

**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: 11 September 2008

Original: English

IN TRIAL CHAMBER III

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

Registrar: Mr. Hans Holthuis

Decision of: 11 September 2008

PROSECUTOR

v.

VOJISLAV ŠEŠELJ

PUBLIC DOCUMENT

**DECISION ON THE PROSECUTION'S ORAL MOTION SEEKING THE
ADMISSION INTO EVIDENCE OF WITNESS NEBOJŠA STOJANOVIĆ'S
THREE WRITTEN STATEMENTS**

Office of the Prosecutor

Ms. Christine Dahl
Mr. Daryl Mundis

The Accused

Mr. Vojislav Šešelj

I. INTRODUCTION

1. **TRIAL CHAMBER III** (“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 an oral motion made by the Prosecution during the testimony of witness Nebojša Stojanović (“Mr. Stojanović”) on 22 and 23 July 2008, requesting that his three prior written witness statements be admitted into evidence (“Motion”), both to impeach Mr. Stojanović’s credibility and for the truth of their contents.¹

II. BACKGROUND

2. Mr. Stojanović was interviewed and provided the Prosecution with written witness statements on three separate occasions: 17 and 18 August 2004 (“August 2004 Written Statement”), 17 November 2004 (“November 2004 Written Statement”) and 21 June 2006 (“June 2006 Written Statement”) (collectively, the “Written Statements”).

3. In each of these Written Statements, Mr. Stojanović provided consistent information regarding the Accused and volunteers of the Serbian Radical Party (“SRS”) that could potentially support charges in the Indictment.² Specifically, the Written Statements included information regarding Mr. Stojanović becoming an SRS volunteer in 1991, the Accused’s role in motivating and recruiting SRS volunteers, the Accused’s visits to Vukovar and Erdut, and the commission of crimes by SRS volunteers.³ The Prosecution included Mr. Stojanović as an “insider witness” in its Rule 65ter witness list⁴ and indicated its intention to call him to testify.⁵

4. On 21 February 2008, however, Mr. Stojanović sent a statement to the Prosecution indicating that he refused to appear before the Tribunal as a “Prosecution witness” and would only do so as “witness for the Accused”.⁶ The Trial Chamber issued a confidential and *ex parte* subpoena ordering Mr. Stojanović’s appearance in this case, which was served on 14 April 2008, and issued a

¹ Hearing of 22 July 2008, T. 9704-9706; Hearing of 23 July 2008, T. 9785-9786.

² Third Amended Indictment, 7 December 2007.

³ See e.g., August 2004 Written Statement, paras 5-7, 18-19, 25-29; November 2004 Written Statement, paras 6-7, 9-17, 19-20; June 2006 Written Statement, paras 7-16, 21-22, 30-32, 40-43.

⁴ Prosecution’s Submission of Revised Final Witness List, with Annex A (confidential), 29 March 2007, p. 19-21.

⁵ Following a request by the Prosecution, Mr. Stojanović was granted protective measures by the Pre-Trial Judge on 30 August 2007 (a pseudonym until the date of his testimony and disclosure of his identity no less than 30 days before the trial start date). Decision on Adopting Protective Measures, confidential, original in French dated 30 August 2007, p. 8; see also, Decision on Prosecution Motion for Reconsideration of the Decision on Protective Measures of 30 August 2007, confidential, original in French dated 16 October 2007.

⁶ Hearing of 23 July 2008, T. 9784-9785.

safe conduct order for Mr. Stojanović on 11 June 2008.⁷ Following the issuance of the subpoena and safe conduct order, Mr. Stojanović appeared before the Trial Chamber in July 2008.

5. Mr. Stojanović was examined by the Prosecution before the Trial Chamber on 22 and 23 July 2008 but reiterated that he considered himself to be a “Defence witness”.⁸ Further, Mr. Stojanović disavowed much of the information contained in the Written Statements. Despite being confronted with information in the Written Statements to the contrary, Mr. Stojanović testified *inter alia* that he had not been an SRS volunteer in 1991, that he had never seen the Accused in Vukovar or Erdut, and that he had not witnessed SRS volunteers commit crimes.⁹ Though he did not dispute having been interviewed by the Prosecution or having signed the Written Statements, he maintained (i) that the Written Statements differed materially from the Serbian translations that were read to him orally by the interpreters during the interviews and (ii) that he had failed to properly read the Serbian hard copies of the Written Statements that were presented to him during the interviews before signing them.¹⁰ Mr. Stojanović also claimed that the Prosecution was placing undue pressure on him to testify on its behalf by repeatedly phoning him as of December 2007.¹¹

6. Given Mr. Stojanović’s assertions, the Trial Chamber *proprio motu* called a member of the Office of the Prosecutor who was present during Mr. Stojanović’s 17 November 2004 and 21 June 2006 interviews (the “OTP Interviewer”). The OTP Interviewer testified that both the November 2004 Statement and the June 2006 Statement were accurate reflections of the information provided by Mr. Stojanović during those interviews, that both statements had been read back to Mr. Stojanović in BCS and that he had been given an opportunity to correct any information he deemed inaccurate before signing them.¹²

7. The Prosecution moved, during its examination of Mr. Stojanović, for leave to treat him as a hostile witness,¹³ which the Accused orally objected to.¹⁴ The Trial Chamber was persuaded that,

⁷ Decision on Motion for Issuance of Safe Conduct for Witness VS-048, confidential, original in French dated 11 June 2008. See also Hearing of 22 July 2008, T. 9672.

⁸ Hearing of 22 July 2008, T. 9672.

⁹ Hearing of 22 July 2008, T. 9687-9688, 9691-9692, 9697-9700; Hearing of 23 July 2008, T. 9771-9778.

¹⁰ Hearing of 22 July 2008, T. 9708-9728; Hearing of 23 July 2008, T. 9776-9780. All three Witness Statements indicate that they were read to Mr. Stojanović in the Serbian language by the interpreters during the interviews. Mr. Stojanović was also presented with hard copies of the August 2004 Written Statement and the June 2006 Written Statement in Serbian.

¹¹ Hearing of 23 July 2008, T. 9787-9788.

¹² Hearing of 23 July 2008, T. 9734-9743. The Trial Chamber notes that the OTP Interviewer used the generic term “BCS” to refer to the language used by the interpreters during Mr. Stojanović’s interviews, while the Witness Statements and Mr. Stojanović indicate the interpreters translated from English into Serbian, Mr. Stojanović’s native language.

¹³ Hearing of 22 July 2008, T. 9704-9706.

¹⁴ Hearing of 22 July 2008, T. 9706-9707.

given the circumstances, the Prosecution's request was appropriate and granted its oral motion.¹⁵ The Prosecution also moved to admit the Written Statements into evidence, both to impeach Mr. Stojanović's credibility and for the truth of their contents.¹⁶ The Accused opposed the Prosecution's request by oral response.¹⁷ The Trial Chamber stated that it would defer its determination as to whether to admit the Written Statements into evidence but attributed MFI numbers to each of the Written Statements.¹⁸ This Motion is now the subject of the present decision.

III. APPLICABLE LAW

8. No provision of the Rules of Procedure and Evidence ("Rules") expressly addresses the question of whether a prior inconsistent statement of a witness may be admitted into evidence, and if so, for what purposes. Rather, it is necessary to turn to the general provisions of the Rules and the jurisprudence of this Tribunal to determine the issue. Rule 89(C) of the Rules entitles a Chamber to "admit any relevant evidence which it deems to have probative value" provided that the rights of an accused to a fair trial are ensured.¹⁹

9. Prior statements of witnesses who have testified before the Tribunal may be admitted into evidence when the party calling the witness intends to impeach their credibility.²⁰ While the determination to impeach a witness with their prior statement does not require that the Trial Chamber designate the witness as "hostile", the decision may not be placed entirely in the hands of the party seeking to impeach.²¹ Rather, the Trial Chamber must be the one to determine whether to allow a party to cross-examine its own witness.²²

10. A Trial Chamber may also exercise its discretion to admit a witness's previous inconsistent statement as hearsay evidence for the truth of its contents provided that "it is relevant and

¹⁵ Hearing of 22 July 2008, T. 9707-9708.

¹⁶ Hearing of 22 July 2008, T. 9704-9706; Hearing of 23 July 2008, T. 9785-9786.

¹⁷ Hearing of 22 July 2008, T. 9706-9707; Hearing of 23 July 2008, T. 9801.

¹⁸ Hearing of 22 July 2008, T. 9707-9708; Hearing of 23 July 2008, T. 9786. The Written Statements bear the following 65ter and MFI numbers: August 2004 Written Statement (65ter number 7265 marked as MFI P526); November 2004 Written Statement (65ter number 7264 marked as MFI P527); June 2006 Written Statement (65ter number 7266 marked as MFI P528).

¹⁹ *Prosecutor v. Rasim Delić*, Case No. IT-04-83-AR73.1, Decision on Rasim Delić's Interlocutory Appeal Against Trial Chamber's Oral Decisions on Admission of Exhibits 1316 and 1317, 15 April 2008 ("*Delić* Appeal Decision"), para. 20. See also Rule 89(D) of the Rules.

²⁰ *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-AR73.3, Decision on Appeals Against Decision on Impeachment of a Party's Own Witness, 1 February 2008 ("*Popović* Appeal Decision"), para. 32; *Prosecutor v. Fatmir Limaj et al.*, Case No. IT-03-66-T, Decision on the Prosecution's Motions to Admit Prior Statements as Substantive Evidence, 25 April 2005 ("*Limaj* Decision"), para. 30. The Trial Chamber notes that some Trial Chambers have found that prior inconsistent statements need not be admitted into evidence if they are used only for impeachment purposes. See *Prosecutor v. Mile Mrkšić et al.*, Case No. IT-95-13/1-T, Decision Concerning the Use of Statements Given by the Accused, 9 October 2006, paras 9-10, 25.

²¹ *Popović* Appeal Decision, para. 28.

²² *Popović* Appeal Decision, para. 26.

sufficiently reliable to be accepted as probative”.²³ Where hearsay evidence, such as an out-of-court prior statement, is sought to be admitted as substantive evidence, a Chamber must be satisfied that the evidence is reliable for that purpose and may consider both the content of the evidence and the circumstances under which it arose.²⁴ The opportunity to cross-examine the person who made the statements, and whether the hearsay is ‘first-hand’ or removed are also relevant to the probative value of the evidence.²⁵

11. A Trial Chamber admitting a witness’s prior statement into evidence must specify for what purpose(s) it is doing so — *i.e.*, to impeach the witness’s credibility and/or for use as substantive evidence — so that it can properly weigh the prejudice caused to an accused.²⁶ Ultimately, “[t]he decision as to whether a particular piece of evidence will be admitted for the purpose of assessing a witness’ credibility and/or for the substance therein must be left to the Trial Chamber’s discretion.”²⁷

IV. DISCUSSION

12. The Trial Chamber recalls that the Written Statements include information concerning the Accused’s role in motivating and recruiting SRS volunteers, the Accused’s visits to Vukovar and Erdut, and the commission of crimes by SRS volunteers.²⁸ As such, the Trial Chamber finds that the Witness Statements are clearly relevant to the charges in the Indictment.

13. Further, despite Mr. Stojanović’s assertions to the contrary, the Witness Statements provide strong indicia of reliability. First, the formalities surrounding the Written Statements belie Mr. Stojanović’s assertion that they do not reflect the information he provided during the interviews. The Trial Chamber notes that each of the Written Statements contains a “Witness Acknowledgement”, signed by Mr. Stojanović, stating that the statement had been given voluntarily, read to him in the Serbian language and was “true to the best of [his] knowledge and recollection”.²⁹ Mr. Stojanović also signed and/or initialled every page of each of the Written Statements, in either their Serbian and/or English form. These signatures and initials, which Mr.

²³ *Popović* Appeal Decision, para. 31, citing *Limaj* Decision, paras 18, 21.

²⁴ *Limaj* Decision, para. 17; *see also Popović* Appeal Decision, para. 31

²⁵ *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-AR73, Decision on Prosecutor’s Appeal on Admissibility of Evidence, 16 February 1999, para. 15.

²⁶ *Delić* Appeal Decision, paras 22-23.

²⁷ *Popović* Appeal Decision, para. 32.

²⁸ *See* para. 3 *supra*.

²⁹ *See* August 2004 Written Statement (signed by Mr. Stojanović in its Serbian form), November 2004 Written Statement (signed by Mr. Stojanović in its English form – no Serbian copy seems to have been produced) and June 2006 Written Statement (signed by Mr. Stojanović in its Serbian and English forms).

Stojanović does not dispute are his own,³⁰ are often times affixed a few centimetres under bold and underlined subject headers in Serbian such as **“Dolazak Vojislava ŠEŠELJA i njegovih dobrovoljaca u Erdut”** (Arrival of Vojislav Šešelj and his volunteers in Erdut)³¹ or **“Poseta Vojislava ŠEŠELJA Vukovaru”** (Visit of Vojislav Šešelj to Vukovar).³² Every single page of the Written Statements was also signed or initialled by the other individuals present during the interviews. Moreover, a signed “Interpreter Certification” is appended to each of the Written Statements, which certifies that the Witness Statements were orally translated from the English to the Serbian language by the interpreters in Mr. Stojanović’s presence and that he appeared to have “heard and understood [their] translation”.³³ The “Interpreter Certification” for the June 2006 Written Statement (which consolidated the August 2004 Written Statement and the November 2004 Written Statement) also states that Mr. Stojanović read the June 2006 Written Statement in his native Serbian in the interpreters’ presence.³⁴ The Trial Chamber adds that Mr. Stojanović himself does not dispute having voluntarily provided supporting documents to the Prosecution during his initial August 2004 interviews, which were reflected in his August 2004 Witness Statement and his June 2006 Written Statement.³⁵

14. Second, the procedures governing the November 2004 Statement and the June 2006 Statement were confirmed by the OTP Interviewer. The Trial Chamber recalls that the OTP Interviewer testified that the November 2004 Statement and the June 2006 Statement were accurate reflections of the information provided by Mr. Stojanović during those interviews.³⁶ The Trial Chamber notes that the Accused was able to cross-examine the OTP Interviewer regarding his interviews with Mr. Stojanović.³⁷

15. Third, Mr. Stojanović was given an opportunity to explain the inconsistencies between the Written Statements and his testimony in light of the questions posed to him by the Parties and the

³⁰ Hearing of 22 July 2008, T. 9708-9721.

³¹ August 2004 Written Statement (in Serbian), p. 5.

³² June 2006 Written Statement (in Serbian), p. 15; *Id.*, (in English), p. 10.

³³ See Interpreter Certifications attached to the August 2004 Written Statement, p. 16, November 2004 Written Statement, p. 8, and June 2006 Written Statement, p. 17.

³⁴ Interpreter Certification attached to the June 2006 Written Statement, p. 17.

³⁵ See August 2004 Written Statement, para. 41 stating that Mr. Stojanović provided to the Prosecution: (i) a photocopy of the Decision of the Republic Fund for Pension and Disability Insurance of Employees which indicates that he was executing military duties from 1 October 1991 to 15 May 1992; (ii) photocopies of newspaper articles regarding the conflict in Croatia; (iii) two photographs taken of Arkan’s ‘Tigers’ in Bogdanovci; and (iv) a photograph of Arkan and a Novi Sad Corps Lieutenant in Erdut; see also, June 2006 Witness Statement pp. 14-15; Hearing of 22 July 2008, T. 9725.

³⁶ Hearing of 23 July 2008, T. 9734-9743.

³⁷ Hearing of 23 July 2008, T. 9746-9752, 9753-9755 (Private Session).

Trial Chamber.³⁸ The Trial Chamber finds that his explanation for those inconsistencies — *i.e.*, that the Prosecution repeatedly deceived him while he remained unaware throughout the interviews of the content of his Written Statements — strains credibility. Similarly, Mr. Stojanović's claim that the Prosecution placed undue pressure on him to testify on its behalf by repeatedly phoning him as of December 2007 is at odds with his acknowledgment that he continued to contact the Prosecution through February 2008 to arrange for his trip to The Hague to appear as a Prosecution witness.³⁹ In short, Mr. Stojanović's testimony fails to cast sufficient doubt on the reliability of his previous Written Statements.

16. The Trial Chamber finds that the Written Statements were properly used by the Prosecution to challenge Mr. Stojanović's credibility. The Prosecution laid the foundation for Mr. Stojanović to be declared a hostile witness by first providing him with a chance to refresh his recollection of the Written Statements.⁴⁰ When Mr. Stojanović persisted in refuting the information contained in the Written Statements, the Prosecution then sought leave to treat him as a hostile witness, which the Trial Chamber granted, and cross-examined him regarding the inconsistencies between his testimony and the information contained in the Written Statements. The Trial Chamber considers that the Witness Statements were properly used to impeach Mr. Stojanović and that they should be admitted into evidence for that purpose.

17. In addition, the Trial Chamber finds that given the instant circumstances, the Witness Statements are sufficiently relevant and reliable that it may exercise its discretion to admit them for the truth of their contents. The Trial Chamber finds that the matters discussed above are also relevant to the exercise of this discretion and, on balance, favour the admission of the Written Statements into evidence. The Trial Chamber notes that the Accused will be able to put forth additional evidence during the presentation of his defence and finds that admission of the Written Statements as substantive evidence would not unduly prejudice him at this stage of the trial proceedings.

18. The Trial Chamber recalls that the admission of the Written Statements into evidence in no way prejudices what weight, if any, they will be accorded by the Trial Chamber. Indeed, that determination will be for the Trial Chamber to make in light of the totality of the evidence before it

³⁸ In particular, the Trial Chamber notes that the Accused was also able to cross examine Mr. Stojanović regarding the Written Statements. Hearing of 23 July 2008, T. 9790-9795. The Trial Chamber further notes that Mr. Stojanović testified that he first received a copy of his Written Declarations from "the Defence of the Accused" in March or April 2008. Hearing of 22 July 2008, T. 9727-9728; Hearing of 23 July 2008, T. 9787-9788.

³⁹ Hearing of 23 July 2008, T. 9788.

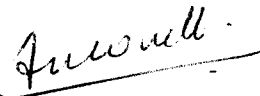
⁴⁰ Hearing of 22 July 2008, T. 9696-9702.

at the final stage of the trial, including Mr. Stojanović's testimony and the evidence presented by the Accused during the presentation of his defence.

V. DISPOSITION

19. Accordingly, the Trial Chamber, pursuant to Rule 89(C) of the Rules, **GRANTS** the Motion and **ADMITS** the Written Statements into evidence both to impeach Mr. Stojanović's credibility and for the truth of their contents.

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



Judge Jean-Claude Antonetti
Presiding

Dated this eleventh day of September 2008
At The Hague
The Netherlands

[Seal of the Tribunal]