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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: 2 November 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: **2 November 2009**

THE PROSECUTOR

v.

VOJISLAV ŠEŠELJ

PUBLIC DOCUMENT

DECISION ON MOTION FOR ADMISSION OF ALEKSANDAR FILKOVIĆ'S TESTIMONY PURSUANT TO RULE 92 *QUATER*

The Office of the Prosecutor

Mr Daryl Mundis
Ms Christine Dahl

The Accused

Mr Vojislav Šešelj

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I. INTRODUCTION

1. Trial Chamber III ("Chamber") of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 ("Tribunal"), is seized of the Motion for admission of testimony of VS-012 ("Witness VS-012"), filed on 15 December 2009 ("Motion")[1] pursuant to Rule 92 *quater* of the Rules of Procedure and Evidence of the Tribunal ("Rules") by the Office of the Prosecutor ("Prosecution").

II. PROCEDURAL BACKGROUND

2. On 24 January 2006, the Prosecution submitted a motion for the admission of transcripts and written statements pursuant to Rule 92 *bis* of the Rules with regard to, amongst others, Witness VS-012.[2]

3. On 22 October 2007, the Prosecution submitted a consolidated Motion in which it presented an overview of its previous motions pursuant to Rules 89 (F), 92 *bis*, *ter* and *quater* of the Rules ("Consolidated Motion"),[3] thereby acting in accordance with the Order rendered by the pre-trial Judge on 20 September 2007.[4] Witness VS-012 was identified in Annex A of the Consolidated Motion as a witness for whom a request for admission of prior testimony had been submitted pursuant to Rule 92 *ter* of the Rules.[5]

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[1] "Prosecution's Motion for Admission of Evidence of Witness VS-012 Pursuant to Rule 92 *quater* and Request Regarding Protective Measures for Witness VS-012", public document with confidential Annexes, submitted on 12 December 2008 and filed on 15 December 2008 ("Motion").
[2] "Prosecution Motion for Admission of Transcripts and Written Statements in *lieu* of *viva voce* Testimony Pursuant to Rule 92 *bis*", submitted on 24 January 2006 and filed on 6 March 2006, para. 16.
[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, Annex A, p. 1; *see* also "Prosecution's Additional *Addendum* and *Corrigendum* to 'Prosecution Motion for Admission of Transcripts and Written Statements in *lieu* of *Viva Voce* Testimony Pursuant to Rule 92 *bis* with Confidential Annexes'", partly confidential, 17 October 2006, paras 11, 14, Annex A, p. 9; "Prosecution Submission Regarding the Trial Chamber Order to Review the Prior Transcript Testimony of Certain Witnesses the Prosecution Seeks to Admit Pursuant to Rule 92 *bis*", confidential with confidential Annexes and partly *ex parte*, 20 February 2007, para. 4 (j) and Annex B confidential and *ex parte*, p. 28.
[4] "Order for Clarification of Prosecution's Motions for Admission of Statements Pursuant to Rules 89 (F), 92 *bis*, 92 *ter* and 92 *quater* of the Rules of Procedure and Evidence", 20 September 2007.
[5] Consolidated Motion, Annex A, p. 1.

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4. In its Decision of 7 January 2008, the Trial Chamber dismissed the Consolidated Motion, notably with regard to the admission of the testimony of Witness VS-012, on the grounds that there was no showing of relevance and the number of pages of the Prosecution's Motion was found excessive.[6] The Chamber indicated, however, that it could consider a new motion from the Prosecution.[7]

5. On 12 December 2008, the Prosecution submitted the present Motion. On 6 May 2009, it filed a *Corrigendum* containing the documents for which it sought admission in the Motion.[8]

III. ARGUMENTS OF THE PARTIES

A. The Motion

6. In its Motion, the Prosecution requests that the Chamber admit, pursuant to Rules 73 (A), 89 (C) and 92 *quater* of the Rules, certain portions of the written Statement of Witness VS-012 given to the Prosecution and dated 1, 24, 26 and 27 July 2003 ("Statement")[9], its *addendum* of 25 November 2003 ("*Addendum*")[10] and the *viva voce* testimony of Witness VS-012 in Case No. IT-02-54-T, *The Prosecutor v. Slobodan Milošević* ("Testimony" and "*Milošević* Case", respectively)[11] and the relative exhibits ("Exhibits").[12]

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[6] "Decision on the Prosecution's Consolidated Motion Pursuant to Rules 89 (F), 92 *bis*, 92 *ter* and 92 *quater* of the Rules of Procedure and Evidence", 7 January 2008 ("Decision on the Consolidated Motion"), paras 52 and 59.
[7] Decision on Consolidated Motion, paras 53-54.
[8] "*Corrigendum* to Prosecution's Motion for Admission of Evidence of Witness Aleksandar Filković Pursuant to Rule 92 *quater*", confidential, 6 May 2009 ("*Corrigendum*").
[9] Motion, para. 1; Statement of 1, 24, 26 and 27 July 2003 (ERN 0308-9175-0308-9202) included in the *Corrigendum*, p. 4328. The Prosecution seeks the admission of paragraphs 1-6, 8-14, 17-18, 23-24, 27-31, 38-44, 49-55, 57-59, 66-67, 72-73, 88, 93-98 of the Statement, *see* Annex B of the Motion.
[10] *Addendum* to the Statement, dated 25 November 2003 (ERN 0344-8321-0344-8325), *see Corrigendum*, p. 43101. The Prosecution seeks the admission of paragraphs 2-3, 8-12, 18, 24, 27, 30, 38, 41, 44, 49, 55, 57-58, 67, 72 of the *Addendum*; Annex B of the Motion.
[11] *The Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Witness VS-012 (called "C-057" in the *Milošević* Case). The Prosecution seeks the admission of portions T (F) pp. 29802-29809; T (F) pp. 29814:21-29819:8 of the hearing of 27 November 2003 and T (F) pp. 29879-29883 of the hearing of 2 December 2003, *see* Annex C of the Motion.
[12] The Prosecution requests the admission of Exhibits Nos 187, 321, 324, 386, 389, 655, 2033, 2036, 4029 on the 65 *ter* list of related exhibits: *see* Annex D of the Motion. The Chamber notes that the 65 *ter* number 655 given in Annex D is incorrect, and should actually be 65 *ter* number 355.

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7. In support of its Motion, the Prosecution submits that the requirements for the application of Rule 92 *quater* have been met, namely the unavailability[13] of the witness and the reliability of his testimony in light of the circumstances in which the statements were made.[14]

8. The Prosecution claims that the reliability of the information given in the Testimony is guaranteed by several factors: 1) the testimony was given under oath and in open session; 2) the witness was subject to extensive cross-examination by the Accused Slobodan Milošević; 3) a further examination of the witness was conducted by an *Amicus Curiae*; 4) the testimony is consistent and corroborated by other evidence.[15]

9. The Prosecution also claims that the reliability of the information given in the Statement is guaranteed by the following factors: 1) the presence during the interview of duly qualified interpreters appointed by the Registry; 2) the presence of two investigators during the interview; 3) the Statement was read back to the witness in the presence of a duly qualified interpreter appointed by the Registry; 4) the witness stated in the Statement that he was providing his Statement voluntarily; 5) the witness signed the Statement and indicated that it was true and correct to the best of his knowledge and that it had been read over to him in his own language; 6) the interpreter and the investigators also signed the Statement;[16] 7) the Statement is consistent and the witness was able to make corrections, recorded in the *Addendum*,[17] before giving testimony in the *Milošević* Case.

10. The Prosecution adds that the Statement and the Testimony of VS-012 provide important evidence with regard to paragraphs 5-10(a), 15, 16, 17(a), (h), (j), 18, 20 and 31 as well as counts 1, 4 and 12 to 14 of the Third Amended Indictment.[18] According to the Prosecution, the Statements and Testimony have probative value as

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[13] Motion, paras 1, 3. The Chamber notes that the death certificate of VS-012 is attached in the confidential Annex A to the Motion.
[14] Motion, para. 3.
[15] Motion, paras 12, 17, Annexes B and C.
[16] Motion, para. 13.
[17] Motion, para. 14. The Statement and the *Addendum* were admitted into evidence as P607 in the *Milošević* Case pursuant to Rule 89 (F) of the Rules, *see* T (F) p. 29799; *also see Corrigendum*, p. 43101.
[18] Motion, para. 15; *see* the Third Amended Indictment, 2 January 2008.

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they contain information concerning notably the structure and organisation of Serb forces participating in the conflict in Croatia in 1991 and 1992, in particular in the eastern Slavonia region and the bombing and taking of Erdut.[19] The Prosecution adds that the Statement and the Testimony describe the arrival of SRS volunteers and their integration into JNA units in 1991, in addition to their recruitment into the JNA through the SRS local branches, and their training and arming by the JNA.[20] Furthermore, the Testimony describes the lack of discipline amongst the SRS volunteers and acts of looting and violence committed against Croatian prisoners, notably following the capture of Vukovar and the evacuation of the hospital.[21] Finally, the Testimony describes the presence of Arkan's men in Vukovar and the cooperation between them, the TO and the JNA.[22]

11. The Prosecution puts forward that the Statement and the Testimony of VS-012 do not directly concern the responsibility of the Accused, and the interests of justice support the admission of this testimony, including portions which support the Prosecution's case, in that the Statement and the Testimony are corroborated by other testimony and evidence.[23] The Prosecution submits that Witness VS-012 was subject to cross-examination by an accused who shared common defence interests with the Accused, notably the alleged participation in the joint criminal enterprise.[24] In addition, the Prosecution seeks the admission of certain portions of the cross-examination for the sake of fairness towards the Accused.[25] Finally, the Prosecution submits that the credibility of the witness can be assessed by examining the transcripts of the statements given by the witness prior to his testimony.[26] The Exhibits for which admission is sought by the Prosecution are an indispensable and inseparable part of the Statement and the Testimony.[27]

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[19] Motion, para. 16.
[20] Motion, para. 16.
[21] Motion, para. 16.
[22] Motion, para. 16.
[23] Motion, para. 17, Annex B of the Motion.
[24] Motion, paras 12, 18.
[25] Motion, para. 19.
[26] Motion, para. 18.
[27] Motion, para. 20.

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12. In the Motion, the Prosecution requests furthermore that the Chamber rescind the protective measures granted to Witness VS-012 in the *Milošević* Case, which were extended to this case and are still presently in effect.[28]

13. During the hearing of 12 March 2009, the Accused opposed the admission of the testimony of VS-012 and, more in general, the admission of statements pursuant to Rule 92 *quater* of the Rules, on the ground that the retroactive application of the Rule would be prejudicial to him.[29] In his oral statements at the hearing, the Accused also expressed his objection to the admission of testimony of witnesses in the *Milošević* Case.[30]

IV. APPLICABLE LAW

14. The Chamber recalls that Rule 92 *quater* (A) of the Rules, which governs the admission of evidence from unavailable persons, provides that:

> 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
>
> ii) finds from the circumstances in which the statement was made and recorded that it is reliable.

15. Tribunal jurisprudence sets forth that the following factors must be taken into consideration in order to assess the reliability of evidence presented under Rule 92 *quater* (A) (i) of the Rules, amongst which: (a) the circumstances in which the statement was made and registered, 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 made with the assistance of an interpreter duly qualified and approved by the Registry of the Tribunal; (b) whether the statement

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[28] Motion, para. 5, 21(i); "Decision on Prosecution's Third and Fourth Motion for Protective Measures for Witnesses during the Pre-Trial with Confidential and *Ex Parte* Annexes", 27 May 2005, p. 2.
[29] Hearing of 12 March 2009, T (F) pp. 14435-37.
[30] Hearing of 26 March 2009, T (F) pp. 14451-14454.

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has been subject to cross-examination; (c) whether the statement, in particular an unsworn statement never subject to cross-examination, is corroborated by other evidence; and (d) other factors such as the absence of manifest or obvious inconsistencies in the statements.[31]

16. 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."

17. The Chamber must also ensure that the general requirements governing the admission of evidence set out in Rule 89 of the Rules have been met, 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.[32]

V. DISCUSSION

18. The Chamber notes that in light of his death,[33] Witness VS-012 is unavailable and that, in this respect, the first requirement of Rule 92 *quater* of the Rules has been met.

19. With regard to the reliability and relevance of the portions of the Statement, the *Addendum* and the Testimony, the Chamber considers firstly that they are relevant insofar as they relate notably to counts 1, 4, 8 and 9, 10 and 11 and paragraphs 5-10(a), 15-17(a), (h), (j), 18, 20 and 31 of the Third Amended Indictment. The Chamber notes that the Statement, the *Addendum* and the Testimony describe notably the deployment of JNA forces and the capture of Erdut in eastern Slavonia, the Serbian propaganda relating to that event[34] and the presence of Arkan.[35] In this context, these documents describe the disparity between written and spoken orders within the JNA and, in particular, the lack of awareness on the part of the soldiers of

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[31] *The Prosecutor v. Vujadin Popović, Ljubiša Beara, Drago Nikolić, Ljubomir Borovčanin, Radivoje Miletić, Milan Gvero and Vinko Pandurević*, Case No. IT-05-88-AR73.4 "Decision on Beara's and Nikolić's Interlocutory Appeals against Trial Chamber's Decision of 21 April 2008 Admitting 92 *quater* Evidence", confidential, 18 August 2008, para. 30.
[32] *The Prosecutor v. Rasim Delić*, Case No. IT-04-83-PT, "Decision on Prosecution Motion for Admission of Documentary Evidence Pursuant to Rule 92 *quater*", 9 July 2007, p. 4.
[33] Annex A of the Motion containing the death certificate of Aleksander Filković.
[34] Statement and *Addendum*, paras 1-6, 8-9, 11-14, 17-18; Testimony T (F) pp. 29802-29803.

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the Geneva Conventions.[36] In addition, the Statement and its *Addendum* describe the logistic contribution provided by the JNA to the SRS volunteers,[37] the integration of the volunteers into TO[38] and JNA[39] units, the attack by Serb forces and SRS units[40] on Lužac town and the Borovo industrial complex in Borovo Naselje near Vukovar and the allegations of crimes committed by the SRS volunteers and their lack of discipline.[41]

20. With regard to the reliability of the Testimony, the Chamber notes that VS-012 gave his testimony under oath[42] and that he was subject to a direct examination by the Prosecution,[43] a cross-examination by the Accused[44] followed by that of an *Amicus curiae*.[45] Consequently, the Chamber considers that the Testimony of Witness VS-012 presents sufficient indicia of reliability.

21. With regard to the reliability of the Statement of Witness VS-012 and its *Addendum*, the Chamber notes that the English version of the Statement provided by the Prosecution in the Annex to the Motion is not signed. However, during the hearing of 27 November 2003 of the *Milosević* Case, the Prosecution claimed that Witness VS-012 had signed his Statement, which was confirmed by the latter who, moreover, declared under oath that it was truthful.[46] The Statement and its *Addendum* were subsequently admitted into evidence as P607[47] and were assessed by means of a cross-examination of Witness VS-012 by Mr Milosević[48] followed by that of an *Amicus curiae*.[49] Furthermore, the Statement was made with the assistance of an interpreter

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[35] Statement and *Addendum*, paras 29-31; Testimony T (F) pp. 29805-29807, 29817-29819, 29880-29881.
[36] Statement and *Addendum*, paras 13-16, 28; Testimony T (F) pp. 29800-29801, 29814-29816, 29879-29880, 29882.
[37] Statement and *Addendum*, paras 10, 38, 39, 41.
[38] Statement and *Addendum*, paras 24, 58, 59.
[39] Statement and *Addendum*, paras 38-41, 57-59.
[40] Statement and *Addendum*, paras 55-59, 66-73; Testimony, T (F) p. 29804.
[41] Statement and *Addendum*, paras 41, 55-59, 66-73.
[42] Testimony, T (F) p. 29797.
[43] Testimony, T (F) pp. 29797-29809.
[44] Testimony, T (F) pp. 29809-29870; P607, Tab. 1.
[45] Testimony, T (F) pp. 29871-29878; P607, Tab. 1.
[46] Testimony, T (F) pp. 29797-29798.
[47] Testimony, T (F) pp. 29797-29798.
[48] *Milošević* Case, T (F) pp. 29809-29870; P607, Tab. 1.
[49] *Milošević* Case, T (F) pp. 29871-29878; P607, Tab. 1.

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duly qualified and approved by the Registry of the Tribunal.[50] Consequently, the Chamber considers that the Statement of Witness VS-012 and its *Addendum* present sufficient indicia of reliability.

22. The Chamber observes moreover that some portions of the Statement, the *Addendum* and the Testimony and other *viva voce* testimony subject to cross-examination in this case overlap,[51] notably the testimony of witness VS-015 on the subordination of the SRS volunteers to the JNA.[52]

23. With regard to the Exhibits, the Chamber notes that certain of these Exhibits constitute an indispensable part to the understanding of the Statement, the *Addendum* and the Testimony. Exhibits bearing 65 *ter* numbers 324, 386 and 389 are relevant since they deal with the written orders of the JNA,[53] and the Serbian propaganda on the capture of Erdut.[54] Exhibits bearing 65 *ter* numbers 2033, 2036 and 187 serve to assess the credibility of Witness VS-012.[55] 65 *ter* Exhibit No. 321 describes the organisation of Witness VS-012's unit and the participation of Arkan. 65 *ter* Exhibit No. 4029 provides support to the Statement, the *Addendum* and the Testimony in regard to the description of the equipment used by Witness VS-012's unit.[56] On the other hand, 65 *ter* Exhibit No. 655 is not relevant insofar as it does not relate to the portions of the Statement, the *Addendum* and the Testimony for which the Prosecution seeks admission.[57]

24. In conclusion, the Chamber considers that the Statement, its *Addendum*, the Testimony and the Exhibits bearing 65 *ter* numbers 324, 386, 389, 2033, 2036, 187, 321, and 4029 are admissible. It recalls however the fundamental distinction between

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[50] *See* Statement attached to the *Corrigendum*, p. 28.
[51] The Chamber notes that the Prosecution attached to the Motion Annex C which contains a table which examines the relevancy of information given in the Statement, its *Addendum* and the *viva voce* Testimony, the link with the conduct and acts of the Accused and the corroboration of the information with other evidence.
[52] Goran Stoparić (VS-015), T (F) pp. 2423: 25-2425:13.
[53] Exhibit No. 324.
[54] Exhibits Nos 386, 389.
[55] Documents testifying to the time served by Witness VS-012 in his unit and the reasons for the termination of his service.
[56] Photographs of the equipment in question.
[57] Notes taken by Witness VS-012 describing, in particular, disappearances and maltreatment of non-Serbian civilians which Witness VS-012 had tried to forward to his superior Lukić, and which resulted in his transfer: Statement, paras 75-87.

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the admissibility of evidence and the weight which will be accorded to it in the light of the entire record.[58] At this stage of the trial, the Chamber has still not conducted a final assessment of the relevance, reliability and probative value of the evidence. This assessment is only made at the end of the trial, in the light of all the evidence presented by the Prosecution and the Defence. The Chamber is aware moreover that the jurisprudence of the Tribunal provides that a Chamber cannot base a conviction solely or in a decisive manner on evidence not subjected to a cross-examination.[59]

25. *Obiter dictum*, the Chamber considers that the protective measures which had been granted to Witness VS-012 in the *Milosević* Case and extended to this case[60] are no longer appropriate and consequently should be rescinded.

VI. DISPOSITION

26. For the foregoing reasons, pursuant to Rule 92 *quater* of the Rules,

PARTIALLY GRANTS the Motion;

ORDERS that the Registry assign an exhibit number to the following documents:

Paragraphs 1-6, 8-14, 17-18, 23-24, 27-31, 38-44, 49-55, 57-59, 66-67, 72-73, 88 and 93-98 of the Statement;

Paragraphs 2-3, 8-12, 18, 24, 27, 30, 38, 41, 44, 49, 55, 57-58, 67 and 72 of the *Addendum*;

The entire Witness Testimony, namely T (F) pages 29797-29883 in the *Milosević* Case;

Exhibits Nos 187, 321, 324, 386, 389, 2033, 2036 and 4029 on the 65 *ter* list of evidence;

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[58] "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.
[59] *The Prosecutor v. Milan 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 Decision Admitting Transcript of Jadranko Prlić's Questioning into Evidence", 23 November 2007, para. 53.

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ORDERS that the protective measures granted to VS-012 be rescinded.

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

/signed/
Jean-Claude Antonetti
Presiding Judge

Done this second day of November 2009
At The Hague
The Netherlands

[Seal of the Tribunal]

[60] "Decision on Prosecution's Third and Fourth Motion for Protective Measures for Witnesses during the Pre-Trial with Confidential and *Ex Parte* Annexes", 27 May 2005, p. 2.