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-98-32/1-T

Date: 9 July 2008

Original: English

IN TRIAL CHAMBER III

Before: **Judge Patrick Robinson, Presiding**
Judge Christine van den Wyngaert
Judge Pedro David

Registrar: **Mr. Hans Holthuis**

Decision of: **9 July 2008**

PROSECUTOR

v.

MILAN LUKIĆ
AND
SREDOJE LUKIC

PUBLIC

DECISION ON CONFIDENTIAL PROSECUTION MOTION FOR THE ADMISSION OF PRIOR TESTIMONY WITH ASSOCIATED EXHIBITS AND WRITTEN STATEMENTS OF WITNESSES PURSUANT TO RULE 92 *TER*

The Office of the Prosecutor

Mr. Dermot Groome
Mr. Frédéric Ossogo
Ms. Laurie Sartorio
Mr. Stevan Cole
Ms. Francesca Mazzocco

Counsel for the Accused

Mr. Jason Alarid for Milan Lukić
Mr. Đuro Čepić and Mr. Jens Dieckmann for Sredoje Lukić

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 "Confidential Prosecution Motion for the Admission of Prior Testimony with Associated Exhibits and Written Statements of Witnesses Pursuant to Rule 92 *ter*", filed on 15 February 2008 ("Motion").

A. Submissions of the Parties

2. In its Motion, the Prosecution requests that it be permitted to lead the evidence of a total of 26 witnesses,[1] including witnesses VG-014 and VG-079, pursuant to Rule 92 *ter* of the Rules of Procedure and Evidence ("Rules"). It submits that admission of prior testimony of these witnesses will substantially "reduce the time needed" for examination-in-chief of the witnesses and "reduce the hardship to these witnesses who have already provided lengthy testimony".[2] In summarising the content of the prior evidence, the Prosecution submits that many witnesses provide evidence that goes to the acts and conduct of the Accused. Therefore, the Prosecution argues that the evidence is relevant and of probative value.[3] The Prosecution also submits that, as a result of the defence of alibi, making identification of the perpetrators a key issue in the case, it will be necessary to "lead evidence on the witnesses' bases for recognising the Accused, their opportunities to witness the Accused as direct perpetrators in the crimes, and their ability to make an in-court identification."[4] It also emphasised that the witnesses will be available for questions of the Trial Chamber and cross-examination by the Defence.

3. In addition to requesting the admission of the prior testimony or statements of witnesses, the Prosecution requests that the exhibits accompanying the prior testimony be admitted into evidence.

4. The Defence for Sredoje Lukić filed its response to the Motion confidentially on 28 February 2008.[5] It objects to the requested admission of the evidence on the grounds that such admission "would cause a significant prejudicial effect for the Accused" and "would put him in an unfair and discriminated position".[6] In particular, it submits that all the proposed testimony refers to

[1] Confidential Prosecution Motion for the Admission of Prior Testimony with Associated Exhibits and Written Statements of Witnesses Pursuant to Rule 92 *ter*", filed on 15 February 2008 ("Motion"), para. 1. Subsequent amendments to the Prosecution witness list have reduced the total number of witnesses covered by the Motion.
[2] Motion, para. 2.
[3] Motion, para. 5.
[4] Motion, para. 6.
[5] Response of Defence Counsel for Sredoje Lukić to 'Confidential Prosecution Motion for the Admission of Prior Testimony with Associated Exhibits and Written Statements of Witnesses Pursuant to Rule 92 *ter*', filed confidentially on 28 February 2008 ("Sredoje Lukić Response").
[6] Sredoje Lukić Response, para. 5.

"individual acts of the Accused and/or to acts of the paramilitary group of the 'White Eagles' of which the Accused has allegedly been an active member".[7]

5. A further argument of the Defence for Sredoje Lukić is that admission of previous testimony pursuant to Rule 92 *ter* "might lead to a high risk of witnesses feeling bound to [their previous evidence]".[8] It submitted that admission "would impede the Accused from fully challenging the Prosecution's evidence in the sense of [the Trial Chamber's Judgement in the case of the *Prosecutor v. Mitar Vasiljević*]".[9] In sum, it argues that the rights of the Accused enshrined in Articles 20 and 21 of the Statute "would be seriously affected" in the case of full admission of the proposed evidence.[10]

6. On 4 March 2008, the Prosecution filed its motion for leave to reply to the Sredoje Lukić Response and reply ("First Reply").[11] In the First Reply, the Prosecution submits that Rule 92 *ter* of the Rules specifically provides for the admission of written statements and prior testimony from other cases before this Tribunal and specifically provides that the testimony may go to the acts and conduct of the accused.[12] It further argues that there is no rational basis for the assertion of the Defence for Sredoje Lukić that the admission of these witnesses' testimony would put the Accused "in an unfair and discriminated position" and notes that the Defence failed to provide an explanation as to how or why the Accused would be so prejudiced.[13]

7. The Prosecution further submits that the Defence for Sredoje Lukić did not make any showing that the witnesses whose evidence is now sought to be introduced were "confused, fundamentally mistaken or otherwise so unreliabile that there are material reasons why it would be unfair to allow the evidence-in-chief to be given by statement".[14] It challenged the Defence's submission that witnesses might feel bound to their prior statements or testimony, as being purely speculative and having no basis in fact. With respect to that same submission, it argued that this would be a factor going to the weight of the evidence, rather than its admissibility.[15] Finally, the Prosecution argues that the Defence will have the opportunity to engage in rigourous cross-

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[7] Sredoje Lukić Response, para. 5.
[8] Sredoje Lukić Response, para. 10.
[9] Sredoje Lukić Response, para. 10.
[10] Sredoje Lukić Response, para. 10.
[11] Prosecution Motion for Leave to Reply to "Response of Defence Counsel for Sredoje Lukić to 'Confidential Prosecution Motion for the Admission of Prior Testimony with Associated Exhibits and Written Statements of Witnesses Pursuant to Rule 92 *ter*'" and Reply, filed confidentially on 4 March 2008.
[12] First Reply, para. 3.
[13] First Reply, para. 4.
[14] First Reply, para. 5, referring to the "Decision on Prosecution's First Revised Motion Pursuant to Rule 92 *bis* and on Prosecution's Motion Pursuant to Rule 92 *ter*", issued by the Trial Chamber in the case of *the Prosecutor v. Ljube Boškoski et al*, IT-04-82-PT, 30 March 2007("*Boškoski* Decision"), para. 50.
[15] First Reply, para. 6.

examination of the witnesses and explore the possibility that the witness is influenced by his prior testimony; it noted in this respect that counsel can be expected to challenge the evidence, including matters concerning credibility and reliability of the recollection of the witness.[16]

8. The Defence for Milan Lukić sought an extension of time for its response to the Motion during the Status Conference of 12 March 2008 and was ordered to file its response no later than 28 March 2008.[17] The Defence for Milan Lukić filed its response confidentially on that date.[18] In its Response, the Defence argues that, pursuant to Rule 92 *ter* of the Rules, the Trial Chamber has the discretion to admit evidence in written form and must determine whether admission is appropriate.[19] It submits that admission of the prior testimony and accompanying exhibits "would cause significant, if not irreparable, prejudicial effect for the both Accused", which effect would "stem from the fact that all of the proposed testimonies refer to individual acts that have been allegedly committed by the Accused and/or acts of the paramilitary group of the White Eagles of which the Accused has allegedly been an active member"; the Defence specifically denies any such membership.[20] It further submits that many of the witnesses did not provide first hand knowledge but that the testimony "is often operating under hearsay or double hearsay from a second hand or greater removed position."[21]

9. The Defence for Milan Lukić joins the Defence for Sredoje Lukić in arguing that the admission of prior testimony might lead to a high risk of the witnesses feeling bound to their earlier testimony and might "encourage lack of cando[u]r to the Tribunal based on lack of recollection or personal knowledge."[22] It submits that such admission might lengthen the case, because the cross-examination would focus on impeaching the witness solely on inconsistencies or lack of recollection with prior evidence. It also argues that "there is no substitute for the current Tribunal to hear ALL the evidence", submitting that "only then" can the "accuracy of the evidence be felt by the Tribunal", can the credibility of each witness "be assessed with fairness and impartiality" and can "the integrity of due process for the Accused be preserved."[23]

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[16] First Reply, para. 6, referring to the *Boškoski* Decision, para. 50.
[17] Status Conference, 12 March 2008, T. 152-153.
[18] Response of Defense Counsel for Milan Lukić to "Confidential Prosecution Motion for the Admission of Prior Testimony with Associated Exhibits and Written Statements of Witnesses Pursuant to Rule 92ter", filed confidentially on 28 March 2008 ("Milan Lukić Response").
[19] Milan Lukić Response, para. 5.
[20] Milan Lukić Response, paras 7 and 8.
[21] Milan Lukić Response, para. 8.
[22] Milan Lukić Response, para. 12.
[23] Milan Lukić Response, para. 14 (emphasis in original).

10. Finally, the Defence for Milan Lukić argues that the right to a fair trial and equality of arms would be seriously affected in case of full admission of the evidence now proposed for admission.[24] It specifically adverts to the Defence in the case of the *Prosecutor v. Mitar Vasiljević* adopting "the classic 'empty chair' defense" and attempting to shift blame away from Mitar Vasiljević, toward the Accused in the current case.[25] In this respect, it argues that "the Prosecution tactic to attempt to try the case of Milan Lukić and Sredoje Lukić by and through innuendo present during the Vasiljević trial actually increases the difficulty of our defense."[26]

11. On 4 April 2008, the Prosecution filed a motion for leave to reply to the Milan Lukić Response and a reply ("Second Reply").[27] In that reply, it reiterates the same submissions it made in the First Reply. However, it specifically opposes the argument of the Defence for Milan Lukić with respect to the length of time necessary for cross-examination, submitting that it can be expected that less court time will be required "where the Defence efficiently apportion their time in terms of preparation, and are subsequently properly prepared for cross-examination, and where such cross-examination is relevant and to the point".[28]

12. The Prosecution has informed the Parties that it intends to call witnesses VG-014 and VG-079 as two of the first witnesses. The Prosecution has also informally notified the Trial Chamber that it now plans to call witness VG-014 as a *viva voce* witness. The Trial Chamber has not yet received a formal application to withdraw the Motion with respect to this witness. However, in the interests of the expeditious conduct of the proceedings, it hereby finds that the Motion is withdrawn with respect to witness VG-014. In this decision, the Trial Chamber will only decide on the Motion insofar as it pertains to witness VG-079.

B. Applicable Law

13. Rule 92 *ter* of the Rules was adopted on 13 September 2006 in order to "increase the ability of the Trial Chambers to consider written statements and transcripts of witnesses in lieu of oral testimony where that evidence goes to the acts and conducts of an accused" and enhance the efficiency of trial proceedings.[29] It reads as follows:

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[24] Milan Lukić Response, para. 15.
[25] Milan Lukić Response, para. 16.
[26] Milan Lukić Response, para. 17.
[27] Prosecution Motion for Leave to Reply to "Response of Defense Counsel for Milan Lukić to 'Confidential Prosecution Motion for the Admission of Prior Testimony with Associated Exhibits and Written Statements of Witnesses Pursuant to Rule 92ter'", filed confidentially on 4 April 2008 ("Second Reply").
[28] Second Reply, para. 7.
[29] Statement of ICTY President Judge Pocar to the U.N. General Assembly on 9 October 2006; *Boškoski Decision*, para. 44.

> (A) A Trial Chamber may admit, in whole or in part, the evidence of a person in the form of a written statement or transcript of evidence given by a witness in proceedings before the Tribunal, under the following condition:
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> (i) the witness is present in court;
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> (ii) the witness is available for cross-examination and any questioning by the Judges; and
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> (iii) the witness attests that the written statement or transcript accurately reflects that witness' declaration and what the witness would say if examined.
>
> (B) Evidence admitted under paragraph (A) may include evidence that goes to proof of the acts and conduct of the accused as charged in the indictment.

14. The criteria set forth in the Rule require no further clarification. As to the nature of the written evidence that may be admitted under Rule 92 *ter*, the case law and practice of the Tribunal indicates that there is "no limit to the scope of Rule 92 *ter* to a specific means of documenting evidence and, in general, the requirement of a written statement should be considered as fulfilled when the witness's words are documented and preserved".[30] The admission of evidence under Rule 92 *ter* is restricted only by the discretion of the Trial Chamber.[31]

15. Whilst Rule 92 *ter* of the Rules does not govern the admission of exhibits, the case law of the Tribunal has developed to allow for it where they accompany written statements or transcripts and form an inseparable part of the evidence.[32] That is not to say that each document referred to in the written statement of a witness automatically forms an "inseparable and indispensable part" of the testimony of this witness. A document falls into this category if the witness actually discussed the document and if it is one without which the written statement would become incomprehensible or of lesser probative value.[33]

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[30] *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Decision on Motion To Convert *Viva Voce* Witnesses to Rule 92*ter* Witnesses, 31 May 2007, ("*Popović* Decision"), p. 2.
[31] *Popović Decision*, p. 3; *Boškoski Decision*, para. 39.
[32] *Prosecutor v. Dragomir Milošević*, IT-98-29/1-T, Decision on Admission of Written Statements, Transcripts and Associated Exhibits Pursuant to Rule 92*ter*, 22 February 2007, ("*D. Milošević Decision*"), p. 3; *Prosecutor v. Popović et al.*, IT-05-88-T, Decision on Prosecution's Motion for Admission of Written Evidence in Lieu of *Viva Voce* Testimony Pursuant to Rule 92*bis*, 12 September 2007, para. 23; *Prosecutor v. Ljubičić*, IT-00-41-PT, Decision on Prosecution's Motion for Admission of Transcripts Pursuant to Rule 92*bis* (D), 23 January 2004, p. 5; *Prosecutor v. Naletilić and Martinović*, IT-98-34-PT, Decision Regarding Prosecution's Notice of Intent to Offer Transcripts under Rule 92*bis* (D), 9 July 2001, para. 8.
[33] *Prosecutor v. Jovica Stanišić and Franko Simatović*, IT-03-69-PT, Decision on Prosecution's Motion for the Admission of Written Evidence of Slobodan Lazarević Pursuant to Rule 92 *ter* with Confidential Annex, 16 May 2008, para. 19; *Prosecutor v. D. Milosevic*, IT-98-29/1-T, Decision on Admission of Written Statements, Transcripts and Associated Exhibits Pursuant to Rule 92*ter*, 22 February 2007; *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Decision on Prosecution's Motion for Admission of Written Evidence in Lieu of *Viva Voce* Testimony Pursuant to Rule 92*bis*, 12 September 2007, para. 23; *Prosecutor v. Ljubičić*, Case No. IT-00-41-PT, Decision on Prosecution's Motion Admission of Transcripts Pursuant to Rule 92*bis* (D), 23 January 2004, p. 5; *Prosecutor v. Naletilić and Martinović*, Case No. IT-98-34-PT, Decision Regarding Prosecution's Notice of Intent to Offer Transcripts under Rule 92*bis* (D), 9 July 2001, para. 8.

20. The admission of all evidence, whether written or oral, has to be tested for its relevance and probative value pursuant to Rule 89 (C) of the Rules. However, relevant and probative evidence may still be excluded if its admission is substantially outweighed by the need to ensure a fair trial in the interests of justice under Rule 89 (D).

C. Discussion

16. The Defence for both Accused objected to the admission of the Rule 92 *ter* evidence on a number of grounds, including that the evidence of some witnesses goes to the acts and conduct of the Accused or to the acts and conduct of the White Eagles. During his testimony in the *Vasiljević* case, witness VG-079 did not provide evidence with respect to Sredoje Lukić, but he did discuss Milan Lukić. However, while the evidence contained in the written evidence does go in some part to the acts and conduct of the Accused or the White Eagles, this does not render it inadmissible under Rule 92 *ter* of the Rules. Counsel for each of the Accused will be afforded the opportunity to cross-examine the witness on his prior testimony or written statements – this is the characteristic built into Rule 92 *ter* which makes it possible for written evidence relating to the acts and conduct of an accused to be admitted into evidence and which thereby distinguishes it from its far more restrictive Rule 92 *bis* counterpart under which there is no built-in safeguard requiring witnesses to be present for cross-examination.

17. The Defence for both Accused also argued that the evidence admitted pursuant to Rule 92 *ter* would render the witness' evidence to be provided in court unreliable, as there would be a "high risk" that the witnesses would feel bound to their earlier statement. The Trial Chamber disagrees with the Defence that this is a factor going against admission pursuant to Rule 92 *ter* of the Rules. The Defence will have the opportunity to cross-examine the witnesses and confront them with any possible inconsistencies in their evidence. The Trial Chamber will then assess the weight to be attached to that evidence. Furthermore, the argument is based on speculation and, in and of itself, is insufficient to warrant the conclusion that the evidence should be excluded because its probative value is outweighed by the need to ensure a fair trial. Equally, the fact that a certain amount of the witness evidence consists of hearsay evidence is not a factor barring admission of such evidence. That fact can, however, affect the weight to be accorded to such evidence.

18. As for the argument of the Defence for Milan Lukić that only if the Trial Chamber hears "[all] the evidence" would it be able to assess the credibility of the witness, the accuracy of the evidence and to protect the integrity of the proceedings, the Trial Chamber finds this argument to be without merit. The witness will appear for cross-examination, thus enabling the Trial Chamber to assess the witness' credibility during his testimony in court. It is for the Defence to challenge the accuracy of the evidence, thus enabling the Trial Chamber to make its determination when

assessing the evidence in the case as a whole. Finally, the Trial Chamber has an overriding duty to ensure the integrity of the proceedings, whether the evidence is provided in written form or completely through oral testimony in court. Were the evidence to be such that its probative value is outweighed by the need to ensure a fair trial, the Trial Chamber would decide to exclude, rather than admit, the evidence.

19. Finally, the Defence for Milan Lukić argues that the evidence should not be admitted because of the strategy to avert responsibility from Mitar Vasiljević, employed by the Defence for Mitar Vasiljević during the case against that accused. The Trial Chamber notes that such a strategy is not uncommon in criminal law proceedings in general. If the Defence for the Accused is of the opinion that the evidence is aimed at diverting the responsibility from another accused, whether that is Mitar Vasiljević or someone else, it can challenge that evidence in cross-examination. This does not affect the admissibility of the evidence under Rule 92 *ter* of the Rules.

20. The Trial Chamber has reviewed the evidence of witness VG-079 and finds that the testimony is admissible under Rule 92 *ter* of the Rules once the formal requirements of that Rule are met, that is, that he appears in court, is available for cross-examination by the Defence and questioning by the Judges and that he attests that the testimony accurately reflects what he woulds say if examined. As for the three accompanying documents that are submitted for admission into evidence, only one is listed on the Prosecution's Rule 65 *ter* exhibit list, namely the document with 65 *ter* number 134. The Trial Chamber finds that this document forms an inseparable and indispensable part of the testimony, is relevant and of probative value and is admissible together with the transcript of the prior testimony of witness VG-079, again upon fulfilment of the formal requirements of Rule 92 *ter* of the Rules.

D. Disposition

21. The Trial Chamber, pursuant to Rule 92 *ter* and 126 *bis* of the Rules, hereby **GRANTS** the Prosecution's motion for leave to reply to the responses of the Defence for Sredoje Lukić and the Defence for Milan Lukić; **GRANTS** the Motion insofar as it pertains to the prior testimony of witness VG-079 and accompanying document with 65 *ter* number 134; **FINDS** the Motion insofar as it pertains to witness VG-014 to be withdrawn and **REMAINS SEISED** of the Motion insofar as it pertains to the remaining witnesses listed in the Motion.

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

Judge Patrick Robinson
Presiding

Dated this ninth day of July 2008
At The Hague
The Netherlands

[Seal of the Tribunal]