



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 December 2010
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IN TRIAL CHAMBER I

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

Registrar: Mr John Hocking

Decision of: 16 December 2010

PROSECUTOR

v.

**JOVICA STANIŠIĆ
FRANKO SIMATOVIĆ**

PUBLIC

**DECISION ON PROSECUTION'S MOTION FOR ADMISSION
OF EVIDENCE OF WITNESS MILAN BABIĆ 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 in which it seeks admission into evidence of certain portions of the transcript of the testimony of Milan Babić (“Babić”) in *Prosecutor v. Slobodan Milošević* (“Milošević case”), *Prosecutor v. Momčilo Krajišnik* (“Krajišnik case”), and *Prosecutor v. Milan Martić* (“Martić case”), as well as the associated exhibits thereto, pursuant to Rule 92 *quater* of the Tribunal’s Rules of Procedure and Evidence (“Rules”).¹

2. On 29 May 2007, the Simatović Defence requested that the Chamber postpone the time limit for filing responses to the Motion and a number of other Prosecution motions for the admission of written evidence.² The Chamber partly granted this request on 1 June 2007 and allowed both the Stanišić Defence and the Simatović Defence to respond by 9 July 2007.³

3. On 9 July 2007, both the Stanišić and the Simatović Defence opposed the Motion.⁴ The Prosecution sought leave to file a reply to the Stanišić Response and Simatović Response and filed its replies on 16 July 2007.⁵ The Prosecution was granted leave to reply to the Simatović Defence and the Stanišić Defence on 16 September 2009 and 11 March 2010 respectively.⁶

4. On 3 August 2009, the Prosecution filed a corrigendum to the Motion⁷ in which it withdrew 33 of the 271 exhibits originally sought for admission in the Motion, and added 58 additional exhibits to its request for admission.⁸ It also submitted four DVDs containing audiovisuals of Babić’s testimony (in the *Milošević* case, the *Krajišnik* case, and the *Martić* case).⁹ Although no

¹ Prosecution’s Motion for Admission of the Evidence of Milan Babić Pursuant to Rule 92 *quater*, with Confidential Annexes A through D, 21 May 2007 (“Motion”).

² 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.

³ Decision on Several Applications to Modify Terms of the Work Plan and Order Following a Rule 65 *ter* Conference, 1 June 2007, para. 7.

⁴ Stanišić Defence Response to Prosecution Motion for Admission of Evidence of Witness Milan Babić Pursuant to Rule 92 *quater*, 9 July 2009 (“Stanišić Response”); Simatović Defence Response to Prosecution’s Motion for Admission of the Evidence of Witness Milan Babić Pursuant to Rule 92 *quater*, 9 July 2007 (“Simatović Response”).

⁵ Prosecution Request for Leave to Reply and Reply to the Accused Stanišić Response’s to the Prosecution’s Motions Pursuant to Rule 92 *quater*, 16 July 2007 (“Reply to Stanišić Response”); Prosecution Leave to Reply and Consolidated Reply to Simatović’s Responses to the Prosecution Motions for Admission of Evidence Pursuant to Rule 92 *quater*, 16 July 2007 (“Reply to Simatović Response”).

⁶ See Decision on Prosecution’s Motion for Admission of Evidence of Witnesses Unavailable Pursuant to Rule 92 *quater*, 16 September 2009; Decision on Prosecution Motion for Admission of Evidence of Witness B-179 Pursuant to Rule 92 *quater*, 11 March 2010 (“Witness B-179 Decision”).

⁷ Corrigendum to Prosecution Motion for Admission of the Evidence of Milan Babić Pursuant to Rule 92 *quater*, with Confidential Annexes, 3 August 2009 (“Corrigendum”).

⁸ These numbers, as provided in the Corrigendum, would add up to 296 proposed exhibits. However, Confidential Annex A to the Corrigendum lists 287 exhibits. The Trial Chamber considers itself seized of the request to admit all listed (287) exhibits.

⁹ Confidential Annex B to the Corrigendum.

surrogate sheets were provided for these DVDs, the Trial Chamber understands the Prosecution to tender them for admission into evidence. On 13 August 2009, the Stanišić Defence opposed the Corrigendum.¹⁰

5. On 15 October 2009, the Chamber adjourned the proceedings in the current case until 30 November 2009 and extended the Simatović Defence's time to respond to the Corrigendum.¹¹ On 16 November 2009, the Simatović Defence filed its response to the Prosecution's Corrigendum¹² ("Simatović Response to Corrigendum"), in which it opposed the Corrigendum, and requested that an oral hearing be held in relation to the Motion.¹³ The Prosecution filed a request for leave to reply to the Simatović Response on 19 November 2009.¹⁴ On 24 November 2009, the Chamber denied the request for leave to reply and notified the Prosecution accordingly through an informal communication.

II. SUBMISSIONS OF THE PARTIES

A. Prosecution

6. The Prosecution seeks admission of 98 portions of the transcripts of Babić's testimony in the *Milošević* case,¹⁵ the *Krajišnik* case, and the *Martić* case¹⁶ as well as four DVDs containing audiovisuals of Babić's testimony in the aforementioned cases ("Proffered Evidence") and 287 associated exhibits¹⁷ pursuant to Rule 92 *quater* of the Rules.¹⁸

7. The Prosecution submits that the Chamber has discretion to admit any relevant evidence which it deems to have probative value.¹⁹ It argues that the Proffered Evidence relates to paras 3-7, 8-14, 24-32, 41-42, and 60-61 of the Revised Second Amended Indictment,²⁰ which was the indictment in place at the time of the filing of the Motion. Babić testified about the activities and

¹⁰ Stanišić Defence Response to Corrigendum to Prosecution Motion for Admission of the Evidence of Milan Babić Pursuant to Rule 92 *quater* with Confidential Annexes, 13 August 2009 ("Stanišić Response to Corrigendum").

¹¹ Decision on Motion for Adjournment of Proceedings by the Simatović Defence, 15 October 2009, para. 30

¹² Response to Corrigenda to Prosecution Motions for Admission of Evidence of Milan Babić, Miroslav Deronjić and B-161, filed 16 November 2009. By its decision of 15 October 2009, the Chamber prolonged the deadline for filing responses to the Corrigendum to 15 November 2009. The Chamber notes that 15 November 2009 was a Sunday and consequently according to Rule 126(B) of the Rules the response could be filed until 16 November 2009.

¹³ Simatović Response to Corrigendum, para. 22.

¹⁴ 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.

¹⁵ When Babić started testifying in the *Milošević* case, protective measures were still in place and he was referred to by his pseudonym C-061. Later during that case, the protective measures were lifted, *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, T. 13968 (6 December 2002) and further.

¹⁶ See Confidential Annex A to the Motion.

¹⁷ See Confidential Annex A to the Corrigendum.

¹⁸ Motion, para. 14.

¹⁹ Motion, para. 2.

“inner workings” of the joint criminal enterprise (“JCE”) of which the Accused are alleged to have been members during the period between 1991 and 1995.²¹

8. The Prosecution further submits that Babić testified on three occasions, in court and under oath, and was on each occasion subjected to cross-examination by or on behalf of an accused with a common interest to Jovica Stanišić and Franko Simatović (“Accused”) in the present case, as each one was alleged to have been a member of the same JCE (although the Prosecution notes that cross-examination could not be completed in the *Martić* case).²² The Prosecution argues that the fact that the *Krajišnik* Trial Chamber has relied on Babić’s testimony in that case for factual findings in its Judgement is a “clear indication” that Babić’s testimony was considered credible.²³ Moreover, it submits that the Proffered Evidence will be cumulative with or corroborated by other Prosecution evidence, both documentary and testimonial.²⁴ Therefore, the Prosecution submits that the Proffered Evidence is relevant and probative.²⁵

9. The Prosecution submits that as Babić committed suicide on 5 March 2006, admission of his testimony at the ICTY falls within the purview of Rule 92 *quater* (A).²⁶

10. The Prosecution acknowledges that parts of the Proffered Evidence go to the acts and conduct of the Accused as charged in the Indictment. It submits that there is “no question of fabrication or misrepresentation” in these portions of the Proffered Evidence.²⁷ Moreover, it submits that even a complete absence of, or deficiency in, the cross-examination of a witness affects the weight of the evidence, but that it does not automatically lead to its non-admission; evidence that goes to the acts and conduct of the accused or is pivotal to the Prosecution’s case will require corroboration if relied on for a conviction.²⁸

11. The Prosecution emphasises that while the Chamber cannot assess Babić’s credibility in person, it remains able to assess the credibility of his evidence by reviewing and comparing the transcripts of his testimony in prior cases. Furthermore, if the Chamber considers it necessary, it can

²⁰ Motion, para. 2; Confidential Annex A to the Motion.

²¹ Motion, para 12.

²² Motion, paras. 2, 9.

²³ Motion, para. 2.

²⁴ Motion, para. 2, 6.

²⁵ Motion, para. 2.

²⁶ Motion, para. 4; The death certificate of Babić is submitted as Confidential Annex D to the Motion.

²⁷ Motion, para. 4.

²⁸ Motion, para. 9.

review the video recordings of his previous testimony. The Chamber will then be in a position to decide what weight to attach to the evidence.²⁹

12. The Prosecution submits that, “given the particular circumstances of this evidence and its strong reliability”, the Accused would not suffer any prejudice if the Proffered Evidence were admitted.³⁰ However, if admission of portions of the Proffered Evidence were considered prejudicial to the Accused, the Prosecution submits proposals for measures the Chamber could take to reduce or eliminate any such prejudice.³¹

13. Finally, the Prosecution submits that if the Chamber were to find that certain portions of the Proffered Evidence that go to the acts and conduct of the Accused should not be admitted pursuant to Rule 92 *quater*, the interests of justice would support their admission under Rule 89 (F).³²

B. Stanišić Defence

14. The Stanišić Defence opposes the Motion and requests that the Chamber deny admission of the Proffered Evidence.³³ It stresses that Rule 92 *quater* is an exceptional mechanism for the admission of evidence.³⁴ It argues that the Proffered Evidence does not bear sufficient indicia of reliability³⁵ and is “inherently suspect”,³⁶ and that its admission would deny Stanišić his right to cross-examine “a critical Prosecution witness”, thereby breaching Articles 20 and 21 of the Statute of the Tribunal.³⁷

15. The Stanišić Defence disputes the number of witnesses mentioned by the Prosecution as corroborating Babić’s evidence.³⁸ For the Stanišić Defence, the Prosecution’s reference to “other deceased witnesses” as purported corroboration suggests that there is little proof that this evidence is reliable.³⁹

16. The Stanišić Defence considers that cross-examinations are not interchangeable between different cases.⁴⁰ It argues that the Chamber should not only evaluate whether the testimony in prior

²⁹ Motion, para. 8.

³⁰ Motion, para. 11.

³¹ Motion, para. 11.

³² Motion, para. 13.

³³ Stanišić Response, para. 39.

³⁴ Stanišić Response, para. 15.

³⁵ Stanišić Response, para. 7.

³⁶ Stanišić Response, para. 8.

³⁷ Stanišić Response, para. 2.

³⁸ Stanišić Response, para. 31 (referring to Confidential Annex A to the Motion).

³⁹ Stanišić Response, para. 36, wherein it states that “a good part of the other footnotes [of the Prosecution Motion] are referring to statements of deceased witnesses too”.

⁴⁰ Stanišić Response, para. 28.

proceedings was subject to cross-examination, but should also consider the quality and nature of the cross-examination.⁴¹ It cites the *Martić* Trial Chamber, which “declined to admit the testimony of witnesses who had been fully cross-examined by Slobodan Milošević, due to the ‘rather peculiar circumstances of the *Milošević* case’”.⁴²

17. The Stanišić Defence argues that the Proffered Evidence is fundamental to the Prosecution’s case against Stanišić,⁴³ as it goes directly to his acts and conduct as charged in the Indictment. In support of this argument, the Stanišić Defence lists a series of portions of Babić’s evidence which it considers to refer to the acts and conduct of the Accused.⁴⁴

18. Based on a psychological examination of Babić of 5 March 2004, the Stanišić Defence questions the mental health of Babić at the time he gave statements and testimony before the ICTY.⁴⁵

19. Lastly, the Stanišić Defence requests to exceed the word limit. The Chamber grants this request.

C. Simatović Defence

20. The Simatović Defence submits that the interests of justice do not support admission of the Proffered Evidence and thus opposes the Motion.⁴⁶

21. The Simatović Defence submits that the Proffered Evidence is of “great importance” for the Prosecution’s case against Simatović.⁴⁷ To illustrate this, it lists a number of examples of allegations against Simatović for which Babić is “the only or crucial source”.⁴⁸ The Simatović Defence submits that the Prosecution “unjustly” belittles the significance of cross-examination.⁴⁹ It stresses that Babić’s testimony contains details about Simatović’s concrete acts, but that no information was obtained in cross-examination as to whether Babić had learned about these issues “directly or indirectly”.⁵⁰ It highlights that, although Babić “made a whole set of serious accusations against Simatović” in the *Krajišnik* case, he was not asked “a single question” about Simatović

⁴¹ Stanišić Response, para. 23.

⁴² Stanišić Response, para. 23.

⁴³ Stanišić Response, para. 29.

⁴⁴ Annex to the Stanišić Response; Stanišić Response to Corrigendum, para. 11.

⁴⁵ Stanišić Response, para. 35.

⁴⁶ Simatović Response, para. 6; Simatović Response to Corrigendum, paras 23-24.

⁴⁷ Simatović Response, para. 8.

⁴⁸ Simatović Response to Corrigendum, para. 7.

⁴⁹ Simatović Response, para. 12.

⁵⁰ Simatović Response, para. 9.

during the cross-examination.⁵¹ As to the *Martić* case, the Simatović Defence stresses that the cross-examination was not finished due to Babić's death and did not address "Simatović's role".⁵² In regards to the *Milošević* case, it argues that cross-examination was inadequate as it was conducted by Slobodan Milošević himself, as opposed to a professional defence counsel. The Simatović Defence submits that Milošević used his cross-examination for political purposes,⁵³ and that from the questions asked it is clear that Milošević "had no interest in the role and position of Simatović".⁵⁴

22. The Simatović Defence further submits that the exhibits associated with Babić's testimony are "a huge corpus of documentary evidence" which should not be admitted into evidence as their relevance and probative value have not been verified.⁵⁵

23. The Simatović Defence requests that the Chamber schedule oral arguments before deciding on the Motion, in order to give the parties the opportunity to give additional arguments in support of their positions.⁵⁶

D. Prosecution's Replies

24. In its replies, the Prosecution notes that both the Stanišić Defence and the Simatović Defence seem to suggest that only testimony received in proceedings which have been settled on appeal may be admitted pursuant to Rule 92 *quater* of the Rules,⁵⁷ but that they provide no authority in support of this submission.⁵⁸

25. The Prosecution emphasises that "it is settled law before the Tribunal" that the right to cross-examine is not absolute.⁵⁹ It further submits that Rule 92 *quater* would be meaningless if the statements of deceased witnesses were inadmissible without cross-examination by a Defence in the second proceedings. Rather than rendering such statements inadmissible, it submits that Rule 92 *quater* requires a balancing of interests.⁶⁰

⁵¹ Simatović Response to Corrigendum, para. 10

⁵² Simatović Response to Corrigendum, para. 11.

⁵³ Simatović Response, para. 7.

⁵⁴ Simatović Response to Corrigendum, para. 8.

⁵⁵ Simatović Response to Corrigendum, para. 16.

⁵⁶ Simatović Response to Corrigendum, para. 22.

⁵⁷ Reply to Stanišić Response, para. 5; Reply to Simatović Response, paras. 9-10.

⁵⁸ Reply to Stanišić Response, para. 7, referring to para. 17 of the Stanišić Response; Reply to Simatović Response, para. 10, referring to para. 13 of the Simatović Response.

⁵⁹ Reply to Stanišić Response, para. 12.

⁶⁰ Reply to Simatović Response, para. 6.

26. In relation to the arguments pertaining to the cross-examination conducted by Milošević, the Prosecution submits that i) Babić was cross-examined in a “highly effective” manner;⁶¹ ii) Milošević “often addressed portions of [Babić]’s testimony that directly related to Stanišić”;⁶² iii) Babić was also cross-examined by a professional defence counsel (i.e. one of the *amici curiae*); and iv) Babić also testified in two other cases in which he was cross-examined.⁶³

27. As to Babić’s mental state, the Prosecution submits that the report on the death of Babić found that “there were no signs that Babić might commit suicide, and that the psychological examination of Babić [...] did not reveal any signs of underlying pathology or incapacity to cope with the situation at the Detention Unit”.⁶⁴

III. APPLICABLE LAW

28. The Chamber recalls the law governing the admission of evidence pursuant to Rule 92 *quater* as set out previously by this Chamber, and refers to it.⁶⁵

IV. DISCUSSION

29. By its Motion, the Prosecution seeks admission of 98 portions of the transcripts of Babić’s testimony in the *Milošević* case, the *Krajišnik* case and the *Martić* case. The relevant portions are listed in the Confidential Annex A to the Motion.⁶⁶

⁶¹ Reply to Stanišić Response, para. 15.

⁶² Reply to Stanišić Response, para. 15.

⁶³ Reply to Stanišić Response, para. 15; Reply to Simatović Response, para. 5. The *amicus curiae* conducting the cross-examination of Babić in the *Milošević* case was Mr. Tapušković. See *Milošević* case, Hearing of 6 December 2002, T. 14046-14087.

⁶⁴ Reply to Stanišić Response, para. 19.

⁶⁵ Decision on Prosecution Motion for Admission of Evidence of Stevan Todorović Pursuant to Rule 92 *quater*, 29 October 2010, section III.

⁶⁶ The said annex appears to contain several discrepancies and several of the dates on which the proposed portions of the testimony are said to have been given are incorrect. Furthermore, some of the transcript portions listed are actually part of another, larger, portion of the same transcript. For these reasons, the Chamber considers it appropriate to first list what it understands to be the Proffered Evidence. For the *Milošević* case, the Prosecution seeks admission of the following portions: 18 November 2002: T. 12873-12877, T. 12899-12910, T. 12878-12898, T. 12910-12925, T. 12928-12938; T. 12955-12957, 19 November 2002: T. 12962-12974, T. 12978-12984, T. 12992-13007, T. 13011-13019, T. 13040-13049, T. 13054-13059; 20 November 2002: T. 13064-13069, T. 13081-13094, T. 13098-13101, T. 13103-13109, T. 13113-13116, T. 13118-13136, T. 13152-13153, T. 13156-13158, T. 13161-13164; 21 November 2002: T. 13175-13203, T. 13214-13226, T. 13230-13234, T. 13244-13245; 22 November 2002: T. 13274-13282, T. 13287-13318, T. 13321-13359, T. 13375-13376, T. 13377, T. 13382-13386; 25 November 2002: 13386-13392, T. 13397, T. 13401-13402, T. 13404; 26 November 2002: T. 13490-13501, T. 13502-13507, T. 13524-13539, T. 13543, T. 13550-13551, T. 13602-13603; 2 December 2002: T. 13654-13656; 4 December 2002: T. 13877-13878; 9 December 2002: T. 14093-14098. For the *Krajišnik* case, the Prosecution seeks admission of the following portions: 2 June 2004: T. 3340-3345; 3 June 2004: T. 3350-3353, T. 3395-3400, T. 3406-3407, T. 3415, T. 3417-3429, T. 3431-3433; 4 June 2004: T. 3454-3472; 7 June 2004: T. 3531-3535, T. 3541-3546, T. 3551-3553, T. 3558-3561, T. 3581-3582. For the *Martić* case, the Prosecution seeks admission of the following portions: 15 February 2006: T. 1365-1382, T. 1384-1386, T. 1390-1397, T. 1408; 16 February 2006:

30. The Chamber considers that it has received sufficient information through the filings to decide on the issue before it, and therefore does not consider it necessary to hear oral submissions. Consequently, the Simatović Defence's request for an oral hearing is denied.

31. As to the Defence's general assertions that admission of the Proffered Evidence would violate the rights of the Accused under Article 21 of the Statute, the Chamber notes that the right to cross-examine a witness is not absolute.⁶⁷ The Chamber further notes that the admission of the evidence of "unavailable persons" pursuant to Rule 92 *quater* of the Rules is subject to the general provisions for admission of evidence contained in Rule 89(D), which states that evidence may be excluded if its probative value is substantially outweighed by the need to ensure a fair trial.⁶⁸ As such, the Chamber does not consider that the inability of the Accused to cross-examine Babić is, by itself, a reason to render the Proffered Evidence inadmissible.

A. Relevance

32. The Proffered Evidence is relevant to the Third Amended Indictment.⁶⁹ It contains detailed information about the alleged financial and military assistance of Serbia to the Republic of Serbian Krajina ("RSK"), the alleged arming and training of Bosnian Serbs, and the transport of weapons into Bosnia and Herzegovina.⁷⁰ Furthermore, Babić testified on various occasions about the alleged "parallel structure" that allegedly was in existence in the Krajina and of which the Accused are alleged to have been part.⁷¹ The Proffered Evidence also discusses the role of the Serb Territorial Defence ("TO") of the SAO Krajina and the SAO Krajina Milicia ("Martić Police").⁷² As such, the information relates to various parts of the Third Amended Indictment and to the role of the Accused as alleged in the Indictment.

T. 1414-1419, T. 1425-1432, T. 1434-1441, T. 1446-1450, T. 1455-1467, T. 1469-1471, T. 1474, T. 1488-1489, T. 1493-1494; 17 February 2006: T. 1499-1500, T. 1502-1515, T. 1519-1520, T. 1522-1528, T. 1530-1534, T. 1538-1546, T. 1556, T. 1558-1559, T. 1567, T. 1571-1572, T. 1574-1576; 20 February 2006: T. 1580-1589, T. 1596-1597, T. 1601, T. 1604-1605, T. 1621-1633, T. 1636-1644, T. 1655; 2 March 2006: T. 1761, T. 1769-1770, T. 1780, T. 1805-1806, T. 1821-1822.

⁶⁷ *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. 12;

⁶⁸ See e.g. *Martić Appeal Decision*, para. 14; See also *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Decision on Prosecution Motion for Admission of Testimony of Witness KDZ198 and Associated Exhibits Pursuant to Rule 92 *quater*, 20 August 2009, para. 8.

⁶⁹ The Prosecution argued that the Proffered Evidence relates to paras 3-7, 8-14, 24-32, 41-42, and 60-61 of the Revised Second Amended Indictment of 15 May 2006, Motion, para. 2; Confidential Annex A to the Motion. These areas overlap with the Third Amended Indictment as described, *inter alia*, in the paragraphs referenced below.

⁷⁰ See e.g. Third Amended Indictment, paras 3-8, 10-17.

⁷¹ See e.g. Third Amended Indictment, paras 3-8, 22-25, 64-65.

⁷² See Third Amended Indictment, paras 4-6.

33. The Chamber notes that it has already taken judicial notice of much of the information in the Proffered Evidence relating to issues such as the rising tension between Croats and Serbs in the Krajina, the proclamation of the SAO Krajina, the establishment of the Martić Police and the establishment of the RSK.⁷³ However, this does not render the portions of the transcript which relate to these issues less relevant to the present case; nor does it preclude their admission. Having reviewed the Proffered Evidence, the Chamber finds that it is relevant to the case.

B. Admissibility pursuant to Rule 92 quater

34. Milan Babić committed suicide on 6 March 2006.⁷⁴ The Trial Chamber is satisfied that he is unavailable within the meaning of Rule 92 quater (A)(i).

35. The Chamber now turns to the second requirement of Rule 92 quater (A), which is that the statement, from the circumstances in which it was made and recorded, is reliable. The Chamber notes that Babić testified under oath before the Trial Chambers in the *Milošević* case, the *Krajišnik* case, and the *Martić* case.⁷⁵ No further arguments relating to the circumstances under which his evidence was given and recorded have been raised by either the Stanišić or the Simatović Defence. The Chamber therefore finds that the Proffered Evidence meets the requirements of Rule 92 quater (A) (ii).

36. The Chamber then turns to the exercise of its discretion under Rule 92 quater. A number of factors are relevant to the exercise of this discretion, including issues of reliability going beyond the circumstances in which Babić's testimony was given and recorded: examples are whether and to what extent the Proffered Evidence has been subject to cross-examination; whether it is corroborated by other evidence; and the absence of manifest or obvious inconsistencies.⁷⁶ The Chamber will also consider whether and to what extent the Proffered Evidence goes to the acts and conduct of the Accused as charged in the Indictment.

37. Both the Stanišić Defence and the Simatović Defence argue that the cross-examination of Babić undertaken by Slobodan Milošević in his own case was not of sufficient quality to hold that Babić was "effectively cross-examined", leaving his testimony "largely unchallenged and

⁷³ See Decision on Second Prosecution Motion for Judicial Notice of Adjudicated Facts, 28 January 2010, para. 72.

⁷⁴ Confidential Annex D to the Motion.

⁷⁵ *Milošević* case, Hearing of 18 November 2002, T. 12855; *Krajišnik* case, Hearing of 2 June 2004, T. 3323-3324; *Martić* case, Hearing of 15 February 2006, T. 1324.

⁷⁶ Decision on Prosecution Motion for Admission of Evidence of Stevan Todorović Pursuant to Rule 92 quater, 29 October 2010, para 23.

untested”.⁷⁷ The Chamber recalls that, for the purposes of the *admission* of transcripts pursuant to Rule 92 *quater*, cross-examination need not have been conducted by a qualified lawyer.⁷⁸ The Chamber does not consider that, in the present instance, the quality of Milošević’s cross-examination affects the admission of the Proffered Evidence in this case.⁷⁹ However, the quality and extent of Milošević’s cross-examination of Babić are factors which may affect the weight to be attached to the Proffered Evidence, if any.

38. While conducting their respective cross-examinations of Babić, all parties addressed the issue of whether different accused who are alleged to be part of the same JCE share a “common interest”.⁸⁰ Naturally, each defence team will conduct its cross-examination in a way that best fits the strategy for its case. The Chamber does not question the reasons why certain questions were or were not asked in cross-examination. In order to determine the reliability of the Proffered Evidence, it is generally sufficient that the evidence has been tested through cross-examination in general.⁸¹ Given the nature of the evidence, the Trial Chamber will, when weighing Babić’s evidence, exercise caution and carefully review the quality of the cross-examination of Babić in relation to issues of importance to this case.

39. The Chamber considers that the Prosecution has provided information showing that many of the portions of the Proffered Evidence are corroborated by other witnesses.⁸² The Prosecution has named eight witnesses – some of whom have in the meantime given evidence - who corroborate portions of Babić’s testimony.⁸³ The Chamber considers that this weighs strongly in favour of admission of the Proffered Evidence.

40. Babić testified before three different Trial Chambers: in the *Milošević* case, the *Krajišnik* case, and the *Martić* case.⁸⁴ When he gave evidence in these cases, he was respectively an accused before the Tribunal, an accused who had pled guilty, and a convicted person. The Chamber has compared Babić’s testimony in each of these cases, and considers that they do not appear to contain manifest or obvious inconsistencies. The Chamber is also not convinced by the Stanišić Defence’s

⁷⁷ Stanišić Response, paras 37, 38; Simatović Response, para. 7; Simatović Response to Corrigendum, para. 8.

⁷⁸ See Witness B-179 Decision, para. 38, referring to *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, para 51.

⁷⁹ *Ibid.*; 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.

⁸⁰ Motion, para. 9.

⁸¹ *Popović* Decision, para. 60.

⁸² See Confidential Annex A to the Motion.

⁸³ Witnesses B-179, JF-055, JF-030, JF-002, JF-036, JF-051 and Borivoje Savić; see Annex A to the Corrigendum, pp 2-6.

⁸⁴ *Milošević* case, Hearing of 18 November 2002, T. 12855; *Krajišnik* case, Hearing of 2 June 2004, T. 3323-3324; *Martić* case, Hearing of 15 February 2006, T. 1324.

argument that the psychological examination of Babić on 5 March 2004 would lead to the conclusion that Babić's mental health was impaired at the time when he gave the Proffered Evidence such that it would influence the reliability of his evidence.

41. Considering all the above, the Chamber finds the Proffered Evidence reliable. As reliability is also a component part of the probative value of a piece of evidence, there is no need to re-examine it separately for the purpose of Rule 89 (C) of the Rules. For these reasons, the Chamber finds that the requirements of Rule 89 (C) of the Rules are satisfied.

42. Portions of the Proffered Evidence clearly relate to the acts and conduct of the Accused.⁸⁵ However, this is not in itself a bar to their admission pursuant to Rule 92 *quater*. In the following paragraphs, the Chamber will summarize only some of the evidence given by Babić that goes to the acts and conduct of the Accused in the present case.

- In 1990, the Serbian DB, *i.e.*, Jovica Stanišić, Franko Simatović, and Slobodan Milošević personally, formed "parallel structures" in the Krajina; these structures sought to obtain legitimacy by winning the support of the Serbian Democratic Party, were announced in public in the Council for National Resistance, operated in conjunction with the Secretariat for Internal Affairs and the Ministry of the Interior of SAO Krajina, and were not subordinated to the legal authorities of the SAO Krajina.⁸⁶
- Beginning in April 1991, Jovica Stanišić, Radmilo Bogdanović, and Franko Simatović formed volunteer units or detachments in Krajina, and Slobodan Milošević instructed or linked up the police stations on the territory of the SAO Krajina and through them set up special units called the Krajina Milicija (militia).⁸⁷ The police of the SAO Krajina was a paramilitary formation because it was not under the control of the government.⁸⁸ This is the way in which Slobodan Milošević controlled and influenced events in Krajina, namely by taking over the armed forces in the Krajina through the DB and through Martić.⁸⁹

⁸⁵ See *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92bis(C), 7 June 2002, para. 9; see also *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Decision on Prosecution's Request to Have Written Statements Admitted Under Rule 92 *bis*, 21 March 2002, para. 22.

⁸⁶ *Milošević* case, Hearing of 26 November 2002, T. 13491-13492.

⁸⁷ *Milošević* case, hearing of 26 November 2002, T. 13505.

⁸⁸ *Milošević* case, hearing of 26 November 2002, T. 13507.

⁸⁹ *Milošević* case, hearing of 26 November 2002, T. 13508.

- In August 1991, after “Frenki’s” removal, Babić met Stanišić, Martić and Orlović in a café called Vrelo, near Knin.⁹⁰ Stanišić criticised what had happened in Knin and said that Milošević had to intervene.⁹¹
- Babić described Stanišić as “the Number Two man in Slobodan Milošević’s regime” who was an “executor and protector” of Milošević.⁹² Stanišić had said to Babić “Milošević, the president, is dealing with foreign affairs and I deal with internal affairs and won the elections for him”.⁹³ He also commented that the “special units”, which he believed to be headed by “Frenki”, had made the greatest contribution to the fighting in Goražde after the cease fire had been signed in 1994.⁹⁴ They did this “side-stepping” Milošević’s orders in order to conceal Milošević’s role in those events.⁹⁵

43. The Chamber considers that parts of the Proffered Evidence go to the acts and conduct of the Accused. The Chamber emphasises that it cannot enter a conviction solely on Babić’s evidence without other evidence to corroborate it, and notes again that the quality of cross-examination will be carefully taken into account when assessing the weight to be given to the Proffered Evidence. The Chamber is also unable, at this stage of the trial, to determine the weight it will ultimately give to the Proffered Evidence, and will only do so in light of the trial record as a whole. However, the Chamber notes that the quality of cross-examination was not such, even in combination with other factors, as to persuade the Chamber to exclude the Proffered Evidence.

44. In exercising its discretion under Rule 92 *quater*, the Chamber has considered all the factors that weigh against admission of the Proffered Evidence, including the fact that portions of the Proffered Evidence relate to the acts and conduct of the Accused as charged in the Indictment. The Chamber has weighed these factors together against the relevance of the Proffered Evidence to the present case and its strong indicia of reliability – namely, the fact that Milan Babić was subjected to cross-examination in several cases on a range of topics relevant to the case against the Accused, that his testimony in these cases was largely consistent, and that most of the Proffered Evidence has been and/or is expected to be corroborated by other evidence in the present case. The Chamber finds that, on balance, these powerful factors in favour of admission outweigh the countervailing considerations discussed above.

⁹⁰ Milošević case, hearing of 21 November 2002, T. 13175.

⁹¹ Milošević case, hearing of 21 November 2002, T. 13175.

⁹² Milošević case, hearing of 21 November 2002, T. 13175-13176.

⁹³ Milošević case, hearing of 21 November 2002, T. 13176.

⁹⁴ Milošević case, hearing of 21 November 2002, T. 13176.

⁹⁵ Milošević case, hearing of 21 November 2002, T. 13176.

45. Finally, with regard to Rule 89 (D) of the Rules, the Trial Chamber considers that the relevance and probative value of the Proffered Evidence is significant. The Chamber does not consider the Accused's inability to cross-examine Babić to be a sufficient ground for concluding that the probative value of the Proffered Evidence is outweighed by the need to ensure a fair trial. When assessing the Proffered Evidence, the Chamber has compared Babić's testimony in each of the cases. The Chamber considers that the Proffered Evidence does not contain manifest or obvious inconsistencies that would render it inadmissible pursuant to Rule 89 (D).

C. Conclusion on the admission of the Proffered Evidence

46. The Chamber has given consideration to the relevance of Babić's evidence as well as to its reliability. The Chamber has balanced these factors against the fact that a significant part of the Proffered Evidence goes to the Accused's acts and conduct as charged in the Indictment. On balance, the Chamber admits the Proffered Evidence pursuant to Rule 92 *quater*.

D. Associated exhibits

47. The Prosecution has requested admission into evidence of 287 associated exhibits. The Chamber notes that a number of exhibits have already been admitted in the present trial through other witnesses.⁹⁶

48. The Chamber notes that many of the intercepted communications that were put to Milan Babić have meanwhile been authenticated by Witness JF-002 and admitted through that witness in the present case.⁹⁷ In light of Witness JF-002's authentication and the Trial Chamber's decision thereon,⁹⁸ and in light of Babić's familiarity with and proximity to many of the interlocutors that he identified, as well as the nature of the objections raised by the Defence on the intercepted communications put to Babić and to Witness JF-002, the Trial Chamber is satisfied that Babić's authentication of said intercepts is sufficient for their admission into evidence as associated exhibits to his testimony.

⁹⁶ These exhibits are P233, P619, P621, P622, P623, P624, P625, P626, P629, P634, P635, P636, P637, P638, P639, P640, P641, P642, P644, P645, P646, P647, P649, P651, P653, P654, P655, P656, P657, P658, P659, P661, P662, P663, P665, P668, P669, P677, P680, P682, P714, P953, P954, P957, P958, P960, P963, P965, P968, P1010, P1042, P1101, P1102, P1105, P1106, P1107, P1108, P1109, P1110, P1111, P1112, P1116, P1117, P1118, P1119, P1133, P1221, P1122, P1123, P1224, P1228, P1239, P1247, P1250, P1273, P1275, P1307, P1553, P1564, D48, D57, D103, and D107

⁹⁷ These are: P619, P621, P622, P623, P624, P625, P626, P629, P634, P635, P636, P637, P638, P639, P640, P641, P642, P644, P645, P646, P647, P649, P651, P653, P654, P655, P656, P657, P658, P659, P661, P662, P663, P665, P668, P669, P677, P680, P682, and P714.

⁹⁸ T. 8982-8983 (10 November 2010).

49. The Chamber notes that two of the exhibits sought for admission were simply mentioned by the Prosecution in passing, and were deliberately not put to Babić.⁹⁹ The Chamber denies admission of these two documents, without prejudice. The Chamber considers that the remaining proposed associated exhibits form an inseparable and indispensable part of Babić's testimony, without which the Proffered Evidence would become incomprehensible or of lesser probative value. The Trial Chamber notes that, other than general challenges made to the admission of the associated exhibits, no specific challenges were made by the Defence to specific associated exhibits. The Trial Chamber will ultimately decide in light of the trial record what weight to give them, if any.

V. DISPOSITION

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

GRANTS the Stanišić Defence's request to exceed the word limit for their Response;

GRANTS the Motion in part;

ADMITS into evidence:

- (i) the portions of the transcript of the testimony of Babić in the *Milošević* case, the *Krajišnik* case and the *Martić* case as identified in para. 29 *supra*, as well as the accompanying DVDs containing audiovisuals of Babić's testimony; and
- (ii) the Death Certificate of Babić (Confidential Annex D to the Motion);

ORDERS the Prosecution to file surrogate sheets for the audiovisuals of Babić's testimony in the *Milošević* case, the *Krajišnik* case, and the *Martić* case;

DENIES the admission into evidence of associated exhibits with Rule 65 *ter* numbers 421 and 422;

DENIES the Simatović Defence request for an oral hearing;

ADMITS into evidence the remaining associated exhibits which are identified in Confidential Annex A to the Corrigendum and have not yet been admitted in the present case;

⁹⁹ These are documents bearing Rule 65 *ter* nos 421 and 422.

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

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



Judge Alphons Orié
Presiding Judge

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

[Seal of the Tribunal]