



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-03-67-T
Date: 20 January 2010
Original: ENGLISH
French

IN TRIAL CHAMBER III

Before: Judge Jean-Claude Antonetti, Presiding
Judge Frederik Harhoff
Judge Flavia Lattanzi

Registrar: Mr John Hocking

Decision of: 20 January 2010

THE PROSECUTOR

v.

VOJISLAV ŠEŠELJ

PUBLIC DOCUMENT

**DECISION ON ADMISSION OF TESTIMONY OF MIROSLAV DERONJIĆ
PURSUANT TO RULE 92 *QUATER* OF THE RULES OF PROCEDURE AND
EVIDENCE INCLUDING THE DISSENTING OPINION OF PRESIDING
JUDGE JEAN-CLAUDE ANTONETTI IN ANNEX**

The Office of the Prosecutor

Mr Mathias Marcussen

The Accused

Mr Vojislav Šešelj

1. Trial Chamber III (“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 seized of a motion (“Motion”)¹ filed by the Office of the Prosecutor (“Prosecution”) on 11 December 2008 pursuant to Article 92 *quater* of the Rules of Procedure and Evidence of the Tribunal (“Rules”) to admit in writing certain portions of the written statement of Miroslav Deronjić (“Statement”² and “Deronjić” respectively) as well as a portion of his testimony (“Testimony”)³ in Case No. IT-02-54-T, *The Prosecutor v. Slobodan Milošević* (“Milošević Case”) and several exhibits (“Exhibits”) admitted in Case No. IT-00-39, *The Prosecutor v. Momčilo Krajišnik* (“Krajišnik Case”).⁴

I. PROCEDURAL BACKGROUND

2. On 24 January 2006, the Prosecution submitted a motion⁵ for admission in the present case of the Statement and Testimony of Deronjić in the *Milošević* Case as well as of Exhibits pursuant to former Rule 92 *bis* (D) of the Rules.⁶ No decision was

¹ “Prosecution’s Motion for Admission of Evidence of Witness Miroslav Deronjić Pursuant to Rule 92 *quater* and to Add the Witness’s Written Statement to its Rule 65 *ter* Exhibit List”, filed on 10 December 2008 and registered on 11 December 2008 (“Motion”).

² See Annex B of the Motion, “Statement by Miroslav Deronjić of 25 November 2003” (ERN ET-0344-7914-0344-7981), paras 1-52, 62-68 (“Statement”).

³ The Prosecution requests the admission of the following passages of the transcript of 26 November 2003 in the *Milošević* Case: T(F) 29620:24 – 29624:11; 29624:12 – 29627:5; 29628:22 – 29629:18; 29629:19 – 29631:3; 29631:4 – 29631. The Prosecution also requests the admission of the following passages of the transcript of 27 November 2003: T(F) 29741:25 – 29742:14; 29757:6–21, see Annex C of the Motion (“Testimony”).

⁴ See Annex D of the Motion which contains 7 exhibits whose admission is sought pursuant to Rule 65 *ter* of the Rules as follows: 1) a letter by Karadžić of 15 August 1991 to the Municipal Boards of the SDS in Sarajevo (document no. 65 *ter* 439); 2) Instructions on stages to be followed in every municipality (document no. 65 *ter* 836); 3) Minutes of the Bratunac Municipal Board of 23 December 1991 presided by Deronjić (document no. 65 *ter* 859); 4) excerpts from the minutes of a meeting held on 24 February 1992 (document no. 65 *ter* 992); 5) intercepted conversation between Karadžić and Kertes (document no. 65 *ter* 303); 6) the diary of Petar Janković for the period 12 January 1991 to 9 February 1992 (document no. 65 *ter* 157); 7) a copy of a decision on the strategic objectives of the Serbian people in Bosnia and Herzegovina of 12 May 1992 signed by Momčilo Krajišnik (document no. 65 *ter* 1298) (“Exhibits”).

⁵ “Prosecution Motion for Admission of Transcripts and Written Statements in lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis*” with confidential and *ex parte* annexes, filed on 24 January 2006 and registered on 6 March 2006 (“Motion of 24 January 2006”), para. 34; see also confidential Annex A of the Motion of 24 January 2006, p. 40.

⁶ Motion, paras. 1, 14; see former Rule 92 *bis* (D) of the Rules, revision 36, 21 July 2005: “A Chamber may admit a transcript of evidence given by a witness in proceedings before the Tribunal which goes to proof of a matter other than the acts and conduct of the accused”. The Chamber notes that, in addition to the request for admission of Deronjić’s testimony in the *Milošević* Case, the Prosecution requested

rendered on the Motion of 24 January 2006 by the previous Chamber that was seized of the present case.

3. Following Deronjić's death on 19 May 2007,⁷ the Prosecution informed the present Chamber that was newly seized of the case of its wish to file a new motion pursuant to Rule 92 *quater* of the Rules.⁸ The present Motion therefore replaces the Motion of 24 January 2006 in its entirety.⁹

II. ARGUMENTS OF THE PARTIES

4. In its Motion, the Prosecution seeks first that paragraphs 1-52 and 62-68 of the Statement be added to the Rule 65 *ter* exhibit list ("Rule 65 *ter* List") and that they be admitted in keeping with Rule 92 *quater* of the Rules.¹⁰ The Prosecution also requests the admission of portions of Deronjić's Testimony in the *Milošević* Case¹¹ and of Exhibits already admitted during Deronjić's testimony in the *Krajišnik* Case.¹²

5. Regarding the Statement, the Prosecution argues that, in the interests of justice, the Rule 65 *ter* List should be amended and have the Statement added to it and that there are valid reasons for such an amendment since the Statement is relevant and has probative value.¹³ The Prosecution adds that adding the Statement to the Rule 65 *ter* List is not prejudicial to the Accused as it was originally scheduled that Deronjić testify *viva voce*, that his name was already on the Rule 65 *ter* list of witnesses to be called by the Prosecution and that the Statement was already disclosed to the Accused on 4 June 2007.¹⁴

that the Chamber hear Deronjić *viva voce* regarding those portions of his testimony concerning the acts and conduct of Vojislav Šešelj ("Accused"), see Motion of 24 January 2006, paras 14, 17.

⁷ See Annex A of the Motion, Death Certificate of Miroslav Deronjić, 31 May 2007.

⁸ "Prosecution's Clarification of the Pending Motions for Admission of Statements pursuant to Rule 89(F), 92 *bis*, 92 *ter*, and 92 *quater*", confidential and *ex parte*, 22 October 2007, para. 14.

⁹ Motion, para. 1.

¹⁰ Motion, paras 1, 23. See also the Statement in Annex B of the Motion.

¹¹ Motion, paras 1, 23. See Annex C of the Motion and Annex E of the Motion, the latter annex identifying the relevant portions of the Testimony sought for admission.

¹² Motion, paras 1, 22-23; see also Annex E of the Motion.

¹³ Motion, paras 7-8. The Prosecution also refers to Annex E of the Motion which, according to it, shows that the specific portions of this Statement are relevant with regards to paragraphs 6, 8 and 15 of the Third Amended Indictment registered on 2 January 2008.

¹⁴ Motion, para. 7, referring to the confidential Annex A of the final list of witnesses called on 29 March 2007.

6. The Prosecution argues that the evidence whose admission is requested under Rule 92 *quater* of the Rules, that is, the Statement, Testimony and Exhibits, are highly probative and are related to the elaboration and the execution of the joint criminal enterprise in Bosnia and Herzegovina.¹⁵ The Prosecution adds that this evidence is coherent and corroborated by other documentary and testimonial evidence in the present case.¹⁶

7. Regarding the Statement, the Prosecution argues that it is reliable since the witness signed the Statement in his own language and acknowledged that its contents were true and exact to the best of his knowledge, that the Statement was read to him in his own language and that the interpreter and investigators also signed it.¹⁷

8. Regarding the Testimony, the Prosecution argues that it was given under oath, that Deronjić was subject to extensive cross-examination on questions concerning first and foremost the Accused, such as Milošević's alleged participation in a joint criminal enterprise, that Deronjić was further examined by the *Amicus Curiae* and, finally, that the Testimony is coherent and corroborated by other evidence.¹⁸

9. Finally, regarding the Exhibits, the Prosecution argues that they form an inseparable and indispensable part of the Testimony, that they corroborate the relevant portions of the Testimony and Statement¹⁹ and that they were admitted in the *Krajišnik* Case.²⁰

10. At the hearing on 4 March 2009, the Accused objected to the amendment of the Rule 65 *ter* List and to the admission of the Statement and Testimony.²¹ On that occasion he claimed that Deronjić was a false witness who accepted to testify in order to obtain a reduction of sentence while admitting to having taken part and planned the execution of prisoners in Srebrenica.²² The Accused also argues that the Deronjić's

¹⁵ Motion, paras 16-17, referring to paragraphs 6, 8 and 15 of the Indictment and Annex E of the Motion.

¹⁶ Motion, para. 18; see also Annex E of the Motion.

¹⁷ Motion, para. 15.

¹⁸ Motion, paras 14, 19, Annex E.

¹⁹ Motion, para. 21.

²⁰ Motion, para. 22.

²¹ Hearing on 4 March 2009, T(F) 14392-14393.

²² *Ibid.*

testimony refers to Bratunac, although there were no SRS volunteers in Bratunac.²³

The Accused has always objected on principle to the implementation of Rule 92 *quater* of the Rules, arguing that the admission of documents under Rule 92 *quater* of the Rules was prejudicial to him.²⁴

III. APPLICABLE LAW

11. The Chamber recalls first of all that Rule 65 *ter* (E) (iii) of the Rules provides that within a time-limit set by the pre-trial Judge and not less than six weeks before the Pre-Trial Conference, the Prosecution shall file “the list of exhibits the Prosecutor intends to offer” and shall serve on the Defence copies of the said exhibits. The Trial Chamber may, however, exceptionally, authorise the Prosecution to amend the list.

12. In this connection, the Appeals Chamber stated:

In doing so, a Trial Chamber must be satisfied that, taking into account the specific circumstances of a case, good cause is shown for amending the original list and that the newly offered material is relevant and of sufficient importance to justify the late addition. Moreover, a Trial chamber must carefully balance any amendment to the lists in Rule 65 *ter* with an adequate protection of the rights of the accused.²⁵

13. In order to consider if there is reason to grant a Prosecution motion to amend its Rule 65 *ter* exhibit list, the Chamber also takes into account additional criteria such as relevance or any other reason the Chamber deems to be of value, such as the complexity of the case, or the date on which the Prosecution obtained the documents it is seeking to add to its Rule 65 *ter* exhibit list.²⁶

14. Furthermore, the Chamber recalls that Rule 92 *quater* (A) of the Rules, governing evidence of unavailable persons, provides that:

²³ *Ibid.*

²⁴ Hearing on 15 January 2009, T(F) 13481-13482; Hearing on 12 March 2009, T(F) 14437.

²⁵ *The Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-AR73.1, “Decision on Appeals against Decision Admitting Material Related to Borovčanin’s Questioning”, 14 December 2007 (“Popović Decision”), para. 37.

²⁶ *The Prosecutor v. Vujadin Popović, Ljubiša Beara, Drago Nikolić, Ljubomir Borovčanin, Radivoje Miletić, Milan Gvero and Vinko Pandurević*, Case No. IT-05-88-T, “Decision on Prosecution’s Motion for Leave to Amend Rule 65 *ter* Witness List and Rule 65 *ter* Exhibit List”, confidential, 6 December 2006, p. 7.

The evidence of a person in the form of a written statement or transcript who has subsequently died, or who can no longer with reasonable diligence be traced, or who is by reason of bodily or mental condition unable to testify orally may be admitted, whether or not the written statement is in the form prescribed by Rule 92 *bis*, if the Trial Chamber:

- i) is satisfied of the person's unavailability as set out above; and
- ii) finds from the circumstances in which the statement was made and recorded that it is reliable.

15. The case law of the Trial Chambers of the Tribunal establishes that the following factors should be taken into consideration in order to assess the reliability of evidence admitted under Rule 92 *quater* (A) (i) of the Rules, such as: (a) the circumstances in which the statement was made and recorded, including (i) whether the statement was given under oath; (ii) whether the statement was signed by the witness with an accompanying acknowledgement that the statement is true to the best of his or her recollection; and (iii) whether the statement was taken with the assistance of an interpreter duly qualified and approved by the Registry of the Tribunal; (b) whether the statement has been subject to cross-examination; (c) whether the statement, in particular an unsworn statement never subject to cross-examination, relates to events about which there is other evidence; and (d) other factors, such as the absence of manifest or obvious inconsistencies in the statements.²⁷

16. Furthermore, pursuant to Rule 92 *quater* (B) of the Rules: "If the evidence goes to proof of acts and conduct of an accused as charged in the indictment, this may be a factor against the admission of such evidence, or that part of it".

17. The Chamber must also ascertain that the general conditions for the admission of evidence provided under Rule 89 of the Rules are satisfied, namely that the

²⁷ *The Prosecutor v. Vujadin Popović, Ljubiša Beara, Drago Nikolić, Ljubomir Borovčanin, Radivoje Miletić, Milan Gvero and Vinko Pandurević*, Case No. IT-05-88-AR73.4, "Decision on Beara's and Nikolić's Interlocutory Appeals against Trial Chamber's Decision of 21 April 2008 Admitting 92 *quater* Evidence", confidential, 18 August 2008, para. 30.

proffered evidence is relevant and has probative value and that the probative value is not substantially outweighed by the need to ensure a fair trial.²⁸

18. Finally, the Chamber recalls the case law of the Tribunal according to which a Chamber cannot base a conviction solely or to a decisive extent on evidence which has not been subject to examination by both parties.²⁹ The Chamber also recalls that there is a fundamental distinction between the admissibility of evidence and the weight given to it when determining the Accused's guilt.³⁰ At this stage of the proceedings, the Chamber has not made a final assessment of the relevance, reliability or probative value of the evidence in question. Such an assessment will be made only at the end of the trial in light of all the evidence tendered by the parties, by the Prosecution and Defence.³¹

IV. DISCUSSION

19. Firstly, the Chamber notes that regarding the objections made by the Accused regarding the implementation of Rule 6 (D) of the Rules, he does not show the existence of any prejudice. Moreover, the Chamber holds that it need not examine the Accused's systematic objection in principle which contains no details as to the application of Rule 92 *quater* of the Rules and recalls that in its decision of 7 January 2008 the Chamber already stated that:

Rule 6 (D) of the Rules provides that amendments to the Rules "shall enter into force seven days after the date of issue of an official Tribunal document containing the amendment, but shall not operate to prejudice the rights of the Accused".

Therefore, unless it has been proved that the rights of the Accused are prejudiced, Rules 92 *ter* and 92 *quater* of the Rules may be applied retroactively.

²⁸ *The Prosecutor v. Rasim Delić*, Case No. IT-04-83-PT, "Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 *quater*", 9 July 2007, p. 4.

²⁹ *The Prosecutor v. Jadranko Prlić, Bruno Stojić, Slobodan Praljak, Milivoj Petković, Valentin Ćorić and Berislav Pušić*, Case No. IT-04-74-T, "Decision on the Prosecution Motion for Admission of a Written Statement Pursuant to Rule 92 *quater* of the Rules (Hasan Rizvić)", 14 January 2008, para. 22.

³⁰ "Order Setting Out the Guidelines for the Presentation of Evidence and the Conduct of the Parties During the Trial", 15 November 2007, Annex, para. 2.

³¹ *The Prosecutor v. Jadranko Prlić, Bruno Stojić, Slobodan Praljak, Milivoj Petković, Valentin Ćorić and Berislav Pušić*, Case No. IT-04-74-T, "Decision to Admit Documentary Evidence Presented by the Prosecution (Ljubuški Municipality including the HVO Prison and Vitina-Otok Camp)", 5 October 2007, p. 7.

The Chamber finds that these rules were introduced into the Rules more than a year before the trial of the Accused began.³² As a result, the Accused was informed more than a year in advance of the possibility of the Prosecution making use of these new procedures. The Chamber, however, notes that it was only on 22 October 2007, therefore only two weeks before the Pre-Trial Conference,³³ that the Prosecution changed its 92 *bis* and 89 (F) motions to 92 *ter* motions through the Motion.

Moreover, the Chamber notes that the Accused as well could request, during the presentation of the Defence case, the application of Rules 92 *ter* and 92 *quater* of the Rules.

In the light of these considerations, the Chamber holds that the application of Rules 92 *ter* and 92 *quater* of the Rules in this case does not prejudice the rights of the Accused, since he may invoke the same rights as the Prosecution and has not shown the existence of any prejudice.³⁴

20. The Chamber notes that Deronjić was a relatively important member of the Serbian Democratic Party of Bosnia and Herzegovina, that he participated in meetings of the Bosnian Serb leadership on the creation of a Serb entity in Bosnia and that he was involved in the arming of Bosnian Serbs.³⁵ The Chamber also notes the fact that Deronjić was indicted for his role in the commission of a number of crimes in Bratunac in 1992 and that, after pleading guilty, he was sentenced to 10 years' imprisonment on 30 March 2004,³⁶ which was affirmed by the Appeals Chamber.³⁷

21. Firstly, the Chamber considers that the Motion is late and that the Prosecution should have requested an amendment to the Rule 65 *ter* List shortly after it notified the Chamber, on 22 October 2007, of its intention to request the admission of Deronjić's testimony pursuant to Rule 92 *quater* of the Rules.³⁸ Even though a delayed admission of new evidence can be envisaged, the Chamber recalls that such

³² The Chamber recalls that the trial of the Accused began on 11 December 2007 with the hearing of the first Prosecution witness, Anthony Oberschall.

³³ The Pre-Trial Conference was on 6 November 2007, see Scheduling Order of 18 September 2007.

³⁴ "Decision on the Prosecution's Consolidated Motion Pursuant to Rules 89 (F), 92 *bis* and 92 *quater* of the Rules of Procedure and Evidence", confidential, 7 January 2008, paras 33-37.

³⁵ Motion, para. 2.

³⁶ Motion, para. 2; see *The Prosecutor v. Deronjić*, Case No. IT-02-61-S, "Sentencing Judgement", 30 March 2004.

³⁷ *The Prosecutor v. Deronjić*, Case No. IT-02-61-A, "Judgement on Sentencing Appeal", 20 July 2005.

³⁸ Consolidated Motion, para. 14.

an amendment can only be granted exceptionally. Moreover, the fact that a delayed admission of new evidence to a Rule 65 *ter* list was granted previously does not constitute an automatically applicable rule before the Chamber.

22. Furthermore, the Chamber considers that the admission of the Statement to the Rule 65 *ter* List is not prejudicial to the Accused's rights since Deronjić is already on the Prosecution witness list³⁹ and the Statement was already disclosed to the Accused on 4 June 2007.⁴⁰

23. The Chamber, by majority, Judge Antonetti dissenting, considers in light of the explanations provided by the Prosecution that the Statement is relevant to the Prosecutor's contention on the commission of a joint criminal enterprise in Bosnia and Herzegovina and that there is, therefore, good cause to justify the amendment of the Rule 65 *ter* List at this stage. In it there is mention of the plan of the Bosnian Serb leadership to create a separate Serb entity as well as of the attacks which took place in Bosnia and Herzegovina in 1992.⁴¹ The Statement refers in particular to the arming of the Bosnian Serbs by the SDS⁴² and the JNA⁴³ with the assistance of the police,⁴⁴ the strategic implementation of the theory of "Greater Serbia" and *Republika Srpska*⁴⁵ by the Bosnian Serb leadership and the pattern⁴⁶ in the execution of the joint criminal enterprise in Bosnia and Herzegovina with the presence of the "volunteers",⁴⁷ the assistance of the JNA,⁴⁸ the consent and support of the authorities of *Republika Srpska*.⁴⁹

24. Regarding the admissibility of the Statement and Testimony pursuant to Rule 92 *quater* of the Rules, the Chamber notes that the deceased Deronjić is indisputably unavailable in terms of Rule 92 *quater* (A) of the Rules.⁵⁰

³⁹ See Rule 65 *ter* Prosecution Witness List, Witness no. 17.

⁴⁰ Motion, para. 7.

⁴¹ Motion, para. 16. See also Statement in Annex B of the Motion, paras. 37-44, 48-52, 62-68.

⁴² Statement, paras 4, 8-9, 29-32.

⁴³ Statement, paras 33-36.

⁴⁴ *Ibid.*, para. 35.

⁴⁵ *Ibid.*, paras 37, 39, 43-47, 62-69.

⁴⁶ *Ibid.*, paras 62-68.

⁴⁷ *Ibid.*, paras 62-64, 66.

⁴⁸ *Ibid.*, para. 63.

⁴⁹ *Ibid.*, paras 67-68.

⁵⁰ See the Death Certificate in Annex A of the Motion.

25. Regarding the reliability of the Statement, the Chamber notes that although the English text submitted by the Prosecution in Annex to the Motion is not signed, the Prosecution nevertheless indicated at the hearing on 26 November 2003 in the *Milošević* Case that Deronjić signed the BCS text of the Statement, which the latter confirmed, stating under oath that it was true after having had an opportunity to verify it in his own language.⁵¹ The Statement was then admitted as an exhibit under reference number P600 and assessed in a cross-examination of Deronjić in the *Milošević* Case.⁵² Consequently, the Chamber, by majority, Judge Antonetti dissenting, holds that the Statement sufficiently meets the reliability criteria.

26. Regarding the reliability of the Testimony, the Chamber, by majority, Judge Antonetti dissenting, holds that it is sufficiently reliable to the extent that it was given under oath, under direct examination and cross-examination as well as under a supplementary examination by the *Amicus Curiae*.⁵³

27. Regarding the relevance of the Testimony, the Chamber, by majority, Judge Antonetti dissenting, observes that it refers to the joint criminal enterprise,⁵⁴ but that it also, more directly, deals with the planning of deportation, looting and killings as a means of secession⁵⁵ and the implementation thereof by “Šešelj’s volunteers” and Arkan’s guards⁵⁶ present there.

28. Finally, the Chamber notes that the Statement does not directly concern the acts or conduct of the Accused and that although it was signed by Deronjić while waiting for his judgement, he had already agreed to collaborate with the Tribunal even before he pleaded guilty.⁵⁷

29. The Chamber, by majority, Judge Antonetti dissenting, also holds that even though the guilty plea of an accused who later becomes a witness in another case

⁵¹ Testimony, hearing on 26 November 2003, T(F) 29614:15 – 29617:2. See also the signed original statement in BCS ERN. 0344-7914-0344-7981.

⁵² *Ibid.*, hearing on 26 November 2003, T(F) 29617:3-9; 29636:16 to the hearing on 27 November 2003, T(F) 29775:23.

⁵³ *Ibid.*, hearing on 27 November 2003, T(F) 29775:24 – 29785.

⁵⁴ *Ibid.*, hearing on 26 November 2003, T(F) 29620:24 – 29624:11; 29628:22 – 29629; 29629:19 – 29631:3.

⁵⁵ *Ibid.*, hearing on 27 November 2003, T(F) 29757:10-21.

⁵⁶ *Ibid.*, hearing on 26 November 2003, T(F) 29620:24 – 29624:11.

⁵⁷ *Ibid.*, hearing on 26 November 2003, T(F) 29640:15 – 29641:19.

cannot, in and of itself, justify the dismissal of this witness's testimony for admission, it may nevertheless be taken into consideration by the Chamber when assessing the weight of the testimony to determine the Accused's guilt.

30. Consequently, the Chamber, by majority, Judge Antonetti dissenting, holds that regarding their reliability and relevance, the Testimony and Statement are admissible pursuant to Rule 92 *quater* of the Rules.

31. Regarding the Exhibits,⁵⁸ an examination of the Testimony shows that they were not mentioned at the hearing in the passages indicated in Annex E of the Motion whose admission is sought by the Prosecution. Furthermore, the Prosecution does not specify if these Exhibits were admitted in the *Milošević* Case, but only that they were admitted in the *Krajišnik* Case.⁵⁹ The Chamber, by majority, Judge Antonetti dissenting, reminds the Prosecution that it must show that the Exhibits sought for admission are actually an indissociable and inseparable part of the Testimony and holds that, in this case, the Prosecution has failed to do so.

V. DISPOSITION

32. For the foregoing reasons, pursuant to Rules 65 *ter* and 92 *quater* of the Rules,

By majority, Judge Antonetti dissenting,

GRANTS the request for admission to the Rule 65 *ter* List of passages 1 to 52 and 62 to 68 of the written statement of Mirsolav Deronjić in the *Milošević* Case.

GRANTS the request for admission of passages 1 to 52 and 62 to 68 of the statement of Miroslav Deronjić dated 25 November 2003, under Prosecution reference number 03447914 to 03447981.

⁵⁸ See Annex E of the Motion, and footnote 4 above, describing the 7 exhibits sought for admission.

⁵⁹ Motion, paras 21-22.

GRANTS the request for admission of relevant passages (Annex E of the Motion; T(F) 29620:24 – 29624:11; 29624:12 – 29627:5; 29628:22 – 29629:18; 29629:19 – 29631:3; 29631:4 – 29631:16 (26 November 2003); 29741:25 – 29742:14; 29757:6 – 21 (27 November 2003) of the testimony of Miroslav Deronjić in the *Milošević* Case.

DENIES the request for admission of exhibits related to the testimony of Miroslav Deronjić in the *Milošević* Case.

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

/signed/

Jean-Claude Antonetti

Presiding Judge

Done this twentieth day of January 2010

At The Hague

The Netherlands

[Seal of the Tribunal]

DISSENTING OPINION OF PRESIDING JUDGE JEAN-CLAUDE ANTONETTI

The Trial Chamber decided by majority to admit:

- the request for admission to the Rule 65 *ter* List of passages 1 to 52 and 62 to 68 of the written statement of Miroslav Deronjić in the *Milošević* Case and the request for admission of these passages;
- the request for admission of relevant passages of his hearing in the *Milošević* Case.

The Chamber denies the request in all other respects, namely those regarding the exhibits.

A) The exhibits

I fully agree on the rejection of the exhibits but for different reasons than those put forward by the majority of the Judges.

Rule 92 *quater* refers only to “evidence . . . in the form of a written statement”. There is no reference whatsoever in the Rule to exhibits possibly annexed to a written statement.

It would be inconceivable to have unknown exhibits of a witness presented to him at his examination during investigations or at his hearing and that they then be sought for admission because the witness had died in the meantime, but the exhibits exist because they were presented and commented upon.

This issue of the admission of exhibits in case of unavailability was not discussed at the plenary session held on 13 September 2006 in which I participated as the author of Rule 92 *ter*. . .

B) Written statement of a deceased witness

The request to supplement a Rule 65 *ter* list is technical in nature and does not warrant particular comments since the witness died after the Rule 65 *ter* list was established.

On the other hand, the key question for me is the admission of a written statement of a witness who **pleaded guilty**.

What actually is the subject of the written statement?

It deals with facts regarding BRATUNAC municipality which is not part of the municipalities covered by our indictment.

For this reason, I prefer to reject it for lack of relevance.

I also put forward another argument which has to do with the very conditions of the **plea agreement**.

One has to be extremely cautious with respect to this procedure not provided for by the Statute, the more so as the authors of the Statute made a point of stating in Article 21 (4) (g):

“[. . .] not to be compelled to testify against himself or to confess guilt”.

It is the first authors of the Rules of Procedure and Evidence who introduced the situation of an accused pleading guilty (Rule 62 (A) (vi)) which was elaborated more precisely under Rule 62 *bis* but which does not provide for **total control** over such an agreement by a Judge or, even less so, the execution of such an agreement after sentencing.

The conditions set forth on such an agreement may be necessary, but to me they nevertheless seem insufficient.

Or in more cautious terms, I fear that in certain cases there might subsequently be a risk of the agreement being contested.

C) The hearing in the *Milošević* Case

It first has to be noted that the *Milošević* trial was not concluded and that it was interrupted during the presentation of the Defence case.

There is nothing to say that the contents of this hearing held when the witness was a Prosecution witness would not have been contradicted once all Defence witness evidence was completed.

It is for this simple reason that I prefer to reject the hearing of this witness even though it may contain some characteristic elements particularly linked, for example, to the giving of the oath (which is necessary but not sufficient since there is always a theoretic possibility of a false testimony).

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

 /signed/
Jean-Claude Antonetti
Presiding Judge

Done this twentieth day of January 2010
At The Hague
The Netherlands