

IT-03-69-T  
D 20679 - D 20664  
11 March 2010

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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: 11 March 2010  
Original: English

**IN TRIAL CHAMBER I**

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

**Registrar:** Mr John Hocking

**Decision of:** 11 March 2010

**PROSECUTOR**

v.

**JOVICA STANIŠIĆ  
FRANKO SIMATOVIĆ**

***PUBLIC***

**DECISION ON PROSECUTION MOTION FOR ADMISSION  
OF EVIDENCE OF WITNESS B-179 PURSUANT TO RULE  
92 QUATER**

**Office of the Prosecutor**

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## I. PROCEDURAL HISTORY

1. On 21 May 2007, the Prosecution filed a motion for the admission of evidence of Witness B-179 (“the Witness”) pursuant to Rule 92 *quater* of the Rules of Procedure and Evidence of the Tribunal (“Rules”), and simultaneously requested that the protective measures granted to the Witness in the case of *Prosecutor v. Slobodan Milošević* (“the *Milošević* case”) be lifted.<sup>1</sup>
2. On 29 May 2007, the Simatović Defence requested that the deadline for filing responses to a number of Prosecution motions for the admission of written evidence be postponed.<sup>2</sup> The Chamber partly granted this request on 1 June 2007, by allowing both the Simatović Defence and the Stanišić Defence to respond by 9 July 2007.<sup>3</sup>
3. On 9 July 2007, the Simatović Defence opposed the Motion.<sup>4</sup> On the same day, the Stanišić Defence also opposed the Motion, whilst simultaneously requesting leave to exceed the word limit.<sup>5</sup>
4. On 16 July 2007, the Prosecution requested leave to reply and simultaneously replied to the Stanišić Response and the Simatović Response.<sup>6</sup> On 16 September 2009, the Chamber granted leave to the Prosecution to file the Prosecution Reply to Simatović Response.<sup>7</sup>

<sup>1</sup> Prosecution’s Motion for Admission of Evidence of Witness B-179 Pursuant to Rule 92 *quater* and Request Regarding Protective Measures for Witness B-179 with Confidential Annexes, 21 May 2007 (“Motion”), paras 1-2, 21-22. The Prosecution seeks the admission of the transcript of the Witness’s testimony in *Prosecutor v. Milošević*, Case No. IT-02-54-T, 15 September 2003, T. 26588-26691 (“Transcript”), and 13 related exhibits contained in Confidential Annex A to the Motion (“Proffered Evidence” and “Annex”, respectively). In relation to the Transcript, the Chamber notes that T. 26667 (l. 5) to T. 26668 (l. 19) do not pertain to Witness B-179. The Chamber notes that 65 *ter* number 485 includes several documents (65 *ter* numbers 3827, 486, 536 as well as ERN 0290-8387-0290-8387, 0290-8381-0290-8385) but that it is clear from the Annex, p. 9, that the Prosecution only seeks the admission of 0308-3123-0308-3124 under 65 *ter* number 485. It further notes that several 65 *ter* numbers were not identified in the Annex. These are 65 *ter* number 1261 (for ERN 0337-5434-0337-5434), 65 *ter* number 4528 (for ERN 0337-5433-0337-5433), 65 *ter* number 537 (for ERN 0326-9353-0326-9354), 65 *ter* number 487 (for ERN 0290-8386-0290-8386). The Chamber also notes that the Annex erroneously identifies the BCS ERN for 65 *ter* number 536. The correct BCS ERN is 0290-0878-0290-0878. Similarly, the Annex erroneously identifies the BCS ERN of documents Tabs 11 and 12 in the *Milošević* case. These are, respectively, ERN 0290-8381-0290-8385 and 0290-8383-0290-8383. Finally, the Chamber notes that the document with ERN 0326-9358-0326-9358 is not uploaded into eCourt.

<sup>2</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>3</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>4</sup> Simatović Defence Response to Prosecution’s Motion for Admission of Evidence of Witness B-179 Pursuant to Rule 92 *quater*, 9 July 2007 (“Simatović Response”), para. 13.

<sup>5</sup> Stanišić Defence Response to Prosecution’s Motion for Admission of Evidence of Witness B-179 Pursuant to Rule 92 *quater*, 9 July 2007 (“Stanišić Response”), paras 1-2, 34.

<sup>6</sup> 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 (“Prosecution Reply to Simatović Response”); Prosecution Request for Leave to Reply and Reply to the Accused Stanišić’s Responses to the Prosecution’s Motion Pursuant to Rule 92 *quater*, 16 July 2007 (“Prosecution Reply to Stanišić Response”).

<sup>7</sup> Decision on Prosecution’s Motion for Admission of Evidence of Witnesses Unavailable Pursuant to Rule 92 *quater*, 16 September 2009, p. 6.

5. On 24 November 2009, the Prosecution filed confidentially its “Prosecution Submissions on Status of Protective Measures with Annex”, wherein it withdrew its request that the protective measures granted to the Witness in the *Milošević* case be lifted and requested that the said protective measures remain in force pursuant to Rule 75 (F)(i).<sup>8</sup> The Motion, in as far as it sought that the protective measures be lifted, is therefore moot.

## II. SUBMISSIONS

### A. Motion

6. The Prosecution argues that the Proffered Evidence meets the requirements for admissibility under Rule 92 *quater*.<sup>9</sup> It first submits that the Witness is deceased and therefore unavailable within the meaning of Rule 92 *quater*.<sup>10</sup> It further contends that the transcript of his testimony in the *Milošević* case and the associated exhibits bear sufficient indicia of reliability, pointing out that the Witness’s testimony was given under oath, the majority of which was in open session, and that the Witness was subject to extensive cross-examination by the accused Slobodan Milošević, who was at the time indicted for having allegedly been a member in the same Joint Criminal Enterprise (“JCE”) as Jovica Stanišić and Franko Simatović (collectively “the Accused”), and later by the *amicus curiae* assigned in that case.<sup>11</sup> Moreover, the Prosecution submits that the Proffered Evidence will be largely corroborated by both documentary and testimonial evidence.<sup>12</sup> The Prosecution further contends that the evidence of the Witness is sufficiently probative of the allegations against the Accused.<sup>13</sup>

7. The Prosecution acknowledges that some portions of the Transcript go to Stanišić’s acts and conduct.<sup>14</sup> Yet, it stresses that this may only be a factor against admission of the evidence, and that the indicia of reliability are of such a high level that it is in the interests of justice to admit the Proffered Evidence including those portions of transcripts that go to Stanišić’s acts and conduct.<sup>15</sup>

<sup>8</sup> Prosecution Submissions on Status of Protective Measures with Annex, confidential, 24 November 2009, para. 9.

<sup>9</sup> Motion, paras 2, 7.

<sup>10</sup> Motion, para. 2. The Witness’s death certificate is attached to the Motion as Confidential Annex B.

<sup>11</sup> Motion, paras 2, 7, 15, 17.

<sup>12</sup> Motion, paras 8, 12. The Prosecution has identified documents and the witness scheduled to provide corroborative evidence in the Annex.

<sup>13</sup> Motion, para. 9.

<sup>14</sup> Motion, paras 6, 10, 19-20.

<sup>15</sup> Motion, paras 11-13.

8. The Prosecution emphasises that restrictions to the right to cross-examine do not necessarily violate Articles 20 and 21 of the Statute of the Tribunal (“Statute”) but ought to be weighed by the Chamber against the fairness and expeditiousness of the trial.<sup>16</sup>

9. Alternatively, the Prosecution proposes that the Chamber take measures to reduce or eliminate any portions of the Transcript that it would consider prejudicial to the Accused.<sup>17</sup> It also suggests that the Chamber could: i) instruct the Defence to provide a list of alleged inconsistencies in the Transcript; ii) direct the Defence to provide additional evidence which counters the reliability of the Witness’s prior testimony; iii) direct the Defence to present evidence which counters the statements of the Witness regarding the Accused; or iv) consider any difficulties which the admission of these transcript portions may cause for the Accused when it decides on the weight of the Proffered Evidence.<sup>18</sup>

10. The Prosecution stresses that the exclusion of any evidence, including portions which go to proof of the acts and conduct of the Accused, would deprive the Chamber of “exceptionally reliable, relevant and probative evidence during its determination of the Accused’s guilt or innocence”.<sup>19</sup>

11. The Prosecution alternatively argues that, should the Chamber consider that the portions of the Transcript which go to the acts and conduct of the Accused are inadmissible under Rule 92 *quater*, their admissibility would be supported by the interests of justice pursuant to Rule 89 (F) of the Rules.<sup>20</sup>

### **B. Simatović Response**

12. The Simatović Defence does not challenge the unavailability of the Witness.<sup>21</sup>

13. The Simatović Defence contends that the Transcript contains evidence that goes to proof of Simatović’s acts and conduct and that it is not in the interests of justice to admit it.<sup>22</sup> The Simatović Defence submits that it is not able to rely on the cross-examination by a “non-expert person” such as Milošević and that his cross-examination did not relate to Simatović’s interests as it was rather of

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

<sup>17</sup> Motion, para. 18.

<sup>18</sup> Ibid.

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

<sup>20</sup> Motion, para. 20.

<sup>21</sup> Simatović Response, para. 3.

<sup>22</sup> Simatović Response, paras 5-6.

a political nature.<sup>23</sup> Further, it submits that this cross-examination did not clarify whether the Proffered Evidence is direct or hearsay evidence.<sup>24</sup>

14. The Simatović Defence stresses the fundamental right of an accused to a fair trial, under Articles 20 and 21 of the Statute, and argues that the unavailability of the Witness does not necessarily imply that the Proffered Evidence must be admitted.<sup>25</sup> It contends that the Transcript is not credible as no judgement was issued in the *Milošević* case.<sup>26</sup> The Simatović Defence is also not convinced that the Transcript would be indispensable to the Chamber in determining the Accused's guilt or innocence.<sup>27</sup> In addition, it contends that the associated exhibits proffered by the Prosecution for admission along with the Transcript do not meet the criteria under Rule 92 *quater* of the Rules.<sup>28</sup>

### C. Stanišić Response

15. The Stanišić Defence does not challenge the unavailability of the Witness.<sup>29</sup>

16. The Stanišić Defence contends that the evidence of the Witness does not reach the threshold for admissibility under Rule 92 *quater* of the Rules.<sup>30</sup>

17. The Stanišić Defence first submits that the Proffered Evidence is not reliable.<sup>31</sup> It holds that recognition of the reliability of a witness in previous proceedings by no means implies reliability in the current trial.<sup>32</sup> Moreover, it stresses that the current case is legally distinct from the cases against Milošević, Krajišnik and Martić, and that together with the absence of any cross-examination by the Stanišić Defence, caution is warranted.<sup>33</sup> In addition, it notes that the only corroborative witness is an expert, who will give an analysis of mostly documentary evidence, and it argues that as a result the only corroboration of the evidence of the Witness is documentary, which the Accused Stanišić has been unable to test.<sup>34</sup> It further submits that the Witness could not have had direct knowledge of certain secret or governmental issues, and that as a consequence his testimony on these matters can

<sup>23</sup> Simatović Response, paras 7-8.

<sup>24</sup> Simatović Response, para. 9.

<sup>25</sup> Simatović Response, para. 10.

<sup>26</sup> Simatović Response, para. 11.

<sup>27</sup> Ibid.

<sup>28</sup> Simatović Response, para. 12.

<sup>29</sup> Stanišić Response, paras 1, 6.

<sup>30</sup> Stanišić Response, paras 1, 27, 34.

<sup>31</sup> Stanišić Response, paras 7, 27, 29, 31, 34.

<sup>32</sup> Stanišić Response, para. 7.

<sup>33</sup> Ibid.

<sup>34</sup> Stanišić Response, para. 29.

only be hearsay.<sup>35</sup> The Stanišić Defence also argues that the admission of closed session testimony “is in contravention with the principle of fairness and that of a public hearing in order to control and verify such”.<sup>36</sup>

18. The Stanišić Defence states that the majority of the Proffered Evidence goes directly to proof of the acts and conduct of the Accused Stanišić, as defined in the case-law of the Tribunal.<sup>37</sup> It argues that as an alleged member of a broadly defined JCE, his acts and conduct “are those which direct the acts and conduct of others”.<sup>38</sup> Indeed, for the Stanišić Defence, most of the Proffered Evidence goes to the acts and conduct of the Accused Stanišić as it “is Stanišić who is alleged to have been directing the whole operation through the HQ of the DB of Serbia”.<sup>39</sup>

19. The Stanišić Defence asserts that it would be contrary to the principle of a fair and public hearing to convict an accused based on written evidence that he has not had the opportunity to challenge.<sup>40</sup> It stresses that the discretion of the Chamber under Rule 92 *quater* to admit evidence from unavailable witnesses that “goes to proof of the acts and conduct of the accused as charged in the indictment” should not represent an “abandonment of the overall standards of admissibility contained within the previous Rule 92 *bis* (C)”.<sup>41</sup> It suggests that the Rule 92 *bis* (A) discretionary factors developed in the jurisprudence to determine whether cross-examination would be required, should be considered in order to ensure that admitting the Proffered Evidence under Rule 92 *quater* does not infringe on the right to a fair trial under Articles 20 and 21 of the Statute.<sup>42</sup> These factors include whether the witness’s material goes to proof of a critical element of the Prosecution’s case against the accused and whether the cross-examination of the witness in other proceedings dealt adequately with the issues relevant to the defence in the current proceedings.<sup>43</sup> In other words, elements which should be considered, according to the Stanišić Defence, are whether the evidence relates to a “live and important issue between the parties, as opposed to a peripheral or marginally relevant issue”, the nature and quality of prior cross-examination and the proximity of the evidence to Stanišić.<sup>44</sup>

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<sup>35</sup> Stanišić Response, para. 31.

<sup>36</sup> Stanišić Response, para. 32.

<sup>37</sup> Stanišić Response, paras 18-19, 30, 33-34.

<sup>38</sup> Stanišić Response, paras 19, 33.

<sup>39</sup> Stanišić Response, para. 33.

<sup>40</sup> Stanišić Response, para. 11.

<sup>41</sup> Stanišić Response, paras 13-14.

<sup>42</sup> Stanišić Response, para. 20.

<sup>43</sup> Ibid.

<sup>44</sup> Stanišić Response, paras 20-23.

20. Having considered these factors, the Stanišić Defence states that the Proffered Evidence is inadmissible.<sup>45</sup> The Stanišić Defence submits that the Proffered Evidence is proximate to Stanišić and pivotal to the Prosecution's case.<sup>46</sup> Moreover, it submits that Milošević's cross-examination of the Witness was not effective because Milošević did not have the same interests as Stanišić.<sup>47</sup> It further argues that the Chamber should consider that there was no final adjudication in the *Milošević* case.<sup>48</sup>

21. In case the Chamber finds that the Proffered Evidence meets the requirements of Rules 92 *quater* (A) and 89 (C) and that its probative value is not outweighed by the need to ensure a fair trial pursuant to Rule 89 (D), the Stanišić Defence submits that the Chamber should in any case exercise its discretion to deny the admission of the Proffered Evidence based on i) the degree to which it goes to the acts and conduct of the Accused, ii) the extent to which it comports with or diverges from the criteria of Rule 92 *bis* (A), iii) its centrality to the Prosecution's case, iv) the inadequacy of the prior cross-examination, and v) the proximity of the evidence to the Accused.<sup>49</sup>

#### **D. Prosecution Reply to Simatović Response**

22. The Prosecution argues that the evidence of the Witness was tested through cross-examination by Milošević, a trained lawyer, and the *amicus curiae*.<sup>50</sup> It also submits that Rule 92 *quater* does not require that the prior testimony sought for admission was heard in a case that has reached the final judgement stage.<sup>51</sup>

23. The Prosecution also submits that Rule 92 *quater* would become impracticable and meaningless if the admission of statements of deceased witnesses in the absence of cross-examination by a defence team automatically resulted in a violation of the right to confront witnesses, and stresses that Rule 92 *quater* requires a balancing of interests.<sup>52</sup> It further contends that the Simatović Defence challenges the weight to be given to the Proffered Evidence rather than its admissibility.<sup>53</sup>

<sup>45</sup> Stanišić Response, paras 9, 15.

<sup>46</sup> Stanišić Response, paras 24, 27, 30.

<sup>47</sup> Stanišić Response, para. 28.

<sup>48</sup> Stanišić Response, para. 16.

<sup>49</sup> Stanišić Response, para. 17.

<sup>50</sup> Prosecution Reply to Simatović Response, para. 5.

<sup>51</sup> Ibid.

<sup>52</sup> Prosecution Reply to Simatović Response, para. 6.

<sup>53</sup> Prosecution Reply to Simatović Response, para. 7.

### E. Prosecution Reply to Stanišić Response

24. The Prosecution asserts that the Stanišić Defence fails to draw upon any Rule 92 *quater* jurisprudence, and that it confuses 'reliability' with 'credibility'.<sup>54</sup> It also reaffirms its position on the definition of 'acts and conduct of the accused' as set out in the Motion.<sup>55</sup>

25. In addition, the Prosecution reiterates that the right to cross-examine is not absolute and that restrictions to this right do not automatically imply a violation of the rights of the Accused.<sup>56</sup>

26. The Prosecution also submits that hearsay evidence is not necessarily excluded from admission under Rule 92 *quater* but might instead influence the weight to be given to the Proffered Evidence by the Chamber.<sup>57</sup> The Prosecution further maintains that the cross-examinations by Milošević and the *amicus curiae* were highly effective and often addressed those portions of the testimony relevant to the case of the Accused.<sup>58</sup> Finally, it submits that evidence given in closed session can still be admitted under Rule 92 *quater*.<sup>59</sup>

### III. APPLICABLE LAW

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

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

(i) is satisfied of the person's unavailability as set out above; and

(ii) finds from the circumstances in which the statement was made and recorded that it is reliable.

(B) If the evidence goes to proof of acts and conduct of an accused as charged in the indictment, this may be a factor against the admission of such evidence, or that part of it.

28. In the assessment of the reliability of the evidence of an unavailable witness pursuant to Rule 92 *quater*, the following criteria may be considered:

(a) the circumstances in which the statement was made and recorded, in particular whether;

(i) the statement was given under oath;

<sup>54</sup> Prosecution Reply to Stanišić Response, paras 6, 8.

<sup>55</sup> Prosecution Reply to Stanišić Response, para. 10.

<sup>56</sup> Prosecution Reply to Stanišić Response, para. 12.

<sup>57</sup> Prosecution Reply to Stanišić Response, para. 14.

<sup>58</sup> Prosecution Reply to Stanišić Response, para. 15.

<sup>59</sup> Prosecution Reply to Stanišić Response, para. 16.



(ii) the statement was signed by the witness with an accompanying acknowledgement that the statement is true to the best of his or her recollection;

(iii) 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 un-sworn statement that has never been subject to cross-examination, relates to events about which there is other evidence;

(d) other factors, such as the absence of manifest or obvious inconsistencies in the statement.<sup>60</sup>

29. According to the Trial Chamber in the *Milošević* case, although within the context of Rule 92 *bis*, the term “acts and conduct of the accused”:

[i]s a plain expression and should be given its ordinary meaning: deeds and behaviour of the Accused. It should not be extended by fanciful interpretation. No mention is made of acts and conduct by alleged co-perpetrators, subordinates or, indeed, of anybody else. Had the rule been intended to extend to acts and conduct of alleged co-perpetrators or subordinates it would have said so.<sup>61</sup>

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

[...] clear distinction drawn in the jurisprudence of the Tribunal between (a) the acts and conduct of those others who commit the crimes for which the indictment alleges that the Accused is individually responsible, and (b) the acts and conduct of the Accused as charged in the indictment which would establish his responsibility for the acts and conduct of those others. It is only a written statement which goes to proof of the latter acts and conduct which Rule 92 *bis*(A) excludes from the procedure laid down in that Rule.<sup>62</sup>

31. As evidence tendered and admitted pursuant to Rule 92 *quater* would previously have been subject to Rule 92 *bis*, the Chamber considers it appropriate to draw upon Tribunal jurisprudence interpreting this rule to the extent that it still applies to the new provision, including the definition of “acts and conduct of the Accused”.<sup>63</sup> Under Rule 92 *bis*, in the specific situation of a JCE,

<sup>60</sup> *Prosecutor v. Milan Milutinović, Nikola Šainović, Dragoljub Ojdanić, Nebojša Pavković, Vladimir Lazarević and Sreten Lukić*, Case No. IT-05-87-T, Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 *quater*, 16 February 2007 (“*Milutinović* Decision”), para. 7; *Prosecutor v. Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj*, Case No. IT-04-84-T, Decision on Prosecution’s Motion to Admit Five Statements of Witness 1 into Evidence Pursuant to Rule 92 *quater* and 13<sup>th</sup> Motion for Trial-Related Protective Measures, 7 September 2007, para. 8; *Prosecutor v. Ante Gotovina, Ivan Čermak and Mladen Markač.*, Case No. IT-06-90-T, Decision on the Admission of Statements of two Witnesses and Associated Documents Pursuant to Rule 92 *quater*, 16 January 2009 (“*First Gotovina* Decision”), para. 13; *Prosecutor v. Gotovina et al.*, Case No. IT-06-90-T, Decision on the Admission of a Witness Statement Pursuant to Rule 92 *quater*, 5 March 2009 (“*Second Gotovina* Decision”), para. 10; Decision on Prosecution’s Motion for Admission of Evidence of Witnesses Unavailable Pursuant to Rule 92 *quater*, 16 September 2009, para. 11.

<sup>61</sup> *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Decision on Prosecution’s Request to Have Written Statements Admitted Under Rule 92 *bis*, 21 March 2002, para. 22 (citation omitted) (“*Milošević* Decision 21 March 2002”).

<sup>62</sup> *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92 *bis* (C), 7 June 2002 (“*Galić* Appeals Decision”), para. 9.

<sup>63</sup> See also *Milutinović* Decision, para. 7; *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 Evidence Pursuant to Rules 92 *bis* and *quater* of the Rules, 27 October 2006, para. 12; *Prosecutor v.*

evidence that is not given *viva voce* which goes to proof of acts and conduct of an accused upon which the Prosecution relies to establish that the said Accused participated in that JCE or shared with the person who actually committed the crimes charged the required intent for those crimes, does not qualify for admission.<sup>64</sup> Such shared intent can be inferred from a written statement which indicates the presence of the accused during the occurrence of crimes committed by individuals other than the Accused.<sup>65</sup>

32. With regard to the issue of corroboration, the Chamber recalls that the *Galić* Appeals Chamber held, also in the context of Rule 92 *bis*, that “where the witness who made the statement is not called to give the accused an adequate and proper opportunity to challenge the statement and to question that witness, the evidence which the statement contains may lead to a conviction only if there is other evidence which corroborates the statement”.<sup>66</sup>

33. Exhibits accompanying transcripts which form an inseparable and indispensable part of the testimony can be admitted into evidence.<sup>67</sup> That is to say that the witness needs to have discussed the document and that without the said exhibit the transcript or the written statement would become incomprehensible or of lesser probative value.<sup>68</sup>

34. Finally, the Chamber must be satisfied that the general requirements of admissibility pursuant to Rule 89 (C) and (D) are met, namely that the evidence is relevant, has probative value, and that its probative value is not substantially outweighed by the need to ensure a fair trial.<sup>69</sup> The rights of an accused to a fair trial and to cross-examination of witnesses against him are enshrined in Article 20 and 21 of the Statute respectively.

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*Gotovina et al.*, Case No. IT-06-90-T, Decision on the Admission of Statements of Seven Witnesses Pursuant to Rule 92 *quater*, 16 June 2008, para. 15.

<sup>64</sup> See *Galić* Appeals Decision, para. 10.

<sup>65</sup> *Galić* Appeals Decision, para. 13.

<sup>66</sup> *Galić* Appeals Decision, fn. 34.

<sup>67</sup> *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 Motion for Admission of Evidence Pursuant to Rule 92 *quater*, 21 April 2008 (“*Popović* Decision”), para. 33; *Prosecutor v. Rasim Delić*, Case No. IT-04-83-PT, Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 *quater*, 9 July 2007, p. 4.

<sup>68</sup> Decision on Prosecution’s Motion for the Admission of Written Evidence of Slobodan Lazarević Pursuant to Rule 92 *ter* with Confidential Annex, 16 May 2008, para. 19. See further *Prosecutor v. Mladen Naletilić and Vinko Martinović*, Case No. IT-98-34-PT, Decision Regarding Prosecutor’s Notice of Intent to Offer Transcripts Under Rule 92 *bis*(D), 9 July 2001, para. 8; *Prosecutor v. Paško Ljubičić*, Case No. IT-00-41-PT, Decision on Prosecution’s Motion on Admission of Transcripts Pursuant to Rule 92 *bis* (D), 23 January 2004, p. 5; *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-T, Decision on Confidential Prosecution Motion for the Admission of Prior Testimony with Associated Exhibits and Written Statements of Witnesses pursuant to Rule 92 *ter*, 9 July 2008, para. 15.

## IV. DISCUSSION

### A. Unavailability

35. The Chamber finds that the Witness is deceased and therefore unavailable pursuant to Rule 92 *quater* of the Rules.<sup>70</sup>

### B. Reliability

36. Both the Simatović and the Stanišić Defence challenge the reliability of the Proffered Evidence.<sup>71</sup> In this respect, the Chamber first notes that the Witness testified under oath before the Trial Chamber hearing the *Milošević* case.<sup>72</sup>

37. Both the Simatović and the Stanišić Defence stress that no final adjudication was reached in the *Milošević* case. The Chamber however notes that this does not imply inadmissibility in itself.

38. Both the Simatović and the Stanišić Defence argue that the cross-examination conducted by Milošević did not sufficiently challenge the Prosecution's case and was conducted for political purposes by a "non-expert person". In terms of relevance, the Chamber notes that the Witness was cross-examined extensively and that Milošević attempted, amongst other things, to establish that the Association of Serbs and Emigrants of Serbia was not involved in arms trafficking, but merely financed and transported humanitarian aid.<sup>73</sup> The Chamber, therefore, is not convinced by the Defence's argument that the cross-examination performed by Milošević was not generally relevant to the case against the Accused as, amongst other things, it challenged the distribution of arms and other material to parties to the armed conflict as such and thus, indirectly, any alleged role that Milošević, Stanišić, or others, may have played in such distribution. In relation to the manner in which cross-examination was conducted by the then-accused, Milošević, the Chamber notes that the factor, for the purposes of Rule 92 *quater*, that the statement has been subject to cross-examination, does not necessarily require that this cross-examination be conducted by a qualified lawyer. In general, however, the Chamber finds that the quality of prior cross-examination of the Witness is a factor which may be considered when weighing the Proffered Evidence, if admitted, rather than

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<sup>69</sup> *Prosecutor v. Gotovina et al.*, Case No. IT-06-90-T, Decision on the Admission of Statements of Four Witnesses Pursuant to Rule 92 *quater*, 24 July 2008, para. 4; First *Gotovina* Decision, para. 4.

<sup>70</sup> See fn. 10 *supra*.

<sup>71</sup> Stanišić Response, paras 7, 27, 29, 31, 34 ; Simatović Response, para. 11.

<sup>72</sup> Transcript, p. 26589.

<sup>73</sup> Transcript, pp. 26649-26652.

when deciding on its admissibility.<sup>74</sup> The Chamber shall therefore not examine this factor any further at this stage.

39. The Stanišić Defence argues that it is contrary to the principle of a fair and public hearing to convict an accused based on written evidence which the Defence has not been able to challenge.<sup>75</sup> The Chamber recalls that, in such instances, the said evidence may lead to a conviction only if it is corroborated by other evidence.<sup>76</sup> For the purpose of admission, however, it is sufficient at this stage for the Chamber to note that the Prosecution expects to present relevant corroborating documentary evidence.<sup>77</sup> The Chamber finds that the Transcript and associated exhibits proffered in the Motion generally corroborate each other. The Proffered Evidence is expected to be further corroborated by the evidence of witness Reynaud Theunens, a military analyst who worked for the Office of the Prosecutor and who is scheduled to give evidence in this case as a proposed expert witness. He is expected to testify about the composition and command structures of the Serb military forces who were allegedly involved in the crimes mentioned in the Indictment, including volunteers and volunteer units and forces of, or otherwise controlled by, the Serb Ministry of Defence. The Chamber notes that Reynaud Theunens, as a proposed expert witness, will not provide eye-witness or factual evidence but will mostly analyse documentary evidence, as is correctly pointed out by the Stanišić Defence.<sup>78</sup> As such, the Defence will have the opportunity to cross-examine the proposed expert witness Theunens and challenge all the documentary evidence he will present as part of his report, including evidence which is pertinent to the Proffered Evidence.

40. The Chamber further finds that some portions of the Transcript contain 'hearsay' evidence<sup>79</sup> but notes that this does not preclude admission of evidence under Rule 92 *quater*.<sup>80</sup> Rather, the Chamber will consider this factor when weighing the evidence at the end of trial in view of the totality of the trial record.

41. With regard to the issue that a minor part of the testimony of the Witness was conducted in private session, the Chamber notes that protective measures are granted, *inter alia*, to protect the security and safety of witnesses in accordance with Article 20 (1) of the Statute and Rules 75 and

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<sup>74</sup> Popović Decision, para. 51.

<sup>75</sup> Stanišić Response, para. 9.

<sup>76</sup> See para. 32 *supra*.

<sup>77</sup> Annex.

<sup>78</sup> See para. 17 *supra*.

<sup>79</sup> See for instance Transcript, pp. 26606, 26608-26609, 26659.

<sup>80</sup> With regard to the admissibility of hearsay evidence, see *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-AR73, Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 January 1999, para. 15.

79 of the Rules. As such, protective measures do not impact on the reliability of a witness's testimony.

42. Finally, the Chamber finds that the Proffered Evidence does not appear to contain any "manifest or obvious inconsistencies".

43. The Chamber is therefore satisfied that the Proffered Evidence has sufficient indicia of reliability for the purpose of admission pursuant to Rule 92 *quater* of the Rules.

### C. Relevance

44. The Chamber is satisfied that the Proffered Evidence is relevant to the case as it presents evidence about the supply of arms, logistical support and other substantial assistance or support to special units of the Republic of Serbia State Security Division which were allegedly involved in the commission of crimes in Croatia and Bosnia between 1 August 1991 and 31 December 1995.<sup>81</sup>

### D. Probative Value

45. For the foregoing reasons, the Chamber further finds that the Proffered Evidence is of probative value within the meaning of Rule 89 of the Rules.

### E. Evidence Going to Proof of Acts and Conduct of the Accused

46. The Prosecution notes that some parts of the Transcript go to proof of Stanišić's acts or conduct as charged in the Indictment.<sup>82</sup> Both the Simatović Defence and the Stanišić Defence also generally argue that the Proffered Evidence includes elements relating to acts and conduct of the Accused.<sup>83</sup>

47. The Chamber recalls that the Accused are alleged to have participated in a JCE, *inter alia*, by:

- i) "providing channels of communication between and among the core members of the JCE in Belgrade, in the specific regions, and locally; and

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<sup>81</sup> Third Amended Indictment ("Indictment"), para. 15.

<sup>82</sup> Motion, paras 6, 10; Annex.

<sup>83</sup> Simatović Response, para. 5; Stanišić Response, para. 30.

- ii) directing and organising the logistical support and other substantial assistance or support to special units of the Republic of Serbia DB and other Serb forces alleged to have been involved in the commission of crimes in Croatia and BiH".<sup>84</sup>

48. The Chamber finds that the Transcript does not go to proof of the acts and conduct of Simatović.

49. The Chamber notes that the Stanišić Defence's argument pertaining to the scope of Stanišić's acts and conduct as an alleged co-perpetrator in the JCE<sup>85</sup> does not rest upon a correct analysis of the jurisprudence.<sup>86</sup> The Chamber finds that certain portions of the Transcript go to proof of certain acts and conduct of Stanišić. The Chamber notes in this respect the *Galić* Appeals Decision according to which the presence of information in the evidence sought for admission establishing that an accused participated in an alleged JCE or shared the required intent for crimes committed by other members of an alleged JCE, is a factor against the admission into evidence of the said part.<sup>87</sup> In the specific instance, the Chamber considers that portions of the Transcript which indicate Stanišić's presence during meetings where military supplies were discussed<sup>88</sup> go directly to Stanišić's acts and conduct as charged in the Indictment. The Chamber further considers that some of the excerpts sought for admission describing the involvement of the Republic of Serbia MUP in directing and organising logistical support, in the form of weapon delivery, to the front lines in BiH and Croatia go directly to Stanišić's acts and conduct as charged in the Indictment.<sup>89</sup>

#### **F. Conclusion on the Admission of the Proffered Evidence**

50. In exercising its discretion, the Chamber has given particular consideration to the highly relevant nature of the Witness's evidence as well as to the range of indicia indicating its *prima facie* reliability, including the fact that he testified under oath, that he was cross-examined extensively and that there exists no obvious reason to expect that his evidence will remain without corroboration, which would already at this stage militate against its admission. The Chamber balanced the totality of these factors against the fact that some portions of the Transcript go to Stanišić's acts and conduct as charged in the Indictment. On balance, the Chamber finds that the Transcript, including those portions identified in paragraph 49 above, shall be admitted pursuant to

<sup>84</sup> Indictment, para. 15.

<sup>85</sup> See para. 18 *supra*.

<sup>86</sup> *Milošević* Decision 21 March 2002, para. 22 (citation omitted); *Galić* Appeals Decision, para. 9.

<sup>87</sup> *Galić* Appeals Decision, paras 10, 13.

<sup>88</sup> Transcript, pp. 26606:4 - 26608:14, 26609:1 - 6, 26618:21 - 26619:3, 26657:24 - 26659:8.

<sup>89</sup> Transcript, pp. 26598:14 - 26601 :1, 26613:1 - 10, 26674:9 - 13, 26686:24 - 26688:7.

Rule 92 *quater*. The Chamber notes, however, that it will adopt a cautious approach when evaluating the weight to be given to the Proffered Evidence.

### G. Associated Exhibits

51. The Prosecution seeks the admission into evidence of 13 documents admitted in the *Milošević* case during the course of the Witness's testimony.<sup>90</sup> The Chamber considers that the associated exhibits referred to above form an inseparable and indispensable part of the Witness's evidence. Because they were extensively discussed during his prior testimony in the *Milošević* case, the Transcript would become incomprehensible without them. They are therefore admitted into evidence.

## V. DISPOSITION

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

**GRANTS** the Stanišić Defence leave to exceed the word limit in its response;

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

**GRANTS** the Motion;

**ADMITS** into evidence under seal:

- 1) The Witness's testimony in the *Milošević* case, T. 26588-26691;
- 2) The associated exhibits with 65 *ter* numbers 1261, 4528, 3827, and ERN 0290-8381-0290-8385, 0290-8383-0290-8383, 0290-8387-0290-8387, and 0326-9358-0326-9358;

**ADMITS** into evidence publicly the associated exhibits with 65 *ter* numbers 538, 537, 487, 485, 536 and 486.

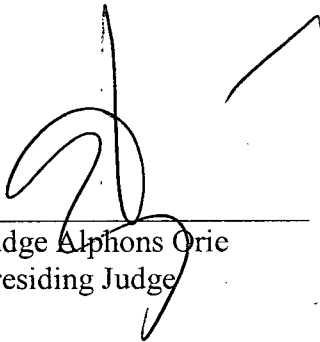
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<sup>90</sup> See fn. 1 *supra*.

**REQUESTS** the Prosecution to ensure that all aforementioned documents are adequately uploaded into eCourt, in particular documents with ERN 0326-9358-0326-9358 and 65 *ter* numbers 485, 486, 536 and 3827; and

**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.



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Judge Alphons Orie  
Presiding Judge

Dated this eleventh day of March 2010  
At The Hague  
The Netherlands

[Seal of the Tribunal]