

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: 3 June 2009

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: 3 June 2009

THE PROSECUTOR

v.

VOJISLAV ŠEŠELJ

PUBLIC DOCUMENT

**DECISION ON REQUEST FOR ADMISSION OF SELECTED PORTIONS
OF ZORAN TOT'S EVIDENCE PURSUANT TO RULE 92 QUATER**

Office of the Prosecutor

Mr Daryl Mundis
Ms Christine Dahl

The Accused

Mr Vojislav Šešelj

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”), is seized of the “Prosecution’s Motion for Admission of Evidence of Witness Zoran Tot Pursuant to Rule 92 *quater*”, filed on 7 January 2009 (“Motion”)¹ by the Office of the Prosecutor (“Prosecution”).

I. PROCEDURAL BACKGROUND

2. On 6 March 2006, the Prosecution filed a motion for the admission of the evidence of Zoran Tot pursuant to Rule 92 *bis* (C) of the Rules of Procedure and Evidence (“Rules”).²

3. On 22 October 2007, the Prosecution informed the Chamber of its intention to request the admission of the evidence of Zoran Tot (“Witness”) pursuant to Rule 92 *quater* of the Rules.³

II. SUBMISSIONS OF THE PARTIES

4. In its Motion, the Prosecution requests that the Chamber admit, pursuant to Rule 92 *quater* and Rule 89 (C) of the Rules, selected portions of the written statements of Zoran Tot given to the Bosnia and Herzegovina Agency for Investigation and Documentation (“AID”) on 12 February 1996 (“First Statement”)⁴ and to the Prosecution on 20 January 2004 (“Second Statement”).⁵ In support of its Motion, the Prosecution argues that the conditions for the application of Rule 92

¹ “Prosecution’s Motion for Admission of Evidence of Witness Zoran Tot Pursuant to Rule 92 *quater*”, 7 January 2009 (“Motion”).

² “Prosecution’s Motion for Admission of Transcripts and Written Statements in lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis*”, confidential with partially *ex parte* annexes, 6 March 2006 (“Motion of 6 March 2006”).

³ “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, para. 11.

⁴ Motion, para. 1. The title of the First Statement is: “Statement to the Agency for Investigation and Documentation in Sarajevo”, dated 12 February 1996 (ERN 0092-4883-0092-4886). The Chamber notes that the First Statement is attached to Annex B of the Motion.

⁵ Motion, para. 1. The title of the Second Statement is: “Statement to the Office of the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia”, dated 20 January 2004 (ERN 0349-2610-0349-2626). The Chamber notes that the Second Statement is attached to Annex B of the Motion.

quater have been fulfilled, namely the unavailability of the Witness⁶ and the reliability of the information based on the circumstances in which the statements were given.⁷

5. In this regard, the Prosecution indicates that the reliability of the information contained in the statements is guaranteed by several factors: 1) the Witness signed the First Statement acknowledging that he had dictated its contents to the relevant AID official; 2) the Witness signed the Second Statement and acknowledged that its contents were true and correct to the best of his knowledge; 3) the Second Statement was taken with the assistance of an interpreter duly qualified and approved by the Registry of the Tribunal; 4) both statements are consistent and corroborated by other evidence.⁸

6. The Prosecution adds that the selected portions of the Witness's statements are relevant and provide important and probative evidence, notably concerning the recruitment and deployment of SRS/SČP volunteers, but also the execution of the joint criminal enterprise in the municipality of Mostar.⁹ The Prosecution points out that the statements of Zoran Tot are relevant to paragraphs 8, 10 (a) (e) (g), 15, 16, 24, 26 and 34 (b) of the Third Amended Indictment.¹⁰ According to the Prosecution, the statements demonstrate the direct involvement of Ljubiša Petković and Vojislav Šešelj ("The Accused") in the recruitment and deployment of SRS/SČP volunteers,¹¹ and also the JNA's logistical support to the volunteers, the volunteers' subordination to the JNA units and the attack of the town of Mostar by Serbian forces and the SRS/SČP units commanded by the Accused's former bodyguard, Mićo Pančevac.¹² Furthermore, the statements demonstrate the role of one "Oliver" from the SRS party in the co-ordination of the SRS/SČP units and the JNA in the field.¹³

⁶ Motion, para. 1. The Chamber notes that Zoran Tot's death certificate is attached to Annex A to the Motion.

⁷ Motion, paras. 3, 5.

⁸ Motion, paras. 2, 10.

⁹ Motion, para. 11.

¹⁰ Motion, para. 11 referring to the Third Amended Indictment, filed on 2 January 2008.

¹¹ Motion, para. 11.

¹² Motion, para. 11.

¹³ Motion, para. 11.

7. The Prosecution acknowledges that the Witness' statements contain sections on the acts and conduct of the Accused, but argues that it is in the interest of justice to admit these statements due to their relevance and corroboration by other evidence.¹⁴ In the alternative, the Prosecution proposes to redact the portions from the Second Statement that concern the acts and conduct of the Accused should the Chamber deem that it is preferable, in the interest of justice, to exclude these portions.¹⁵

8. During the hearing of 25 February 2009, the Accused objected to the admission of the written statements of Zoran Tot, due to the retroactive application of Rule 92 *quater* of the Rules, which would prejudice him.¹⁶

III. APPLICABLE LAW

9. The Chamber recalls that Rule 92 *quater* (A) of the Rules, which governs the admission of evidence provided by unavailable persons, states that:

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

- (i) is satisfied of the person's unavailability as set out above; and
- (ii) finds from the circumstances in which the statement was made and recorded that it is reliable.

10. The Tribunal's jurisprudence establishes that the following factors should be taken into consideration in order to assess 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

¹⁴ Motion, para. 12.

¹⁵ Motion, para. 13.

¹⁶ Hearing of 25 February 2009, T (F) 14250-14253.

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.¹⁷

11. Furthermore, pursuant to Rule 92 *quater* (B) of the Rules, “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.”

12. The Chamber must also ensure that the general requirements of admissibility of evidence under Rule 89 of the Rules have been satisfied, namely that the proffered evidence is relevant and has probative value, and that the probative value is not substantially outweighed by the need to ensure a fair trial.¹⁸

IV. DISCUSSION

13. The Chamber notes that due to his death,¹⁹ Zoran Tot is unavailable and that in that regard, the first condition of Rule 92*quater* has been satisfied.

14. Regarding the reliability and relevance of the First and Second Statement, the Chamber considers, first, that the statements of Zoran Tot are relevant insofar as they relate notably to paragraphs 8, 10 (a) (e) (g), 16, 24 and 26 of the Third Amended Indictment. The Chamber notes in this respect that the statements concern notably the recruitment²⁰ and deployment of SRS/SČP volunteers to Mostar²¹ and Bosanski Šamac,²² logistical support of the JNA to the SRS/SČP volunteers,²³ the subordination

¹⁷ *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.

¹⁸ *The 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.

¹⁹ Annex A to the Motion containing Zoran Tot’s death certificate.

²⁰ Second Statement, paras. 6 and 12.

²¹ Second Statement, paras. 37-57.

²² Second Statement, paras. 60-74.

²³ Second Statement, paras. 15-18.

of the volunteers to the JNA units,²⁴ the attack on the town of Mostar by the Serbian forces and the SRS/SČP units commanded by Mićo Pančevac,²⁵ and allegations of crimes committed by SRS/ SČP volunteers.²⁶

15. Regarding the reliability of the First Statement, the Chamber notes that, contrary to what the Prosecution argues in its Motion,²⁷ the First Statement was not signed by the Witness. The Chamber recalls in this respect that a signature constitutes a particularly important indicum of reliability. The Chamber deems that in the absence of a signature, the First Statement does not bear the indicia of reliability that would allow its admission. The Chamber could, if the need arises, reconsider its position if the Prosecution subsequently presents a signed version of the First Statement.

16. With regards to the Second Statement given to the Prosecution, the Chamber notes that the following elements attest to its reliability: (i) the Witness signed the Second Statement and acknowledged that its contents were true and correct to the best of his knowledge; (ii) the Second Statement was taken with the assistance of an interpreter duly qualified and approved by the Registry of the Tribunal;²⁸ (iii) there is no obvious contradiction in the Second Statement.

17. The Chamber further notes that certain portions of the Second Statement appear to be corroborated by other *viva voce* evidence heard and subjected to cross-examination.²⁹ Therefore, the Second Statement appears to be corroborated by the testimony of Witnesses VS-015³⁰ and VS-1060³¹ about the characteristics of the uniforms of members of “Šešelj’s unit”,³² the testimony of Witness VS-033³³ about the presence of SRS/SČP volunteers in Croatia,³⁴ the testimony of Witness VS-

²⁴ Second Statement, para. 42.

²⁵ First Statement, p. 1; Second Statement, paras. 49-57

²⁶ First Statement, p. 4; Second Statement, para. 92.

²⁷ Motion, para. 10.

²⁸ See Second Statement, in Annex B attached to the Motion.

²⁹ The Chamber notes that the Prosecution attached a table to Annex C of the Motion specifying the relevance of the information contained in the two statements, its link with the conduct and acts of the Accused and the corroboration of the information by other evidence.

³⁰ Hearing on 15 January 2008, T(F) 2324 :21-2325 :15.

³¹ Hearing on 24 June 2008, T(F) 8574 :22-25.

³² Second Statement, para. 17.

³³ Hearing on 1 April 2008, T(F) 5516 :25 -5518 :14.

³⁴ Second Statement, paras. 19-20.

1060³⁵ about the presence of SRS/SČP volunteers in Grbavica and, the testimony of Witness VS-033³⁶ about the distribution of JNA weapons and uniforms to the SRS/SČP volunteers.³⁷ Furthermore, the testimony of Witness VS-1000³⁸ and Witness VS-007³⁹ also appear to corroborate certain portions of the Second Statement.⁴⁰

18. In light of the foregoing, the Chamber is satisfied that the Second Statement presents sufficient indicia of reliability.

19. The Chamber further notes that certain portions of the Second Statement contain information that concerns the acts and conduct of the Accused, specifically the Accused's involvement in the recruitment of SRS/SČP volunteers.⁴¹ Even though this may be a factor against the admission of the Second Statement, it should be recalled that in such a case admission is not automatically excluded.⁴²

20. In conclusion, the Chamber deems that the Second Statement is admissible, but recalls the fundamental difference between the admissibility of evidence and the weight which the Chamber gives to it in light of the entire record.⁴³ At this stage of the proceedings, the Chamber will not carry out a final examination of the relevance, reliability and probative value of the evidence. That examination will only be done at the end of the case, in light of all the evidence presented by the Prosecution and the Defence. Furthermore, the Chamber is aware that the Tribunal's jurisprudence does not allow a Chamber to base its conviction solely, or in a decisive manner, on evidence that has not been subject to cross-examination.⁴⁴

³⁵ Hearing of 24 June 2008, T(F) 8574 :5-8, 8591 :6-10.

³⁶ Hearing on 1 April 2008, T(F) 5515 :14-5516 :22.

³⁷ Second Statement, para. 15.

³⁸ Hearing of 11 December 2008, T(F) 12988:15-13001:14 (partial closed session).

³⁹ Hearing of 15 April 2008, T(F) 6031 :18-21 (closed session).

⁴⁰ Second Statement, para. 10.

⁴¹ Second Statement, paras. 7 and 14.

⁴² *The 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 (Hasan Rizvić)", 14 January 2008, para. 22.

⁴³ Order Setting Out the Guidelines for the Presentation of Evidence and the Conduct of the Parties during the Trial, 15 November 2007, annex, para. 2.

⁴⁴ *The Prosecutor v. Martić*, Case No. IT-95-11-AR73.2, "Decision on Appeal against the Trial Chamber's Decision on the Evidence of Witness Milan Babić", 14 September 2006, para. 20 ; *The Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR73.6, "Decision on Appeals against

V. DISPOSITION

23. **FOR THE FOREGOING REASONS**, the Chamber, pursuant to Rules 89 and 92 *quater* of the Rules, **PARTIALLY GRANTS** the Prosecution Motion, **ORDERS** that the Registry assign an exhibit number to the Second Statement of Zoran Tot and **DENIES** the Motion as it relates to the admission of the First Statement.

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

/signed/

Jean-Claude Antonetti
Presiding Judge

Done this third day of June 2009
At The Hague
The Netherlands

[Seal of the Tribunal]

Decision Admitting Transcript of Jadranko Prlić's Questioning in Evidence", 23 November 2007,
para. 53.