go to Babić's credibility, the Chamber considers that they are relevant to the present case, and that their prejudicial effect is minimal. Their probative value is not substantially outweighed by the need to ensure a fair trial. The Chamber is also satisfied that they form an inseparable and indispensable part of Babić's testimony. Accordingly, these documents shall be admitted into evidence.

(iii) Babić's witness statement and declarations

80. The document with Rule 65 *ter* number 21219 is Babić's witness statement of 29 March 2004, prepared for the purposes of the *Krajišnik* trial. It was admitted as P154 in that case, following Babić's acceptance of its contents and confirmation that they are true and accurate. Attached to this statement is also an intercept spreadsheet, detailing 33 intercepts Babić listened to and made certain comments on, all of which are outlined in the spreadsheet. The statement was referred to by Babić throughout his testimony in *Krajišnik* and thus forms an indispensable and inseparable part of his evidence. In addition, the statement contains many references to Krajišnik and a few references to the Accused and other high-ranking Bosnian Serb politicians. With respect to the Accused, Babić recounts in the statement a meeting he attended with him, in Čelinac, where the Accused argued for the expulsion of Bosnian Muslims and unification of Bosnian Serb territories in BiH. Thus, the statement as a whole is undoubtedly relevant to the present case and, given Babić's confirmation of the truth of its contents, has probative value. The Chamber has also considered the fact that the part of this statement referring to the meeting in Čelinac is potentially prejudicial to the Accused. However, Babić was cross-examined on this point and the Čelinac meeting was discussed extensively in his testimony. In light of the fact that (i) Babić's evidence was found to be reliable for the purposes of Rule 92 *quater*; (ii) the Chamber cannot base a conviction of the Accused on a witness statement of a deceased witness, if it is uncorroborated; and (iii) Babić was cross-examined in relation to this evidence, the

Chamber does not consider that probative value of this statement is substantially outweighed by the need to ensure a fair trial. It shall, therefore, be admitted into evidence.

81. The document with Rule 65 *ter* number 00745 is a declaration signed by Babić and admitted into evidence during the *Slobodan Milošević* trial as exhibit P353.001 and the *Krajišnik* trial as exhibit P153. It contains a list of 50 intercepted telephone conversations which Babić listened to and identified the voices of the participants. In both cases where this document was admitted, Babić authenticated the list and confirmed that he had signed it. Indeed, in the *Slobodan Milošević* case he explained the process by which he identified the said voices. Accordingly, this document forms an indispensable and inseparable part of Babić's evidence. Given that many of these intercepts reflect the conversations the Accused had with various people, the declaration is undoubtedly relevant to the present case. Furthermore, since Babić was asked and explained how it was created, the probative value of this declaration is not substantially outweighed by the need to ensure a fair trial. Accordingly, it shall be admitted into evidence.

82. The document with Rule 65 *ter* number 21220 is another declaration signed by Babić, admitted into evidence during the *Martić* trial as exhibit 199. It contains a list of 12 intercepted telephone conversations which Babić listened to and identified the voices of the participants. During his testimony in the *Martić* trial he authenticated the list and confirmed that he had signed it.[90] However, this portion of Babić's evidence, while tendered in the original Motion, was removed from the Prosecution's Further Submission.[91] Accordingly, it shall not be admitted into evidence.

(iv) Intercepts

83. As noted earlier, the Prosecution tenders 85 intercepted telephone conversations as exhibits associated with Babić's testimony. In the *Slobodan Milošević*, *Krajišnik*, and *Martić* cases, a large number of intercepts were mentioned during Babić's testimony. This was achieved using the above mentioned declarations and spreadsheets which contain lists of relevant intercepts. Babić was then asked by the Prosecution to explain how he identified the voices from all these intercepts. In addition, a small number of the intercepted conversations were played to him during his testimony and some, but not all, intercepts were then discussed on both direct and cross-examination. In the *Milošević* and *Martić* cases, the intercepts were then

[90] *Martić*, T. 1481–1482 (16 February 2006).
[91] Prosecution's Further Submission, Appendix A, p. 25724.

marked for identification until such time as they could be authenticated,[92] while in the *Krajišnik* case they were admitted immediately following Babić's testimony due to the previous litigation between the parties regarding intercepted conversations[93] and because there was no objection to their admission from the defence.[94]

84. The Chamber notes that, in order to now admit the intercepts in question as associated exhibits pursuant to Rule 92 *quater*, they must (i) have been raised and/or discussed in court with Babić, and (ii) satisfy the requirements of Rule 89, such as those relating to their authenticity and reliability. As stated earlier, this Chamber considers intercepts to be a special category of evidence given that they bear no indicia of authenticity or reliability on their face. Unlike documents that are *prima facie* authentic and reliable, the authenticity and reliability of intercepts is established by further evidence, such as hearing from the relevant intercept operators or the participants in the intercepted conversation themselves.[95]

85. However, the Chamber considers that, with respect to intercepts where Babić was not one of the interlocutors, the Prosecution has failed to provide the Chamber with any indicia of their authenticity as Babić's main role was simply to identify the interlocutors in the conversations, by way of listening to and recognising their voices. This, in the Chamber's view, does not equate to the authentication of the said intercepts. As a result, the Chamber cannot be satisfied of their reliability. Accordingly, given the Chamber's earlier finding that, to have any probative value, evidence must be *prima facie* reliable,[96] the Chamber is of the view that the probative value of the said intercepts is doubtful at this stage. It shall, therefore, not admit them through Babić.

86. Furthermore, with respect to (i), the Chamber notes that many of the intercepts tendered through Babić were not discussed with him at any stage of his testimony in any of the cases, and thus cannot be said to form an indispensable and inseparable part of his testimony. The Chamber notes here that, given the manner in which the intercepts were admitted in those cases, and the way in which the Motion and the Prosecution's Further Submission are structured, it has found it extremely difficult to determine which of the intercepts tendered in the present case

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[92] As it turns out, all of the intercepts discussed by Babić in the *Slobodan Milošević* case were later denied admission into evidence. *See Prosecutor v. Slobodan Milošević*, Case No, IT-02-54-T, Decision and Order on Admission of Exhibits Marked for Identification During Prosecution Case-in-Chief, 15 February 2005.

[93] *See Prosecutor v. Krajišnik*, Case No. IT-00-39-PT, (Confidential) Order to Seek Additional Information on Certain Intercepted Communications, 17 April 2—3; (Confidential) Decision on Defence Motion to Exclude Certain Intercepted Communications, 29 January 2004.

[94] *Krajišnik*, T. 3653–3655 (14 June 2004).

[95] Decision on the Prosecution's First Motion for Judicial Notice of Documentary Evidence Related to the Sarajevo Component, 31 March 2010, para. 9.

were in fact played to and/or discussed with Babić during his various appearances at the Tribunal, and thus form an indispensable and inseparable part of his evidence. Indeed, unlike with some of its other Rule 92 *quater* motions, the Prosecution did not provide the Chamber with transcript page numbers indicating where the exhibits tendered were discussed in the *Slobodan Milošević, Krajišnik,* and *Martić* cases. Furthermore, a number of intercepts were played in the *Slobodan Milošević* case, and yet the Prosecution's Further Submission refers to no exhibit numbers from that case.[97]

87. For all those reasons, the Chamber will deny the admission into evidence of all telephone intercepts tendered by the Prosecution through the Motion and the Prosecution's Further Submission. Those intercepts where Babić is one of the participants in the conversations may be admitted into evidence through him pursuant to Rule 92 *quater* but only if they form an inseparable and indispensable part of his evidence. The Prosecution may, therefore, resubmit such intercepts for admission as exhibits associated with the admitted portions of Babić's evidence, but such a submission should make clear exactly where in the admitted transcripts Babić discussed each particular intercept.

88. In this context, the Chamber notes that it has previously admitted one intercept through a deceased witness, Ljubo Bojanović, who was not a participant in the intercepted conversation, nor able to authenticate the intercept in question.[98] This intercept is now on the case record as P140. The Chamber, in light of its approach outlined above, is now of the view that it should not have admitted it into evidence as its authenticity and reliability had not been established by the Prosecution. It has, therefore, *proprio motu* reconsidered its decision in relation to that intercept and will order the Registry to remove P140 from the record of the case. The Prosecution may, if it so wishes, resubmit this intercept for admission through a more appropriate channel, in accordance with the guidelines above.

(v) Other documents

89. The document with Rule 65 *ter* number 06122 has no English translation available. Therefore, the Chamber will deny its admission at this time.

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[96] *See Prosecutor v. Popović et al.*, Case No. IT-05-88-AR73.2, Decision on Joint Defence Interlocutory Appeal Concerning the Status of Richard Butler as an Expert Witness, 30 January 2008, para. 22.

[97] For example, while the intercept with a Rule 65 *ter* number 30335 was discussed in the *Slobodan Milošević* case, the Prosecution's Further Submission does not reflect that. *See Slobodan Milošević*, T. 13069 (20 November 2002).

[98] *See* Decision on Prosecution Motion for Admission of Testimony of Sixteen Witnesses and Associated Exhibits Pursuant to Rule 92 *quater*, 30 November 2009, para. 26.

90. The Chamber has been unable to locate the documents with Rule 65 *ter* numbers 01011, 01238, 05910, 06114, 06126, 10872, 14470, 14474, 14481, 14489, 14492, 14519, 14545, 14553, 14565,[99] 14568, 14581, 14589, 14592, 14593, 14595, 14598, 14599, 14601, and 14609, in the transcripts tendered and shall, therefore, refuse the admission of these documents into evidence at this time.

IV. Disposition

91. Accordingly, pursuant to Rules 54, 89, and 92 *quater* of the Rules, the Trial Chamber hereby:

(i) **GRANTS** the Motion in part;

(ii) **ADMITS** into evidence the relevant portions of Babić's testimony outlined in paragraph 18 (footnotes 31–36) with the exception, by majority, Judge Kwon dissenting, of the portions described in paragraphs 41 (*Slobodan Milošević*, pages T. 13054, line 12 to T. 13056, line 14 and *Krajišnik*, T. 3402, line 21 to T. 3404, line 24) and 42 (*Slobodan Milošević*, pages T. 13069 line 10 to T. 13079 line 2);

(iii) **ORDERS** the Prosecution to upload into e-court revised transcripts of Babić's evidence from the *Slobodan Milošević*, *Krajišnik*, and *Martić* cases, which should contain only the portions of testimony admitted in this decision, while the remaining portions should be redacted;

(iv) **INSTRUCTS** the Registry to assign exhibit numbers to the transcripts referred to in (iii) above;

(v) **ADMITS** into evidence the documents with the following Rule 65 *ter* numbers: 00745, 06085, 06104, 06105, 06629, 14462, 14468, 14476, 14495, 14496, 14504, 14513, 14550, 14587, 14602, 14608, 14610, 14618, 14619, 14620, 17239, and 21219, and instructs the Registry to assign exhibit numbers to them.

[99] As noted above, in footnote 23, it appears that the Accused mistakenly sought admission of document with number 14567 (a map which was already tendered by the Prosecution in its Further Submission) rather than 14565, which was in fact exhibit P352.147 in the *Slobodan Milošević* case. *See* Accused's Further Submission, Annex A, p. 11.

(vi) **DENIES** the admission of documents with Rule 65 *ter* numbers 01011, 01238, 05910, 06114, 06122, 06126, 10872, 14470, 14474, 14481, 14489, 14492, 14519, 14545, 14553, 14565, 14568, 14581, 14589, 14592, 14593, 14595, 14598, 14599, 14601, and 14609 , without prejudice;

(vii) **DENIES**, without prejudice, the admission of intercepted conversations in which Babić personally participated;

(viii) **DENIES** the Motion in all other respects; and

(ix) **INSTRUCTS** the Registry to remove exhibit P140 from the case record at this time.

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

Judge O-Gon Kwon
Presiding

Dated this thirteenth day of April 2009
At The Hague
The Netherlands

[Seal of the Tribunal]

PARTIALLY DISSENTING OPINION OF JUDGE KWON

1. I agree with the opinion of the majority that the relevant portions of Milan Babić's evidence should be admitted in the present case pursuant to Rule 92 *quater*. However, I respectfully disagree with the majority's denial of two portions of Babić's evidence, discussed in paragraphs 41 and 42 of the decision.

2. The majority excludes these two portions on the basis of the Rule 89(D) test, namely by finding that their probative value is substantially outweighed by the need to ensure a fair trial. The majority reasons that these portions are highly incriminatory, and thus extremely prejudicial to the Accused, and Babić was only cross-examined to a limited extent in relation to one of them, and not at all in relation to the other. Leaving aside the issue of cross-examination, which I will discuss below, I consider that the incriminating or prejudicial nature of evidence in relation to the accused is not one of the criteria to be assessed in determining its admission pursuant to Rule 92 *quater*, and indeed no other Chamber has found it to be so. Rather, Rule 89(D) simply requires the Trial Chamber to balance its obligation to ensure a fair trial with the probative value of the proposed evidence.[100]

3. Moreover, the majority finds that other portions of Babić's evidence relating to: (i) the position of the Accused in the Serb political elite in the former Yugoslavia and his contact with Slobodan Milošević; (ii) the Accused's alleged influence on the rise of Serb nationalism and the formation of Serb Autonomous Regions in Croatia and BiH; (iii) the Accused's alleged support for the idea to unite all Serbs in one state; (iv) the alleged involvement of the Accused in the arming of Serbs in Croatia and BiH; (v) the Accused's alleged political strategy to "wait for Izetbegović to make the wrong political move and that is when accounts would be settled"; (vi) the military organisation and operations of the Serbs in Croatia and BiH and the Accused's alleged role therein; and (vii) the Accused's alleged participation in attempts to have Milan Martić released after his arrest in Otoka, are not unduly prejudicial to the Accused, and therefore their probative value is not substantially outweighed by the need to ensure a fair trial. I agree with these conclusions and note that they reflect a determination that Babić's evidence has sufficient reliability to be admitted pursuant to Rule 92 *quater*. However, despite this finding, the majority goes on to exclude the two portions of his evidence on the ground that they are "highly incriminating" or "extremely prejudicial" to the Accused. Given the general reliability

[100] *See Prosecutor v. Delalić et al.* ("*Čelebići* Case"), Case No. IT-96-21-A, Appeal Judgement, 20 February 2001, para. 288 (concerning the nature of the Rule 89(D) test in the context of a decision on re-opening of the Prosecution's case).

of the evidence, I cannot agree that its purported incriminatory nature somehow alters the balance so as to create a fair trial issue which substantially outweighs the obvious probative value of the evidence. This is particularly the case when it is clear in the jurisprudence that the Chamber cannot enter a conviction of the Accused based on the uncorroborated evidence of a deceased witness, an already significant fair trial protection in respect of incriminatory evidence which may be adduced pursuant to Rule 92 *quater*.

4. Further, I take the view that it is not appropriate to draw any conclusions as to the incriminating or prejudicial nature of evidence at this stage or in such an isolated and piecemeal manner. That is a determination which can only be properly done at a later stage when the evidence can be assessed in light of the case as a whole. Indeed, in considering the totality of the evidence at the end of the trial, the Chamber may determine that these two portions of Babić's evidence are not particularly incriminating at all, depending on the other evidence brought. In addition, ultimately, with the caveat that it cannot stand alone as the basis for conviction, any issues arising from the incriminatory nature of evidence adduced pursuant Rule 92 *quater* are best left to be addressed in a determination as to the weight the Chamber will accord to it and not in terms of its admissibility.

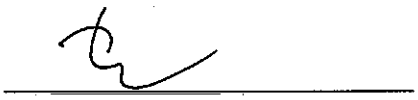
5. With regard to the place of cross-examination in prior proceedings as a factor in making an assessment of admissibility under Rule 92 *quater*, I note that it is a matter for consideration in determining the overall reliability of the relevant evidence. Even if the evidence has not been subject to prior cross-examination, in whole or in part, it may still be found to be sufficiently reliable to be admitted in later proceedings under this Rule. Thus, the presence, absence, or poor quality of cross-examination in the prior proceedings should be analysed in the overall assessment of that evidence as a whole. It cannot be considered as a discrete test applicable to individual passages, questions or parts of the testimony or statement. Indeed, Milan Babić was subject to extensive cross-examination during his oral testimony in previous proceedings at this Tribunal, and the Chamber has taken this into account in finding his evidence to be reliable. The fact that he was not cross-examined on a particular aspect of his evidence, or that the cross-examination may have been conducted poorly, cannot be a reason for not admitting that particular part of it. It is yet again a matter of the weight to be accorded to any part of the admitted evidence in the absence of effective cross-examination on it.

6. Finally, the Chamber unanimously makes it clear that any parts of telephone intercepts which were played in the courtroom or read into the record during Babić's prior testimony are not considered to form part of his evidence, and therefore Babić's evidence in relation to those intercepts will have no probative value until such time as the intercepts themselves are admitted.

Therefore, I do not consider it necessary to deny admission to that portion of Babić's evidence relating to the Accused's intercepted conversation with Gojko Đogo. Indeed, by not admitting this portion of Babić's evidence, should the Chamber later admit the relevant telephone intercept, it may lose important testimony that could assist in interpreting its content.

7. For these reasons, as the majority states with respect to the remaining relevant portions of Babić's evidence, I am of the view that the Rule 92 *quater* requirements are satisfied for these two portions also.

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



O-Gon Kwon
Judge

Dated this thirteenth day of April 2010
At The Hague
The Netherlands

[Seal of the Tribunal]