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-95-5/18-T

Date: 3 June 2010

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IN THE TRIAL CHAMBER

Before: **Judge O-Gon Kwon, Presiding Judge**
Judge Howard Morrison
Judge Melville Baird
Judge Flavia Lattanzi, Reserve Judge

Registrar: **Mr. John Hocking**

Decision of: **3 June 2010**

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

DECISION ON PROSECUTION REQUEST FOR RECONSIDERATION AND/OR CERTIFICATION OF PARTS OF THE "DECISION ON PROSECUTION'S MOTION FOR ADMISSION OF THE EVIDENCE OF KDZ172 (MILAN BABIĆ) PURSUANT TO RULE 92 *QUATER*"

Office of the Prosecutor

Mr. Alan Tieger
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The Accused

Mr. Radovan Karadžić

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THIS TRIAL 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 seised of the "Prosecution Request for Reconsideration and/or Certification of Parts of the 'Decision on Prosecution's Motion for Admission of the Evidence of KDZ172 (Milan Babić) Pursuant to Rule 92 *Quater*'", filed on 20 April 2010 ("Motion"), and hereby issues its decision thereon.

I. Background and Submissions

1. On 13 April 2010, the Chamber issued the "Decision on Prosecution's Motion for Admission of Evidence of KDZ172 (Milan Babić) Pursuant to Rule 92 *Quater*" ("Babić Decision"), in which it granted in part the Prosecution's request for the admission into evidence of the oral testimony given by Milan Babić in the *Slobodan Milošević*, *Krajišnik*, and *Martić* trials, as well as his witness statement of 29 March 2004 prepared for the purposes of the *Krajišnik* trial, and numerous associated exhibits pursuant to Rule 92 *quater* of the Tribunal's Rules of Procedure and Evidence ("Rules").

2. However, it denied the admission into evidence of parts of Milan Babić's evidence, including, by majority,[1] two portions of his written evidence, the probative value of which was substantially outweighed by the need to ensure a fair trial because the evidence went to the acts and conduct of the Accused, was highly prejudicial to the Accused and was subject to poor cross-examination or no cross-examination at all.[2]

3. The Chamber also denied the admission of all intercepted conversations tendered by the Prosecution through Milan Babić for a number of reasons. First, the Prosecution tendered for admission as associated exhibits two "declarations" and an "intercept spreadsheet" that were attached to Milan Babić's witness statement, all of which contained references to the tendered intercepts. These documents were prepared for the purposes of earlier trials, where they were admitted. In the Babić Decision, the Chamber admitted only one of the declarations and the spreadsheet (hereinafter "declarations") as associated exhibits.[3] Aside from being mentioned in the declarations, however, most of the intercepts were not discussed by Milan Babić at any time during his previous testimony[4] and, thus, were denied admission into evidence on the basis that

[1] *See* Babić Decision, Partially Dissenting Opinion of Judge Kwon, in which Judge Kwon sets out his reasons for disagreeing with the majority in relation to its decision to deny the admission of the two portions of Milan Babić's written evidence.

[2] Babić Decision, paras. 41-43.

[3] Babić Decision, paras. 80-82.

[4] The Chamber further notes that, as far as the Chamber could determine, the intercepts were not mentioned or discussed in Milan Babić's witness statement.

they did not form indispensable and inseparable parts of his evidence.[5] Secondly, the Chamber denied the admission of all of the intercepts where Milan Babić was not one of the interlocutors in the intercepted conversations, including those discussed or raised with him in his written evidence, on the basis that he was unable to authenticate the intercepts in question.[6] Thirdly, while acknowledging that there *may* be intercepts that were specifically raised with Milan Babić and where he was one of the participants in the conversation, the Chamber noted that it was "extremely difficult" to determine from the Prosecution's motion and supplemental request which of the tendered intercepts fell into this category.[7] Therefore, the Chamber stated that the Prosecution could resubmit for admission as associated exhibits the intercepted conversations where Milan Babić was a participant in the conversations, making clear where in his previous testimony he discussed each of the resubmitted intercepts.[8]

4. In the Motion, the Prosecution requests, firstly, certification to appeal the Babić Decision insofar as it denied the admission of two portions of Milan Babić's previous testimony. Secondly, the Prosecution requests reconsideration of, or in the alternative, certification to appeal, the Chamber's decision to deny the admission into evidence of the intercepts.

5. In relation to the first request, the Prosecution submits that denying the admission of two portions of Milan Babić's previous testimony significantly affects the fair and expeditious conduct of the proceedings or the outcome of the trial because it excludes highly relevant and probative evidence at the admissibility stage on the basis of factors that are best addressed when weighing the evidence in light of the case as a whole.[9] The Prosecution argues that while evidence admitted pursuant to Rule 92 *quater* requires corroboration to sustain a conviction, it may be pivotal evidence which corroborates and is corroborated by other evidence and thus its exclusion affects both the fairness of the trial and its outcome.[10] Furthermore, its exclusion may impact on the Chamber's consideration of evidence in other ways.[11] It also argues that resolving the issue of whether the incriminating nature of relevant and probative evidence and the extent to which the evidence was cross-examined serve as a bar to admission or rather go to the weight to be attributed to that evidence, at this stage, would materially advance the proceedings because

[5] Babić Decision, paras. 83, 86-87.
[6] Babić Decision, para. 85.
[7] Babić Decision, para. 86.
[8] Babić Decision, para. 87.
[9] Motion, paras. 4-5.
[10] Motion, para. 5.
[11] Motion, para. 5.

the issue "may well come up again in this trial, particularly with regard to evidence admitted under Rule 92 *quater*."[12]

6. According to the Prosecution, it would also materially advance the proceedings for the Appeals Chamber to determine now whether the excluded testimony should be admitted, rather than waiting until the appeal, at which stage the evidence could not be evaluated by the Trial Chamber in the context of the totality of evidence as a whole.[13] The Prosecution further submits that the possibility that the majority erred in excluding the evidence weighs in favour of granting certification to appeal; in addition, in its view, the Babić Decision is contrary to an Appeals Chamber decision in the *Prlić* case and two Trial Chamber decisions, and "disagreement among the bench on an issue which may arise again in the course of these proceedings also weighs in favour of having the Appeals Chamber determine the issue now."[14]

7. In relation to the second request concerning the excluded intercepts, the Prosecution submits that, contrary to the Babić Decision, the intercepts do form an inseparable and indispensable part of Milan Babić's evidence and should be admitted into evidence.[15] According to the Prosecution, the Chamber "employed an unduly restrictive test for the admission of associated exhibits by limiting its analysis to Babić's oral testimony, to the exclusion of the written component of his evidence."[16] The Prosecution asserts that the Chamber took a different approach from other Trial Chambers, relying on one decision from the *Popović* case, which concerned different circumstances to those in the present case,[17] and it further distinguishes the present circumstances from those involving the admission of Milan Babić's evidence pursuant to Rule 92 *quater* in the *Stanišić and Župljanin* case.[18] The Prosecution submits that the "Trial Chamber's approach greatly reduces the utility of Rule 92 *quater* when the deceased person previously gave evidence under Rule 92 *bis* or Rule 92 *ter*."[19]

8. In support of its alternative request for certification to appeal the Chamber's decision to deny the admission of the excluded intercepts, the Prosecution argues that the Chamber's approach significantly affects the fair and expeditious conduct of proceedings because it is contrary to that taken by other Trial Chambers and "[a]ppellate determination of this issue has

[12] Motion, para. 6.
[13] Motion, para. 7.
[14] Motion, paras. 7-9.
[15] Motion, para. 11.
[16] Motion, paras. 12-13.
[17] Motion, paras. 15-16.
[18] Motion, para. 17.
[19] Motion, para. 18.

the potential to affect the admissibility of a broad category of evidence, which is an established basis for certification", and the effect of excluding the intercepts will reduce the probative value of Milan Babić's evidence.[20] Furthermore, if the intercepts are not admitted, the Prosecution will have to pursue alternative means of tendering this evidence and thus the requirement that an immediate resolution by the Appeals Chamber would materially advance the proceedings is met.[21]

9. On 26 April 2010, the Accused filed the "Response to the Prosecution's Motion for Reconsideration/Certification Re: Milan Babic Evidence" ("Response"), in which he submits that the grounds for reconsideration or certification to appeal have not been met. In relation to the request for reconsideration of the decision not to admit the excluded intercepts, the Accused argues that no error of reasoning has been shown and "the prosecution simply disagrees with the Chamber as to what constitutes 'indispensable and inseparable part' of the witness's evidence."[22] He submits that the decisions cited by the Prosecution demonstrate that the Chamber has a wide margin of discretion when determining whether to admit documents referred to by a witness.[23]

10. In relation to the request for certification to appeal, the Accused refers to the Chamber's "Decision on Prosecution Motion for Reconsideration, Alternatively for Certification, of the Decision Concerning the Evidence of Miroslav Deronjić", issued on 20 April 2010 ("Deronjić Reconsideration Decision"), and submits that "since the Chamber's decision on the merits cannot be based on uncorroborated Rule 92 *quater* evidence, the exclusion of any such evidence cannot affect the fairness of the trial."[24] Furthermore, if the Chamber has erred in excluding some of Milan Babić's evidence, the Appeals Chamber could evaluate the excluded evidence on appeal from final judgement, and take remedial action, and, therefore, there is no basis to conclude that an immediate resolution of the matter would materially advance the proceedings.[25] The Accused asserts that the admission of Rule 92 *quater* evidence is "ill-suited for interlocutory review."[26] He also states with regard to the exclusion of the two portions of Milan Babić's testimony that the Motion "simply re-argues the merits of the decision", and he submits that "[t]here is a balancing test of probative value versus prejudicial effect at the stage of

[20] Motion, para. 19.
[21] Motion, para. 20.
[22] Response, para. 4.
[23] Response, para. 5.
[24] Response, para. 7.
[25] Response, para. 7.
[26] Response, para. 10.

admission of evidence as well as the stage of weighing the evidence during final deliberations."[27]

II. Applicable Law

11. As the Chamber recently noted in the Deronjić Reconsideration Decision, there is no provision in the Rules for requests for reconsideration, which are a product of the Tribunal's jurisprudence, and are permissible only under certain conditions.[28] However, the Appeals Chamber has articulated the legal standard for reconsideration of a decision as: "a Chamber has inherent discretionary power to reconsider a previous interlocutory decision in exceptional cases 'if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent injustice.'"[29] Thus, the requesting party is under an obligation to satisfy the Chamber of the existence of a clear error in reasoning, or the existence of particular circumstances justifying reconsideration in order to prevent an injustice.[30]

12. The Chamber also previously noted that the Rules contemplate applications for certification to appeal decisions issued by a Trial Chamber.[31] According to the Rules, decisions on motions other than preliminary motions challenging jurisdiction are without interlocutory appeal save with certification by the Trial Chamber.[32] Rule 73(B) of the Rules provides that a Trial Chamber may grant certification to appeal if the decision "involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings."

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[27] Response, para. 9.

[28] Deronjić Reconsideration Decision, para. 7, citing *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, Decision Regarding Requests Filed by the Parties for Reconsideration of Decisions by the Chamber, 26 March 2009 ("*Prlić* Reconsideration Decision"), p. 2.

[29] Deronjić Reconsideration Decision, para. 7, citing *Prosecutor v. Milošević*, Case No. IT-02-54-AR108*bis*.3, confidential Decision on Request of Serbia and Montenegro for Review of the Trial Chamber's Decision of 6 December 2005, para. 25, note 40 (quoting *Kajelijeli v. Prosecutor*, Case No. ICTR-98-44A-A, Judgement, 23 May 2005, paras. 203–204). *See also Ndindabahizi v. Prosecutor*, Case No. ICTR-01-71-A, Decision on Defence "Requête de l'Appelant en Reconsidération de la Décision du 4 avril 2006 en Raison d'une Erreur Matérielle", 14 June 2006, para. 2.

[30] Deronjić Reconsideration Decision, para. 7, citing *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Decision on Defence's Request for Reconsideration, 16 July 2004, p. 2. *See also Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Decision on Nikolić's Motion for Reconsideration and Order for Issuance of a Subpoena Duces Tecum, 2 April 2009, p. 2; *Prlić* Reconsideration Decision, p. 3.

[31] Deronjić Reconsideration Decision, para. 8.

[32] Rules 72 and 73 of the Rules.

III. Discussion

a) The two portions of Babić's testimony

13. The Prosecution has requested certification to appeal the majority's decision to deny the admission of two portions of Milan Babić's testimony. Turning to the first limb of the reconsideration test, the Prosecution argues that the majority's decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial because its effect is to exclude highly relevant and probative evidence, which may be "pivotal", and thus required to sustain a conviction.[33] However, it does not identify any other evidence that it intends to present in the course of its case, which will corroborate or be corroborated by only the excluded evidence. While the Prosecution may consider itself disadvantaged to a certain degree by the exclusion of this evidence, it fails to show how the exclusion of the two portions of Milan Babić's evidence may impact on the Chamber's consideration of other evidence, such that it would significantly affect the fair and expeditious conduct of the trial.

14. In addition to not being satisfied that the first limb is met on the basis of the submissions discussed above, the Chamber further considers that an immediate resolution by the Appeals Chamber of the issue of whether "the incriminating nature of relevant and probative evidence and the extent to which the evidence was cross-examined bar admission or rather go to weight"[34] would not materially advance the proceedings.

15. While the Prosecution disagrees with the majority's decision to deny admission of the two portions of Milan Babić's testimony, it does not show how an Appeals Chamber resolution of the issue would materially advance the proceedings. The question of the admission of evidence is a highly discretionary exercise that is undertaken by Trial Chambers based on the particular circumstances of the case and the specific items that are tendered. The fact that one Judge has dissented from the majority view is not a ground for granting certification to appeal *per se*.[35] Furthermore, the Chamber has applied Rule 89(D) at the admissibility stage in

[33] Motion, para. 4

[34] Motion, paras. 4, 6.

[35] *Prosecutor v. Halilović*, Case No. IT-01-48-PT, Decision on Prosecution Request for Certification for Interlocutory Appeal of "Decision on Prosecutor's Motion Seeking Leave to Amend the Indictment", 12 January 2005, p. 1, where it is stated: "even when an important point of law is raised [...], the effect of Rule 73(B) is to preclude certification unless the party seeking certification establishes that both conditions are satisfied." Cited with approval in *Prosecutor v. Lukić & Lukić*, Case No. IT-98-32-/1-T, Decision on Motion for Reconsideration or Certification to Appeal the Decision on Rebuttal Witnesses, 9 April 2009, para. 12.

previous decisions,[36] an approach that has not been challenged earlier by the Prosecution. Moreover, while the issue of the admissibility of incriminating evidence from a Rule 92 *quater* witness who has not been subject to cross-examination may arise again in these proceedings, the Chamber notes that the Prosecution has not indicated it will make any more Rule 92 *quater* applications, and, should any more such applications be made by the Prosecution or the Accused, the Chamber will assess each witness's evidence pursuant to Rule 92 *quater* and Rule 89(D), as it has done with all other applications filed to date.

16. The Chamber is also not satisfied that it would materially advance the proceedings for the Appeals Chamber to resolve the issue now so that the Chamber can evaluate the two portions of Milan Babić's evidence in the context of the totality of evidence as a whole. In the case of an acquittal of the Accused on the charges to which the two portions of Milan Babić's evidence relate, it would be open to the Prosecution to attempt to persuade the Appeals Chamber that, had it not been for the exclusion of this evidence, convictions would have been entered.[37] The Chamber is, therefore, not satisfied that the second limb is met.

17. The Chamber notes that the Prosecution also recognises that a decision to grant certification to appeal is not concerned with the merits of the Chamber's decision that is being challenged, but submits that the possibility that the majority erred in reaching its decision "weighs in favour of certifying the issue for appeal."[38] It states that the majority decision is contrary to Appeals Chamber decisions in the *Prlić* and *Popović* cases and a *Stanišić and Župljanin* Trial Chamber decision.[39] As it is not clear from the Motion which limb of the certification test the Prosecution advances this submission in support of, the Chamber addresses it here.

18. In relation to the *Prlić* Appeals Chamber Decision cited by the Prosecution, the Chamber notes that it concerns the admission into evidence pursuant to Rule 89(C) of the Rules of a transcript of an interview conducted by the Prosecution of one of the accused, Jadranko Prlić, in

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[36] Decision on Prosecution's Motion for Admission of Evidence of KDZ297 (Miroslav Deronjić) Pursuant to Rule 92 *Quater*, 23 March 2010; Deronjić Reconsideration Decision, 20 April 2010; Decision on Prosecution's First Bar Table Motion, 13 April 2010. *See also* other Trial Chamber decisions, from which it is clear that Rule 89(D) is applicable at the admissibility stage, *for example*, *Prosecutor v. Stanišić and Simatović*, Case No. IT-03-69-T, Decision on Prosecution Motion for Admission of Evidence of Witness B-179 Pursuant to Rule 92 *Quater*, 11 March 2010, para. 34; *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Redacted Version of "Decision on Motion on Behalf of Dragan Nikolić Seeking Admission of Evidence Pursuant to Rule 92 Quater", Filed Confidentially on 18 December 2008, 19 February 2009, para. 31; *Prosecutor v. Lukić and Lukić*, Case No. IT-98-32/1-T, Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 *Bis*, 22 August 2008 ("*Lukić and Lukić* Decision"), para. 15; *Prosecutor v. 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.

[37] *See also* Deronjić Decision, para. 15.

[38] Motion, para. 8.

[39] Motion, para. 8.

that case. In relation to the question of whether admission of the transcript of that interview would be contrary to the rights of the other co-accused in the *Prlić* case because, unless Jadranko Prlić elected to testify, they would not be able cross-examine him on the contents of the transcript, the Appeals Chamber found, *inter alia*, that "as a matter of principle nothing bars the admission of evidence that is not tested or might not be tested through cross-examination."[40] The Chamber notes that this decision does not deal with the admissibility of evidence pursuant to Rule 92 *quater* and thus does not consider the admissibility of the transcript in that context. As such, while stating a general principle, the decision is not directly on point. Furthermore, in the Babić Decision, the majority did not consider the lack of Milan Babić's cross-examination in and of itself a bar to its admission. Rather, exercising the broad discretion ascribed to Trial Chambers with regard to the admission of evidence,[41] the majority determined that, *together with other factors*, the absence of adequate cross-examination of Milan Babić on the two portions of his evidence meant that the evidence should be excluded pursuant to Rule 89(D).

19. With regard to the *Popović* Appeals Chamber Decision, the Prosecution submits that the majority decision "runs counter to case-law holding that it is appropriate for 'issues related to the substance of prior cross-examination' to be considered as 'matters that go to the Trial Chamber's assessment of the weight to be accorded to that evidence rather than its admissibility'".[42] This submission would appear to be directed towards the portion of Milan Babić's evidence that was subject to poor cross-examination. However, in relation to this portion, the majority was not concerned with the "substance of the cross-examination" and it did not deny admission of this portion solely because the cross-examination had been poor, just as it did not deny the admission of the portion not subject to cross-examination at all on that ground alone. Rather, again, in exercising its discretion pursuant to Rule 89(D), the majority took the poor cross-examination and the absence of cross-examination into consideration *together* with other factors.

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[40] *Prosecutor v. Prlić et al.*, Case No. IT-04-74-AR73.6, Decision on Appeals Against Decision Admitting Transcript of Jadranko Prlić's Questioning into Evidence, 23 November 2007 ("*Prlić* Appeals Chamber Decision"), para. 55. The Chamber notes that in reaching this conclusion that Appeals Chamber reaffirmed a previous Appeals Chamber finding that the right to cross-examination is not absolute while citing with approval a statement by the European Court of Human Rights that restrictions to the right must not infringe the rights of the defence. According to the Appeals Chamber, an "unacceptable infringement" would occur when a conviction is based solely, or in a decisive manner, on the depositions of a witness whom the accused has had no opportunity to examine or have examined. *See Prlić* Appeals Chamber Decision, paras. 52, 53, citing *A.M. v. Italy*, No. 37019/97, para. 25, ECHR 1999-IX.

[41] *Prlić* Appeals Chamber Decision, para. 8.

[42] *See Prosecutor v. Stanišić and Župljanin*, Case No. IT-08-91-T, Decision Granting in Part the Prosecution's Motion for Admission of Evidence Pursuant to Rule 92 *Quater*, 14 April 2010 ("*Stanišić and Župljanin* Decision"), para. 23, citing *Prosecutor v. Popović et al.*, 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, 18 August 2008 ("*Popović* Appeals Chamber Decision"), para. 31.

20. Furthermore, in the *Popović* Appeals Chamber Decision, the Appeals Chamber was not establishing a general principle, but rather stating that it was satisfied that the Trial Chamber in that case had not exercised its discretion improperly.[43] In fact, it is the discretionary character of a Trial Chamber's decision to admit, pursuant to Rule 92 *quater*, the evidence of certain witnesses in the circumstances of the case that is apparent when one reviews the decisions cited by the Prosecution.[44] It is further noteworthy that the *Stanišić and Župljanin* Trial Chamber did not have to consider Rule 89(D) in assessing the admissibility of the evidence in question in that case. As such, this Chamber is not convinced that these decisions illustrate that the majority decision here is contrary to case-law cited by the Prosecution.

21. For the above reasons, the Chamber finds that the Prosecution has not demonstrated that the majority's decision to deny the admission into evidence of two portions of Milan Babić's testimony involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and that granting certification to appeal in this instance will materially advance the proceedings.

b) Excluded intercepts – Request for reconsideration

22. The Prosecution submits that Chamber committed a clear error of reasoning when it denied admission of certain intercepts because they had not been raised and/or discussed with Milan Babić in court and, thus, could not be admitted as exhibits associated with his written evidence, despite being referred to in the declarations.[45]

23. The Prosecution argues that by following the approach set out in the *Popović* Trial Chamber Decision and "excluding documents discussed in witnesses' written statements but not discussed in court", the Chamber has departed from the approach of other Trial Chambers, and has been "unduly restrictive".[46] The Prosecution relies on Trial Chamber decisions from the *Dragomir Milošević*, *Naletilić and Martinović*, *Stanišić and Župljanin*, *Lukić and Lukić*, and *Stanišić and Simatović* cases.

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[43] *Popović* Appeals Chamber Decision, para. 31. The full finding reads: "The Appeals Chamber is not satisfied that the Appellants have demonstrated that the Trial Chamber erred in concluding that issues related to the substance of prior cross-examination or the allegedly differing interests of counsel are matters that go to the Trial Chamber's assessment of the weight to be accorded to that evidence rather than its admissibility."

[44] In addition to the *Popović* Appeals Chamber Decision, the Prosecution cites *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 Quarter, 21 April 2008 ("*Popović* Trial Chamber Decision"), *see particularly* paras. 40, 51, 60-61; *Stanišić and Župljanin* Decision, paras. 24-26.

[45] Motion, paras. 11-12.

[46] Motion, para. 15.

24. According to the *Dragomir Milošević* and *Naletilić and Martinović* Trial Chambers, "exhibits accompanying written statements or transcripts form an inseparable part of the evidence", and may be admitted as associated exhibits.[47] The Trial Chambers in the *Lukić and Lukić* and *Stanišić and Simatović* cases held that "[o]ne way of making [the determination as to whether a document is an inseparable and indispensable part of a witness's evidence] is to ascertain whether the document has been the subject of comment by the witness either in the statement itself or during his testimony in a previous case."[48] In the *Popović* Trial Chamber Decision, the Trial Chamber referred to the *Naletilić and Martinović* Decision, and determined that for exhibits to be considered "accompanying transcripts" they had to be "used and explained by the witness in court."[49] As such, the *Popović* Trial Chamber Decision does not represent an alternative approach; rather, it may be considered to elaborate on the earlier enunciated test from the *Naletilić and Martinović* Chamber.

25. The Chamber is also not satisfied that the varied wording in these Trial Chamber decisions indicates that it has applied an "unduly restrictive" approach. On the contrary, the Chamber's decision that the excluded intercepts did not qualify as associated exhibits arose from the status of the intercepts, and not due to the application of a stricter test. Milan Babić had previously commented on the excluded intercepts in his declarations.[50] The Prosecution requested the admission of the declarations as associated exhibits, which was granted in the Babić Decision.[51] The Prosecution's request for admission of the excluded intercepts was, therefore, a request for the admission of documents referred to in other documents also tendered as associated exhibits. The Chamber continues to be convinced that these documents could not be considered to be an inseparable and indispensable part of Milan Babić's written evidence. Furthermore, insofar as the Chamber is aware, documents that are referred to in documents tendered as associated exhibits have not been admitted as associated exhibits in other cases. As such, the Chamber considers that it has not committed a clear error of reasoning.

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[47] *Prosecutor v. D. Milošević*, Case No. IT98-29/1-T, Decision on Admission of Written Statements, Transcripts and Associated Exhibits Pursuant to Rule 92 *ter*, 22 February 2007, p. 3; *Prosecutor v. Naletilić and 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 ("*Naletilić and Martinović* Decision"), para. 8. *See also Prosecutor v. Stanišić and Župljanin*, Case No. IT-08-91-T, Decision on Prosecution's Motions for Admission of Evidence of 33 Witnesses Pursuant to Rule 92 *ter*, 2 October 2009, paras. 15-16, where the Chamber stated it would "admit all accompanying documents [...] for the reason that it views this evidence as an integral whole."

[48] *Lukić and Lukić* Decision, para. 21; *Stanišić and Simatović*, Case No. IT-03-69-PT, Decision on Prosecution's Motion for Admission of Written Statements and Associated Exhibits Pursuant to Rule 92 *bis* of the Rules (Two Witnesses), 18 March 2008, para. 20.

[49] *Popović* Trial Chamber Decision, paras. 33, 65.

[50] *See* Motion, para. 14.

[51] Babić Decision, paras. 81-82.

26. The Prosecution also attempts to distinguish the present situation from that in the *Popović* Trial Chamber Decision, noting that "there were no written declarations discussing the associated exhibits equivalent to those of Babić in the present case."[52] However, this Chamber cited the *Popović* Trial Chamber Decision in support of its general approach to the admission of associated exhibits, and not because the particular factual circumstances were analogous. It should be noted, furthermore, that none of the decisions cited by the Prosecution addressed the issue posed by the request for the admission of the excluded intercepts, that is, documents referred to in other documents that are admitted as associated exhibits and not the witness's written evidence. The same applies to the *Stanišić and Župljanin* Decision,[53] also distinguished by the Prosecution, which, in any case, the Chamber did not seek to rely upon in the Babić Decision.

27. The test applied in the Babić Decision has been applied by this Chamber consistently in all its previous Rule 92 *quater* decisions, and its application has not been challenged by either party until now. In addition, the Prosecution has now only challenged its application in relation to the excluded intercepts and not to all associated exhibits addressed in the Babić Decision, indicating that the Prosecution is only concerned with the application of the test to one type of tendered document.[54] These factors would also appear to undermine its assertion that the Chamber has committed a clear error of reasoning.

28. The Chamber also does not see any merit in the Prosecution argument that the approach taken in the *Popović* Trial Chamber Decision is inapplicable because, unlike in that situation, the Prosecution does not have any alternative means of tendering the excluded intercepts.[55] In that decision, the *Popović* Trial Chamber noted that the tendered associated exhibits in question could be admitted in those proceedings pursuant to Rule 92 *quater*.[56] In applying the legal test for admission of associated exhibits tendered in relation to Milan Babić, the question for this Trial Chamber was not whether the Prosecution had alternative means of tendering the excluded exhibits, but rather whether the intercepts formed an inseparable and indispensable part of Milan Babić's evidence, and satisfied the requirements of Rule 89. Furthermore, in the Babić Decision, the Chamber made it clear that the Prosecution could resubmit for admission as

[52] Motion, para. 15.

[53] *Stanišić and Župljanin* Decision.

[54] The Chamber notes that while this submission is broadly worded, there is no indication in the Motion that the Prosecution is challenging the Chamber's general approach, and the Chamber interprets this submission to relate to the issue of the excluded intercepts.

[55] *See Popović* Trial Chamber Decision, para. 65, where the associated exhibits in question were excerpts of transcripts of the witness's testimony given in previous cases, and which the Trial Chamber stated could be resubmitted as written evidence pursuant to Rule 92 *quater*, instead of as associated exhibits.

[56] *Popović* Trial Chamber Decision, para. 65.

associated exhibits those intercepts discussed in court or the witness statement and in which Milan Babić is one of the participants in the conversations.[57] In relation to other excluded intercepts, it is open to the Prosecution to have them authenticated by an intercept operator or by other participants in the conversations. As such, the Prosecution does, in fact, have other means of tendering the excluded intercepts; it even seems to acknowledge this in the Motion where in arguing, in the alternative, for certification to appeal the decision not to admit the excluded exhibits, it submits that "the Prosecution will have to pursue alternative means of tendering the evidence".[58] While there is a possibility that not all of the excluded intercepts will ultimately be admitted into evidence, this outcome may occur in relation to any evidence tendered for admission. It does not mean that the Chamber has committed a clear error of reasoning, or that reconsideration of its decision to deny the admission of the intercepts is necessary to prevent injustice.

29. The Chamber is also not satisfied, as argued by the Prosecution, that the decision to exclude the intercepts "greatly reduces the utility of Rule 92 *quater*" when a deceased person (proposed as the Rule 92 *quater* witness) previously gave evidence under Rule 92 *bis* or Rule 92 *ter* because the effect of the decision is that "any exhibit referred to in a Rule 92 *bis* or Rule 92 *ter* statement [of a deceased witness] would be excluded from the record where it was not discussed in court, even where the exhibit was an integral part of the written statement."[59] Should that Rule 92 *bis* or Rule 92 *ter* statement be tendered as written evidence of a Rule 92 *quater* witness, the exhibits that form an inseparable and indispensable part of the statement are admissible. This can be quite clearly seen from the Chamber's previous Rule 92 *quater* decisions, including the Babić Decision, as well as its Rule 92 *bis* Decisions.[60] Furthermore, as

[57] Babić Decision, para. 87.

[58] Motion, para. 20.

[59] Motion, para. 18.

[60] *See, for example*, Decision on Prosecution Motion for Admission of Testimony of Witness KDZ198 and Associated Exhibits Pursuant to Rule 92 *Quater*, 20 August 2009;; Decision on Prosecution's Motion for Admission of Evidence of KDZ290 (Mirsad Kučanin) Pursuant to Rule 92 *Quater*, 25 September 2009; Decision on Prosecution's Motion for Admission of Evidence of KD446 and Associated Exhibits Pursuant to Rule 92 *Quater*, 25 September 2009; Decision on Prosecution Motion for Admission of Testimony of Sixteen Witnesses and Associated Exhibits Pursuant to Rule 92 *Quater*, 30 November 2009; Decision on Prosecution's Third Motion for Admission of Statements and Transcripts of Evidence in Lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis* (Witnesses for Sarajevo Municipality), 15 October 2009; Decision on Prosecution's Sixth Motion for Admission of Statements in Lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis*: Hostage Witnesses, 2 November 2009; Decision on Prosecution's Third Motion for Admission of Statements and Transcripts of Evidence in Lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis* (Witnesses for Eleven Municipalities), 10 November 2009; Decision on Prosecution's Seventh Motion for Admission of Transcripts of Evidence in Lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis*: Delayed Disclosure Witnesses, 21 December 2009; Decision on Prosecution's Fifth Motion for Admission of Statements in Lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis* (Srebrenica Witnesses), 21 December 2009; Decision on Prosecution's Fourth Motion for Admission of Statements and Transcripts of Evidence in Lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis* – Sarajevo Siege Witnesses, 5 March 2010; Decision on Prosecution's Fifth Motion for Admission of Statements in Lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis* (Witnesses Ark Municipalities), 18 March 2010.

stated above, the excluded intercepts are not of the same nature as exhibits commonly referred to by a witness in his or her written statement (or previous testimony), and documents such as these have not been admitted as associated exhibits by other Chambers.

30. Finally, the Chamber notes that the admission of the excluded intercepts was denied primarily because their authenticity had not been established and, consequently "the probative value of the said intercepts is doubtful at this stage."[61] Thus, even if the Chamber were to apply a lower threshold with regard to what constituted "inseparable and indispensable", the intercepts would not have been admitted. The Chamber notes here that the admission of the excluded intercepts was also denied in the *Slobodan Milošević* case.[62] The Rules relating to the admission of written evidence in cases before the Tribunal are very broad and they facilitate the admission of written evidence, as has been seen to date in the present case.

31. For the reasons above, the Chamber is satisfied that there was no error of reasoning in denying the admission into evidence of the excluded intercepts. It is also not satisfied that reconsideration of that decision is necessary to prevent an injustice. Therefore, the Chamber will not reconsider its decision to deny the admission of the excluded exhibits.

c) Excluded intercepts – Request for certification

32. The Prosecution has requested, in the alternative, the Chamber to grant certification to appeal the decision to deny the admission of the excluded intercepts. In relation to the submissions made by the Prosecution in respect of first limb, that there is an issue involved that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, the Chamber notes that in denying the admission of the excluded intercepts, it neither made a distinction between "discussions of exhibits in written and oral evidence" nor took an approach to the admission of associated exhibits that is contrary to the approach taken by other Trial Chambers. The Chamber has addressed these submissions above. The Chamber further considers that, as its decision denied the admission of a very specific category of document, namely documents tendered as associated exhibits which were referred to in other documents tendered as associated exhibits and not the written evidence of the witness, appellate

[61] Babić Decision, para. 85. Note that the exception to this is intercepts in which Milan Babić was a participant in the intercepted conversation.

[62] Babić Decision, para. 83, fn. 92, citing *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Decision and Order on Admission of Exhibits Marked for Identification During the Prosecution Case-in-Chief, 15 February 2005.

determination of the issue of whether the excluded intercepts should have, in fact, been admitted into evidence does not "affect the admissibility of a broad category of evidence."[63]

33. The Chamber is also not convinced that an immediate resolution by the Appeals Chamber would materially advance the proceedings because without it the Prosecution will have to tender the excluded intercepts through alternative means. As stated above, if the Prosecution wants the intercepts admitted, it is open to it to tender them through other means, ensuring that they satisfy the requirements of Rule 89. The Chamber acknowledges that the Prosecution may, therefore, have to bring intercept operators or other witnesses to authenticate and testify to the intercepts. However, the Prosecution will have to do this in relation to other intercepts, the admission of which have already been denied by the Chamber,[64] and, therefore, the possible increase in the number of witnesses that need to appear in court is likely to be small and this, in itself, is unlikely to impact significantly on the expeditiousness of the trial. The Chamber notes in this regard that the Prosecution, while asserting that tendering the excluded intercepts through other means will extend the trial time, has not indicated what those other means are and by how much the trial will be extended.

34. For these reasons, the Chamber considers that the Prosecution has not demonstrated how the decision not to admit the excluded intercepts involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and, even if it was satisfied that the first limb was met, it is not satisfied that an immediate resolution by the Appeals Chamber may materially advance the proceedings.

[63] *See* Motion, para. 19.

[64] *See* Decision on the Prosecution's First Motion for Judicial Notice of Documentary Evidence Related to the Sarajevo Component, 31 March 2010, para. 11; Decision on the Prosecution's First Bar Table Motion, 13 April 2010, para. 13; Babić Decision, para. 88.

IV. Disposition

35. Accordingly, the Trial Chamber, pursuant to Rules 54 and 73(B) of the Rules, hereby **DENIES** the Motion.

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

Judge O-Gon Kwon
Presiding

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

[Seal of the Tribunal]