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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: IT-98-29-T

Date: 26 July 2002

Original: English

IN TRIAL CHAMBER I

Before: Judge Alphons Orie, Presiding
Judge Amin El Mahdi
Judge Rafael Nieto-Navia

Registrar: Mr. Hans Holthuis

Decision of: 26 July 2002

THE PROSECUTOR

v.

STANISLAV GALIĆ

DECISION ON THE PROSECUTION'S REQUEST FOR ADMISSION OF RULE 92 *bis* STATEMENTS

The Office of the Prosecutor:

Mr. Mark Ierace

Defence Counsel:

Ms. Mara Pilipović
Mr. Stéphane Piletta-Zanin

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I. INTRODUCTION

1. Pending before Trial Chamber I, Section B ("the 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 ("the International Tribunal") is an "Application for Admission of Statements Pursuant to Rule 92 *bis* (A)" ("the Application") filed by the Prosecution on 6 June 2002, whereby it seeks admission of 21 Rule 92 *bis* statements. On 20 June 2002, the Prosecution orally informed the Chamber that it had withdrawn its application in respect of one witness statement.[1]

2. The question of admission of Rule 92 *bis* statements was addressed on several occasions in the course of the trial and it is useful to summarise the various steps and arguments presented by the parties.

3. On 29 October 2001, pursuant to its obligations under Rule 65 *ter* (E)(ii)(e), the Prosecution submitted its list of witnesses wherein 22 witnesses were announced to provide evidence through Rule 92 *bis* statements. On 4 November 2001, the Defence opposed the admission of all Rule 92 *bis* statements announced ("the Defence's First Objections"), on the grounds that they either pertained to the acts and conduct of the accused, or they were adduced to authenticate documents, which were, for most of them, illegible or incomplete.

4. In a letter dated 25 November 2001, the Prosecution informed the Defence of its intention to seek admission of 32 witness statements under Rule 92 *bis*, instead of the 22 previously announced. On 9 December 2001, the Defence objected to the admission of all these statements, on the same grounds as those set out in its filing of 4 November 2001 ("the Defence's Second Objections").

5. The Defence indicated that it received all 32 statements the Prosecution intended to submit under Rule 92 *bis* on 29 January 2002. On 5 February 2002, the Defence objected to the admission of 29 of these statements, on the grounds that 22 of them pertained to acts and conduct of the accused, while seven of them dealt with issues of authenticity of documents

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which were either illegible or incomplete ("the Defence's Third Objections"). The Defence did not object to the admission, without cross-examination, of three statements.[2] On 12 February, the Prosecution filed a "Reply to the Response of Defence Counsel to the Prosecution's Proposal to Admit Evidence Pursuant to Rule 92 *bis* (A)" ("the Reply").

6. After hearing the arguments of the parties on 12 March 2002, the Chamber requested the Prosecution to submit a thoroughly structured application and to set out its arguments in support of the admission of these statements.[3] The Chamber further indicated that the statements tendered were to be filed with the Registry together with a formal application for admission.

7. On 6 June 2002, the Prosecution filed a formal application for admission of 21 statements under Rule 92 *bis*. No arguments in support of admission were presented in the Application. However, the Prosecution filed "Submissions Pursuant to Rule 92 *bis*, following the Appeals Chamber Decision of 7 June 2002" (the "Prosecution's Submissions") on 24 June 2002, wherein it exposed why, in its view, the statements should be admitted. The Defence filed on a confidential basis a response to the Prosecution's Submissions on 3 July 2002, wherein it expressed in general terms its opposition to the admission of all statements, let alone their admission without cross-examination ("the Defence's Fourth Objections").[4]

8. Nine witnesses out of the 21 submitted here were announced to be presented through Rule 92 *bis* statements in the Witnesses List. All witness statements here submitted for admission but one[5] were received by the Defence on 29 January 2002 as being submitted for admission under Rule 92 *bis*.

9. Finally, the Chamber heard the oral submissions of the parties on 4 July 2002.

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[1] statement of witness Karel Lindr. See transcript of 20 June, T. 10276.
[2] Concerning Witnesses Adem Omerkić, Diana Kablar and Ismail Haverić.
[3] 12 March 2002, T. 5222-5223.
[4] "Détermination de la Défense en Relation à l'Article 92 *bis* et suite à la Requête du Procureur en Date du 24 Jun [sic] 2002 (confidentielle)"

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THE TRIAL CHAMBER, HAVING CONSIDERED the written and oral submissions of the parties,

HEREBY ISSUES ITS DECISION.

II. DISCUSSION

A. Applicable Law

10. In order to decide on admission of Rule 92 *bis* Statements, the Chamber will first analyse whether the formal requirements set out in Rule 92 *bis* are met. It will then set out the criteria considered in assessing the statements' probative value under Rule 89 (C) and 89 (D), and, lastly, it will explain what elements will be considered in determining whether the witness should be called for cross-examination or full *viva voce* testimony.

11. Rule *92 bis* (A) provides that

> "a Trial Chamber may admit, in whole or in part, the evidence of a witness in the form of a written statement in lieu of oral testimony which goes to proof of a matter other than the acts and conduct of the accused as charged in the indictment".

12. Rules 89(C) and (D) read as follows:

> (C) A Chamber may admit any relevant evidence which it deems to have probative value.
>
> (D) A Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.

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[5] Statement of Faris Gavrakapetanović. No information was given to the Chamber on disclosure of this statement as no objection based on the lateness of disclosure was presented.

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1. Acts and Conduct of the Accused

13. In considering admission of Rule 92 *bis* statements, the Chamber should first ascertain that the statement does not pertain to the "acts and conduct of the accused as charged in the indictment". The Appeals Chamber's "Decision on Interlocutory Appeal Concerning Rule 92 *bis* (C)" of 7 June 2002 ("the Appeals Chamber Decision") has specified what should be understood by "acts and conduct of the accused" in the present case. The Appeals Chamber first reminded the distinction made in the Tribunal's jurisprudence "between (a) the acts and conduct of those others who commit the crimes for which the indictment alleges that the accused is individually responsible, and (b) the acts and conduct of the accused as charged in the indictment which establish his responsibility for the acts and conduct of those others". It then indicated that "[i]t is only a written statement which goes to proof of the latter acts and conduct which Rule 92 *bis* (A) excludes from the procedure laid down in that Rule".[6] The Appeals Chamber further specified that the "conduct" of the accused includes his relevant state of mind. It however noted that the prosecution could rely on acts and conduct of *others* adduced by way of Rule 92 *bis* statements that would, for example, go to prove the knowledge by the accused that his acts fitted into a pattern of widespread or systematic attacks directed against a civilian population.[7]

14. The Chamber will assess the statements submitted in accordance with this interpretation of Rule 92 *bis* (A).

2. Assessment of the statements' probative value

15. In deciding on admission of Rule 92 *bis* statements, the Trial Chamber must further determine whether the statement is relevant evidence which it deems to have probative value, within the meaning of Rule 89 (C) and may exclude evidence "if its probative value is substantially outweighed by the need to ensure a fair trial", pursuant to Rule 89 (D).

16. In assessing the statements' probative value, the Chamber will consider the degree of precision of the information provided as well as whether the information is based on first-hand knowledge or hearsay. The Chamber will also take into consideration that the

[6] The Appeals Chamber's Decision, para. 9.

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Application and the Prosecution's Submissions were filed about a month before the end of the Prosecution case. Having heard most of the Prosecution case, the Trial Chamber is in a better position to assess the significance of the statement sought to be admitted. The Chamber recognises that the cumulative nature of the evidence is presented in Rule 92 *bis* as one of the factors in favour of admission.[8] The Appeals Chamber also recalled that evidence in the form of a written statement may not lead to a conviction if it is not corroborated by other evidence.[9] However, it is also the duty of the Chamber, under Articles 20 and 21 of the Statute, to ensure a fair and expeditious trial. At the beginning of a case, this often leads to merely imposing time limits within which the Prosecution is free to proffer evidence which it deems will best serve its case. Trial chambers are in a position to exercise more control over the evidence to be presented as the case develops. One particular way of ensuring expeditious trial is to exclude evidence that is repetitious, in view of the amount of evidence already adduced on the same matter.[10] As a result, and in view of the evidence already heard, the Chamber will admit statements containing evidence of a cumulative nature only if it is significant, which supposes, among other things, that it is not a pure repetition of evidence already admitted but adds details and information which contribute to a better understanding or assessment of the evidence presented.

3. The Chamber's discretion under Rule 92 *bis*

17. As set out in the Appeals Chamber's Decision, "Rule 92 *bis* identifies a particular situation in which, once the provisions of Rule 92 *bis* are satisfied, and where the material has probative value within the meaning of Rule 89 (C), it is in principle in the interests of justice within the meaning of Rule 89 (F) to admit the evidence in written form".[11]

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[7] The Appeals Chamber's Decision, para. 11.
[8] Rule 92 *bis* (A)(i)(a).
[9] The Appeals Chamber's Decision, para. 34: "where the witness who made the statement is not called to give the accused an adequate and proper opportunity to challenge the statement and to question that witness, the evidence which the statement contains may lead to a conviction only if there is other evidence which corroborates the statement".
[10] See *The Prosecutor v. Kordić & Čerkez*, Decision on Prosecutor's Submissions Concerning 'Zagreb Exhibits' and Presidential Transcripts", IT-95-14/2-T, 1 December 2000, paras. 36 and 39, for use of similar criteria
[11] The Appeals Chamber's Decision, para. 12.

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18. The Chamber however has discretion in determining whether, albeit admissible under Rules 92 *bis*, 89 (C) and 89 (D), the witness should nevertheless, in view of the matters touched upon in the statement, be called to testify *viva voce*, even if only for cross-examination. The Chamber is fully aware of its duty to ensure a fair and expeditious trial, as provided in Articles 20 and 21 of the Statute. In particular, due consideration will be given to the right of the accused, under Article 21(4)(e) of the Statute, to examine or have examined, the witnesses against him. While the right to cross-examine is not absolute,[12] the Chamber should carefully examine in which circumstances admission of Rule 92 *bis* statement without cross-examination will not impact on the fairness of the trial.

19. In *The Prosecution v. Sikirica & al*,[13] Trial Chamber III considered the admission of transcripts of evidence given by witnesses in other proceedings before the Tribunal, as envisaged in Rule 92 *bis* (D), and mentioned that "among the matters for consideration are whether the transcript goes to proof of a critical element of the Prosecution's case against the accused".[14] In *The Prosecution v. Slobodan Milošević*, Trial Chamber III granted the accused the right to cross-examine those witnesses whose statements touched upon "a critical element of the Prosecution's case or, put another way, to a live and important issue between the parties, as opposed to a peripheral or marginally relevant issue".[15] The same criterion was used by Trial Chamber II in the case against Brđanin and Talić.[16]

20. The Appeals Chamber's Decision also provided guidelines to this Trial Chamber in the exercise of its discretionary power and indicated that "[w]here the evidence is so pivotal to the prosecution case, and where the person whose acts and conduct the written statements describe is so proximate to the accused, the Trial Chamber may decide that it would not be fair to the accused to permit the evidence to be given in written form".[17] As an example, the Appeals Chamber referred to the particularly sensitive situation posed by a charge of

[12] *The Prosecution v. Kordić & Čerkez*, Decision on Appeal regarding the Admission into Evidence of Seven Affidavits and on the Formal Statement, IT-95-14/2-AR 73.6, para. 24.
[13] "Decision on Prosecution's Application to Admit Transcripts under Rule 92 *bis*", IT-95-8-T, 23 May 2002.
[14] *The Prosecution v. Sikirica*, para. 4.
[15] *The Prosecution v. Slobodan Milošević*, IT-02-54-T, 21 March 2002, para. 24.
[16] *The Prosecutor v. Radoslav Brđanin and Momir Talić*, Decision on "objection and/or Consent to Rule 92 *bis* Admission of Witness Statements Number One" Filed by Brđanin on 16 January 2002 and "Opposition du General Talić à l'Admission des Dépositions Recueillies en Application de l'Article 92 Bis du Règlement" Filed by Talić on 21 January 2002, IT-99-36-T, 30 July 2002, para. 5.

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command responsibility under Article 7 (3), in the context of which the acts and conduct of subordinates could be so proximate to the accused that "it would be unfair to the accused to permit the evidence to be given in written form".[18]

21. The Chamber will evaluate the statements submitted according to this case-law.

B. Law applied to the Statements Submitted

22. The Chamber will consider successively the statements related to sniping and shelling incidents, the statements of overview/international witnesses, and the statements of authenticating witnesses.

1. Statements Related to Sniping and Shelling Incidents

23. Seven Rule 92 *bis* statements related to sniping incidents and one statement related to a shelling incident are submitted by the Prosecution.

24. The Prosecution seeks admission of the whole statements without cross-examination. Subsidiarily, and in case the Chamber would find cross-examination necessary, the Prosecution indicates that it would seek admission "solely of those parts of the statements that do not pertain to origin or source of fire".[19]

25. The objections of the Defence with respect to these statements can be summarised as follows: the statements relate to the acts and conduct of the accused,[20] and, if the Chamber does not find so, they deal with facts which are too proximate to the accused to be admissible without cross-examination.[21] The Defence also refers to incidents "not included

[17] The Appeals Chamber's Decision, para. 13.
[18] The Appeals Chamber's Decision, para. 14.
[19] The Prosecution's Submissions, para. 24.
[20] The Defence's First, Second and Third Objections.
[21] The Defence's Fourth Objections.

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in the list", which could not be admitted through Rule 92 *bis* "for obvious reasons".[22] Further, it does not accept the limitation proposed by the Prosecution to admit only those parts of the statements which do not pertain to the source of fire and believes that the witnesses should be cross-examined on all issues brought up in their statements in order to verify the accuracy of the facts mentioned in their statement.[23] In addition, the Defence claims that search for truth would require that it be given the possibility to question the witnesses on other aspects of the case, which are not specifically mentioned in their statement.[24]

26. The Chamber first notes that the source of fire of sniping and shelling incidents has been one of the most contested points between the parties. The evidence heard so far by the Chamber has also shown that the information provided by the witnesses on the source of fire often needed to be tested.

27. Most statements related to sniping and shelling incidents include some observations made, with whatever precision, on the source of fire. If this aspect is taken out, the remaining part of the statements often does not substantially add to the evidence already heard. As a result, most of these statements could be admitted only if those parts pertaining to the source of fire are kept, provided that the witnesses are called for cross-examination. After carefully reviewing each statement submitted, the Chamber has also set out the maximum period of time that would be needed for cross-examination.

28. Keeping in mind this general finding, the Chamber now turns to a detailed analysis of each statement.

29. The statement of witness N refers to scheduled sniping incident No. 27. The Prosecution argues that the statement does not relate to the acts or conduct of the accused and merely provides corroborative evidence.[25] The Defence considers that witness N must be heard in court because his/her statement provides information on the separation lines and the direction of fire.[26] Three witnesses were heard *viva voce* on this incident,[27] two of whom were eyewitnesses and one of whom investigated the incident. Witness N was also an

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[22] The Defence's Fourth Objections.
[23] Transcript of 4 July 2002, T. 11169.
[24] T. 11175.
[25] The Prosecution's Submissions, para. 17.
[26] Transcript of 4 July 2002, T. 11168.

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eyewitness. His/her statement relates to the specifics of the incident and indicates the location where, in this witness' opinion, the bullet could only have come from. The Chamber concludes that the statement will be admitted in its entirety, provided that the witness is called for cross-examination. Time for cross-examination should not exceed half an hour.

30. The Prosecution submits the statements of three witnesses who provide evidence on an unscheduled sniping incident. The Prosecution claims that these statements merely corroborate evidence heard through *viva voce* witnesses, including on information related to the source of fire.[28] The Defence argues that the statements deal with important facts, such as the origin of the fire, which should not be admitted without cross-examination.[29] The Defence further maintains that cross-examination is required in order to establish the witnesses' reliability and credibility.[30] The Chamber notes that all three witnesses concerned here were not eyewitnesses of the incident itself. They came together after the victim was shot and pulled her to a safe place. Their account of the incident and the type of information they can provide on the incident is thus very similar. Considering that the incident concerned is unscheduled and in view of the need to ensure expeditious trial, the Chamber will admit only one of the three statements submitted for admission, to the choice of the Prosecution, provided that the witness is called for cross-examination. Time for cross-examination should not exceed half an hour.

31. The Prosecution submits the statement of Hamdo Brkanić, which provides evidence on scheduled sniping incident No. 4. The Prosecution claims that the statement is merely corroborative of *viva voce* witnesses, while the Defence deems that it relates to events for which the accused is charged in the indictment and which cannot be admitted without cross-examination.[31] The Chamber has heard two witnesses *viva voce* in respect of this incident: the victim and another witness who rescued the victim together with Hamdo Brkanić. The latter's statement also recounts unscheduled shelling incidents. The Chamber admits the statement to the sole extent that it relates to scheduled sniping incident No. 4 and provided

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[27] Witnesses AH, AG, Mirsad Kučanin.
[28] The Prosecution's Submissions, para. 19.
[29] The Defence's Third Objection, pp. 3-4.
[30] Transcript of 4 July 2002, T. 11168.
[31] The Defence's Third Objection.

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that the witness is called for cross-examination. Time for cross-examination should not exceed half an hour.

32. The Prosecution submits the statement of Salko Zametića. The Prosecution claims that it corroborates the testimony of *viva voce* witnesses, while the Defence argues that it is necessary to hear the witness in order to check his credibility. This statement refers to scheduled sniping incident No. 6. In this statement, the witness, who was not an eyewitness of the incident, explains that he received from the hospital the death certificate of his wife. The victim's death certificate was tendered into evidence as P 1382 on 11 February 2002, during the testimony of Sadija Sahinovic. Upon the Defence's objection, the certificate was not admitted into evidence on the ground that it was illegible. The Prosecution then announced its intention to tender the certificate through the 92 *bis* statement of the victim's husband, which would further authenticate the death certificate. It also recognised that the statement would be relevant only to that extent, as Salko Zametica was not an eyewitness of the incident.[32] The Chamber first notes, however, that the said death certificate is not attached to the statement. As a result, the statement only tends to prove that the victim's husband received *a* death certificate of his wife but does not authenticate the death certificate previously tendered and rejected. The Defence contested the time of the victim's death and claimed that there was no proof that her death directly resulted from the incident.[33] However, admission of the statement would not clarify this point. Further, the Chamber has heard enough evidence on the submission that the victim died as a result of the incident and considers that, at this stage of the proceedings, the evidence provided in this statement is repetitious. The Chamber thus does not admit the statement.

33. The Prosecution submits the statement of Ferzaheta Džubur ("the Džubur Statement"), which refers to scheduled sniping incident No. 7. The Prosecution argues that it is significant evidence because this witness noted "there was a key in the inside of the locked door, which in the other circumstances of the incident, suggests that the deceased was alone when shot".[34] The Defence claims that the Džubur Statement deals with acts for which the accused is charged and thus cannot be admitted without cross-examination. The Chamber has heard one single witness on this incident. Two documents are submitted as a Rule 92 *bis* statement for witness Džubur. The document dated 5 January 2002 deals with

[32] T. 3455-56.
[33] T. 11180-11181.

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scheduled sniping incident No. 7, another sniping incident resulting in the death of a 50 year old Serb male, which the witness did not see herself, and a shelling incident that occurred in Summer 1992 on a skyscraper located in the same area as the area where scheduled sniping incident No. 7 occurred. The document dated 11 November 1995 only provides evidence on scheduled sniping incident No. 7. To the extent that it refers to scheduled sniping incident No. 7, the Džubur Statement corroborates the *viva voce* testimony while providing further specifics and details which are useful in better assessing the reliability of witnesses. The Chamber therefore admits the document of 11 November 1995 in its entirety and those parts of the documents dated 5 January 2002 which pertain to sniping incident No. 7, as a Rule 92 *bis* Statement.

34. The Prosecution submits the statement of Muradif Čelik ("the Čelik Statement") and claims that it is corroborative evidence on scheduled shelling incident 5.[35] The Defence considers that cross-examination is necessary as the witness concerned is an eyewitness of one of the incidents scheduled in the indictment. Muradif Čelik was an eyewitness and a victim of scheduled shelling incident No. 5. The Čelik Statement submission is composed of four different statements made by the witness. Three of them mainly refer to scheduled shelling incident 5.[36] Various documents are also attached to the statement, namely the patient history sheet,[37] the temperature lists, the operation sheet and a supplemental case history, which all relate to the medical treatment of the witness as a result of his injury. In an addendum to statements dated 14 January 2002, the witness rectifies his date of birth and authenticates the medical documents attached to this submission. Finally, in a statement dated 1 September 2000, the witness gives some background information on the beginning of the war, the involvement of "Karadžić's people", the siege conditions in Sarajevo, and recounts the shelling of his house which occurred in 1995. He also provides very general information on sniping fire coming from the Jewish cemetery, which, according to his statement, notably targeted people while queuing for humanitarian aid. The Chamber finds the Čelik Statement admissible under Rule 92 *bis*. It does not pertain to the acts and conduct of the accused and corroborates evidence already provided either through *viva voce*

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[34] The Prosecution's Submissions, para. 21.
[35] The Prosecution's Submissions, para. 23.
[36] Statements dated 23 December 1994, 22 November 1995 and 7 January 2002.
[37] This document is already included in the collection of medical files admitted on 11 January 2002 under the exhibit number P3573 through Witness Nakaš.

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witnesses or through exhibits. However, the information found in the statement of 1 September 2000, being very general, is not sufficiently significant to be admitted at this stage of the proceedings, in view of the material already in evidence. The Chamber further notes that it does not pertain to the matter for which the Prosecution seeks admission of this Rule 92 *bis* statement. The Chamber thus admits as a Rule 92 *bis* statement, the statement of 23 December 1994, the statement of 22 November 1995, the statement of 7 January, the addendum of 14 January 2002, the Patient history sheet, the operation sheet, the supplemental case history and the temperature lists. Many aspects of scheduled shelling incidents have been strongly debated in the course of trial and the Chamber deems that the Defence should be allowed to cross-examine the witness for a period of time not exceeding half an hour.

2. Overview/International Witnesses

35. The Prosecution submits the statement of Fahrudin Isaković. The Prosecution claims that it merely corroborates the initial overview witnesses and does not pertain to scheduled shelling or sniping incidents.[38] The Defence objects on the ground that the statement touches on acts for which General Galić is charged. This witness was a high school and a university professor during the time period covered in the indictment and his statement gives evidence on the living conditions in Sarajevo and the efforts made to guarantee the education of the children during the war. The Chamber deems that the statement is admissible under Rule 92 *bis*. It however notes that the use of schools for military purposes during the war is a contested issue between the parties. For this reason, the Chamber allows the Defence to cross-examine the witness, for a period of time not exceeding 45 minutes.

36. The Prosecution submits the statement of Smail Čekić. The Prosecution claims that the content of the statement falls under Rule 92 *bis* (A)(i)(c).[39] The Defence considers that the statement is not admissible under Rule 92 *bis* because it gives evidence on acts and conduct of the accused for which he is charged in the indictment.[40] In this statement, the witness explains how the Household Survey of Sarajevo 1994 was prepared. This survey is the basis for the analysis to be provided by the expert witness Ewa Tabeau. The Chamber deems that the statement is admissible under Rule 92 *bis*. As the method by which the

[38] The Prosecution's Submissions, para. 26.
[39] The prosecution's Submissions, para. 26.
[40] The Defence's Second Objections, para. 6; the Defence's Third Objections, p. 2.

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Survey was prepared is of importance to assess the reliability of the expert witness Ewa Tabeau's analysis, the Chamber considers that an opportunity should be given to the Defence to cross-examine the witness. The Chamber decides that the witness should be called for cross-examination, which should not exceed one and a half hours.

37. The Prosecution submits the statement of Oystein Strand. The witness, who was a staff member of the UNMO in Sarajevo from August to December 1993, gives evidence on two unscheduled shelling incidents in Alipasino Polje that affected civilians, especially children. He further describes Alipasino Polje as a purely residential area. The Prosecution claims that this statement provides evidence of a similar nature as the evidence heard through *viva voce* witnesses.[41] The Defence claims that the statement is inadmissible under Rule 92 *bis* because it relates to acts and conduct of the accused for which he is charged in the indictment.[42] The Chamber deems that the statement is admissible under Rule 92 *bis*. However, the statement deals with critical elements which are contested by the parties and cross-examination is thus allowed for a period of time not exceeding one hour.

3. Authenticating witnesses

38. Nine witness statements are submitted by the Prosecution for the purpose of authenticating documents. The Prosecution argues that all these witnesses "validate or certify medical records, death certificates or maps. They do not give evidence as to the truthfulness of the content of the documents but, rather that they are the documents they purport to be".[43] The Defence first argues that the documentation hereby submitted is illegible.[44] It further claims that, in reality, the Prosecution seeks to tender into evidence certain documentation, which is not what Rule 92 *bis* is meant for. Further, it is the Defence's view that Rule 92 *bis* statements cannot confirm the authenticity of the documents,[45] as the "context and the veracity of a document needs to be established through direct examination before the courts if the parties disagree".[46] The Defence concludes that it should at least be authorised to cross-examine those witnesses.[47] The Defence notably claims that it has no evidence as to how those witnesses came by those documents, nor does

[41] The Prosecution's Submissions, para. 27.
[42] The Defence's Second Objections, para. 6.
[43] The Prosecution's Submissions, para. 28.
[44] Transcript of 4 July 2002, T. 11163.
[45] T. 11164.
[46] T. 11164-11165.

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it have information on the source of these documents.[48] The Defence notes in that respect that it has not seen the original documentation and that some documents presented had apparently been tampered with.[49]

39. On 28 June 2002, the Chamber requested the Prosecution to clearly identify the documents attached to the authenticating witnesses' statements, and to point those documents which were tendered into evidence, indicate whether they were admitted or not, and explain why authenticating witnesses' statements would be necessary for documents which were already admitted without objection and without the Chamber asking for further authentication.[50] On 5 July 2002, the Prosecution filed "Additional Information Concerning Documentation Sought to be Admitted Pursuant to Rule 92 *bis* (A)" ("Additional Information"), whereby the Prosecution identifies "the documents a) that [the statements] authenticate and b) that are an inseparable part of [the statements], that have already been tendered and admitted into evidence through *viva voce* testimony". The Prosecution recognises in this filing that only five of the nine witnesses presented as authenticating witnesses do authenticate documents that have been tendered in court.[51] No explanation is provided as to why authenticating statements would be needed for documents already admitted and for which the Chamber did not ask for further authentication. The Defence filed a "Submission Regarding the Additional Information of the Prosecution in Relation with the Documentation and Evidences Pursuant to the Rule 92 *bis* of the Rules" on 11 July 2002, whereby it reiterated its opposition to the admission of any authenticating statement.

40. The Chamber states at the outset that witness statements that intend to authenticate documents which have not been tendered in court are irrelevant and therefore not admissible under Rule 89 (C). As a result, the Chamber rejects the statements of Suada

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[47] T. 11165.
[48] T. 11166.
[49] This last argument concerns particularly the medical documentation disclosed with respect to the Markale incident. The Defence reminded that it challenges the authenticity of each one of these documents. See T. 11166.
[50] 28 June 2002, T. 10840.
[51] Those witnesses are Faris Gavrankapetanović, Zineta Arigagić, Dinko Radnić, Diana Kablar, Jasminka Kovačević and Muradif Ćelik. The Chamber notes, however, that the latter witness is presented as an eyewitness to a scheduled shelling incident, rather than an authenticating witness. See *supra* the discussion devoted to this witness statement.

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Espek, Muhamed Musa, Ziha Ademaj and Adem Omerkić.[52] For the same reasons, the Chamber does not admit any of all the other statements to the extent that they seek to authenticate attached documents which have not been presented in court. In case the documents concerned would be later tendered in court and an objection on their authentication would arise, it would be time for the Prosecution to then seek admission of these statements' relevant parts.

41. The Prosecution intends to authenticate through the statement of Faris Gavrankapetanović ("the Gavrankapetanović Statement") six documents tendered into evidence. The medical report of Sabahudin Ljusa, Faruk Kadrić[53] and Muhamed Kapetanović[54] were admitted without any objection from the Defence. Although the copies here provided are sometimes of a slightly better quality than those tendered in court, the Chamber considers that no question of authenticity was raised with respect to these pieces of evidence. The medical record of Ramiza Kundo was tendered and rejected by the Trial Chamber on the ground that it was illegible. The Chamber specified in its oral ruling that no further authentication of the document was required and admission of this document could be later reconsidered only if the Prosecution could provide a legible copy and explain the inconsistencies between the English translation and the copy in the original language.[55] The medical record of witness AJ was partially admitted, under seal, on 11 April 2002, without any objection on authentication. The Defence objected to the admission of the medical report of Ivan Franjić on the ground that it was barely legible and did not bear the stamp of the medical centre. The Chamber nevertheless admitted it on the ground that lack of legibility and lack of stamp did not prevent admission although it would necessarily impact on the probative value that would eventually be given to this document.[56] The Chamber notes that the medical report here adduced for authentication is slightly different from the one which was admitted in court. The Chamber further notices that the copy attached to the statement is stamped and more legible. In view of the conditions of admission, and considering the differences between the copy originally tendered in court and the copy

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[52] The Defence at first did not object to the admission of the statements of Adem Omerkić and Diana Kablar. It however raised objections on admission of Adem Omerkić's statement at the hearing of 4 July (see T.11164, 11178). In any event, the fact that the Defence would not object does not render those statements any more relevant.
[53] T. 3751.
[54] T. 7990-7992.
[55] 25 March 2002, T. 6150-6152.
[56] T. 3967-3968.

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attached to the Gavrankapetanović Statement, the Chamber decides to admit it to the sole extent that it purports to authenticate the medical record of Ivan Franjić and requires that the witness be called for cross-examination, which should not exceed a period of half an hour.

42. The Prosecution intends to authenticate 15 documents tendered in court, through the statement of Zineta Arifagić. All these documents were admitted in court and no further authentication is required at this stage. The statement of Zineta Arifagić is therefore not admitted.

43. The statement of Dinko Radnić seeks to authenticate ten documents tendered in court. All these documents but the medical report of Rašid Džonko were admitted and the objections based on authentication were declared "without grounds".[57] The medical report of Rašid Džonko was not admitted by the Chamber, notably on the ground that its authenticity could not be verified.[58] In the statement, the witness certifies that the copies attached correspond to the originals held by the hospital. A translation of the legible parts of the document is also attached. The Chamber thus admits the statement of Dinko Radnić to the sole extent that it authenticates the medical report of Rašid Džonko, previously tendered as P2771.

44. The statement of Diana Kablar seeks to authenticate one document tendered in court. The death certificate of Almasa Konjhodzić was admitted without objection on 31 January 2002.[59] The statement of Diana Kablar is thus rejected.

45. The statement of Jasminka Kovacević is submitted to authenticate one document tendered in court. The death certificate of Edina Trto was submitted as an attachement to a Report tendered as P1675. The admission was postponed until a full translation of the death

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[57] Transcript of 18 February 2002, T. 2580, regarding the document listed under number 4 in the Prosecution's Additional Information.

[58] Oral ruling of 20 March 2002, T. 5761: "If the Prosecution would assist in seeking admission of this document in evidence, it would be minimally required that there is a translation to that document, at least of the legible parts of the document, that can create no confusion in whatever way; that means the type of boxes or the entries in the boxes. So therefore the translations, the two different translations of what seems to be one document, are not acceptable. A further requirement would be that this document, as the Chamber is allowed to ask for and which has been asked for by the Defence as well, that an authentication of this document will be presented to the Chamber. Although there has been no objection to the effect that the Defence has argued that the two copies of the document would not be copies of the same document under the present circumstances and with the confusion the translations have created, the Chamber thinks that it would be necessary."

[59] T. 2766.

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certificate would be provided.[60] The translation was submitted and the document admitted on 24 April 2002. The statement of Jasminka Kovacević is therefore rejected.

III. DISPOSITION

FOR THE FOREGOING REASONS

PURSUANT TO Articles 20 and 21 of the Statute, and Rules 89 and 92 *bis* of the Rules of Procedure and Evidence,

THE TRIAL CHAMBER PARTIALLY GRANTS THE APPLICATION and

- **ADMITS** the statement of witness N **PROVIDED THAT** the witness is called for cross-examination, which should not exceed half an hour;
- **ADMITS** the statement of one of the three witnesses submitted with respect to unscheduled sniping incident 1, to the choice of the Prosecution, **PROVIDED THAT** the witness is called for cross-examination, which should not exceed half an hour;
- **PARTIALLY ADMITS** the statement of Hamdo Brkanić **PROVIDED THAT** the witness is called for cross-examination, which should not exceed half an hour;
- **PARTIALLY ADMITS** the statement of Ferzaheta Džubur;
- **PARTIALLY ADMITS** the statement of Muradif Čelik **PROVIDED THAT** the witness is called for cross-examination, which should not exceed half an hour;

[60] 11 April 2002, T. 7109: "the Chamber orders the Prosecution, because we find it evidence that might well be relevant, we order the Prosecution to provide the Chamber this documents with a full and proper translation within one week from now on".

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- **ADMITS** the statement of Fahrudin Isaković **PROVIDED THAT** the witness is called for cross-examination, which should not exceed 45 minutes;

- **ADMITS** the statement of Smail Čekić **PROVIDED THAT** the witness is called for cross-examination, which should not exceed one and a half hours;

- **ADMITS** the statement of Oysten Strand **PROVIDED THAT** the witness is called for cross-examination, which should not exceed one hour;

- **PARTIALLY ADMITS** the statement of Faris Gavrankapetanović **PROVIDED THAT** the witness is called for cross-examination, which should not exceed half an hour;

- **PARTIALLY ADMITS** the statement of Dinko Radnić;

DISMISSES the Application in all other respects;

ALLOCATES half an hour to the Prosecution for a short introduction of the evidence and/or the re-examination of each witness called for cross-examination.

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

Alphons Orie, Presiding Judge

Dated this 26 July 2002
At The Hague
The Netherlands

[Seal of the Tribunal]

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