

UNITED  
NATIONS



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

Case No. IT-03-69-T  
Date: 16 June 2010  
Original: English

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SMS

**IN TRIAL CHAMBER I**

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

**Registrar:** Mr John Hocking

**Decision of:** 16 June 2010

**PROSECUTOR**

v.

**JOVICA STANIŠIĆ  
FRANKO SIMATOVIĆ**

**PUBLIC**

**DECISION ON PROSECUTION'S MOTION FOR ADMISSION  
OF EVIDENCE OF WITNESS B-161 PURSUANT TO RULE  
92 QUATER**

**Office of the Prosecutor**

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## I. PROCEDURAL HISTORY

1. On 21 May 2007, the Prosecution filed a motion for the admission of the transcript of testimony of Witness B-161 in the case of *Prosecutor v. Slobodan Milošević* (“Milošević case”) as well as 12 associated exhibits (“Proffered Evidence”) pursuant to Rule 92 *quater* of the Rules of Procedure and Evidence of the Tribunal (“Rules”).<sup>1</sup> On 13 March and 2 July 2003, Witness B-161 was granted amongst others, pseudonym and the hearing of parts of the testimony in closed session in the *Milošević* case.<sup>2</sup> The Prosecution seeks no variation of the protective measures currently in force.<sup>3</sup>
  
2. On 29 May 2007, the Simatović Defence requested the Chamber to postpone the time limit for filing responses to a number of Prosecution motions for the admission of written evidence.<sup>4</sup> The Chamber partly granted this request on 1 June 2007, by allowing both the Simatović Defence and the Stanišić Defence to respond to these motions by 9 July 2007.<sup>5</sup>
  
3. On 9 July 2007, the Simatović Defence responded to the Motion, requesting the Chamber to dismiss it.<sup>6</sup> On the same day, the Stanišić Defence also responded to the Motion, opposing it and requesting leave to exceed the word limit.<sup>7</sup>
  
4. On 16 July 2007, the Prosecution requested leave to reply and replied to the Simatović Response and the Stanišić Response.<sup>8</sup> On 16 September 2009, the Chamber granted leave to the Prosecution to file the Reply to Simatović Response.<sup>9</sup> On 11 March 2010, the Chamber granted

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<sup>1</sup> Prosecution’s Motion for Admission of the Evidence of Witness B-161 Pursuant to Rule 92 *quater*, with Confidential Annexes A and B, 21 May 2007 (“Motion”), paras 1, 21. The Prosecution seeks the admission of the following evidence: excerpts of the witness’s testimony in *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54, Hearing of 22 May 2003, T. 20990-21104; Hearing of 23 May 2003, T. 21105-21212; Hearing of 2 July 2003, T. 23562-23685; 12 associated exhibits identified in Annex B to the partly confidential corrigendum to the Motion, 7 October 2009.

<sup>2</sup> See Annex to the Confidential Prosecution Submissions on the Status of Protective Measures, 24 November 2009, p. 29.

<sup>3</sup> *Ibid.*

<sup>4</sup> Simatović Defence Motion to Postpone Deadline for Filing Response on Prosecution Motions for Admission of Written Evidence Pursuant to Rule 92 *bis*, 92 *ter* and 92 *quater*, 29 May 2007, para. 12.

<sup>5</sup> Decision on Several Applications to Modify Terms of the Work Plan and Order Following a Rule 65 *ter* Conference, 1 June 2007, para. 7.

<sup>6</sup> Simatović Defence Response to Prosecution’s Motion for Admission of the Evidence of Witness B-161 Pursuant to Rule 92 *quater*, 9 July 2007 (“Simatović Response”), para. 13.

<sup>7</sup> Stanišić Defence Response to Prosecution Motion for Admission of Evidence of Witness B-161 Pursuant to Rule 92 *quater*, 9 July 2007 (“Stanišić Response”), paras 1-2, 28.

<sup>8</sup> Prosecution Leave to Reply and Consolidated Reply to Simatović’s Responses to the Prosecution Motion for Admission of Evidence Pursuant to Rule 92 *quater*, 16 July 2007 (“Reply to Simatović Response”); Prosecution Request for Leave to Reply and Reply to the Accused Stanišić’s Responses to the Prosecution’s Motions Pursuant to Rule 92 *quater*, 16 July 2007 (“Reply to Stanišić Response”).

<sup>9</sup> Decision on Prosecution’s Motion for Admission of Evidence of Witnesses Unavailable Pursuant to Rule 92 *quater*, 16 September 2009, p. 6.

leave to the Stanišić Defence to exceed the word limit and granted leave to file the Reply to Stanišić Response.<sup>10</sup>

5. On 7 October 2009, the Prosecution filed a partly confidential corrigendum to the Motion requesting replacement of Confidential Annex A to the Motion with Confidential Annex B to the said corrigendum.<sup>11</sup>

6. On 15 October 2009, the Chamber extended the Simatović Defence time limit for responding to the Corrigendum until 15 November 2009.<sup>12</sup> On 16 November 2009, the Simatović Defence opposed the changes requested by the Prosecution in the Corrigendum.<sup>13</sup>

7. On 19 November 2009, the Prosecution filed a request for leave to reply to Simatović Response to Corrigenda.<sup>14</sup> On 24 November 2009 the Chamber denied this request.<sup>15</sup>

## II. SUBMISSIONS

### **A. Motion**

8. The Prosecution submits that the deceased witness is unavailable and that the Proffered Evidence therefore may be admitted pursuant to Rule 92 *quater*.<sup>16</sup> The Prosecution argues that the Proffered Evidence is relevant and highly probative with regard to the allegations against Jovica Stanišić and Franko Simatović (“the Accused”).<sup>17</sup> Moreover, the Prosecution submits that the Proffered Evidence bears sufficient indicia of reliability, as it was given under oath, primarily in open session.<sup>18</sup> The Prosecution also states that the witness was extensively cross-examined by Slobodan Milošević, assumedly a member of the same alleged joint criminal enterprise (“JCE”) as

<sup>10</sup> Decision on Prosecution Motion for Admission of Evidence of Witness B-179 Pursuant to Rule 92 *quater*, 11 March 2010, p. 14.

<sup>11</sup> Prosecution’s Partly Confidential Corrigendum to Prosecution Motion for Admission of Evidence of Miroslav Deronjić and Re-submission of Confidential Annex B to Prosecution Motion for Admission of Evidence of Witness B-161 Pursuant to Rule 92 *quater* with Confidential Annexes, 7 October 2009 (“Corrigendum”), paras 6, 9 (b). The Chamber notes that Annex B to the Motion also contains the witness’s death certificate. From the content of the Corrigendum and the relevant Annexes, the Chamber assumed that the Prosecution seeks replacement of Annex A to the Motion with Annex B to the Corrigendum.

<sup>12</sup> Decision on Motion for Adjournment of the Proceedings by the Simatović Defence, 15 October 2009, p. 10, para. 30 (iv) (a).

<sup>13</sup> Simatović Defence Response to Corrigenda to Prosecution Motions for Admission of Evidence of Milan Babić, Miroslav Deronjić and B161, 16 November 2009 (“Simatović Response to Corrigenda”), paras 3, 23-24. Due to the fact that 15 November 2009 fell on a Sunday, the Simatović Response to Corrigenda was filed on Monday, 16 November 2009.

<sup>14</sup> Prosecution Request for Leave to Reply to Defence Response to Corrigenda to Prosecution Motions for Admission of Evidence Pursuant to Rule 92 *quater*, 19 November 2009.

<sup>15</sup> On 24 November 2009, the parties were informed about this decision through an informal communication.

<sup>16</sup> Motion, paras 1, 3. The witness’s death certificate is attached to the Motion as Confidential Annex B.

<sup>17</sup> Motion, para. 9.

<sup>18</sup> Motion, para. 7.

the Accused, and by the *amicus curiae* in the Milošević case.<sup>19</sup> The Prosecution further submits that the Proffered Evidence will be in large parts corroborated by other evidence, both documentary and testimonial, noting in particular the testimonies of Witnesses B-1769, B-217, and B-024.<sup>20</sup>

9. As to the Proffered Evidence going to proof of acts and conduct of the Accused, the Prosecution submits that Rule 92 *quater* (B) of the Rules does not preclude the admission of such evidence, but acknowledges that it may be a factor weighing against admission.<sup>21</sup> The Prosecution also emphasises that those portions, which go to the acts and conduct of the Accused do not constitute “substantive evidence”<sup>22</sup>

10. Furthermore, the Prosecution submits that possible restrictions on the right to cross-examine would not necessarily implicate a violation of the right to a fair trial as provided in Articles 20 and 21 of the Tribunal’s Statute (“Statute”). It maintains that the Chamber may restrict the Accused’s right to cross-examination in accordance with its duty to ensure the fairness and expeditiousness of the proceedings.<sup>23</sup>

11. The Prosecution states that in order to eliminate any prejudice deriving from the admission of the Proffered Evidence, the Chamber may i) instruct the Defence to provide a list of any real or perceived inconsistencies identified in the previous testimony, ii) direct the Defence to provide additional evidence relevant to the credibility of any portion of the witness’s prior testimony, iii) direct the Defence to present all available evidence which counters the prior testimony of Witness B-161 regarding the Accused, and iv) consider any difficulties which the admission of these transcript portions may cause for the Accused when it determines how much weight to give to the evidence.<sup>24</sup> Finally, the Prosecution stresses that exclusion of any part of the Proffered Evidence would deprive the Chamber of exceptionally reliable, relevant, and probative evidence hence would impair the search for the truth.<sup>25</sup>

12. With respect to the portions of the transcript that go to proof of acts and conduct of the Accused, should the Chamber consider them as inadmissible pursuant to Rule 92 *quater* the

<sup>19</sup> Motion, paras 7, 12, 15-16.

<sup>20</sup> Motion, paras 8, 12 ; Since the Prosecution in its public Motion referred to Witness’s B-024 old pseudonym, the Chamber exceptionally will also refer to this witness’s old pseudonym throughout this Decision.

<sup>21</sup> Motion, paras 2, 6, 11, 13.

<sup>22</sup> Motion, paras 10, 17.

<sup>23</sup> Motion, para. 16.

<sup>24</sup> Motion, para. 18.

<sup>25</sup> Motion, para. 19.

Prosecution seeks their admission in the interest of justice as provided for under Rule 89 (F) of the Rules.<sup>26</sup>

### **B. Simatović Response**

13. The Simatović Defence does not challenge the unavailability of the witness,<sup>27</sup> but opposes admission of the Proffered Evidence pursuant to Rule 92 *quater* as going to proof of acts and conduct of the Accused Simatović.<sup>28</sup> It argues that the Proffered Evidence is unreliable as it is not sufficiently corroborated by other evidence in the case,<sup>29</sup> and has not been subjected to cross-examination in the present proceedings.<sup>30</sup> The Simatović Defence submits that the Prosecution seeks to admit statements, which are of crucial importance to its case against Simatović,<sup>31</sup> as well as a set of documents, which have no “direct connection with the witness”.<sup>32</sup>

14. According to the Simatović Defence, the Prosecution’s assumption that the Proffered Evidence has been sufficiently tested for the purpose of the instant proceedings by the cross-examination in the Milošević case, only because Milošević and Simatović were alleged to be members of the same alleged JCE, is erroneous.<sup>33</sup> It contends that the said cross-examination conducted by a “non-expert” and with a limited role of the *amicus curiae*, has not been sufficient, in particular, with regard to the alleged acts and conduct of Simatović.<sup>34</sup> The Simatović Defence submits that the Proffered Evidence was considered reliable in prior proceedings before the Tribunal, which did not conclude in a final judgement. This fact, however, does not automatically entail the reliability of the said evidence for the purposes of the present case.<sup>35</sup> Therefore, the Simatović Defence argues that admission of the Proffered Evidence would violate Simatović’s right to fair trial, as provided for in Articles 20 and 21 of the Statute,<sup>36</sup> and cannot be justified by referring to the interests of justice.<sup>37</sup>

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<sup>26</sup> Motion, paras 12-13, 20.

<sup>27</sup> Simatović Response, para. 3.

<sup>28</sup> Simatović Response, paras 5-6; Simatović Response to Corrigenda, paras 3, 7, 19, 23.

<sup>29</sup> Simatović Response, para. 9; Simatović Response to Corrigenda, para. 20 with regard to the associated exhibits.

<sup>30</sup> Simatović Response, paras 7-8, 11; Simatović Response to Corrigenda, paras 12, 19.

<sup>31</sup> Simatović Response, para. 8; Simatović Response to Corrigenda, para. 13.

<sup>32</sup> Simatović Response to Corrigenda, para. 18.

<sup>33</sup> Motion, para. 15; Simatović Response, para. 7; Simatović Response to Corrigenda, para. 13.

<sup>34</sup> Simatović Response, paras. 7-9; Simatović Response to Corrigenda, paras 8, 12-13.

<sup>35</sup> Simatović Response, paras. 7, 11; Simatović Response to Corrigenda, para. 13.

<sup>36</sup> Simatović Response, paras 10-11.

<sup>37</sup> Simatović Response, para. 6.

### C. Stanišić Response

15. The Stanišić Defence does not contest the unavailability of the witness. However, it considers the Proffered Evidence as not sufficiently reliable pursuant to Rule 92 *quater*.<sup>38</sup> Moreover, it argues that the Proffered Evidence significantly goes to proof of the acts and conduct of Stanišić, allegedly responsible for having contributed to the alleged JCE by “directing acts and conducts of others”.<sup>39</sup> As the Proffered Evidence, according to the Stanišić Defence, was not and will not be subjected to effective cross-examination, its admission would violate Stanišić’s right to a fair trial.<sup>40</sup> The Stanišić Defence further stresses that the possible reliability of the evidence in relation to previous proceedings before the Tribunal does not necessarily mean that it is reliable in the present case.<sup>41</sup> Additionally, the Stanišić Defence submits that the fact that the Milošević case did not reach the final stage of adjudication should be taken into account by the Chamber.<sup>42</sup>

16. The Stanišić Defence refers the Chamber to the discretionary factors developed in the Rule 92 *bis* (E) jurisprudence as an appropriate guideline in determining the admission of evidence pursuant to Rule 92 *quater*.<sup>43</sup> In this respect, the Chamber should consider i) whether the transcript goes to proof of a critical element of the Prosecution’s case against the Accused, ii) whether the cross-examination of the witness in the Milošević case adequately dealt with the issues relevant to the present case, and iii) the proximity of the evidence to the Accused.<sup>44</sup> The Stanišić Defence submits that the witness’s cross-examination in the Milošević case cannot be considered as adequate for the purposes of the present case.<sup>45</sup> Therefore the Proffered Evidence should be excluded, especially taking into account its pivotal character to the Prosecution’s case and its proximity to the Accused.<sup>46</sup> In this respect the Stanišić Defence argues that the description of the Proffered Evidence provided by the Prosecution is misleading and incorrectly reflects its significance for the Prosecution’s case.<sup>47</sup>

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<sup>38</sup> Stanišić Response, paras 1, 5, 22.

<sup>39</sup> Stanišić Response, paras 14-15, 23-25.

<sup>40</sup> Stanišić Response, paras 12, 16-17, 19-23, 28.

<sup>41</sup> Stanišić Response, para. 6.

<sup>42</sup> Stanišić Response, para. 13.

<sup>43</sup> Stanišić Response, para. 16.

<sup>44</sup> Stanišić Response, paras 16, 18-19.

<sup>45</sup> Stanišić Response, paras 22-23.

<sup>46</sup> Stanišić Response, paras 19, 24-25.

<sup>47</sup> Stanišić Response, paras 24-25.

17. The Stanišić Defence also submits that with regard to the Proffered Evidence there is little, if any, corroborating evidence.<sup>48</sup> Furthermore, the Stanišić Defence considers parts of the Proffered Evidence to be hearsay and thus not reliable.<sup>49</sup>

#### **D. Prosecution Reply to Responses**

18. The Prosecution argues that the Proffered Evidence was tested by Milošević, a trained lawyer, as well as by the *amicus curiae* in the *Milošević* case.<sup>50</sup> It also stresses that Rule 92 *quater* of the Rules does not require that the case, in which the testimony sought for admission was given, had reached the final stage of adjudication.<sup>51</sup>

19. As to the allegations concerning the violation of the right to a fair trial, the Prosecution submits that Rule 92 *quater* requires a balance of interests. Therefore, the absence of cross-examination should not automatically implicate such a violation, as it would render Rule 92 *quater* meaningless.<sup>52</sup> Further, the Prosecution notes that pivotal evidence for its case or evidence going to acts and conduct of the Accused is admissible pursuant to Rule 92 *quater*, provided that it is in some ways corroborated by other evidence.<sup>53</sup> The Prosecution submits that the Defence should have the opportunity to both cross-examine witnesses that will give corroborative evidence, as well as challenge the already admitted evidence, so that it will be able to cast doubt on the already admitted evidence.<sup>54</sup>

20. The Prosecution submits that hearsay evidence is not necessarily excluded from admission under Rule 92 *quater*, but might instead influence the weight that the Chamber deems appropriate to give to the Proffered Evidence.<sup>55</sup> Moreover, it stresses that the alleged “misinforming” descriptions of the evidence that it has provided in Annex B, are only meant to assist the Chamber in the examination of the Proffered Evidence.<sup>56</sup>

21. The Prosecution states that by referring only to Rule 92 *bis* jurisprudence the Stanišić Defence misrepresents the law applicable to the admission of written evidence, as it fails to draw

<sup>48</sup> Stanišić Response, para. 27.

<sup>49</sup> Stanišić Response, para. 26.

<sup>50</sup> Reply to Simatović Response, para. 5; Reply to Stanišić Response, para. 15.

<sup>51</sup> Reply to Simatović Response, para. 5; Reply to Stanišić Response, para. 7.

<sup>52</sup> Reply to Simatović Response, para. 6; Reply to Stanišić Response, para. 12.

<sup>53</sup> Reply to Simatović Response, para. 12; Reply to Stanišić Response, paras 9-10.

<sup>54</sup> Reply to Simatović Response, para. 12.

<sup>55</sup> Reply to Stanišić Response, para. 14.

<sup>56</sup> Reply to Stanišić Response, para. 13.

upon Rule 92 *quater* jurisprudence, which is autonomous and distinct from Rule 92 *bis*, and that it confuses reliability with credibility.<sup>57</sup>

### **III. APPLICABLE LAW**

22. The Chamber recalls the applicable law governing the admission of evidence pursuant to Rule 92 *quater* as set out in its decision on admission of written evidence of Witness B-179.<sup>58</sup>

### **IV. DISCUSSION**

#### **A. Relevance**

23. The Chamber notes that two of the three transcripts referred to by the Prosecution in the Annex to the Corrigendum, in large part, concern either procedural matters or constitute testimony given by other witnesses.<sup>59</sup> The Chamber finds these parts of the transcript of 23 May and 2 July 2003 inadmissible.

24. The Chamber notes that the Proffered Evidence given by Witness B-161, who was an inspector in service of the Serbian MUP at the time of the Indictment, concerns the existence of communication channels between the local leadership in Zvornik and the political leadership of the Serbian MUP. It also concerns the organisational structure of the MUP from the end of 1991 throughout the indictment period. The Proffered Evidence further concerns the presence of Serb forces allegedly subordinated to the Serbian MUP in the Zvornik area around April 1992. Lastly, it concerns the alleged assistance provided to the Bosnian Serbs by the leadership of Serbia, specifically the Serbian MUP.<sup>60</sup> The Chamber therefore finds that, with the caveat explained in paragraph 23 above, the Proffered Evidence is relevant.

#### **B. Unavailability**

25. The Chamber finds that the witness is deceased and therefore unavailable pursuant to Rule 92 *quater* of the Rules.

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<sup>57</sup> Reply to Stanišić Response, paras 6, 8.

<sup>58</sup> Decision on Prosecution Motion for Admission of Evidence of Witness B-179 Pursuant to Rule 92 *quater*, 11 March 2010 (“Witness B-179 Decision”).

<sup>59</sup> *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54, Hearing of 23 May 2003, T. 21132:22-21212; Hearing of 2 July 2003, T. 23562-23619:22.

<sup>60</sup> See Third Amended Indictment, paras 15, 22-26, 62-66.

### C. Reliability

26. In its decision of 11 March 2010 on admission of evidence of Witness B-179, the Chamber mentioned four criteria and identified them as relevant to assess the reliability of evidence requested for admission pursuant to Rule 92 *quater*.<sup>61</sup> These criteria will be dealt with below.

27. The witness testified under oath in the *Milošević* case on 22 and 23 May, and 2 July 2003, when he was also cross-examined by the accused and the *amicus curiae*. These are important factors for the Chamber when considering the reliability of the Proffered Evidence. The Prosecution submits to additionally consider whether the testimony was received in open session. The Chamber considers, however, that whether the witness's testimony was given in open or private session, *per se*, does not constitute an *indicium* of reliability.<sup>62</sup> Nevertheless, depending on the circumstances of a particular case, such a factor might be relevant when assessing the reliability of a witness's testimony. Both the Stanišić and the Simatović Defence argue that the testimony given by the witness in the *Milošević* case does not infer its reliability in the instant proceedings, as the *Milošević* case did not reach the final adjudication stage. Rule 92 *quater* (A) of the Rules does not set such a requirement and does not preclude the Proffered Evidence from admission under these circumstances.

28. Both the Stanišić and the Simatović Defence challenge the reliability of the Proffered Evidence by questioning the value of the cross-examination conducted in the "distinct legal proceedings" of the *Milošević* case. The Chamber notes that an adequate cross-examination, for the purpose of the instant case, conducted in another case is not in itself a requirement for admissibility of evidence pursuant to Rule 92 *quater*. The quality of cross-examination conducted in the prior case and the question as to whether, and to what extent, the cross-examination probed the witness's statement reliable for the instant case, is only one of the elements that the Chamber weighs when assessing the reliability of the evidence to be admitted. The quality and adequacy of the prior cross-examination for the current proceedings will also be considered when weighing the Proffered Evidence, if admitted.<sup>63</sup>

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<sup>61</sup> See Witness B-179 Decision, para. 28.

<sup>62</sup> See also Witness B-179 Decision, para. 41.

<sup>63</sup> Witness B-179 Decision, para. 38; see also *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-T, Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 *quater*, 21 April 2008, ("Popović Decision"), paras 51, 60; *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-AR73.4, Confidential Decision on Beara's and Nikolić's Interlocutory Appeals against Trial Chamber's Decision of 21 April 2008 Admitting 92 *quater* Evidence, 18 August 2008, para. 31.

29. Both the Simatović and the Stanišić Defence argue that the incriminating parts of the Proffered Evidence are based on the witness's indirect knowledge, have not been challenged, and are not corroborated by other evidence. The Prosecution in its Motion explicitly refers to evidence given by three witnesses, which should corroborate the Proffered Evidence. The Chamber notes that Witness B-217 has been removed by the Prosecution from the Prosecution's Witness List.<sup>64</sup> Consequently, the testimony of Witness B-217 has not been taken into account by the Chamber in the examination of the reliability of the Proffered Evidence.

30. The evidence expected to be delivered by Witnesses B-024, B-1517, and B-1769,<sup>65</sup> in large part corroborate the Proffered Evidence. This is especially the case with regard to the testimony that will be given by Witness B-024 as to the presence of Serbian paramilitary groups, including the Arkan's men in Zvornik; logistical and material assistance provided to the Serbs in Zvornik municipality from the territory of Serbia; as well as the existence of a reporting system between the local Serb leadership in Zvornik and the leadership in Serbia.<sup>66</sup> With respect to the evidence that is sought for admission through Witness B-1769, the Chamber notes that this witness is a crime base witness, and that his evidence generally corroborates the Proffered Evidence with respect to the parts relating to the takeover of Zvornik in April 1992.<sup>67</sup> The Chamber finds, however that some portions of Witness B-161's testimony, especially those touching upon the organisational structure of the Serbian MUP, and those relating to the phone call made by Arkan to Radovan Stojčić, can only be found in the Proffered Evidence.<sup>68</sup> The same pertains to the portions addressing reports submitted by Witness B-161 to his superiors in the MUP of Serbia and to the members of the Serbian Government. These reports concern the incidents in which paramilitaries, but also members of the Serbian MUP, were involved.<sup>69</sup>

31. The Chamber finds that the Proffered Evidence partly consists of statements which either have their source in the witness's indirect knowledge, or constitute the witness's conclusions.<sup>70</sup> In

<sup>64</sup> See Annex A to Prosecution Submission of Amended Consolidated Witness List and Request for Permission to Present Additional Witnesses within Allotted Time, 5 June 2009, p. 7.

<sup>65</sup> See Annex B to Prosecution updated Witness List, 13 November 2009; Annex to the Confidential Prosecution Submissions on the Status of Protective Measures, 24 November 2009, pp. 1, 3 and 21; Prosecution's Motion for Admission of Written Evidence Pursuant to Rule 92 bis, 21 May 2007.

<sup>66</sup> See *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54, Hearing of 23 May 2003, T. 21172:4-21173:8; T. 21181:1-21183:4; T. 21195:4-21197:21; T. 21202:5-18; T. 21207:16-23; Hearing of 26 May 2003 T. 21306:15-21309:21; Hearing of 5 June 2003, T. 21845:21-21847:13; T. 21864:22-21866:1; T. 21866:13-21868:15; T. 21870:13-23; T. 21877:5-21878:6; T. 21882:11-21885:8; T. 21906:6-21907:3; T. 21913:11-20.

<sup>67</sup> Witness B-1769, witness statement, 1 June 1996; Witness B-1769, witness statement, 13 May 1997.

<sup>68</sup> See *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54, Hearing of 2 July 2003, T. 23629:6-23630:7.

<sup>69</sup> See *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54, Hearing of 2 July 2003, T. 23638:21-23639:8; T. 23644:19-23645:14; T. 23667:9-23668:8.

<sup>70</sup> See *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54, Hearing of 2 July 2003, T. 23626:18-22, wherein the witness expresses his belief as to the close relation between Jovica Stanišić and Slobodan Milošević; T. 23667:20-

line with the Tribunal's jurisprudence, the Chamber notes that evidence based on hearsay is not in itself considered unreliable, however this is a factor, which may influence the weight attached to the evidence. With respect to the conclusions of a witness, the Chamber will always consider the basis for them provided. The Chamber will not rely on such conclusions if no sound basis for them was given by the witness. This does not mean that the Chamber will redact specific portions of a witness's evidence.

32. Having reviewed the Proffered Evidence, the Chamber considers that it contains no manifest or obvious inconsistencies, at the same time noting that the parties have not drawn its attention to such inconsistencies. Considering this, the nature of the evidence, and that it is expected to be largely corroborated by other evidence, the Chamber finds the Proffered Evidence reliable. Since reliability is also a component part of the probative value of a piece of evidence, there is no need to re-examine this separately for the purpose of Rule 89 (C) of the Rules. For these reasons, with the caveat explained in paragraph 23 the Chamber finds that the requirements of Rule 89 (C) of the Rules are satisfied.

#### **D. Acts and Conduct of the Accused**

33. In its Motion, the Prosecution indicated eight excerpts of the testimony the witness gave in the *Milošević* case, allegedly going to the proof of the acts and conduct of Stanišić,<sup>71</sup> and one allegedly going to the proof of the acts and conduct of Simatović.<sup>72</sup> Likewise, both of the Accused argue that parts of the Proffered Evidence go to proof of acts or conduct of the Accused as charged in the Indictment.

34. According to the Tribunal's jurisprudence, acts and conduct of the accused are those, which can be qualified as "deeds and behaviour of the accused".<sup>73</sup> The Chamber therefore does not qualify as such general statements referring to the appointment of the two Accused to a public office within the Serbian MUP,<sup>74</sup> or to the existence of communication channels between the Serbian MUP and

<sup>71</sup> 23668:8, wherein the witness explains that his reports on the events in Zvornik municipality to the Serbian MUP were left without response, and speculates that these reports must have reached the top leaders of the MUP.

<sup>72</sup> *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54, Hearing of 2 July 2003, 23620:12-20; 23623:1-23624:14; T. 23626:13-23627:18; T. 23633:10-25; T. 23655:2-23656:8; T. 23658:24-23667:19; T. 23667:20-23668:8. In the Corrigendum, Confidential Annex B, p. 3, the Prosecution refers to an excerpt of the Hearing of 23 May 2003, T. 21173:9-21175:23 as providing evidence going to proof of acts and conduct of the Accused Stanišić. However, this particular excerpt is part of a testimony of another witness.

<sup>73</sup> *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54, Hearing of 2 July 2003, T. 23620:21-23.

<sup>74</sup> See Witness B-179 Decision, paras 29-31.

<sup>74</sup> See *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54, Hearing of 2 July 2003, 23620:12-20, with regard to Stanišić; T. 23620:21-23 with regard to Simatović.

the Serbs in Zvornik and Bijeljina.<sup>75</sup> The Chamber notes that some of the portions of the witness's testimony pertaining to the relationship between the Accused, or his subordinates, with other members of the alleged JCE or the Serb local leadership in BiH, could be considered as proximate to the acts and conduct of the Accused Stanišić.<sup>76</sup> The same concerns the portions of the testimony touching upon Stanišić's unwillingness to investigate "incidents" in which MUP subordinates were involved.<sup>77</sup> However, these portions possibly going to proof of the acts and conduct of the Accused constitute a minor part of Witness B-161's testimony in the *Milošević* case. The Chamber has considered the few passages and finds that although weighing against admission, they neither tip the balance towards non-admission, nor require redactions. The often unclear basis of knowledge provided strongly diminishes the weight, if any, to be given to those portions. Moreover, some of the relevant excerpts seem to be based on the witness's indirect knowledge and assumptions and thus will similarly be given little or no weight. The Chamber further notes, that the transcripts include various references to a previous statement of the witness which has not been tendered and will accordingly not consider such portions, unless the content of the statement is unambiguously reflected by the witness's answers.<sup>78</sup>

#### **E. Associated Exhibits**

35. With respect to the associated documents, as indicated by the Prosecution in the Corrigendum, the Chamber finds that all documents have been referred to and discussed during the witness's testimony in the *Milošević* case, and that they constitute an inseparable and indispensable part of the transcript. However, the Chamber finds that the document with 65 *ter* No. 1936<sup>79</sup>, an atlas should be replaced with document ERN 0292-7886-0292-7886, a map marked by the witness, since this map was discussed during the witness's testimony, as opposed to the remaining parts of 65 *ter* No. 1936. Moreover, the Chamber notes that the exhibit with 65 *ter* No. 566 has been dropped from the Prosecution's 65 *ter* Exhibit List and the Chamber understands this as a withdrawal of the tendering of this document.<sup>80</sup>

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<sup>75</sup> See *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54, Hearing of 2 July 2003, T. 23633:10-25; T. 23655:2-23656:8.

<sup>76</sup> See *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54, Hearing of 2 July 2003, T. 23623:1-23624:14; T. 23626:13-23627:18; T. 23626:18-23630:7, T. 23651:24-23653:20; T. 23648:24-23649:17.

<sup>77</sup> See *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54, Hearing of 2 July 2003, T. 23638:21-23639:11; T. 23644:19-23645:19; T. 23662:25-23668:8.

<sup>78</sup> See for example T. 21055:22; T. 21056:25; T. 21060:10.

<sup>79</sup> See ERN 0336-6267-0336-6406.

<sup>80</sup> See Partly Confidential Prosecution's Submission of its Revised Rule 65*ter* Exhibit List with Confidential Annex, 1 May 2009.

#### F. Conclusion

36. When deciding upon the admission of the Proffered Evidence, the Chamber has considered its relevance, as well as the indicia of reliability, including the fact that the Witness testified under oath, that he was cross-examined extensively, also with regard to the parts which might relate to the acts and conduct of the Accused Stanišić, and that at least some of this evidence will be subject to cross-examination by the Defence once those witnesses corroborating Witness B-161's testimony appear in court. In conclusion, the Chamber finds that, with the caveat explained in paragraphs 23 and 35 of this Decision, the Proffered Evidence shall be admitted.

#### V. DISPOSITION

37. For the foregoing reasons pursuant to Rules 89 (C) and (D), 92 *quater* and 126 *bis* of the Rules, the Chamber;

**GRANTS** the Prosecution request to replace Confidential Annex A to the Motion with Confidential Annex B to the Corrigendum;

**GRANTS** the Motion in part, and;

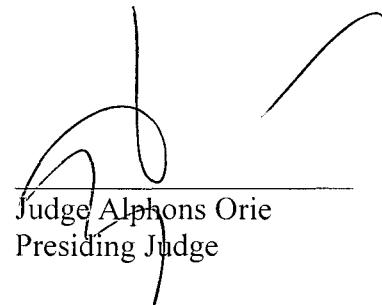
**ADmits** into evidence:

- (i) Witness B-161's testimony in the *Milošević* case dated 22 May 2003 (pp. 21002-21104), 23 May 2003 (pp. 21105-21132:21) and 2 July 2003 (pp. 23619:23-23685) under seal;
- (ii) The associated exhibits with 65 *ter* numbers 4792, 3633, 2583, 3617, 523, 3666, 4691, 2071, 4696 and 4695 under seal;
- (iii) The associated exhibit with ERN 0292-7886-0292-7886;
- (iv) The Death Certificate of Witness B-161 under seal;

**DENIES** the admission into evidence of the remaining parts of the transcripts sought for admission and of the document with 65 *ter* No. 1936;

**REQUESTS** the Registrar to assign exhibit numbers to the admitted documents and inform the parties and the Chamber of the exhibit numbers assigned.

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



Judge Alphons Orie  
Presiding Judge

Dated this sixteenth day of June 2010  
At The Hague  
The Netherlands

**[Seal of the Tribunal]**