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: 9 March 2009

Original: English

IN TRIAL CHAMBER III

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

Acting Registrar: **Mr. John Hocking**

Decision of: **9 March 2009**

PROSECUTOR

v.

VOJISLAV ŠEŠELJ

PUBLIC

DECISION ON PROSECUTION'S MOTION TO ADD ONE EXHIBIT TO ITS RULE 65*TER* LIST AND FOR ADMISSION OF EVIDENCE OF WITNESS MATIJA BOŠKOVIĆ PURSUANT TO RULE 92*QUATER*

Office of the Prosecutor

Mr. Daryl Mundis
Ms. Christine Dahl

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 the Prosecution motion filed on 3 December 2008 ("Motion"),[1] which requests the addition of Matija Bošković's 20 November 2003 written statement ("Bošković Statement") to its Rule 65*ter* exhibit list ("Exhibit List"),[2] as well as the Bošković Statement's admission into evidence, along with three documents, pursuant to Rules 89(C) and 92*quater* of the Rules of Procedure and Evidence of the Tribunal ("Rules").[3]

II. BACKGROUND

2. In the Motion, the Prosecution seeks the addition of the Bošković Statement to the Exhibit List as a preliminary and necessary step to its admission into evidence.[4] The Prosecution notes that, while Matija Bošković was included in its witness list, the Bošković Statement was not included on the Exhibit List as he was originally scheduled to testify *viva voce* before the Trial Chamber.[5] The Prosecution indicates that it was notified on 8 July 2008 that Matija Bošković had died on 24 February 2007.[6] The Prosecution further notes that the Bošković Statement was disclosed to the Accused on 4 June 2007 and argues that it would be in the interest of justice to permit the requested addition.[7]

3. The Prosecution contends that Matija Bošković is "unavailable" pursuant to Rule 92*quater* of the Rules and argues that the circumstances surrounding the Bošković Statement establish that the information it contains is reliable.[8] The Prosecution adds that the Bošković Statement provides relevant evidence relating to the execution of the alleged joint criminal enterprise and to paragraphs 8, 10, 15, 16 and 24 of the Third Amended Indictment.[9] Specifically, the Bošković Statement indicates that Matija Bošković was an SRS/SČP volunteer from Mali Zvornik and provides

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1 Prosecution's Motion to Add One Exhibit to its Rule 65*ter* List and for Admission of Evidence of Witness Matija Bošković Pursuant to Rule 92*quater*, 3 December 2008 ("Motion").

2 Prosecution Notice of Filing Exhibit List Pursuant to Rule 65*ter*, with confidential and *ex parte* annex, 25 June 2007.

3 Motion, para. 1.

4 Motion, para. 12.

5 Motion, para. 9.

6 Motion, para. 2. The Trial Chamber notes that Matija Bošković's death certificate is attached as Annex A to the Motion.

7 Motion, paras 9, 7.

8 Motion, paras 18. The Trial Chamber notes that the Bošković Statement is attached as Annex B to the Motion.

9 Motion, para. 19.

evidence relating to the execution of the joint criminal enterprise in Zvornik municipality and in Greater Sarajevo, including through the use of paramilitary and SRS/SČP volunteers.[10] The Bošković Statement further indicates that Matija Bošković travelled with and provided security for the Accused while the latter was in Bosnia and Herzegovina in August 1992 and provides direct evidence of the Accused's presence at the frontlines and of his contacts with military commanders.[11] The Prosecution acknowledges that portions of the Bošković Statement go to the acts and conduct of the Accused as charged in the Third Amended Indictment and may contain evidence that is fundamental to its case, which may factor against the admission of the Bošković Statement.[12] Nevertheless, the Prosecution contends that the Bošković Statement is internally consistent and is corroborated by other evidence, including the anticipated testimony of VS-037, such that its admission into evidence is warranted pursuant to Rules 89(C) and 92*quater* of the Rules.[13]

4. In conjunction with the admission of the Bošković Statement, the Prosecution also seeks the admission of three documents on its Exhibit List.[14] The Prosecution notes that these three documents are specifically referenced in the Bošković Statement and contends that they should be admitted as they form "an inseparable and indispensable part of that statement."[15]

5. During the hearing of 5 February 2009, the Accused orally objected to the admission of the Bošković Statement.[16]

III. APPLICABLE LAW

6. Rule 65*ter* (E)(iii) provides, *inter alia*, that the Prosecution shall file, within a time-limit set by the pre-trial Judge and not less than six weeks before the Pre-Trial Conference, "the list of exhibits the Prosecution intends to offer", serving on the Defence copies of the listed exhibits. However, a Trial Chamber may exceptionally grant a Prosecution's request to amend its exhibit list. The Appeals Chamber held in this respect that:

> In doing so, a Trial Chamber must be satisfied that, taking into account the specific circumstances of a case, good cause is shown for amending the original list and that the newly offered material is

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[10] Motion, paras 3, 19.

[11] Motion, para. 19.

[12] Motion, para. 20.

[13] Motion, paras 20, 22.

[14] Motion, paras 21, 22. The Trial Chamber notes that the three documents, which are attached as Annex C to the Motion are: (i) a list with names of members of Matija Bošković's unit (65*ter* number 1277); (ii) a payroll list for volunteers in Zvornik for 1-31 May 1992 (65*ter* number 1262); and (iii) receipts of a temporarily confiscated Renault and Golf at Karakaj check-point (65*ter* number 1457).

[15] Motion, para. 21.

[16] Hearing of 5 February 2009, T. 14132-14133.

> relevant and of sufficient importance to justify the late addition. Moreover, a Trial Chamber must carefully balance any amendment to the lists in Rule 65 *ter* with an adequate protection of the rights of the accused.[17]

7. The Trial Chamber recalls that Rule 92*quater* (A) of the Rules governs the admissibility of evidence of unavailable persons and provides:

> The evidence of a person in the form of a written statement or transcript who has subsequently died, or who can no longer with reasonable diligence be traced, or who is by reason of bodily or mental condition unable to testify orally may be admitted, whether or not the written statement is in the form prescribed by Rule 92 *bis*, if the Trial Chamber:
>
> (i) is satisfied of the person's unavailability as set out above; and
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> (ii) finds from the circumstances in which the statement was made and recorded that it is reliable.

8. Trial Chambers have identified, and the Appeals Chamber has upheld, the following factors as relevant to the assessment of the reliability of the evidence to be admitted pursuant to Rule 92*quater* of the Rules: (a) the circumstances in which the statement was made and recorded, including (i) whether the statement was given under oath; (ii) whether the statement was signed by the witness with an accompanying acknowledgement that the statement is true to the best of his or her recollection; (iii) whether the statement was taken with the assistance of an interpreter duly qualified and approved by the Registry of the Tribunal; (b) whether the statement has been subject to cross-examination; (c) whether the statement, in particular an unsworn statement never subject to cross-examination, relates to events about which there is other evidence; and (d) other factors, such as the absence of manifest or obvious inconsistencies in the statements.[18]

9. Further, pursuant to Rule 92*quater* (B) of the Rules, if a statement goes to the 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.

10. The Trial Chamber must also ensure that the general requirements for admissibility of evidence in Rule 89 of the Rules are satisfied, namely that the proffered evidence is relevant, has probative value and that such probative value would not be substantially outweighed by the need to ensure a fair trial.[19]

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[17] *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-AR73.1, Decision on Appeals Against Decision Admitting Material Related to Borovčanin's Questioning, 14 December 2007, para. 37.

[18] *Prosecutor v. Vujadin 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, confidential, 18 August 2008, para. 30; *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-T, Decision on Motion on Behalf of Drago Nikolić Seeking admission of Evidence Pursuant to Rule 92*quater*, confidential, 18 November 2008, para. 32.

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

IV. DISCUSSION

A. Addition to the Exhibit List

11. The Trial Chamber notes that the Bošković Statement includes information regarding a trip made by the Accused to Bosnia and Herzegovina in August 1992, for which Matija Bošković provided security. The Bošković Statement describes the Accused's direct involvement with events in the Sarajevo region, including his visits to the frontlines as well as his meetings with municipal and military leaders.[20] It also recounts a meeting during the trip between the Accused and Momčilo Krajišnik, his alleged co-perpetrator in the joint criminal enterprise.[21] Moreover, the Bošković Statement contains information regarding the role of paramilitary and SRS/SČP volunteers in Zvornik municipality and in Greater Sarajevo.[22] The Trial Chamber considers that this information is clearly relevant to the present case.

12. The Trial Chamber recalls that the Bošković Statement was not included on the Exhibit List as he was originally scheduled to testify *viva voce* before the Trial Chamber. The Trial Chamber also notes that the Accused has been aware of the Prosecution's intention to call Matija Bošković as a witness since March 2007 and that the Bošković Statement was disclosed to him on 4 June 2007.[23]

13. In light of the foregoing, the Trial Chamber considers the addition of the Bošković Statement to the Exhibit List to be warranted.

B. Admission into evidence of the Bošković Statement and of three referenced documents

14. The Trial Chamber notes that the Prosecution attaches Matija Bošković's death certificate as Annex A to the Motion. The Motion thus falls squarely within the ambit of Rule 92*quater* (A) of the Rules.

15. As regards its reliability, the Trial Chamber notes that, while the Bošković Statement was not taken under oath or subject to cross-examination, it does contain the following *indicia* supporting admissibility: (i) the Bošković Statement was signed by Matija Bošković with an accompanying acknowledgement that the statement is true to the best of his knowledge and recollection;[24] (ii) the Bošković Statement was taken with the assistance of an interpreter duly

[20] *See* Bošković Statement, attached as Annex B to the Motion, paras 51-52.
[21] *See* Bošković Statement, attached as Annex B to the Motion, para. 52.
[22] *See* Bošković Statement, attached as Annex B to the Motion, paras 12-17, 19-21, 23, 26-27, 32, 35-36, 40, 42-45.
[23] *See* Prosecution Submission of Revised Final Witness List, with confidential Annex A, 29 March 2007.
[24] *See* Bošković Statement, attached as Annex B to the Motion, p. 13.

qualified and approved by the Registry of the Tribunal;[25] (iii) portions of the Bošković Statement are corroborated by other evidence proffered by the Prosecution;[26] and (iv) the Bošković Statement does not display any obvious inconsistencies.

16. The Trial Chamber further notes that the Bošković Statement includes evidence that goes to the proof of the acts and conduct of the Accused as charged in the Third Amended Indictment. While this factor may weigh against admissibility, it is not determinative of the issue under Rule 92*quater* of the Rules.[27] Rather, the Trial Chamber considers that the Bošković Statement is sufficiently reliable that the entirety of the Statement should be admitted into evidence.

17. The Trial Chamber recalls that, in conjunction with the admission of the Bošković Statement, the Prosecution also seeks the admission into evidence of three documents explicitly referenced in that Statement ("Referenced Documents"). The Referenced Documents consist of: (i) a list from the Municipal Assembly of the Serbian Municipality of Zvornik with the names of the members of Matija Bošković's volunteer unit who were engaged in Zvornik between 6 and 30 April 1992;[28] (ii) a payroll list stamped by the TO municipal staff of the Serbian Municipality of Zvornik which lists the names of volunteers in Zvornik between 1 and 31 May 1992, including that of Matija Bošković;[29] and (iii) receipts for two temporarily confiscated vehicles at the Karakaj check-point, one of which the Bošković Statement indicates he was driving when he was stopped at that same check-point.[30]

18. The Trial Chamber notes that the Referenced Documents are all relevant to the credibility of the information contained in the Bošković Statement. Further, documents (i) and (ii) described above are also directly relevant to the Prosecution's allegations regarding the events in Zvornik Municipality, including the role of SRS/SČP volunteers. The Trial Chamber considers that the Referenced Documents form an inseparable and indispensable part of the Bošković Statement[31] and

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[25] *See* Bošković Statement, attached as Annex B to the Motion, p. 14.

[26] The Trial Chamber notes that the Prosecution attaches as Annex D to the Motion a chart that details the relevance of the information provided in the Bošković Statement as well as whether that information is corroborated by other evidence.

[27] *Prosecutor v. Jadranko Prlić et al.*, 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 (Hasa Rizvić), 14 January 2008, para. 22.

[28] The document, which bears 65*ter* number 1277, is attached as Annex C to the Motion and is referenced at para. 13 of the Bošković Statement.

[29] The document, which bears 65*ter* number 1262, is attached as Annex C to the Motion and is referenced at paras 14-15 of the Bošković Statement.

[30] The document, which bears 65*ter* number 1457, is attached as Annex C to the Motion and is referenced at para. 31 of the Bošković Statement.

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

that their admission in conjunction with that of the Statement would permit a better assessment of the weight to be given to the information contained therein.

19. Moreover, the Trial Chamber considers that the Bošković Statement and the Referenced Documents meet the general requirement set out by Rule 89 of the Rules as they are relevant to the present case, have probative value and that such probative value is not substantially outweighed by the need to ensure a fair trial. However, the Trial Chamber recalls that, according to the jurisprudence of the Tribunal, it may not base a conviction solely or to a decisive extent on evidence that has not been subject to examination by both parties.[32]

20. The Trial Chamber further recalls the fundamental distinction between the admissibility of documentary evidence and the weight that will be given it in light of the entire record.[33] At this stage of the proceedings, the Trial Chamber had not made a final evaluation of the relevance, reliability or probative value of the evidence. This will only be carried out at the end of the trial in light of all the evidence, both Prosecution and Defence, that has been tendered into the record,[34] and until that stage, the Trial Chamber reserves the possibility of removing certain exhibits from the record.

21. In light of the foregoing, the Trial Chamber admits the Bošković Statement and the Referenced Documents into evidence.

V. DISPOSITION

22. Accordingly, the Trial Chamber, pursuant to Rules 65, 89 and 92*quater* of the Rules, **GRANTS** the Motion and **ORDERS** the Registry to assign exhibit numbers to the Bošković Statement[35] and the Referenced Documents.[36]

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[32] *Prosecutor v. Jadranko Prlić et al.*, 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 (Hasa Rizvić), 14 January 2008, para. 22.

[33] Order Setting Out the Guidelines for the Presentation of Evidence and the Conduct of the Parties During the Trial, 15 November 2007, para. 2.

[34] *The Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-T, Decision to Admit Documentary Evidence Presented by the Prosecution, confidential, 5 October 2007, p. 7.

[35] Attached as Annex B to the Motion.

[36] Documents bearing 65*ter* numbers 1277, 1262, 1457.

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

Judge Jean-Claude Antonetti
Presiding

Dated this ninth day of March 2009
At The Hague
The Netherlands

[Seal of the Tribunal]