

**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-03-67-T
Date: 10 December 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: 10 December 2010

THE PROSECUTOR

v.

Vojislav ŠEŠELJ

PUBLIC DOCUMENT

**DECISION ON PROSECUTION MOTION FOR RECONSIDERATION OF THE
DECISION OF 7 JANUARY 2008 REJECTING THE ADMISSION OF MILAN
BABIĆ'S TESTIMONY**

The Office of the Prosecutor:

Mr Mathias Marcussen

Counsel for the Accused:

Mr Vojislav Šešelj

I. INTRODUCTION

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”), seized by the Office of the Prosecutor (“Prosecution”) of a motion filed partially confidentially on 9 April 2009 (“Motion”)¹ in which the Prosecution requests that the Chamber reconsider its Decision of 7 January 2008 (“Decision of 7 January 2008”)² in which it rejected the motion for the admission of Milan Babić’s testimony from other cases³ and the associated evidence, accompanied by an addendum filed publicly on 12 August 2010 (“Addendum”).⁴

II. PROCEDURAL BACKGROUND

2. On 12 March 2007, the Prosecution filed, partially confidentially and *ex parte*, a motion for the admission of Milan Babić’s testimony in the *Milošević*, *Krajišnik* and *Martić* cases, pursuant to Rule 92 *quater* of the Tribunal’s Rules of Procedure and Evidence (“Rules”),⁵ which Vojislav Šešelj (“Accused”) opposed in his response of 15 August 2007.⁶

¹ “Prosecution’s Motion for Reconsideration of the Decision on the Admission of Evidence of Deceased Witness Milan Babić Pursuant to Rule 92 *quater*”, public with partly confidential annexes A to E, 9 April 2009 (“Motion”).

² “Decision on the Prosecution’s Consolidated Motion Pursuant to Rules 89 (F), 92 *bis*, 92 *ter* and 92 *quater* of the Rules of Procedure and Evidence”, confidential, 7 January 2008 (“Decision of 7 January 2008”), paras 49-50. The public version of the Decision was registered on 21 February 2008.

³ In the initial motion dated 12 March 2007, “Prosecution’s Motion for Admission of the Evidence of Milan Babić Pursuant to Rule 92 *quater*, With Annexes A Through D”, partly confidential and *ex parte*, supplemented by the Motion of 22 October 2007, “Prosecution’s Clarification of the Pending Motions for Admission of Statements Pursuant to Rules 89 (F), 92 *bis*, 92 *ter* and 92 *quater*”, confidential and *ex parte*, the Prosecution sought the admission of Milan Babić’s testimony in the following cases: *The Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T (“*Milošević Case*”), *The Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-T (“*Krajišnik Case*”) and *The Prosecutor v. Milan Martić*, Case No. IT-95-11-T9 (“*Martić Case*”).

⁴ “Prosecution’s Addendum to the Motion for Reconsideration of the Decision on the Admission of Evidence of Deceased Witness Milan Babić Pursuant to Rule 92 *quater*”, public, 12 August 2010 (“Addendum”).

⁵ “Prosecution’s Motion for Admission of the Evidence of Milan Babić Pursuant to Rule 92 *quater*, with Annexes A through D, partial confidential and *ex parte*”, 12 March 2007.

⁶ English translation of the BCS original, entitled “Professor Vojislav Šešelj’s Response to the Prosecution’s Motion for Admission of the Evidence of Milan Babić Pursuant to Rule 92 *quater*, with Annexes A through D”, public, 15 August 2007.

3. On 22 October 2007, the Prosecution filed confidentially, *ex parte*, and in conformity with an order issued by the pre-trial judge on 20 September 2007,⁷ a consolidated motion for the admission, pursuant to Rules 92 *ter* and 92 *quater* of the Rules, of a certain number of statements, transcripts and related evidence, concerning 64 witnesses. In this motion, the Prosecution reiterated its request for the admission, pursuant to Rule 92 *quater* of the Rules, of certain portions of Milan Babić's testimony from the *Milošević*, *Krajišnik* and *Martić* cases, and related evidence.⁸

4. On 5 December 2007, the Accused filed document 346 in the form of a motion ("Document 346"), aiming to have all Prosecution motions based on Rules 92 *bis*, 92 *ter* and 92 *quater* of the Rules rejected.⁹

5. Ruling on the Prosecution's consolidated motion of 22 October 2007, in its Decision of 7 January 2008, exercising its discretion under Rule 92 *quater*, the Chamber rejected, in the interest of justice, the admission of portions of Milan Babić's testimony from the *Milošević*, *Krajišnik* and *Martić* cases, as well as related evidence, insofar as the transcripts of the testimony for which admission had been requested directly call into question the responsibility of the Accused.¹⁰

6. On 5 March 2008, the Chamber was seized of a motion, filed confidentially by the Prosecution, for certification to appeal the Decision of 7 January 2008,¹¹ which the Chamber rejected by its Decision of 21 May 2008.¹²

7. On 9 April 2009, the Prosecution submitted partially confidentially its Motion, seeking, due to new circumstances which had arisen since the Decision of 7 January

⁷ "Order for Clarification of Prosecution's Motions for Admission of Statements Pursuant to Rules 89 (F), 92 *bis*, 92 *ter* and 92 *quater*", public, 20 September 2007.

⁸ "Prosecution's Clarification of the Pending Motions for Admission of Statements Pursuant to Rules 89 (F), 92 *bis*, 92 *ter* and 92 *quater*", confidential and *ex parte*, 22 October 2007, Annex B09. On 12 November 2007, the Prosecution lifted the *ex parte* status of passages in Annex B pertaining to several witnesses, among which Witness Milan Babić. "Notice Regarding Prosecution's Clarification of the Pending Motions for Admission of Statements Pursuant to Rules 89 (F), 92 *bis*, 92 *ter* and 92 *quater*", confidential, 12 November 2007.

⁹ English translation of the BCS original, entitled "Professor Vojislav Šešelj's Motion for the Trial Chamber to Dismiss All Prosecution Motions for the Application of Rule 92 *bis*, 92 *ter* and 92 *quater* Because it Would Constitute Retroactive Application in His Case », public document, presented on 22 November 2007 and filed on 5 December 2007 ("Document 346").

¹⁰ Decision of 7 January 2008, paras 49-50.

¹¹ "Prosecution's Motion for Certification to Appeal Decision of 7 January 2008", confidential, 5 March 2008 ("Motion"). A public version of this Motion was filed on 6 March 2008.

¹² "Decision on Prosecution Motion for Certification to Appeal the Decision of 7 January 2008", public, 21 May 2008.

2008, that the Chamber reconsider the said Decision with a view to admitting for this case portions of Milan Babić's testimony from *Milošević* and *Krajišnik* cases and related exhibits ("Exhibits").¹³

8. The Accused did not respond to this Motion within the 14 days prescribed by Rule 126 *bis* of the Rules, counting from the receipt of the BCS version.¹⁴

9. On 12 August 2010, the Prosecution publicly filed the Addendum and put forward, as fresh circumstance justifying reconsideration, the fact that, since the filing of the Motion, portions of Milan Babić's testimony from the *Milošević* and *Krajišnik* cases were admitted in other cases and that this argued in favour of their admission in this case.¹⁵

10. The Accused did not respond to the Addendum within 14 days, counting from the receipt of the BCS version, which he was free to do pursuant to Rule 126 *bis* of the Rules.¹⁶

III. ON RECONSIDERATION

A. Arguments of the Prosecution

11. The Prosecution maintains, in support of its Motion, that new circumstances justify the reexamination of the Decision of 7 January 2008¹⁷ regarding certain portions of Milan Babić's testimony from the *Milošević* and *Krajišnik* cases and the related Exhibits, namely: 1) several witnesses heard by the Chamber since then corroborate portions of Milan Babić's testimony,¹⁸ including the portions going to prove the acts or conduct of the Accused; 2) these portions were also corroborated by the Accused in his testimony in the *Milošević* case and by a statement in our case;¹⁹ 3) the number of exhibits sought for admission was considerably reduced with respect to

¹³ Motion, paras 25, 30. The Chamber notes that the Motion it has been seized of seeks the admission of Milan Babić's testimony in the *Milošević* and *Krajišnik* cases alone. The Chamber consequently considers itself no longer seized of a request for admission of Milan Babić's testimony in the *Martić* case and the related evidence.

¹⁴ The Accused received the BCS version of the Motion on 22 May 2009 (see the transcript of receipt of 27 May 2009).

¹⁵ Addendum, paras 2-4.

¹⁶ The Accused received the BCS version of the Addendum on 18 August 2010 (see the transcript of receipt of 25 August 2010).

¹⁷ Motion, para. 10.

¹⁸ Motion, para. 10.

the originally requested number, and currently consists of 33 excerpts from the transcripts of Milan Babić's testimony in the *Milošević* and *Krajišnik* cases, and 30 related Exhibits;²⁰ 4) Annexes D and E of the Motion show not only the relevance of each excerpt of the testimony and Exhibits,²¹ but also the link with the witness to which they are associated.²²

12. Furthermore, the Prosecution argues in its Addendum that, since the filing of the Motion, portions of Milan Babić's testimony in the *Krajišnik* case and the related Exhibits, were admitted on 14 April 2010, in Case No. IT-08-91, *The Prosecutor v. Stanišić and Župljanin* ("Stanišić and Župljanin case"), portions of Milan Babić's testimony in the *Milošević*, *Krajišnik* and *Martić* cases and the related exhibits were admitted on 13 April 2010 in Case No. IT-95-5/18, *The Prosecutor v. Karadžić* ("Karadžić case"), and portions of Milan Babić's testimony in the *Milošević*, *Krajišnik* and *Martić* cases, as well as his guilty plea, were admitted on 22 September 2009 in Case No. IT-06-90, *The Prosecutor v. Gotovina et al.* ("Gotovina case").²³ According to the Prosecution, these decisions to admit argue in favour of admission in this case.²⁴

B. Applicable Law

13. The Chamber recalls that requests for reconsideration are not provided for by the Rules and that they are only granted in exceptional cases.²⁵ Nevertheless, according to Tribunal case-law, a Trial Chamber has the inherent power to reconsider its own decisions if the requesting party shows that the reasoning of the impugned decision contains a clear error or if particular circumstances, which could be either new facts or arguments,²⁶ justify its reconsideration in order to avoid injustice.²⁷

¹⁹ Motion, paras 2, 11. See also Annex E of the Motion.

²⁰ Motion, para. 12.

²¹ Motion, para. 13.

²² Motion, para. 17.

²³ Addendum, paras 3, 6-8.

²⁴ Addendum, paras 2-4.

²⁵ *The Prosecutor v. Jadranko Prlić, Bruno Stojić, Slobodan Praljak, Milivoj Petković, Valentin Ćorić and Borislav Pusić*, Case No. IT-04-74-T, "Decision on Request for Reconsideration and Certification to Appeal the Decision for Admission of the Statement of Jadranko Prlić", 8 October 2007, public, para. 11.

²⁶ *Ibid.*, See also *The Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, "Decision on Defence's Request for Reconsideration", 16 July 2004, pp. 3 and 4, citing *The Prosecutor v. Laurent Semanza*,

C. Discussion

14. With regard to the Addendum, the Chamber preliminarily emphasizes that the admission of a witness statement and related exhibits pursuant to Rule 92 *quater* in one case does not in itself constitute an argument for the admission of the same evidence in another case. The conditions for the admission of evidence pursuant to Rule 92 *quater* (B) must be assessed by each Chamber *in concreto*, on a case-to-case basis, depending on the degree of relevance that the aforementioned elements have for the case in question and, possibly, their corroboration by other testimony in the same case. Thus, the fact that certain portions of Babić's testimony and related evidence from the *Milošević* and *Krajišnik* cases were admitted in other cases indicated by the Prosecution after the Decision of 7 January 2008, cannot be considered a new fact and serve as a basis for a motion to reconsider the rejection of a request to tender into evidence these same testimonies and related evidence in this case.

15. With regard to the Prosecution's argument in support of reconsideration, according to which the Accused himself corroborated parts of Milan Babić's testimony in the *Milošević* and *Krajišnik* cases in the context of his testimony in the *Milošević* case, the Chamber notes that this is not a new circumstance. It has already assessed this argument in its Decision of 7 January 2008.

16. With regard to the Prosecution's argument that Milan Babić's testimony in the *Milošević* and *Krajišnik* cases was corroborated by the testimonies of the Accused in this case, the Chamber notes that the Prosecution presents only one statement in support of its Motion that was subsequent to the Decision of 7 January, and that all others precede this date and therefore do not constitute a new circumstance in terms of the reconsideration of the decision. Furthermore, the Chamber observes that, by being obtained not as part of the Accused's testimony but during the Accused's cross-examination of a Prosecution witness, such statements cannot be considered as

Case No. ICTR-97-20-T, Trial Chamber III, Decision no Defense Motion to Reconsider Decision Denying Leave to Call Rejoinder Witnesses", 9 May 2002, para. 8.

²⁷ Ibid., See also *The Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, "Decision on Defence's Request for Reconsideration", 16 July 2004, pp. 3 and 4, citing in particular *The Prosecutor v. Adravko Mucić et al.*, Case No. IT-96-21A^{bis}, Appeals Judgment on Sentence, 8 April 2003, paras 48-50; *The Prosecutor v. Popović et al.*, Case No. IT-05-88-T, "Decision on Defense Motion for Certification to Appeal Decision Admitting Written Evidence Pursuant to Rule 92 *bis*", 19 October 2006, p. 4.

corroboration.²⁸ None of these statements, including the one subsequent to the Decision of 7 January 2008, will therefore be examined by the Chamber.

17. With regard to Milan Babić's testimony in the *Milošević* case, following the analysis of testimony given after the Decision of 7 January 2008, put forward by the Prosecution in support of its Motion, in the light of the portions of the testimony, the Chamber notes that several *viva voce* witnesses, heard by the Chamber after the Decision of 7 January 2008 and subject to cross-examination by the Accused, seem to corroborate certain of its portions, notably the following witnesses: VS-004, Mladen Kulić, Reynaud Theunens, VS-008, VS-1112, Asim Alić.

18. The Chamber consequently believes that this testimony constitutes new facts, which justifies a reconsideration of its Decision of 7 January 2008, regarding Milan Babić's testimony in the *Milošević* case.

19. The Chamber nevertheless recalls that, in a note dated 14 May 2010, the Prosecution informed the Chamber that it did not intend to use the evidence of Witness VS-008 as the latter was not reliable.²⁹ Moreover, it should be recalled that, in its Decision of 23 November 2009, the Chamber clearly invoked the "doubt cast on the credibility of Witness VS-008". The testimony of Witness VS-008 will therefore not be examined by the Chamber.

20. The Chamber would like to specify that the portions of Milan Babić's testimony from the *Milošević* case, which seem not to have been corroborated by testimony following the Decision of 7 January 2008, will not be examined by the Chamber because the conditions for reexamination have not been met in the case in point.

21. As regards Milan Babić's testimony in the *Krajišnik* case, the Chamber notes that, in support of its Motion, the Prosecution only puts forward the arguments considered by the Chamber in paragraphs 14 *bis* and 14 *ter*. Furthermore, no testimony heard in our case after the Decision of 7 January 2008 was put forward by the Prosecution with regard to this testimony for the purpose of reconsideration of this

²⁸ Hearing of 27 February 2008, T(F) 4219-4220.

²⁹ "Prosecution Disclosure Regarding VS-008 and Notice of Non-Reliance on Evidence of VS-008", 14 May 2010, public with confidential annexes, para. 4.

Decision. The Chamber therefore considers that none of the new facts justify the reexamination of the portions of this testimony from the *Krajišnik* case.

22. The Chamber has therefore decided that only the portions of Milan Babić's testimony in the *Milošević* case ("Testimony") which seem to have been corroborated by the testimony given in this case³⁰ by Witnesses VS-004,³¹ Mladen Kulić,³² Reynaud Theunens,³³ VS-1112,³⁴ and Asim Alić³⁵ will be examined by the Chamber with a view to being admitted in this case.

23. The Chamber also agrees to reexamine the associated evidence.

IV. ON THE ADMISSION OF CERTAIN PORTIONS OF THE TESTIMONY AND RELATED EVIDENCE

A. Arguments of the Prosecution

24. The Prosecution argues that the evidence it requested for admission meets the requirements for the implementation of Rule 92 *quater* of the Rules as defined by the Chamber,³⁶ as well as the conditions envisaged by Rule 89.

25. The Prosecution attaches to the Motion a certificate showing that Milan Babić died on 5 March 2006³⁷ and was therefore unavailable. Moreover, it argued that, in view of the circumstances in which it had been given and recorded, the Testimony was reliable: it was given under oath, subject to cross-examination and corroborated by other evidence.³⁸

³⁰ A definitive evaluation in this respect will, naturally, be possible only at the end of the trial and in the light of the entire body of evidence introduced by both the Prosecution and the Defence.

³¹ The witness corroborated the following parts: Hearing of 18 November 2002, T(F) 12861-12866.

³² The witness corroborated the following parts: Hearing of 18 November 2002, T(F) 12878-12910; 12928-12933; 12934-12938.

³³ The witness corroborated the following parts: Hearing of 19 November 2002, T(F) 12992-12995; Hearing of 20 November 2002, T(F) 13062-13067; T(F) 13081-13086; T(F) 13089-13092; T(F) 13103-13106, Hearing of 21 November 2002, T(F) 13244-13246; Hearing of 25 November 2002, T(F) 13387-13392.

³⁴ The witness corroborated the following parts: Hearing of 19 November 2002, T(F) 13040-13051; Hearing of 21 November 2002, T(F) 13175-13176.

³⁵ The witness corroborated the following parts: Hearing of 20 November 2002, T(F) 13081-13086.

³⁶ Motion, para. 18; Addendum, para. 10.

³⁷ Motion, para. 24; see also Annex A of the Motion.

³⁸ Motion, para. 25.

26. The Prosecution argues that the Testimony and related evidence are relevant and provide evidence of importance for the amended Indictment of 7 December 2007 (“Indictment”)³⁹ and that it is in the interest of justice⁴⁰ and necessary for the revelation of truth⁴¹ for them to be admitted. According to the Prosecution, the documents for which admission is sought are relevant with regard to the execution of the Joint Criminal Enterprise in Croatia,⁴² as alleged in paragraphs 6-8 of the Indictment. The Prosecution specifies that Milan Babić’s testimony specifically shows the following: 1) the establishment of a parallel structure of command on the territory of Krajina, consisting of persons from the Ministry of Interior of Serbia, the State Security Service of Serbia, the Krajina Police; 2) the involvement of Serbian security agencies in financing and arming of Krajina security agencies; 3) the organizing and arming of Croatian Serbs; 4) the provocation of Croats politically and through armed formations in order to allow the Yugoslav People’s Army (“JNA”) to intervene and the involvement and knowledge of members of JCE of such actions; 5) the pattern of persecution of the non-Serb population in captured territories.⁴³

27. The Prosecution finally specifies that, among the exhibits it initially sought for admission, 21 have since been admitted in this case and no longer need to be examined by the Chamber.⁴⁴

B. Arguments of the Accused

28. The Accused not having responded to either the Motion or the Addendum, the Chamber will focus on the arguments he put forward in Document 346 sent in response to the Prosecution’s Motion of 12 March 2007.

29. In Document 346, the Accused opposed in general the retroactive application of Rules 92 *bis*, 92 *ter* and 92 *quater* of the Rules. The Accused recalled that he was being prosecuted pursuant to the Indictment of February 2003 and that Rules 92 *bis*, 92 *ter* and 92 *quater* of the Rules were adopted only subsequently.⁴⁵ He also argued that the application of these rules violated the principle of security in judicial matters

³⁹ Motion, para. 16; Third Amended Indictment, filed on 7 December 2007.

⁴⁰ Motion, para. 27.

⁴¹ Motion, para. 15.

⁴² Motion, para. 16.

⁴³ Motion, para. 15.

⁴⁴ Addendum, para. 9.

and the principle of oral presentation of evidence in the context of the accusatory procedure. Consequently, the Accused requested that all of the Prosecution's motions based on Rules 92 *bis*, 92 *ter* and 92 *quater* of the Rules be rejected. The Accused added that, in any case, the application of these Rules would be prejudicial to him and thus violate Rule 6 (D) of the Rules. In this aspect, he particularly argued that he was subject to prejudice because he could not verify the circumstances under which the statements the Prosecution had requested for admission had been obtained.⁴⁶

C. Applicable Law

30. The Chamber recalls that Rule 92 *quater* (A) of the Rules governing the admission of evidence provided by persons who are not available, states that "the evidence of a person in the form of a written statement or transcript who has subsequently died [...] may be admitted [...] 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".

31. The Tribunal's jurisprudence sets forth that the following factors should be taken into consideration when assessing the reliability of evidence presented pursuant to Rule 92 *quater* (A) (i) of the Rules, including: (a) the circumstances in which the statement was made and recorded, notably (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 statement.⁴⁷

⁴⁵ Document 346, p. 3.

⁴⁶ Document 346, p. 3.

⁴⁷ *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.

32. Furthermore, Rule 92 *quater* (B) stipulates that “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”.

33. Rule 6 (D) of the Rules stipulates that amendment 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 or of a convicted or acquitted person in any pending case”. Rule 92 *quater* entered into force on 20 September 2006, thus long before the start of the trial.

34. The Chamber must equally make sure that general conditions regulating the admission of evidence as set out under Rule 89 of the Rules have been met, namely, that the proffered evidence is relevant and has probative value which is not substantially outweighed by the need to ensure a fair trial.⁴⁸

35. Finally, the Chamber wishes to recall the Tribunal’s case-law according to which a Trial Chamber cannot base a conviction solely or to a decisive extent on evidence which has not been subject to examination by both parties.⁴⁹ It also recalls that there is a fundamental distinction between the admissibility of evidence and the weight given to it in the determination of the Accused’s guilt.⁵⁰ At the present stage of the proceedings, the Chamber has not made a final assessment of the relevance, reliability and probative value of evidence in question. This assessment will only be made at the end of the trial and in the light of all evidence introduced by the parties, Prosecution and Defence alike.⁵¹

⁴⁸ *The Prosecutor v. Rasim Delić*, Case No. IT-04-83-PT, “Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 *quater*”, public, 9 July 2007, p. 4.

⁴⁹ *The Prosecutor v. Jadranko Prlić, Bruno Stojić, Slobodan Praljak, Milijov 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 (Hazan Rizvić)”, public, 14 January 2008, para. 22.

⁵⁰ “Order Setting Out the Guidelines For the Presentation of Evidence and the Conduct of the Parties During the Trial”, public, 15 November 2007, Annex, p. 2.

⁵¹ *The Prosecutor v. Jadranko Prlić, Bruno Stojić, Slobodan Praljak, Milijov 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.

D. Discussion

36. Concerning the unavailability of the Witness, the Chamber notes that, with the Witness being dead, the first condition set out by Rule 92 *quater* of the Rules has been fulfilled.⁵²

37. With regard to the reliability of the Testimony, the Chamber notes that it was given under oath in the *Milošević* case, that it was subjected to cross-examination by the Accused in the said case and that it was the subject of a new examination by an *Amicus Curiae*. Furthermore, the Chamber reiterates the opinion expressed in the Decision of 7 January 2008, according to which, if the Testimony was given following a guilty plea this cannot, in and of itself, justify the dismissal of the admission of the evidence. The Chamber may, nevertheless, take into account this element when assessing the weight of this evidence in determining the Accused's guilt.⁵³

38. The Chamber considers that the portions of the Testimony presented by the Prosecution are relevant for the current case insofar as they specifically refer to the existence and execution of a Joint Criminal Enterprise in Croatia, as alleged in paragraphs 6, 7 and 8 of the Indictment.⁵⁴ Just as the portion of the Testimony referring to the personality, education and credibility of Milan Babić is pertinent insofar as it allows the Chamber to determine what weight to assign to other portions of the Testimony.⁵⁵

39. The Chamber also notes that the examined portions of the Testimony were in part corroborated by the following testimony: the testimony of Mladen Kulić concerning the organisation and arming of Serbs of Croatia by the JNA and the

⁵² Annex A to the Motion.

⁵³ "Decision on Prosecution's Motion for Admission of Evidence of Stevan Todorović (VS-1008) Pursuant to Rule 92 *quater* of the Rules of Procedure and Evidence", confidential, 17 February 2010, para. 20; *The Prosecutor v. Mićo Stanišić and Stojan Župljanin*, Case No. IT-08-91-T, "Decision Granting in Part the Prosecution's Motion for Admission of Evidence Pursuant to Rule 92 *quater*", public, 14 April 2010, para. 26.

⁵⁴ This concerns the following portions of the Testimony: T(F) 12878:22-12910:20; T(F) 12910:21-12917:20; T(F) 12917:21-12920:7; T(F) 12923:20-12928:15; T(F) 12928:21-12933:19; T(F) 12934:19-12938:17; T(F) 12992:20-12995:10; T(F) 12995:16-12997:22; T(F) 13005:12-13010:2; T(F) 13062:11-13067:22; T(F) 13081:5-13086:13; T(F) 13089:19-13092:15; T(F) 13103:3-13106:25; T(F) 13244:5-13246:16; T(F) 13175:5-13176:22; T(F) 13387:23-13392:24.

⁵⁵ This concerns the following portions of the Testimony: T(F) 12861:15-12866:2, corroborated by the testimony of VS-004 in this case on 7 February 2008 (T(F) 3324:25-3325:5).

establishment of a parallel structure of command on the territory of Krajina;⁵⁶ the testimony of VS-004 concerning the role of the media in the anti-Croatian campaign as well as Slobodan Milošević's control of Serbian media, propaganda and institutions;⁵⁷ the report and testimony of expert witness Reynaud Theunens concerning the project of the creation of Greater Serbia, the taking of the Posavina corridor in June 1992, the persecution of the non-Serbian population in the occupied territories, the subordination of Serbian volunteers of the SRS/SP to the JNA during their participation in the conflict in Croatia and their jointly executed operations, and the meetings of members of the Joint Criminal Enterprise where Serbia's part in the supplying of arms in Krajina and the formation of paramilitary organisations were discussed;⁵⁸ the testimony of Asim Alić which sheds light on the circumstances surrounding the deployment of the JNA in Zvornik between 1991 and April 1992, and the presence of volunteers within the context of the execution of the Joint Criminal Enterprise;⁵⁹ the testimony of VS-1112 referring to a meeting in Knin attended by Mićo Stanišić, number two in Slobodan Milošević's government, and other members of the Joint Criminal Enterprise.⁶⁰

40. Consequently, the Chamber believes that the portions of the Testimony, examined above based on the fresh facts that were taken into consideration, present sufficient indicia of reliability, relevance and probative value to be admitted pursuant to Rule 92 *quater* of the Rules.

41. This being the case, the Chamber considers that the following portions of the Testimony may be admitted: T(F) pp. 12861-12866; T(F) pp. 12878-12920; T(F) pp. 12923-12933; T(F) pp. 12934-12938; T(F) pp. 12992-12997; T(F) pp. 13005-13010; T(F) pp. 13062-13067; T(F) pp. 13081-13086; T(F) pp. 13089-13092; T(F) pp. 13103-13106; T(F) pp. 13244-13246; T(F) pp. 13175-13176; T(F) pp. 13387-13392.⁶¹

⁵⁶ Mladen Kulić, 4 March 2008, T. 4420-4421, 4423-4424, 4429-4431.

⁵⁷ VS-004, 7 February 2008, T. 3324-3325.

⁵⁸ Reynaud Theunens, 14 February 2008, T. 3707-3708, 3648-3649, 3716-3720, 3650-3656 and 19 February 2008, T. 3740-3768 ; Report exhibit no. P00258: part II, section IV, part I pp. 74-85, part II pp. 86-147, part II pp. 90-140, part II pp. 7-19 and 21 February 2008, T. 4034-4036.

⁵⁹ Asim Alić, 15 May 2008, T(F) 6974-7015.

⁶⁰ VS-1112, 9 July 2008, T(F) 9181-9182, 10 July 2008, T(F) 9288-9292.

⁶¹ For reasons of clarity, the Chamber preferred no longer to refer to the lines of the admitted portions of transcript.

42. As regards the 30 Exhibits sought for admission, the Chamber notes, as did the Prosecution in its Addendum, that the following 65 *ter* documents were admitted in this case in a decision of 19 February 2010: 82, 89, 99, 123, 162, 181, 182, 218, 317, 441, 490, 513, 581, 607, 636, 970, 994, 1297, 1546, 1708.⁶² The request to admit these exhibits is therefore moot.

43. As regards the rest of the documents, the Chamber insists, above all, on specifying that it will not proceed to examine the admissibility of 65 *ter* documents number 710 and 837 associated with the portions of the Testimony which were not the subject of reconsideration.⁶³

44. Concerning 65 *ter* document number 776 for which admission was also sought, it will not be examined by the Chamber because it is not associated with any portion of the Testimony.

45. As regards 65 *ter* document number 454, presented by the Prosecution as an exhibit associated with a portion of the Testimony considered admissible by the present decision,⁶⁴ the Chamber notes that this is a decision of the government of Krajina aimed at dismantling the security services of the State of Krajina, signed by Milan Babić. The Chamber however emphasizes that this exhibit was neither presented to the witness nor discussed during the trial in connection with the indicated portion of the Testimony. The Chamber consequently considers that this exhibit is not indispensable for the understanding of this portion of the Testimony.

46. As regards 65 *ter* document number 66, presented by the Prosecution in relation to a portion of the Testimony considered admissible by the present decision,⁶⁵ the Chamber notes that this is a letter sent by Radovan Karadžić to Milan Babić, in which he congratulates himself on the proclamation of the Assembly of the Serbian Autonomous District (“SAO”) of Krajina. The Chamber believes that this letter is not indispensable for the understanding of the Testimony insofar as the Prosecution had

⁶² “Decision on Prosecution’s Motion for Admission of Evidence from the Bar Table”, public, 17 February 2010, para. 11.

⁶³ These are exhibits with the following reference numbers in Annex D: 5, 6, 7, 10, 12, 16, 18, 19, 20, 22, 24, 25 and 27.

⁶⁴ Hearing of 18 November 2002, T(F) 12923-12938.

⁶⁵ Hearing of 20 November 2002, T(F) 13062-13067.

only verified with Witness Babić the date on which it had been written, without discussing the contents. This document will therefore not be tendered into evidence.

47. As regards 65 *ter* document number 2083, presented by the Prosecution in relation to a portion of the Testimony considered admissible by the present decision,⁶⁶ the Chamber notes that this is a letter from Colonel Dusan Smiljanić to Ratko Mladić, dated 15 October 1994, dealing with their conflict and the illegal arms trafficking in SAO Krajina. The Chamber considers this document to be inseparable from the said portion of the Testimony. Moreover, it seems to the Chamber to have *prima facie* relevance and probative value. It is also relevant as it relates to the execution of the Joint Criminal Enterprise alleged in the Indictment and can therefore be tendered into evidence.

48. As regards 65 *ter* document number 1332, presented by the Prosecution in relation to a portion of the Testimony considered admissible by the present Decision,⁶⁷ the Chamber notes that this is an extract of the Official Gazette of the Republic of Krajina dated 19 May 1992, describing the creation of an army in the SAO Krajina. According to the Chamber, the document is indispensable for an understanding of the Babić Testimony and seems to the Chamber to have *prima facie* reliability and probative value. It is also relevant for it concerns the execution of the Joint Criminal Enterprise in Croatia, and can therefore be tendered into evidence.

49. As regards 65 *ter* document number 155, presented by the Prosecution in relation to a portion of the Testimony considered admissible by the present decision,⁶⁸ the Chamber notes that this is a decision of the SAO Krajina Executive Council, nominating Milan Babić as Secretary of the Interior of the SAO Krajina. The Chamber believes that its admission would allow for a better appreciation of the portion of the Testimony dealing with Milan Babić as a key figure and therefore has *prima facie* relevance for this case. According to the Chamber, the document also presents sufficient indicia of reliability and probative value to be tendered into evidence.

⁶⁶ Hearing of 18 November 2002, T(F) 12923-12938. 65 *ter* exhibit no. 2083 is also associated in the following reference numbers from Annex D: 6, 16 and 19, of which portions of testimony were not admitted. Only this T(F) will therefore be examined.

⁶⁷ Hearing of 18 November 2002, T(F) 12861-12938.

⁶⁸ Hearing of 18 November 2002, T(F) 12861-12938.

50. As regards 65 *ter* document number 450, the Chamber notes that these are rules, signed by Milan Babić, specifically concerning the creation of a Territorial Defence in Krajina and the implementation of the Joint Criminal Enterprise in Croatia. The Chamber considers this document to be inseparable from the portion of the Testimony considered admissible by this decision,⁶⁹ and to present sufficient indicia of reliability, relevance and probative value to be tendered into evidence.

51. As regards 65 *ter* document number 197, presented by the Prosecution in relation to a portion of the Testimony considered admissible by the present Decision,⁷⁰ the Chamber notes that this is a signed and stamped Decision of the SAO Krajina, announcing a referendum on the SAO Krajina joining Serbia and remaining with it as part of Yugoslavia, dated 30 April 1991. The Chamber believes that its admission would allow for a better appreciation of the portion of the Testimony dealing with the planning of the Joint Criminal Enterprise as alleged in the Indictment. The Chamber also believes that the document presents sufficient indicia of reliability, relevance and probative value, and that it can therefore be tendered into evidence.

VI. DISPOSITION

52. **FOR THE FOREGOING REASONS,**

PURSUANT TO Rule 89 and Rule 92 *quater* of the Rules,

PARTIALLY GRANTS the Prosecution's Motion **AND**

ORDERS the Registrar:

1) to assign exhibit numbers to the following portions of the Witness Testimony from the *Milošević* case:

- Hearing of 18 November 2002: T(F) pp. 12861-12866; T(F) pp. 12878-12910; T(F) pp. 12910-12917; T(F) pp. 12917-12920; T(F) pp. 12923-12928, 12928-12933; T(F) pp. 12934-12938;

⁶⁹ Hearing of 18 November 2002, T(F) 12878-12910; T(F) 12910-12917, 12917-12920, 12923-12928.

⁷⁰ Hearing of 18 November 2002, T(F) 12861-12938.

- Hearing of 19 November 2002: T(F) pp. 12992-12995; T(F) pp. 12995-12997; T(F) pp. 13005-13010; T(F) pp. 13040-13051;

- Hearing of 20 November 2002: T(F) pp. 13062-13067; T(F) pp. 13081-13086; T(F) pp. 13089-13092; T(F) pp. 13103-13106;

- Hearing of 21 November 2002: T(F) pp. 13244-13246; T(F) pp. 13175 -13176;

- Hearing of 25 November 2002: T(F) pp. 13387-13392;

2) to assign exhibit numbers to the following *65 ter* exhibits: 155, 197, 450, 1332 and 2083.

REJECTS the Motion in all other respects.

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

/signed/

Jean-Claude Antonetti
Presiding Judge

Done this tenth day of December 2010

At The Hague

The Netherlands

[Seal of the Tribunal]