

**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-99-36-T
Date: 3 September 2002
Original: English

IN TRIAL CHAMBER II

Before: Judge Carmel Agius, Presiding
Judge Ivana Janu
Judge Chikako Taya

Registrar: Mr. Hans Holthuis

Decision of: 3 September 2002

PROSECUTOR

v.

**RADOSLAV BRĐANIN
And
MOMIR TALIĆ**

**THIRD DECISION ON THE ADMISSION OF WRITTEN
STATEMENTS PURSUANT TO RULE 92 *BIS***

The Office of the Prosecutor:

Ms. Joanna Korner
Mr. Andrew Cayley

Counsel for the Accused:

Mr. John Ackerman and Mr. Milan Trbojević, for Radoslav Brđanin
Mr. Slobodan Zečević and Ms. Natacha Fauveau-Ivanović, for Momir Talić

TRIAL CHAMBER II (“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 seized of the “Prosecution’s Motion for Admission of Statements Pursuant to Rule 92 *bis*” (“Motion”) and “Confidential Annex A” thereto (“Annex”), filed by the Office of the Prosecutor (“Prosecution”) on 24 June 2002.

I. INTRODUCTION

1. In the Motion, the Prosecution seeks the admission into evidence pursuant to Rule 92 *bis* of the Rules of Procedure and Evidence (“Rules”) of the written statements of six (6) witnesses identified in the Annex, which concern events that allegedly took place in the municipality of Ključ. The Prosecution contends that the aforesaid statements are appropriate for admission into evidence pursuant to Rule 92 *bis*.¹ In the course of the hearing of 2 July 2002, the Prosecution admitted having made a mistake in the numbers it had allocated to the witnesses it identifies in the Annex, and clarified the error.²

2. Counsel for the Accused Radoslav Brđanin (“Brđanin”) responded in the course of the hearing of 2 July 2002 that he objects to the admission into evidence of the written statements of Witnesses 7.101 and 7.117, unless they are required to appear for cross-examination. Brđanin also indicated that he does not otherwise object to the rest of the written statements being admitted into evidence pursuant to Rule 92 *bis*.³

3. Counsel for the Accused Momir Talić (“Talić”) responded in part to the Motion in his “Confidential Opposition of General Talić to the Admission of Statements pursuant to Rule 92 B (*sic*) of the Rules” of 1 July 2002. He objects, for several reasons, to the admission into evidence pursuant to Rule 92 *bis* of the written statements of Witnesses 7.101, 7.191 and 7.192. Subsequently, in his “Confidential Response to the Motion of the Prosecutor for the Admission of the Statements of Witnesses 7.707 (*sic*) and 7.117 pursuant to Rule 92 *bis* of the Rules” of 5 July 2002, Talić further responded that he opposes the admission into evidence of the written statement of Witness 7.117. In the event that the Trial Chamber admits any of these witnesses’ written statements pursuant to Rule 92 *bis*, Talić requires that those witnesses appear for cross-

¹ Prosecution’s Motion for Admission of Statements Pursuant to Rule 92 *bis* and Confidential Annex A, 24 June 2002, par 3.

² Unofficial Trial Transcript (“T”), 7777.

³ T 7775-7776.

examination.⁴ Talić does not object to the admission into evidence of the written statement of Witness 7.163 or that of Witness 7.107.⁵

II. SUBMISSIONS

4. In its Motion, the Prosecution refers to the list of factors that favour admission of written statements into evidence pursuant to Rule 92 *bis* as they appear in paragraph A (i) of the Rule, and emphasises that the list is expressly non-exhaustive.⁶ The Prosecution further submits that the admission into evidence of the written statements it proposes will significantly reduce the duration of trial.⁷ The Prosecution argues that there is a strong public interest in the admission into evidence of written statements pursuant to Rule 92 *bis* as it reduces the length of trials before the Tribunal in general, and permits the trial of other accused to begin.⁸

5. The Trial Chamber considers that “Rule 92 *bis* was primarily intended to be used to establish what has now become known as “crime-base” evidence” and recognises “the advantages to the expeditious disposal of trial which the Rule was designed to achieve”.⁹ The Trial Chamber has a duty to ensure that the requirements for the admission into evidence of witnesses’ statements pursuant to Rule 92 *bis* are met, and that the application of this Rule in the particular case does not prejudice the rights of the accused envisaged in Article 21 of the Statute of the Tribunal (“Statute”). In particular, due consideration is given to the right of the accused, under Article 21(4)(e) of the Statute, to examine, or have examined, the witnesses against him. It is the duty of the Trial Chamber to carefully examine the circumstances for the admission of written statements into evidence without cross-examination to ensure that it will not impact on the fairness of the trial.

III. DISCUSSION

6. The Trial Chamber will now consider the admissibility of the written statements that the Prosecution applies to have admitted into evidence pursuant to Rule 92 *bis*, and the objections raised by the Defence.

⁴ Confidential Opposition of General Talić to the Admission of Statements pursuant to Rule 92 B (*sic*) of the Rules, 1 July 2002, par 6(b). Response to the Motion of the Prosecutor for the Admission of the Statements of Witnesses 7.707 (*sic*) and 7.117 pursuant to Rule 92 *bis* of the Rules, 5 July 2002, par 4(3).

⁵ Confidential Opposition of General Talić to the Admission of Statements pursuant to Rule 92 B (*sic*) of the Rules, 1 July 2002, par 3(a). Response to the Motion of the Prosecutor for the Admission of the Statements of Witnesses 7.707 (*sic*) and 7.117 pursuant to Rule 92 *bis* of the Rules, 5 July 2002, par 3(1).

⁶ Prosecution’s Motion for Admission of Statements Pursuant to Rule 92 *bis* and Confidential Annex A, 24 June 2002, par 5.

⁷ *Ibid*, par 1.

⁸ *Ibid*, par 10.

⁹ *The Prosecutor v Stanislav Galić*, Case No IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92 *bis* (C), 7 June 2002, par 16.

Witness 7.101

7. The Prosecution seeks to tender into evidence pursuant to Rule 92 *bis*:

(a) written statement to the Prosecution, signed by Witness 7.101 on 20 February 2001

(b) amendment to the statement, signed by the witness on 27 July 2001.

8. The Trial Chamber has viewed the attestation by the Presiding Officer pursuant to Rule 92 *bis* (B) regarding this witness' statement and is satisfied that the procedure prescribed by Rule 92 *bis* (B) was duly carried out.

9. Brđanin opposes the admission into evidence pursuant to Rule 92 *bis* of this witness' statement, unless the witness is required to appear for cross-examination. Notwithstanding that the Trial Chamber, by its "Decision on the Admission of Rule 92 *bis* Statements" of 23 May 2002, set out at the request of *inter alia* Brđanin a number of procedural guidelines for the application of this Rule, and that amongst these the Trial Chamber emphasised that "(t)he defence should explain the reasons for its objection, having regard to the factors set out in Rule 92 *bis*",¹⁰ Brđanin does not give any reasons for his opposition.

10. Talić opposes the admission into evidence pursuant to Rule 92 *bis* of this witness' statement on the grounds that the general interest requires that the witness give the evidence orally before the Trial Chamber. If the written statement is admitted into evidence, Talić requires that the witness appear for cross-examination.

11. The Trial Chamber is satisfied that the evidence in the written statement goes to proof of matters other than the acts and conduct of the Accused as charged in the indictment and, further, that it does not contain any direct references to either of the Accused. Talić contests the Prosecution's assertion that the statement of Witness 7.101 is cumulative to the evidence that Witness 7.162 is called to give orally, as he considers that the statement of Witness 7.101 deals with a different geographical area and covers events over a longer period of time. The Trial Chamber has reviewed the written statement of Witness 7.101 and, insofar as it describes the witness' arrest and detention in the Sanica elementary school and his internment in the Manjača detention camp, is satisfied that it is partly cumulative to the evidence of Witness 7.162. This factor favours its admission into evidence pursuant to Rule 92 *bis* (A)(i)(a). Furthermore, the written statement of Witness 7.101 refers to the relevant political and military background in the municipality of Ključ, a factor which in turn favours the admission of a written statement into evidence pursuant to

¹⁰ Decision on the Admission of Rule 92 *bis* Statements, 23 May 2002, par 6.

Rule 92 *bis* (A)(i)(c). In addition other witnesses, such as Witness 7.106 and BT-26, will also be called to testify on this background, or have already done so.

12. Talić further submits that the witness' position as chief of the Ključ police station is relevant to the determination that the general interest requires that the witness present the evidence orally, and, further, that the witness found a number of documents and he alone can explain where and how these were found.¹¹ The Trial Chamber, for the reasons set out above, admits this written statement into evidence. The Trial Chamber considers, on the other hand, that the position of the witness as chief of the Ključ police station is relevant to the further determination whether he should be required to appear for cross-examination. In his statement, he describes, *inter alia*, the police structure and chain of command and the work of the Territorial Defence. The degree of their involvement, as opposed to the involvement of the regular army, in the crimes charged in the indictment has been strongly debated in the course of trial and the Trial Chamber deems that Brđanin and Talić should be allowed to cross-examine the witness in this respect.

13. Further, the Trial Chamber notes that the witness refers in his written statement to a number of documents which are appended to his statement and which the Prosecution therefore seeks to have admitted into evidence. The Trial Chamber has taken into consideration that although Rule 92 *bis* (A) is phrased in terms of admitting "the evidence of a witness in the form of a written statement in lieu of oral testimony", there is no bar to other documents which the witness identifies in his statement being attached to the written statement, and that Brđanin and Talić have not objected to these documents being tendered into evidence in this way. They are therefore admitted into evidence subject to the relevant objections that may be raised by Brđanin and Talić, who will have an opportunity to cross-examine the witness on these documents.

Witness 7.107

14. The Prosecution seeks to tender into evidence pursuant to Rule 92 *bis*:

- (a) written statement to the Prosecution, signed by Witness 7.107 on 28 August 1997
- (b) amendment to the statement, signed by the witness on 27 July 2001.

15. The Trial Chamber has viewed the attestation by the Presiding Officer pursuant to Rule 92 *bis* (B) regarding this witness' statement and is satisfied that the procedure prescribed by Rule 92 *bis* (B) was duly carried out.

¹¹ Confidential Opposition of General Talić to the Admission of Statements pursuant to Rule 92 B (*sic*) of the Rules, 1 July 2002, par 5b.

16. Brđanin and Talić do not oppose the admission into evidence pursuant to Rule 92 *bis* of this witness' statement. Talić submits that he does not oppose its admission into evidence because, *inter alia*, it does not involve Talić's acts or conduct as charged in the Indictment. Nonetheless, Talić further submits that those identified in the witness' statement as "Serb soldiers" were not Talić's subordinates. The Trial Chamber observes that counsel is not entitled to give evidence but that this is a matter that will be decided at trial. Furthermore, Talić is always at liberty to call evidence to contradict matters contained in the written statement, which will also be taken into account in assessing the weight to be attributed to its contents.

17. Notwithstanding the absence of opposition by the Defence to the admission into evidence of this witness' statement, the Trial Chamber has a duty to ensure that the requirements of Rule 92 *bis* are met, and that its application in the particular case does not prejudice the rights of the Accused. The Trial Chamber is satisfied that the evidence in the statement goes to proof of matters other than the acts and conduct of the accused as charged on the indictment and, further, that it does not contain any direct references to either of the accused. Though Talić does not object to the admission into evidence of this witness' statement, he nevertheless contests the Prosecution's assertion that the statement is cumulative to the evidence that Witnesses 7.109 and 7.135 are called to give before the Trial Chamber. The Trial Chamber on the other hand considers that the evidence to be presented orally by Witnesses 7.109 and 7.135 is broader than the written statement of Witness 7.107, which deals with a sole incident. To the extent that Witnesses 7.135 and 7.109 will be called to give evidence, *inter alia*, that they were aware that Prhovo was or had been shelled on or about 1 June 1992, their evidence will relate to similar facts to those in the written statement of Witness 7.107. It appears that, unlike Witness 7.107, they were not present in Prhovo in the aftermath of the shelling. Witness 7.107 describes in detail in his written statement the alleged consequences for the victims of the shelling of Prhovo. This factor also favours its admission pursuant to Rule 92 *bis* (A)(i)(d). Furthermore, the Trial Chamber emphasises that the fact that a written statement is cumulative to the evidence that other witnesses will or have given in oral testimony is not a requirement for its admission into evidence pursuant to Rule 92 *bis* (A), but merely a factor in favour of admitting it, and, moreover, that the list of factors in paragraph (A) (i) of the Rule is non-exhaustive.

Witness 7.117

18. The Prosecution seeks to tender into evidence pursuant to Rule 92 *bis*:

(a) written statement to the Prosecution, signed by Witness 7.117 on 21 February 2001

(b) amendment to the statement, signed by the witness on 27 July 2001.

19. The Trial Chamber has viewed the attestation by the Presiding Officer pursuant to Rule 92 *bis* (B) regarding this witness' statement and is satisfied that the procedure prescribed by Rule 92 *bis* (B) was duly carried out.

20. Brđanin opposes the admission into evidence pursuant to Rule 92 *bis* of this witness' statement, unless the witness is required to appear for cross-examination. Brđanin does not give any reasons for his opposition. The Trial Chamber adopts by reference the observations made in paragraph 9 above.

21. Talić objects to the admission of this witness' statement pursuant to Rule 92 *bis* on the ground that there is an overriding public interest in the evidence of this witness being presented orally. If the written statement is admitted into evidence pursuant to Rule 92 *bis*, Talić requires that the witness appear for cross-examination.

22. Talić argues that, contrary to the Prosecution's submission, this witness' statement is not cumulative to the evidence that Witness 7.115 is called to present orally before the Trial Chamber. Talić submits that the evidence of Witness 7.117 encompasses a much larger geographical area, and refers to facts, such as the organisation of Muslim resistance and the murder of a Serb policeman, that do not appear in the evidence of 7.115.

23. The Trial Chamber is satisfied that the evidence in the written statement goes to proof of matters other than the acts and conduct of the Accused as charged on the indictment and that it does not contain any direct references to either of the Accused.

24. The Trial Chamber, having reviewed the information at its disposal, finds some merit in Talić's submission that the evidence contained in the written statement of Witness 7.117 refers to alleged facts that do not appear in that of Witness 7.115. In his submissions, however, Talić overlooks the Prosecution's argument that the statement of Witness 7.117 "also provides an identical assessment of the situation in the municipality about which other witnesses will testify" orally before the Trial Chamber.¹² The Prosecution, on the other hand, fails to specify which witnesses will provide this evidence. Having reviewed the material submitted to it pursuant to Rule 65 *ter*, the Trial Chamber considers that other witnesses, namely Witness 7.106 and BT-26, will provide, or have already done so, a similar overview on some matters. The Trial Chamber admits the written statement of Witness 7.117 into evidence, except for Attachment 2, which is impossible to make out. Nevertheless, the Trial Chamber considers that some incidents described in the written statement of Witness 7.117 would not appear in the evidence of those witnesses that

¹² Confidential Annex A, 24 June 2002, par 4.

the Prosecution intends to call *viva voce, inter alia*, the capture of Serb soldiers allegedly from the 6th Sanska Brigade and their ensuing exchange, and that Brđanin and Talić are entitled to cross-examine the witness on these.

Witness 7.163

25. The Prosecution seeks to tender into evidence pursuant to Rule 92 *bis*:

- (a) written statement to the Prosecution, signed by Witness 7.163 on 5 June 2001
- (b) amendment to the statement, signed by the witness on 12 September 2001.

26. The Trial Chamber has viewed the attestation by the Presiding Officer pursuant to Rule 92 *bis* (B) regarding this witness' statement and is satisfied that the procedure prescribed by Rule 92 *bis* (B) was duly carried out.

27. Brđanin and Talić do not oppose the admission into evidence pursuant to Rule 92 *bis* of this witness' statement.¹³ Despite this, Talić notes that, given that the witness does not identify the alleged perpetrators of the acts he describes except as "Serb soldiers", he will object to the acts described in the statement being ascribed to Talić.

28. Notwithstanding the absence of opposition by the Defence to the admission into evidence of this witness' statement, the Trial Chamber has a duty to ensure that the requirements for the admission into evidence of written statements pursuant to this Rule are met, and that its application in the particular case does not prejudice the rights of the Accused.¹⁴ The Trial Chamber is satisfied that the evidence in the statement goes to proof of matters other than the acts and conduct of the Accused as charged in the indictment and, further, that it does not contain any direct references to either of the Accused. The evidence in question deals with events alleged to have occurred in Biljani on 10 July 1992, and, as submitted by the Prosecution, is thus cumulative to the evidence that Witness 7.69 and BT-25 already have given orally before the Trial Chamber. This is a factor that militates in favour of admitting the written statement into evidence.¹⁵

29. In this connection, therefore, the Trial Chamber takes note of Talić's observation, and adopts by reference the conclusions in paragraphs 43 and 44 below with respect to acts and conduct of those alleged to be subordinates of the Accused, but notes that Talić does not oppose the admission into evidence pursuant to Rule 92 *bis*, and that merely the use of the term "Serb soldiers"

¹³ T 7776. Confidential Opposition of General Talić to the Admission of Statements pursuant to Rule 92 B (*sic*) of the Rules, 1 July 2002, par 3 a.

¹⁴ Article 21(4)(e) of the Statute.

in the context of the statement of Witness 7.163 does not allow a conclusion that the subordinates of the accused (or those alleged to be his subordinates) are so proximate so as to preclude the admission into evidence of the written statement or so as to require the witness to appear for cross-examination. The Trial Chamber notes in this respect the observation made by the Prosecution in its opening statement that "(p)eople who survived the killings or witnessed the killings are only able to say that the people who committed them were Serb soldiers. And that, of course, covers a number of possibilities: that they were members of the regular VRS, or that they were people, reservists, in the territorial units who had been called up, or that they were nothing more than local Serbs who had put on uniform".¹⁶ Further, it is open to Talić to raise the issue of the identity of the alleged perpetrators of these acts in the cross-examination of the two witnesses to the same incident who will be presenting their evidence orally. In addition, Talić is always at liberty to call evidence to contradict matters contained in the statement, which will also be taken into account in assessing the weight to be attributed to its contents.

Witness 7.191

30. The Prosecution seeks to tender into evidence pursuant to Rule 92 *bis*:

- (a) statement to the authorities of Bosnia and Herzegovina, signed by the witness on 6 December 1999
- (b) written statement to the Prosecution, signed by Witness 7.191 on 18 September 2001
- (c) amendment to the statement to the Prosecution, signed by the witness on 18 October 2001.

31. The Trial Chamber has viewed the attestation by the Presiding Officer Pursuant to Rule 92 *bis* (B) regarding this witness' statement and is satisfied that the procedure prescribed by Rule 92 *bis* (B) was duly carried out.

32. Brđanin does not oppose the admission into evidence pursuant to Rule 92 *bis* of this witness' statements.¹⁷

¹⁵ Rule 92 *bis* (A)(i)(a).

¹⁶ T 783.

¹⁷ T 7775.

33. Talić objects to the admission into evidence pursuant to Rule 92 *bis* of this witness' statements on the ground that their prejudicial effect outweigh their probative value. If the written statements are admitted into evidence, Talić requires that the witness appear for cross-examination.

34. The Trial Chamber is satisfied that the evidence in the written statements goes to proof of matters other than the acts and conduct of the Accused as charged in the indictment and, further, that they do not contain any direct references to either of the Accused. Talić submits that the witness' statement to the Prosecution contains contradictions and inaccuracies, so that "its probative value is therefore significantly less than its prejudicial effect".¹⁸ Talić argues that, contrary to the Prosecution's assertion, this written statement is not cumulative to the evidence that Witness 7.196 will present orally before the Trial Chamber, but in actual fact contradicts it, and cites an example: in his statement to the Prosecution, Witness 7.191 asserts that Radio Ključ called for the surrender of weapons, and that these were collected by a tractor passing through Pudín Han, whilst in his statement to the Prosecution Witness 7.196 asserts that the majority in Pudín Han had reached the consensus not to surrender the weapons. The Trial Chamber notes that, pursuant to Rule 92 *bis* (A) (ii) (b), one of the factors militating against the admission of a written statement is where a party can demonstrate that "its prejudicial effect outweighs its probative value". The Trial Chamber is not satisfied that the example given by Talić of necessity involves a contradiction between the two statements. In his written statement to the Prosecution, Witness 7.191 goes on to state that, after the call for weapons' surrender, there was on 29 May 2002 another announcement on the radio stating that the Serbs believed that the Muslims had not surrounded all their weapons, but thought they held more. The Trial Chamber is not satisfied that Talić has made his case under Rule 92 *bis* (A) (ii) (b).

35. The Trial Chamber considers that the written statements of Witness 7.191 are cumulative to the evidence that Witness 7.196 will present orally before the Trial Chamber, but only in part; in his statements, Witness 7.191 goes on to describe some of the circumstances surrounding the Velagici School massacre. Whereas this incident cannot be found in the statement of Witness 7.196, it can however be found in the evidence that BT-26 has already given orally before the Trial Chamber. This notwithstanding, the Trial Chamber considers that the written statement to the Prosecution of Witness 7.191 mentions the "Serb Army" in connection with the attack on Pudín Han, without however identifying a particular unit or particular members. The Trial Chamber adopts by reference the conclusions in paragraphs 43 and 44 below with respect to acts and conduct of those alleged to be subordinates of the Accused in the context of the attack on Pudín Han. In light of

¹⁸ Confidential Opposition of General Talić to the Admission of Statements pursuant to Rule 92 B (*sic*) of the Rules, 1 July 2002, par 6.

Talić's case as described in paragraph 44 below, and despite the fact that Talić has not based any of his objections to the written statement on the alleged involvement of the "Serb Army", the Trial Chamber requires Witness 7.191 to appear for cross-examination by Talić on this issue, unless Talić decides to waive this entitlement.

36. Finally, Talić also objects on the basis of Rule 92 *bis* A (ii) (b) to the admission into evidence of the statement that Witness 7.191 made to the Bosnian authorities, as according to him the Prosecution had conceded that it is simply a summary of a witness' statement prepared by a third person.¹⁹ The Trial Chamber, on the other hand, does not preclude the possibility that the contents of a previous statement could modify or qualify what is stated in a written statement or could be relevant to the credibility of a witness who has made a Rule 92 *bis* written statement. The Trial Chamber has reviewed this statement carefully and is of the opinion that the interests of justice require that it should be admitted alongside the witness' written statement to the Prosecution.

Witness 7.192

37. The Prosecution seeks to tender into evidence pursuant to Rule 92 *bis* the written statement to the Prosecution of Witness 7.192 signed on 15 September 2001.

38. The Trial Chamber has viewed the attestation by the Presiding Officer pursuant to Rule 92 *bis* (B) regarding this witness' written statement and is satisfied that the procedure prescribed by Rule 92 *bis* (B) was duly carried out.

39. Brđanin does not oppose the admission into evidence pursuant to Rule 92 *bis* of this witness' written statement.²⁰

40. Talić opposes the admission into evidence of this witness' written statement on the ground that its prejudicial effect outweighs its probative value. If the written statement is admitted into evidence, Talić requires that the witness appear for cross-examination.

41. The Trial Chamber is satisfied that the evidence in the written statement goes to proof of matters other than the acts and conduct of the Accused as charged in the indictment and, further, that it does not contain any direct references to either of the Accused. Talić submits that the written statement contains contradictions and inaccuracies, so that "its probative value is therefore significantly less than its prejudicial effect".²¹ Talić argues that, contrary to the Prosecution's

¹⁹ *Ibid.*, par 6(b).

²⁰ T 7775.

²¹ Confidential Opposition of General Talić to the Admission of Statements pursuant to Rule 92 B (*sic*) of the Rules, 1 July 2002, par 4.

assertion, this written statement is not cumulative to the evidence that Witness 7.196 will present orally before the Trial Chamber, but in actual fact contradicts it, and cites an example: in his statement, Witness 7.192 stated that prior to the shelling of Pudín Han the “Serb Army” had already confiscated the weapons from Pudín Han, and that there had been no resistance to this confiscation, whereas Witness 7.196 stated that the majority in Pudín Han reached the consensus not to surrender the weapons. The Trial Chamber is not satisfied that the example given by Talić necessarily involves a contradiction between the two statements, and incorporates by reference the observation in paragraph 34 above. Furthermore, the Trial Chamber is not satisfied that the alleged contradiction renders the statement’s prejudicial effect greater than its probative value and precludes its admission into evidence.²² The remedy sought by Talić is disproportionate to the apparent contradiction, moreover, as it is open to Talić to raise this issue in the cross-examination of Witness 7.196. The Trial Chamber is not satisfied that Talić has made his case under Rule 92 bis (A) (ii) (b).

42. In addition, according to Talić, the prejudicial effect of the statement of Witness 7.192 outweighs its probative value because it implicates the “Serb Army” without identifying the unit involved or any of its members.²³ It implicates the “Serb Army” in the confiscation of weapons, mentioned above. Further, in describing the shelling of Pudín Han, the statement of Witness 7.192 identifies that the fire was coming from the direction of the areas allegedly controlled by the “Serb Army”.

43. In this connection the Trial Chamber has taken into consideration that the shelling of Pudín Han is an incident for which the Prosecution charges the Accused with responsibility under Article 7(1) and 7(3) of the Statute. The Trial Chamber has taken into consideration that “(t)he exercise as to whether the evidence should be admitted in written form at all becomes more difficult in the special and sensitive situation posed by a charge of command responsibility under Article 7.3 of the Statute”.²⁴ Therefore, the fact that Witness 7.192 refers to the “Serb Army” in the context of the shelling of Pudín Han remains relevant for the determination by this Trial Chamber whether to admit the Witness’ written statement into evidence. In exercising its discretion under Rule 92 bis, the Trial Chamber has taken into consideration whether the proximity of the subordinates to the Accused renders the evidence of the acts and conduct of the subordinates of the Accused which the Prosecution seeks to prove by a Rule 92 bis statement sufficiently pivotal to the Prosecution case

²² *Ibid.*, par 4.a.

²³ *Ibid.*, par 4b.

²⁴ *The Prosecutor v Stanislav Galić*, Case No IT-98-29-AR73.2, Decision on interlocutory appeal concerning Rule 92 bis (C), 7 June 2002, par 14.

that it would not be fair to the Accused to permit the evidence to be given in written form.²⁵ The Trial Chamber considers that this is not the case with respect to the statement of Witness 7.192. Insofar as it simply refers to the “Serb Army”, the statement by Witness 7.192 does not provide evidence of this proximity. As noted by Talić, the witness simply refers to the “Serb Army” and does not provide any more details as to what units of the “Serb Army” the witness is referring to or which of its members.

44. Further, the Trial Chamber recognises that the proximity to the Accused of the acts and conduct of the subordinates of the Accused (or those alleged to be his subordinates) which are described in a witness’ written statement is relevant to the further determination as to whether the maker of the statement should appear for cross-examination. Again the Trial Chamber considers that no such proximity is apparent in the case of the written statement of Witness 7.192, which just mentions the “Serb Army” without further particulars, and fails to identify a particular unit or particular members of the “Serb Army”. The Trial Chamber emphasises that the Accused is entitled by Article 21(3) of the Statute to a presumption of innocence. This presumption of innocence places the burden to establish the guilt of the Accused upon the Prosecution, and the Prosecution must establish the Accused’s guilt beyond reasonable doubt.²⁶ However, the Trial Chamber considers that, it being Talić’s case that “(t)he municipality of Ključ was not in the 1st [Krajina] Corps’ area of responsibility and the Prosecutor must identify the units to which she is referring if she wants to establish General Talić’s responsibility”,²⁷ fairness requires that Witness 7.192 appear for cross-examination by Talić on this point. In so deciding, the Trial Chamber has also taken into consideration that the Prosecution concedes that “(d)ocuments indicate that, on or about 6 June 1992, the majority of the municipality of Ključ was transferred from the area of responsibility (“AOR”) of the 1st KK [Krajina Corps] to that of the 2nd KK [Krajina Corps]”, but that the attack on Pudin Han is alleged to have occurred before that date, and, moreover, that the Prosecution further concedes that “(u)nits of the 1st KK continued to operate in Ključ after that date and Momir Talić continued to report on events on that municipality”.²⁸

²⁵ *The Prosecutor v Stanislav Galić*, Case No IT-98-29-AR73.2, Decision on interlocutory appeal concerning Rule 92 bis (C), 7 June 2002, par 15.

²⁶ Rule 87(A) of the Statute.

²⁷ General Talić’s Defence Brief, 20 November 2001, par 4(a).

²⁸ Admissions (No.1) made on behalf of the Prosecutor, 27 August 2002.

IV. DISPOSITION

For the foregoing reasons,

PURSUANT to Rule 92 *bis* of the Rules of Procedure and Evidence

TRIAL CHAMBER II HEREBY:

1. Admits into evidence the written statements of Witnesses 7.107 and 7.163, along with the amendments to those statements, in their entirety.
2. Admits into evidence the written statement of Witness 7.101, along with the amendment to the statement, in their entirety, provided that the witness appears for cross-examination by Brđanin and by Talić, which should not exceed one hour for each Accused.
3. Admits into evidence the written statement of Witness 7.117, along with the amendment to the statement, provided that the witness appears for cross-examination by Brđanin and by Talić, which should not exceed one hour for each Accused. It does not admit into evidence Attachment 2 to the written statement.
4. Admits into evidence the written statements of Witnesses 7.191 and 7.192, along with the amendment to those statements, in their entirety, provided that the witnesses appear for cross-examination by Talić, which should not exceed half an hour for each witness.
5. In each case where the witness is required to appear for cross-examination, the time limit for cross-examination may be extended upon good cause being shown.
6. In each case where the witness is required to appear for cross-examination, the Prosecution will be allowed to ask some introductory questions to the witness so that he or she becomes adjusted to giving testimony before facing cross-examination.

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

Dated this third day of September 2002,

At The Hague, The Netherlands



Carmel Agius

Presiding Judge

[Seal of the Tribunal]