



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: 21 February 2008

Original: ENGLISH
French

BEFORE TRIAL CHAMBER III

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

Registrar: Mr Hans Holthuis

Decision of: 21 February 2008

THE PROSECUTOR

v.

VOJISLAV ŠEŠELJ

PUBLIC DOCUMENT

**REDACTED VERSION OF THE
“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”
FILED CONFIDENTIALLY ON 7 JANUARY 2008**

The Office of the Prosecutor:

Ms Christine Dahl

The Accused:

Mr Vojislav Šešelj

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:

- a confidential and *ex parte* consolidated motion filed by the Office of the Prosecutor ("Prosecution") on 22 October 2007 pursuant to Rules 92 *ter* and 92 *quater* of the Rules of Procedure and Evidence of the Tribunal ("Rules"), requesting the admission of a number of written statements and court transcripts, as well as any exhibits pertaining thereto, relating to 64 witnesses ("Motion");¹ and
- a motion by Vojislav Šešelj ("Accused") asking for all Prosecution motions based on Rules 92 *bis*, 92 *ter* and 92 *quater* of the Rules to be dismissed ("Submission 346").²

II. PROCEDURAL BACKGROUND

A. On the Prosecution's Principal Request

2. Between 11 September 2006 and 11 March 2007, the Prosecution filed numerous motions pursuant to Rules 89 (F), 92 *bis*, 92 *ter* and 92 *quater* of the Rules before various Trial Chambers responsible for this case in order to obtain admission in written form of a number of statements and court transcripts, as well as exhibits pertaining thereto.³

3. On 20 September 2007, the pre-trial Judge issued an order for the clarification of these motions, charging the Prosecution with filing a consolidated motion by 4

¹ Confidential and *ex parte* "Prosecution's Clarification of the Pending Motions for Admission of Statements Pursuant to Rules 89 (F), 92 *bis*, 92 *ter* and 92 *quater*", 22 October 2007 ("Motion").

² "Professor Vojislav Šešelj's Motion for the Trial Chamber to Dismiss All Prosecution Motions for the Application of Rule 92 *bis*, 92 *ter* and 92 *quater* because It Would Constitute Retroactive Application in His Case", presented on 22 November 2007 and filed on 5 December 2007 ("Submission 346").

³ For a summary of all the motions filed on this subject by the Prosecution, see "Order for Clarification of Prosecution's Motions for Admission of Statements Pursuant to Rules 89 (F), 92 *bis*,

October 2007, dealing with all the statements and transcript testimony for which the Prosecution requests admission pursuant to Rules 89 (F), 92 *bis*, 92 *ter* and 92 *quater* of the Rules.⁴

4. Having been given two extensions to the deadline,⁵ the Prosecution filed its confidential and *ex parte* Motion on 23 October 2007, attaching in Annexe A a summary of previous motions ("Annex A").⁶ On 25 October 2007, the Prosecution filed a confidential and *ex parte* Annex B to the Motion ("Annex B") with a table indicating the request made for each of the 64 witnesses dealt with in the Motion.⁷

5. On 29 October 2007, the Prosecution lifted the *ex parte* status of the Motion, of Annex A and of some passages in Annex B relating to 19 witnesses⁸ in order to disclose them to the Accused ("First Notice").⁹

6. At the request of the pre-trial Judge,¹⁰ a confidential clarification of the Motion was filed by the Prosecution on 31 October 2007 ("Clarification"),¹¹ in which the Prosecution recalled that:

- 1) it withdraws all its previous motions filed pursuant to Rules 89 (F) and 92 *bis* of the Rules and replaces them with motions based on Rule 92 *ter* of the Rules;¹²

92 *ter* and 92 *quater* of the Rules of Procedure and Evidence", rendered on 20 September 2007 by the pre-trial Judge ("Order for Clarification").

⁴ Order for Clarification, pp. 2 and 3.

⁵ Electronic mails of 27 September and 10 October 2007.

⁶ Annex A was filed at the same time as the Motion, as confidential and *ex parte*.

⁷ Confidential and *ex parte* "Prosecution's Annex B to the Clarification of the Pending Motions for Admission of Statements" delivered to the Registry outside working hours on Friday, 22 October 2007 and filed on Monday, 25 October 2007 ("Annexe B").

⁸ The 19 witnesses in question are as follows: [redacted] (VS-1119, Annex B16), [redacted] (VS-1120, Annex B17), VS-021 (Annex B21), [redacted] (VS-1126, Annex B25), [redacted] (VS-1127, Annex B27), [redacted] (VS-1128, Annex B28), [redacted] (VS-1129, Annex B29), VS-054 (Annex B32), [redacted] (VS-1133, Annex B33), [redacted] (VS-1134, Annex B34), [redacted] (VS-1135, Annex B35), [redacted] (VS-1136, Annex B36), VS-1141 (Annex B37), [redacted] (VS-1000, Annex B38), [redacted] (VS-1007, Annex B39), [redacted] (VS-1033, Annex B51), [redacted] (VS-1052, Annex B58), [redacted] (VS-1055, Annex B61) and [redacted] (VS-1056, Annex B62).

⁹ Confidential "Notice Regarding Prosecution's Clarification of the Pending Motions for Admission of Statements Pursuant to Rules 89 (F), 92 *bis*, 92 *ter* and 92 *quater*", 29 October 2007 ("First Notice").

¹⁰ Electronic mail of 26 October 2007.

¹¹ Confidential "Prosecution's Further Clarification of the Pending Motions for Admission of Statements Pursuant to Rules 89 (F), 92 *bis*, 92 *ter* and 92 *quater*", 31 October 2007 ("Clarification").

2) it keeps its motions based on Rule 92 *quater* of the Rules for three of its deceased witnesses;¹³ and

3) it will subsequently file an additional motion pursuant to Rule 92 *quater* of the Rules for three other deceased witnesses for which motions based on Rule 92 *ter* (C) of the Rules were filed.¹⁴

7. On 12 November 2007, the Prosecution lifted the *ex parte* status of the new passages in Annex B relating to 28 witnesses¹⁵ in order to disclose them to the Accused ("Second Notice").¹⁶

8. On 20 November 2007, the Chamber ordered the Prosecution to lift the *ex parte* status of some parties in Annex B which had not yet been disclosed to the Accused,¹⁷ concerning 14 witnesses who do not qualify for the delayed disclosure of their identity to the Accused 30 days before their testimony.¹⁸ The Prosecution did this on 22 November 2007 ("Third Notice").¹⁹

¹² Clarification, para. 4 (recalling Motion, para. 4).

¹³ Clarification, para. 11 (recalling Motion, para. 5). This concerns witnesses VS-036, Šefkija Smailović (VS-1020 and not VS-1008), and Milan Babić (VS-043). See Annex A and corrected version of Annex B of the Motion (*see infra*, para. 9).

¹⁴ Clarification, para. 11 (recalling Motion, para. 14). This concerns witnesses VS-1009, VS-1008 (and not 1020) and VS-1061. *See* Motion, para. 14; Clarification, para. 11; Annex B40 of the Motion, corrected version (*see infra*, para. 9).

¹⁵ The 28 witnesses in question are as follows: VS-013 (Annex B04), Milan Babić (VS-043, Annex B09), Ivan Grujić (Annex B10), Dravor Strinović (Annex B11), Ewa Tabeau (Annex B12), VS-018 (Annex B13), VS-020 (Annex B20), VS-022 (Annex B22), VS-045 (Annex B23), VS-051 (Annex B24), VS-053 (Annex B31), [redacted] (VS-1020, Annex B40), VS-036 (Annex B41), VS-1012 (Annex B43), VS-1014 (Annex B44), VS-1062 (Annex B45), VS-1064 (Annex B46), VS-1065 (Annex B47), VS-1087 (Annex B48), VS-1105 (Annex B50), VS-1022 (Annex B52), VS-1025 (Annex B54), VS-1026 (Annex B55), VS-1035 (Annex B56), VS-1051 (Annex B57), VS-1068 (Annex B59), VS-1069 (Annex B60) and VS-1060 (Annex B63).

¹⁶ Confidential "Notice Regarding Prosecution's Clarification of the Pending Motions for Admission of Statements Pursuant to Rules 89 (F), 92 *bis*, 92 *ter* and 92 *quater*", 12 November 2007 ("Second Notice").

¹⁷ Confidential "Order on the Communication of Information Concerning Witnesses the Prosecution Intends to Call Pursuant to Rules 92 *ter* and *quater* of the Rules of Procedure and Evidence", 20 November 2007.

¹⁸ The 14 witnesses in question are as follows: VS-004 (Annex B01), VS-012 (Annex B03), VS-015 (Annex B05), VS-017 (Annex B6), VS-026 (Annex B07), VS-027 (Annex B08), VS-031 (Annex B14), VS-050 (Annex B15), VS-002 (Annex B18), VS-016 (Annex B19), VS-35 (Annex B30), VS-1093 (Annex 49), VS-1024 (Annex B53) and VS-1111 (Annex B64).

¹⁹ Confidential "Notice Regarding Prosecution's Clarification of the Pending Motions for Admission of Statements Pursuant to Rules 89 (F), 92 *bis*, 92 *ter* and 92 *quater*", 22 November 2007 ("Third Notice").

9. On 26 November 2007, the Prosecution filed the first confidential *corrigendum* in which it informed the Chamber about an error relating to a pseudonym given to a witness in the Motion.²⁰ On 27 November 2007, the Prosecution filed the second confidential *corrigendum* completing the 65 *ter* numbers omitted for 24 related exhibits listed in Annex B of the Motion.²¹

10. On 30 November 2007, the Prosecution asked the Tribunal Registry to lift the *ex parte* status for certain earlier Prosecution submissions filed pursuant to Rules 89 (F), 92 *bis* and 92 *quater* of the Rules, as well as their annexes.²²

11. On 4 December 2007, the Prosecution informed the Chamber that the Accused had received a BCS paper copy of all the documents for which admission was requested based on Rules 92 *ter* or 92 *quater* of the Rules, for 46 of the 64 witnesses referred to in the Motion.²³

12. The Accused received a BCS version of the First Notice and then of the Second Notice on 14 and 7 December 2007, respectively.²⁴ He received a BCS version of the Clarification on 2 January 2008.²⁵

B. On the Accused's Additional Request

13. On 22 November 2007, the Accused presented Submission 346 in the form of a motion to dismiss all the Prosecution motions based on Rules 92 *bis*, 92 *ter* and 92

²⁰ Confidential "Prosecution's Corrigendum to Notice Regarding Clarification of the Pending Motions for Admission of Statements Pursuant to Rule 89 (F), 92 *bis*, 92 *ter* and 92 *quater*", 26 November 2007.

²¹ Confidential "Prosecution's Corrigendum to Clarification of the Pending Motions for Admission of Statements Pursuant to Rule 89 (F), 92 *bis*, 92 *ter* and 92 *quater*", 27 November 2007.

²² Confidential "Request to the Registry to Lift *Ex Parte* Status of Certain Prosecution Submissions", 30 November 2007.

²³ This information, requested by the Chamber informally, was sent by electronic mail on 4 December 2007. On that date, the Prosecution had still not fulfilled its obligation to disclose the following witnesses, pursuant to the "Decision on Motion Number 289 Regarding Form of Disclosure" rendered on 7 June 2007: VS-011 (Annex B02), Ivan Grujić (Annex B10), Dravor Strinović (Annex B11), Ewa Tabeau (Annex B12), VS-016 (Annex B19), VS-021 (Annex B21), VS-022 (Annex B22), [redacted] (VS-1126, Annex B25), VS-007 (Annex B26), Šefkija Smailović (VS-1020, Annex B40), VS-036 (Annex B41), VS-037 (Annex B42), VS-1012 (Annex B43), VS-1093 (Annex B49), [redacted] (VS-1033, Annex B51), VS-1022 (Annex B52), VS-1035 (Annex B56) and VS-1111 (Annex B64). Only witnesses VS-007, VS-010, VS-011, VS-032, VS-034, VS-037 and VS-1066 qualify for delayed disclosure of their identity to the Accused 30 days before their testimony, following two decisions rendered on 20 August and 16 October 2007 by the pre-trial Judge.

²⁴ See procès verbal of reception on 7 and 14 December 2007. The Motion is part of all the documents sent with the First Notice.

quater of the Rules ("Submission 346").²⁶ On 22 October 2007 in support of this request, the Accused also filed statements by Slobodan Milošević's legal advisers ("Submission 329").²⁷

14. The Prosecution responded on 19 December 2007 ("Response to Submission 346").²⁸

III ARGUMENTS OF THE PARTIES

A. On the Prosecution's Principal Request

15. In its Clarification, the Prosecution requests that the Chamber admit written evidence from 61 witnesses mentioned in Annex B on the basis of Rule 92 *ter* of the Rules.²⁹ The Prosecution also states how it intends to proceed during the examination-in-chief of these witnesses, specifying that it will clarify or discuss certain particularly relevant questions raised by the written documents for which it requests admission.³⁰ Finally, the Prosecution rejects the approach suggested by the pre-trial Judge to limit the application of Rule 92 *ter* of the Rules to statements and transcripts which corroborate *viva voce* testimony.³¹

16. The Prosecution moreover requests the admission of written evidence for three deceased witnesses mentioned in Annex B, on the basis of Rule 92 *quater* of the Rules.³²

²⁵ See procès verbal of reception on 2 January 2008.

²⁶ "Professor Vojislav Šešelj's Motion for the Trial Chamber to Dismiss All Prosecution Motions for the Application of Rule 92 *bis*, 92 *ter* and 92 *quater* Because It Would Constitute Retroactive Application in His Case", presented on 22 November 2007 and filed on 5 December 2007 ("Submission 346").

²⁷ "Certified Statements by Slobodan Milošević's Legal Advisers Tendered by Professor Vojislav Šešelj's in Support of the Challenge to the Application of Rule 92 *ter*", presented on 17 October 2007 and filed on 22 October 2007 ("Submission 329").

²⁸ "Prosecution's Response to the Accused's Motion to Dismiss All Prosecution's Motions for the Application of Rule 92 *bis*, 92 *ter* and 92 *quater* (No. 346)", 19 December 2007 ("Response to Submission 346").

²⁹ Clarification, para. 8.

³⁰ *Idem*, para. 9.

³¹ *Idem*, para. 7; Pre-Trial Conference of 27 September 2007, court transcript (French) ("T(F)"), 1524-1526 ; Pre-Trial Conference of 23 October 2007, T(F) 1593-1594.

³² Motion, para. 5; Clarification, para. 11.

B. On the Accused's Additional Request

17. In Submission 346, the Accused requests the dismissal of all the motions based on Rules 92 *ter* and 92 *quater* of the Rules filed or intended to be filed by the Prosecution.³³

18. The Accused also requests permission to exceed the number of words laid down by the "Practice Direction on the Length of Briefs and Motions" ("Practice Direction").³⁴

19. The Accused objects to the retroactive application of Rules 92 *ter* et 92 *quater* of the Rules which would be prejudicial and would contravene Rule 6 (D) of the Rules, and Article 51 (4) of the Statute of the International Criminal Court codifying customary international law in this matter, the principle of security in judicial matters and the existing principle of presenting evidence orally that exists in adversarial proceedings.³⁵ The Accused recalls, in effect, that he was charged by an Indictment issued in February 2003 and that Rules 92 *ter* and 92 *quater* of the Rules were adopted at a later date.³⁶ Moreover, he would be prejudiced by the fact that he was not able to verify the circumstances in which the Prosecution obtained the statements for which it requests admission.³⁷

20. In his Submission 329, the Accused also alleges that the suspicions expressed by Slobodan Milošević's legal advisers regarding statements given by Prosecution witnesses during cross-examination in the Slobodan Milošević case — which were dictated by the Prosecution through witness earphones³⁸ — are an additional reason to dismiss all the Prosecution motions based on Rule 92 *ter* of the Rules.

21. In its Response to Submission 346, the Prosecution argues that the introduction of Rules 92 *ter* and 92 *quater* into the Rules in September 2006 was simply the codification of practice and jurisprudence, relating to Rules 89 (F) and 92 *bis* (C) of

³³ Submission 346, pp. 2-3, 8.

³⁴ *Idem*, p. 3.

³⁵ *Idem*, pp. 2-3 and 4-8. The Accused holds that Article 51(4) of the Statute of the International Criminal Court states that amendments to Rules of Procedure and Evidence should not be applied retroactively to the detriment of suspects, the accused and the convicted.

³⁶ Submission 346, p. 3.

³⁷ *Idem*, p. 3.

³⁸ Submission 329, p. 2.

the Rules, which already existed and, in any case, the rights of the Accused are not prejudiced through the application of these Rules in this case.³⁹

IV APPLICABLE LAW

22. Rule 92 *ter* of the Rules sets out:

(A) Trial Chamber *may* admit,⁴⁰ in whole or in part, the evidence of a witness in the form of a written statement or transcript of evidence given by a witness in proceedings before the Tribunal, under the following conditions:

(i) the witness is present in court;

(ii) the witness is available for cross-examination and any questioning by the Judges; and

(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.

23. Rule 92 *quater* of the Rules sets out:

(A) 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,⁴¹ 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

³⁹ Response to Submission 346, paras. 2, 4-15.

⁴⁰ Our emphasis.

⁴¹ *Ibid.*

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

- (B) 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.

24. These two provisions were introduced into the Rules on 13 September 2006. Rule 92 *quater* of the Rules replaced Rule 92 *bis* (C) allowing in this way to go to proof of the acts or conduct of the Accused henceforth.⁴²

25. Rules 92 *ter* and 92 *quater* of the Rules provide the Trial Chamber with the *power* to admit, entirely or in part, written statements or transcripts of testimony, subject to the conditions laid out in Rules 92 *ter* (A)⁴³ or 92 *quater* (A)⁴⁴ of the Rules, respectively, being met.

26. When exercising its discretion in order to examine a motion based on Rules 92 *ter* and 92 *quater* of the Rules, the Trial Chamber also takes into account the general criteria relating to the admission of all evidence as stipulated in Rule 89 (C) of the Rules, i.e. the relevance and probative value of the evidence. If the probative value can only be established *a posteriori*, a preliminary examination of the relevance must be made *a priori*, within the scope of Rules 92 *ter* and *quater* of the Rules in the absence of an examination-in-chief for the former, and an examination-in-chief and

⁴² Rule 92 *bis* (C) of the Rules envisaged that: "a written statement not in the form prescribed by paragraph (B) may nevertheless be admissible if made by a person who has subsequently died, or by a person who can no longer with reasonable diligence be traced, or by a person who is by reason of bodily or mental condition unable to testify orally, if the Trial Chamber: (i) is so satisfied on a balance of probabilities; and (ii) finds from the circumstances in which the statement was made and recorded that there are satisfactory indicia of its reliability."

⁴³ The presence of a witness at the hearing for the purpose of cross-examination and possible examination by the judges, attestation and confirmation of the content of a written statement or transcript.

⁴⁴ A person who is actually unavailable and the reliability of the statement. In order to assess the reliability of the statement, the Chamber may take into account the following indicia: it is a sworn statement, the statement corroborates or is corroborated by all the other evidence, the statement was signed by the witness asserting that the content of the statement is true to the best of his knowledge, the statement was taken with the help of a duly qualified interpreter approved by the Tribunal Registry, there are no incoherencies or irregularities in the statement (see, *The Prosecutor v. Dario Kordić and Mario Čerkez*, case no. IT-95-14/2-AR73.5, Decision on Appeal Regarding Statement of a Deceased Witness, 21 July 2000, para. 27 ; *The Prosecutor v. Rasim Delić*, case no. IT-04-83-T, "Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 *quater*", 9 July 2007, p. 4.

cross-examination for the latter. In effect, a decision to admit evidence taken on the basis of Rules 92 *ter* and 92 *quater* of the Rules does not prejudice in any way the final probative value or the weight of the evidence admitted, which are subsequently considered in the light of the entire file by the Trial Chamber in its deliberations leading to the final judgement.

27. Moreover, Rule 89 (F) of the Rules sets out the general principle by which "[a] Chamber may receive the evidence of a witness orally or, where the interests of justice allow, in written form." Thus, the interests of justice will also guide the Chamber when exercising its discretion.⁴⁵

28. Moreover, the Chamber recalls that Rules 92 *ter* and 92 *quater* of the Rules were adopted with the aim of improving the efficiency and expedience of the proceedings conducted before the Tribunal, while respecting the rights of the Accused.⁴⁶

V. DISCUSSION

1. Preliminary Observation

29. Pursuant to Rule 126 *bis* of the Rules, the Accused has until 17 January 2008 to reply to the Motion, since he received the BCS version of the Clarification only on 2 January 2008.⁴⁷ The Chamber considers that, in effect, the fact that the Accused received the Motion in BCS on 14 December 2007 has not caused any delay to the response, since the Motion was not sufficiently clear and the Chamber decided that a clarification was necessary.⁴⁸

⁴⁵ On the consideration of criteria when assessing a motion based on Rule 92 *ter* of the Rules, *see for example: The Prosecutor v. Ljube Bošković and Johan Tarčulovski*, case no. IT-04-82-PT, confidential "Decision on Prosecution's First Revised Motion Pursuant to Rule 92 *bis* and on Prosecution's Motion Pursuant to Rule 92 *ter*", 30 March 2007 ("Bošković Decision"), paras. 50, 55 and 66; *The Prosecutor v. Rasim Delić*, case no. IT-04-83-T, confidential "Decision on Prosecution Motion to Admit Written Witness Statements Under Rule 92 *ter*", 27 September 2007 ("Delić Decision"), paras. 13 and 14.

⁴⁶ On this matter, *see for example*, Bošković Decision, para. 44 ; *The Prosecutor v. Prlić et al.*, case no. IT-04-74-T, "Decision on the Application of Rule 92 *ter* of the Rules", 25 June 2007, p. 2 ; *Delić Decision*, para. 10.

⁴⁷ *See supra*, para. 12.

⁴⁸ *See supra*, paras. 6 and 12.

30. The Chamber notes, however, that some Prosecution requests concern witnesses called to appear before it in January 2008,⁴⁹ and considers that this Decision, therefore, must be rendered without delay, in the interests of the proper administration of justice and in order not to prejudice the rights of the Accused.

31. In this Decision the Chamber is therefore ruling only on the part of the Motion which it considers must be dismissed on the grounds explained below and defers its ruling on the Motion in all other respects in order to respect the Accused's right to reply. The Chamber moreover rules on the Accused's additional request to which the Prosecution has responded.

2. On the Admissibility of Submission 346

32. The Chamber agrees to take into consideration the Accused's Submission 346, amounting to 3,309 words in total, exceeding the limit of 3,000 words set by the Direction, considering it not excessive when compared to the length of Prosecution documents.⁵⁰

3. On the Application of Rules 92 *ter* and 92 *quater* of the Rules

33. Rule 6 (D) of the Rules provides that amendments to the Rules "shall enter into force seven days after the date of issue of an official Tribunal document containing the amendment, but shall not operate to prejudice the rights of the Accused".

34. Therefore, unless it has been proved that the rights of the Accused are prejudiced, Rules 92 *ter* and 92 *quater* of the Rules may be applied retroactively.

35. The Chamber finds that these rules were introduced into the Rules more than a year before the trial of the Accused began.⁵¹ As a result, the Accused was informed more than a year in advance of the possibility of the Prosecution making use of these new procedures. The Chamber, however, notes that it was only on 22 October 2007,

⁴⁹ This concerns witnesses VS-004, VS-011, VS-015 (scheduled for 8 January 2008 in accordance with a Prosecution Notice filed on 4 January 2008) and VS-017, according to the schedule sent to the Chamber by the Prosecution in early December 2007.

⁵⁰ The length of the Motion is 997 words, the Clarification 1,703 words and Annex B more than 400 pages in total.

⁵¹ The Chamber recalls that the trial of the Accused began on 11 December 2007 with the hearing of the first Prosecution witness, Anthony Oberschall.

therefore only two weeks before the Pre-Trial Conference,⁵² that the Prosecution changed its 92 *bis* and 89 (F) motions to 92 *ter* motions through the Motion.

36. Moreover, the Chamber notes that the Accused as well could request, during the presentation of the Defence case, the application of Rules 92 *ter* and 92 *quater* of the Rules.

37. In the light of these considerations, the Chamber holds that the application of Rules 92 *ter* and 92 *quater* of the Rules in this case does not prejudice the rights of the Accused, since he may invoke the same rights as the Prosecution and has not shown the existence of any prejudice.

4. On the Prosecution's Requests

38. The Prosecution has made three types of requests on the basis of Rule 92 *ter* or Rule 92 *quater* of the Rules: (a) for some witnesses, it has requested the admission of written statements;⁵³ (b) for others, it has requested the admission of transcript testimony;⁵⁴ (c) for all the witnesses it has requested the admission of exhibits related to the written statements or to the transcripts of testimony.

(a) On the Motion to Admit Written Statements

39. Having examined the statements, it appears to the Chamber that some are by those close to the Accused ("Insiders") or are linked to a key question raised by the Indictment⁵⁵ on which the Chamber will have to rule.

40. The Chamber holds, therefore, that it is in the interests of justice that the witnesses, the authors of the statements, testify *viva voce*, due to their fundamental importance and in view of a better understanding of the case presented before the Chamber.

⁵² The Pre-Trial Conference was on 6 November 2007, *see* Scheduling Order of 18 September 2007.

⁵³ This concerns 28 witnesses mentioned in Annexes B2, 5, 6, 13, 14, 15, 16, 30, 31, 32, 33, 34, 35, 36, 37, 40, 44, 50, 53, 54, 55, 57, 58, 59, 60, 61, 62 and 63 of the Motion.

⁵⁴ This concerns 36 witnesses mentioned in Annexes B1, 3, 4, 7, 8, 9, 10, 11, 12, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 38, 39, 41, 42, 43, 45, 46, 47, 48, 49, 51, 52, 56 and 64 of the Motion.

⁵⁵ This currently concerns the Reduced Modified Amended Indictment of 30 March 2007.

41. Concerning deceased witnesses whose statements directly allege the responsibility of the Accused, the Chamber considers that it is in the interests of justice not to grant the Prosecution's request, all the more since the Accused would be deprived of the right to cross-examine these witnesses.

42. It is therefore in the interest of justice for the Chamber to dismiss the Prosecution's request to admit the written statements:

- based on Rule 92 *ter* of the Rules for witnesses VS-011, VS-015, VS-017, VS-050, VS-035, VS-053, VS-054, VS-1060, [redacted] (VS-1133), [redacted] (VS-1135), [redacted] (VS-1136), VS-1141, [redacted] (VS-1055) and [redacted] (VS-1056); and those

- based on Rule 92 *quater* of the Rules, for witness Šefkija Smailović (VS-1020).

43. The Chamber will not rule on the request to admit written statements by the following witnesses until the expiry of the Accused's time-limit to respond and, if need be, taking into account the response he submits: VS-018, VS-031, VS-1119, [redacted] (VS-1134), VS-1014, VS-1105, VS-1024, VS-1025, VS-1026, VS-1051, [redacted] (VS-1052), VS-1068 and VS-1069.

(b) On the Motion to Admit Transcript Testimony in Other Cases

(i) For Potential Expert Witnesses

44. The Chamber finds that the Prosecution requests the admission of transcript testimony in other cases by witnesses Ivan Grujić, Dravor Strinović and Ewa Tabeau, who testified in other cases as experts. The Chamber notes, moreover, that the Prosecution also requests the admission of their expert reports under Rule 94 *bis* of the Rules.

45. The Chamber notes that the Tribunal's jurisprudence allows a party to file a request to admit the transcripts of an expert witness testimony on the basis of Rule 92 *bis* of the Rules concurrently with a request to admit the report by this expert on the

basis of Rule 94 *bis* of the Rules.⁵⁶ This reasoning may be applied *mutatis mutandis* to Rule 92 *ter* of the Rules.

46. The Chamber considers nevertheless that it would be premature to admit these witnesses' transcripts in other cases while the Chamber has still not ruled on their status as experts in the present proceedings

47. The Chamber therefore defers ruling on the request to admit written transcript testimony in other cases for witnesses Ivan Grujić, Dravor Strinović and Ewa Tabeau, and will rule on this request after ruling on their status as experts.

(ii) For Other Witnesses

a. Interests of Justice

48. The Chamber notes that some of the transcript testimony in other cases for which the Prosecution requests admission is that of Insiders or is linked to a key question raised by the Indictment on which the Chamber will have to rule. The Chamber therefore finds that in the interests of justice the witnesses whose testimony is given in the transcripts should appear *viva voce* due to their vital importance and in order to provide a better understanding of the case presented before the Chamber.

49. With regard to deceased witnesses whose transcript testimony directly alleges the responsibility of the Accused, the Chamber holds that, in the interest of justice, it cannot grant the Prosecution's request, all the more since the Accused would be deprived of the right to cross-examine the witness.

50. The Chamber therefore dismisses, in the interests of justice, the Prosecution's request to admit transcript testimony in other cases:

- based on Rule 92 *ter* of the Rules, for Witness VS-004; and
- based on Rule 92 *quater* of the Rules, for Witness Milan Babić (VS-043).

⁵⁶ On this matter *see*, *The Prosecutor v. Vujadin Popović et al.*, case no. IT-05-88-T, "Decision on Prosecution's Confidential Motion for Admission of Written Evidence in Lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis*", 12 September 2006, paras. 43 and 44, referring to *The Prosecutor v. Stanislav Galić*, case no. IT-98-29-AR73.2, "Decision on Interlocutory Appeal

b. Relevance and Excessive Number of Pages

51. The Chamber also notes that in its Motion the Prosecution requests the admission of close to 8,000 pages of transcript testimony without specifying how all the transcript testimony in other cases is relevant to the case against the Accused.⁵⁷

52. Since there is no showing of relevance and due to their excessive number of pages, the Chamber consequently dismisses the Prosecution's request to admit the following transcript testimony in other cases:

- based on Rule 92 *ter* of the Rules for witnesses VS-012, VS-013, VS-026, VS-027, VS-1120, VS-002, VS-016, VS-020, VS-021, VS-022, VS-045, VS-051, [redacted] (VS-1126), VS-007, [redacted] (VS-1127), [redacted] (VS-1128), [redacted] (VS-1129), [redacted] (VS-1000), [redacted] (VS-1007), VS-037, VS-1012, VS-1062, VS-1064, VS-1065, VS-1087, VS-1093, [redacted] (VS-1033), VS-1022, VS-1035 and VS-1111; and
- based on Rule 92 *quater* of the Rules for Witness VS-036.

53. However, for these witnesses the Chamber could take into consideration a future request based on Rule 92 *ter* of the Rules to admit new statements tailored specifically to the requirements of this case against the Accused and a request based on 92 *quater* of the Rules for the admission of previous statements.

54. The Chamber recalls that if the Prosecution were to file such a motion, the Chamber would then analyse it in the light of the above criteria, notably its relevance, in particular, taking into consideration, if need be, the response by the Accused within a 14-day time-limit running from his reception of the BCS translation of the motion and all the statements, both new and old, for which admission is requested.

Concerning Rule 92 *bis* (C), English version filed on 7 June 2002 and French version on 28 June 2002, para. 40.

⁵⁷ The Chamber notes that, although there is a general reference in Annex B for each witness to paragraphs in the Indictment and to counts, the Prosecution does not mention clearly enough (except for Milan Babić; Annex B09; request based on Rule 92 *quater* of the Rules) the passages which are allegedly relevant and requests the admission of all the witnesses' testimony in another case, without explaining how the overall testimony in another case would be relevant in the case against the Accused.

(c) On the Request to Admit Related Exhibits

55. The Chamber notes that the Prosecution has not shown the relevance of exhibits related to the statements and transcripts for which it requests admission nor the link to the witness to which they relate.

56. As a result, the Chamber dismisses on these grounds the request for the admission of all related exhibits.

57. With regard to the request for the admission of statements or transcript testimony of witnesses which is dismissed in the interests of justice, the dismissal is final.⁵⁸

58. With regard to witnesses for whom a ruling has been deferred⁵⁹ or for whom the Prosecution may present a new request to admit statements made for the purpose of the present case or to admit old statements,⁶⁰ the Chamber authorises the Prosecution to submit a new request to admit related exhibits, clearly showing the relevance of the exhibits and the link with the witness.

DISPOSITION

59. For the foregoing reasons, and pursuant to Articles 6 (D) and 20 of the Statute and Rules 89, 92 *ter* and 92 *quater* of the Rules,

DISMISSES the Prosecution's request to admit written statements in connection with the following witnesses: VS-011, VS-015, VS-017, VS-050, VS-035, VS-053, VS-054, VS-1060, [redacted] (VS-1133), [redacted] (VS-1135), [redacted] (VS-1136), VS-1141, [redacted] (VS-1055), [redacted] (VS-1056) and Šefkija Smailović (VS-1020).

⁵⁸ The dismissal is therefore final for the following witnesses: VS-011, VS-015, VS-017, VS-050, VS-035, VS-053, VS-054, VS-1060, [redacted] (VS-1133), [redacted] (VS-1135), [redacted] (VS-1136), VS-1141, [redacted] (VS-1055), [redacted] (VS-1056) and VS-004, Milan Babić (VS-043).

⁵⁹ The witnesses in question are as follows: VS-018, VS-031, VS-1119, [redacted] (VS-1134), VS-1014, VS-1105, VS-1024, VS-1025, VS-1026, VS-1051, [redacted] (VS-1052), VS-1068, VS-1069, Ivan Grujić, Dravor Strinović and Ewa Tabeau.

⁶⁰ The witnesses in question are as follows: VS-012, VS-013, VS-026, VS-027, VS-1120, VS-002, VS-016, VS-020, VS-021, VS-022, VS-045, VS-051, [redacted] (VS-1126), VS-007, [redacted] (VS-1127), [redacted] (VS-1128), [redacted] (VS-1129), [redacted] (VS-1000), [redacted] (VS-1007), VS-037, VS-1012, VS-1062, VS-1064, VS-1065, VS-1087, VS-1093, [redacted] (VS-1033), VS-1022, VS-1035, VS-1111 and VS-036.

DISMISSES the Prosecution's Request to admit transcript testimony in other cases for the following witnesses: VS-004, Milan Babić (VS-043), VS-012, VS-013, VS-026, VS-027, VS-1120, VS-002, VS-016, VS-020, VS-021, VS-022, VS-045, VS-051, [redacted] (VS-1126), VS-007, [redacted] (VS-1127), [redacted] (VS-1128), [redacted] (VS-1129), [redacted] (VS-1000), [redacted] (VS-1007), VS-037, VS-1012, VS-1062, VS-1064, VS-1065, VS-1087, VS-1093, [redacted] (VS-1033), VS-1022, VS-1035, VS-1111 and VS-036.

DISMISSES the request for admission regarding all exhibits related to these statements and transcripts;

DEFERS ITS RULING on the Motion in all other respects until the expiry of the time-limit for the Accused to respond to the Clarification.

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

_____/signed/

Jean-Claude Antonetti
Presiding Judge

Done this twenty-first day of February 2008
At The Hague
The Netherlands

[Seal of the Tribunal]