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-00-39-PT

Date: 28th February 2003

Original: English

IN TRIAL CHAMBER I

Before:	**Judge Liu Daqun, Presiding** **Judge El Mahdi** **Judge Alphons Orie**
Registrar:	**Mr. Hans Holthuis**
Decision of:	**28th February 2003**

PROSECUTOR

v.

MOMČILO KRAJIŠNIK

DECISION ON PROSECUTION MOTIONS FOR JUDICIAL NOTICE OF ADJUDICATED FACTS AND FOR ADMISSION OF WRITTEN STATEMENTS OF WITNESSES PURSUANT TO RULE 92*bis*

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I. INTRODUCTION

1. **TRIAL CHAMBER I** ("the Chamber") of the International Criminal 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 Tribunal") is seized of a series of motions submitted by the Prosecutor relating to (a) the taking of judicial notice of adjudicated facts, and to (b) admission of evidence in the form of witness statements under Rule 92*bis* of the Tribunal's Rules of Procedure and Evidence ("the Rules").

2. In respect of taking *judicial notice* of facts adjudicated in other cases before this Tribunal, the Prosecution filed its first motion on 7th November 2002 (the "First Motion") for judicial notice of 1.029 adjudicated facts, 150 on which the parties to the trial had agreed to (filed as Annex A), and an additional 879 adjudicated facts on which the parties had *not* agreed to (filed as Annex B). Following the judgement in the *Vasiljević* case,[1] the Prosecution filed a second motion on 10th January 2003 for judicial notice of another 103 facts adjudicated in that case (the "Second Motion"), all of which have been objected to by the Defence. In total, the Prosecution has proposed 1.132 facts for judicial notice in this case against *Momčilo Krajišnik* ("the Accused").

3. As far as the *admission of witness statements* and *transcripts* under Rule 92*bis* is concerned, four Prosecution motions were referred to this Chamber from the Pre-Trial Chamber (Trial Chamber III), namely the Motion of 17th May 2002 for Admission of Statements and Transcripts Pursuant to Rule 92*bis* in Respect of Krajišnik, and the Motions of 2nd August, 9th September and 7th November 2002 for Admission of Evidence Pursuant to Rule 92*bis*. Altogether, the Prosecution sought admission of 188 statements pertaining to 178 witnesses under Rule 92*bis*, all of which have been objected to by the Defence on various grounds.

II. The Parties' Submissions and Arguments on Judicial Notice

4. In support of its First Motion of 7th November 2002, the Prosecution primarily pointed out that taking judicial notice of the proposed adjudicated facts would effectively reduce the number of Prosecution witnesses during trial and satisfy the public interest in judicial recognition of these facts. The Prosecution contended, furthermore, that consent of the Defence is not required under Rule 94(B) and that no unfair prejudice was being created against the Ac-

[1] The *Prosecutor vs. Mitar Vasiljević,* IT-98-32-T, rendered by Trial Chamber II on 29th November 2002.

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cused. Finally, none of the adjudicated facts are legal findings or are based on plea agreements. The adjudicated facts of which the Prosecution had asked the Chamber to take judicial notice in the First Motion were gathered from six judgements in five cases, two of which are under appeal.[2]

5. The Defence objected on 20th November 2002 against the 879 facts included in Annex B of the Prosecution's First Motion, arguing that the taking of judicial notice was rarely used in the Common Law system and that, in any case, judicial economy should never outweigh the right of the Accused to a fair trial. The disputed facts, furthermore, attest to the criminal responsibility of the Accused and are therefore plainly inadmissible under Rule 94. The Defence also pointed out that the time frame in this case is different from the *Kunarać* and *Krnojelac* cases (from which parts of the adjudicated facts were collected) and asserted that the disputed facts were not "truly adjudicated" in the sense that they had been finally determined on appeal or had transpired as the result of "effective and aggressive litigation" between the Parties. In respect of facts from judgements on appeal, furthermore, the Defence submitted that even if the Trial Chamber *can* subsequently exclude the evidential value of adjudicated facts of which it has already decided to take judicial notice (should they be overturned by the appeal), the Prosecution's motions are premature. Finally, the Defence raised the question that if previous Trial Chambers did not find the facts sufficient to form a conviction on Article 7(3) of the Statute, then this Chamber would be unable to determine the strength of the facts as they pertain to the acquittals of the Accused and their interplay with convictions under Article 7(1) of the Statute. The Defence therefore requested that the first Motion be dismissed or deferred for a decision by the Trial Chamber assigned to try the matter.

6. By its Scheduling Order of 25th November 2002, Trial Chamber III requested the President of the Tribunal to assign the present case to another Trial Chamber[3] and allowed the Prosecution to call a maximum of 119 witnesses *viva voce* and to submit a maximum of 178 witness statements under Rule 92*bis*, setting specific limits on the number of live witnesses and 92*bis* statements to be admitted or called for each of the 37 municipalities covered in the indictment. Trial Chamber III also ordered the Prosecution to submit its final witness list by

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[2] *Prosecutor v. Duško Tadić,* IT-94-1-T, dated 7th May 1997 and the Appeals Chamber judgement of 15th July 1999 in that same case; *Prosecutor v. Zejnil Delalić, Zdravko Mucić, Hazim Delić, and Esad Landžo* IT-96-21-T (the "*Čelebići Judgement*") dated 16th November 1998; *Prosecutor v. Dragolub Kunarac et al*., IT-96-23-T & 23/1-T, dated 22nd February 2000; *Prosecutor v. Miroslav Kvočka et al*., IT-98-30/1-T, dated 2nd November 2001; and the *Prosecutor v. Krnojelac,* IT-97-25-T, dated 15th March 2002. The *Kvočka* judgement was appealed on 30 November 2001 and the *Krnojelac* judgement on 12th April 2002. Neither of these appeals is concluded as of today.

[3] The President of the Tribunal assigned the case to this Chamber by Order of 28th November 2002.

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10th January 2003 but this was interrupted by the Prosecution's request of 8 January 2003 for more time to submit its revised witness list and for variation of the Scheduling Order's limitation of the number of witnesses for each municipality. In its decision of 10th January 2003 in response to the Prosecution's request, the Chamber suspended the time limit set out in the Scheduling Order and stayed the decision on the application for variation. This last matter is still pending and will be dealt with as well in the present decision.

7. In its response of 28th November 2002 to the Defence's objections against the First Motion, the Prosecution argued, in short, *that* the Common Law concept and use of judicial notice is irrelevant to the consideration of the nature of judicial notice under Rule 94(B), which is distinct from the concept of judicial notice contained in Rule 94(A); *that* the disputed adjudicated facts set out in Annex B do not relate directly to the Accused or to his immediately proximate subordinates and are thus appropriate for judicial notice, adding that even if they did relate to the Accused or his close subordinates, nothing in Rule 94 prevents the Chamber from taking judicial notice of such facts; *that* the adjudicated facts from the *Kunarac* and *Krnojelac* judgements are relevant to the period of time covered by the indictment against the Accused; and finally *that* an unsubstantiated assertion that the proposed facts were not truly adjudicated in the previous judgements because they were not properly challenged by the Defence is not a valid objection to the Prosecution's motion in the present case.

8. Following the judgement in the *Vasiljević* case,[4] the Prosecution filed its Second Motion for judicial notice of adjudicated facts on 10th January 2003 requesting the taking of judicial notice of an additional 103 adjudicated facts relating to the attack on and the persecution of the non-Serb population of Višegrad beginning in April 1992. The *Vasiljević* judgement was appealed on 30th December 2002.

9. In response to the Second Motion, the Defence filed its "Defence Response to Prosecutior's Second Motion for Judicial Notice of Adjudicated Facts" dated 29th January 2003, arguing that Mr. Vasiljević had been an ordinary waiter at a café in Višegrad and had never held any position in the military or Government structure of the Republika Srpska (RS), and that the judgement contains no evidence of any conspiracy between Mr. Vasiljević and the Accused or any RS military or Government official. The Defence, however, agreed that judicial notice could be taken of facts 1.030 to 1.033 and 1.040 to 1.047. Otherwise, the Second Motion should be dismissed.

[4] *Prosecutor v. Mitar Vasiljević,* IT-98-32-T, dated 29th November 2002.

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10. To clarify the issue raised by the Defence in relation to the First Motion of whether judicial notice may be taken of facts derived from judgements currently *under appeal*, the Prosecution filed a Supplement, dated 29th January 2003 ("the Supplement") to indicate exactly which facts in the *Kvočka* and *Krnojelac* judgements were *not* being appealed. In line with the present Chamber's decision of 23rd January 2003 in *Ljubičić*,[5] the purpose of the Supplement was to identify those facts which would not be affected by the appeal, regardless of its outcome, and of which judicial notice could thus be taken without any prejudice to the Accused.

III. Discussion on Judicial Notice

11. Taking judicial notice of adjudicated facts is for the purpose of achieving judicial economy in the sense that it condenses the relevant proceedings to what is essential for the case of each party without rehearing supplementary allegations already proven in past proceedings and thereby shortens the duration of the trial. Judicial economy has been held up as one of the procedural legal principles of the International Tribunal in Articles 20(1) and 21(4)(c) of the Statute, *i.e*. the right of the accused to an *expeditious trial* and the right to be *tried without undue delay.* The Chamber emphasizes, however, that its first concern is always to ensure that the Accused is offered a *fair trial*. As long as this principle is accomplished, the Chamber is under a duty to avoid that unnecessary time and resources are wasted on unnecessary disputes.

12. Rule 94 on judicial notice reads:

> "(A). A Trial Chamber shall not require proof of facts of common knowlegde but shall take judicial notice thereof.
>
> (B). At the request of a party or *proprio motu*, a Trial Chamber, after hearing the parties, may decide to take judicial notice of adjudicated facts or documentary evidence from other proceedings of the Tribunal relating to matters at issue in the current proceedings."

13. While Sub-Rule (A) mirrors the concept of judicial notice as laid down in both Common Law and Civil Law, Sub-Rule (B) is a distinct production of this Tribunal reflecting the particularity of its jurisdiction *ratione materiae*. The wording of this Sub-Rule raises two obvious questions, namely: (1) which kind of facts can be taken judicial notice of; and (2) what are the legal consequences for the parties of the Trial Chamber's taking judicial notice of certain facts?

14. As far as the first question is concerned, the Tribunal has already offered a number of criteria in its previous decisions. In the *Simić* case, for instance, the Trial Chamber established

[5] The *Prosecutor vs. Paško Ljubičić*, IT-00-41-PT

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that only facts *not subject to reasonable dispute* between the parties in the case at hand could be judicially noticed, and that Rule 94 only covers facts and *not legal consequences inferred from facts*, for which reason a Trial Chamber can only take judicial notice of factual findings but not of a legal characterization as such.[6] In *Sikirica*, the Trial Chamber confirmed this position and held, too, that it could only take judicial notice of facts which are not the subject of reasonable dispute between the parties in the case and which do not involve interpretation or legal characterizations of facts.[7] In *Kvočka*, then, the Trial Chamber found that even if the judgement from which the adjudicated facts are taken is *on appeal*, no provision in the Statute or the Rules prevents the Trial Chamber, having taken account of the rights of the Accused, from drawing legal conclusions based on facts established beyond a reasonable doubt.[8] In *Kupreškić*, the Appeals Chamber established, in respect of cases on appeal, that only facts from judgements *concluded* on appeal can be judicially noticed in subsequent cases under Rule 94(B) and that the facts would have to be specified individually, thereby excluding the taking of judicial notice of an entire judgement.[9] In *Milošević*, the Trial Chamber concluded that for a fact to be capable of admission under Rule 94(B) of the Rules, it should be "truly adjudicated and not based upon an agreement between the parties to previous proceedings, such as agreed facts underpinning a plea agreement". [10] Truly adjudicated facts, in particular, would be facts extracted from cases for which the Appeals Chamber has ruled on the merits or has not been called to do so.[11] In *Ljubičić*, finally, this Chamber sought to clarify the position expressed earlier by the Appeals Chamber in *Kupreškić* and most recently by the Trial Chamber in *Milošević* (*i.e*. that, as a main rule, only facts from *final* judgements are truly adjudicated) by finding that judicial notice of adjudicated facts should "generally not be taken of facts which are *themselves* being appealed." To the extent in which such facts have been "truly adjudicated" at trial but are not covered by the appeal, they will remain unaffected and may thus be judicially noticed even before the appeal is finally concluded. The *mere* fact that a judgement has been appealed, in other words, does not *in itself* provide sufficient grounds for excluding *all* facts adjudicated in that judgement.[12]

15. In view of these considerations, the Chamber finds that, for a fact to be capable of admission under Rule 94(B), it should be *truly adjudicated* in previous judgements in the sense that:

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[6] The *Prosecutor vs.Blagoje Simić et alt,* IT-95-9-PT; Decision of 25th March 1999, at page 3.
[7] *The Prosecutor vs. Duško Sikirica et. alt*., IT-95-8-PT; Decision of 27th September 2000, at page 5.
[8] The *Prosecutor vs. Miroslav Kvočka et alt*., IT-98-30/1-T; Decision of 8th June 2000, at page 5.
[9] The *Prosecutor vs. Zoran Kupreškić et alt*., IT-95-16-A; Decision of 8th May 2001, at par. 12.
[10] The *Prosecutor vs. Slobodan Milošević*, IT-02-54-T; Decision of 5th June 2002, at page 3.
[11] The Trial Chamber referred to the ICTR Decision of 3rd November 2000 in *The Prosecutor vs. Semanza*, ICTR-97-20-PT
[12] The *Prosecutor vs. Paško Ljubičić*, IT-00-41-PT; Decision of 23rd January 2003, at page 6.

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(i) it is *distinct, concrete and identifiable*;

(ii) it is restricted to *factual* findings and does not include *legal* characterizations;

(iii) it was *contested* at trial and forms part of a judgement which has either *not been appealed* or has been *finally settled* on appeal; or

(iv) it was *contested* at trial and now forms part of a judgement which is under appeal, but falls within issues which are *not in dispute* during the appeal;

(v) it does *not attest to criminal responsibility* of the Accused;

(vi) it is *not the subject of (reasonable) dispute* between the Parties in the present case;

(vii) it is *not based on plea agreements* in previous cases; and

(viii) it does not impact on the *right of the Accused to a fair trial*.

16. Turning then to the second question of the *legal consequences* of taking judicial notice of certain facts, the Chamber notes that Rule 94 does not itself establish the procedural legal implications of judicial notice of such facts. Judicial notice of "*facts of common knowledge*" under Rule 94(A) normally implies that such facts *cannot* be challenged during trial. Rule 94(B), however, allows for judicial notice of information based on sources which are substantially different in character from the facts contemplated in Rule 94(A). By taking judicial notice of an *adjudicated fact*, thus, the Chamber establishes a well-founded presumption for the accuracy of this fact, which therefore does not have to be proven again at trial – *unless* the other party brings out new evidence and successfully challenges and disproves the fact at trial.[13] In other words, the procedural legal impact of taking judicial notice of an adjudicated fact is *not* that the fact cannot be challenged or refuted at trial, but rather that the *burden of proof to disqualify the fact is shifted* to the disputing party. The general principle of criminal law that it is always for the Prosecutor to prove the criminal responsibility of the Accused is not, to be sure, affected by this particular Rule-based exception in relation to judicial notice of adjudicated facts; these facts *have* already been subject to judicial review, and both parties are still allowed – in order to safeguard the fairness of the trial – to challenge the fact during trial by submitting evidence that calls into question the veracity of the adjudicated facts.

17. If, during trial, a Party wishes to dispute an adjudicated fact of which the Trial Chamber has taken judicial notice, accordingly, that Party must then bring out the evidence in support of its contest and request the Chamber to entertain the challenge. If the Chamber admits the challenge, the other Party will be provided with an opportunity to respond within a short time frame set out by the Chamber and the Chamber will then decide on the matter.

[13] *Prosecutor v. Pasko Ljubičić*, "Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts", IT-00-41-PT, 23rd January 2003.

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IV. Findings on Judicial Notice

18. Applying the principles discussed above to the circumstances of the present case, the Chamber will *not* take judicial notice of the following adjudicated facts proposed by the Prosecution in its First and Second Motions:[14]

(i) Facts number 214, 933, and 958 for the reason that the alleged adjudicated facts are not to be found in the paragraphs cited by the Prosecution;[15]

(ii) Facts number 243 and 257-258 for the reason that they do not correctly reflect the factual findings in the judgement;

(iii) Facts number 284-289, 309-310, 321-324, 333-334, 341-342, 344, 348-350, 352-358, 369-380, 385-388, 391, 393-396, 402-403, 407-408, 412-417, 420, 422-449, 961, 963-972, 974-977, and 979-1004 for the reason that they are currently under appeal in the *Kvočka* case;

(iv) Facts number 602, 605, 614-618, 620-621, and 647-918 for the reason that they are currently under appeal in the *Krnojelac* case;

(v) Facts number 1.034-1.039, 1.048-1.073, 1.075-1.076, 1.078, 1.080-1.132 for the reason that they are currently on appeal in the *Vasiljević* case.[16]

V. The Parties' Submissions and Arguments on Rule 92*bis*

19. The Chamber is also seized of four Prosecution motions for admission of evidence pursuant to Rule 92*bis* of the Rules filed on 17th May 2002 ("the first 92*bis* Motion"), 2nd August 2002 ("the second 92*bis* Motion"), 9th September 2002 ("the third 92*bis* Motion"), and 7th November 2002 ("the fourth 92*bis* Motion"), respectively, requesting the Trial Chamber to admit into evidence certified written witness statements or transcripts of witness testimonies given other proceedings before the Tribunal.

20. In the first 92*bis* Motion of 102 witnesses, the Prosecution requests admission of statements or transcripts of 102 witnesses. An annex to the motion summarizes the evidence of each witness and indicates, pursuant to Rule 92*bis*(A)(i), the particular factor in favour of its admission (for the most part the cumulative nature of the evidence). The Prosecution contends that the evidence in question goes to proof of matters other than the acts and conduct of the Accused as charged in the indictment. The Defence filed a response to the first 92*bis* Motion on 21 May 2002, in which it challenges what it sees as the Prosecution's "implicit con-

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[14] In the consecutive listing of facts in this decision, the *first* as well as the *last* number are both *included*.

[15] Despite the (insignificantly) incorrect numerical references, the Chamber accepts that Fact number 180 should have referred to TJ 133 (in stead of 135), fact number 943 to KUJ 51 (in stead of 52); and fact number 1001 to KVJ 667 (in stead of 666). The references in facts number 806 and 964 are substantially incorrect but these two facts are not listed here as they are also excluded for the reason that they are under appeal in *Kvočka*.

[16] Fact number 1.030 is one of common knowledge and it makes no sense to dispute that Višegrad is located in South-Eastern Bosnia, etc. For facts 1.031, 1.074, 1.077 and 1.079, these were admitted by the parties as matters *not* in dispute. For facts number 1.032 and 1.033, finally, they also appear among the facts already agreed upon by the parties, see facts number 99 and 102. It makes no sense, therefore, to dispute them.

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tention" that the 102 witnesses would not be subjected to cross-examination. The Defence goes on to emphasize the right of the Accused to confront the witnesses who made these statements, because the statements are, according to the Defence, "critical elements" of the Prosecution's case.

21. The second 92*bis* Motion is similar in terms to the first, requesting admission into evidence the statements of three witnesses. On 5th August 2002 the Defence filed a response to the second motion repeating in essence the submissions made in response to the first motion.

22. The third 92*bis* Motion is a request to admit material relating to 25 witnesses, five of whom were the subject of the earlier motions. The Defence's reply, filed on 11th September 2002, is virtually identical to those filed previously.

23. The fourth 92*bis* Motion seeks to have admitted evidence from 58 witnesses, whose statements are summarized at the end of the motion. The Defence's objections to admission, filed on 8th November 2002, do not raise new issues.

VI. Discussion and Findings on Rule 92*bis*

24. The Trial Chamber has reviewed the 92*bis* statements and concurs with the assessment of Trial Chamber III made in its Scheduling Order of 25th November 2002 that the statements are admissible under Rule 92*bis*.[17] The Chamber is not persuaded by the arguments of the Defence in respect of its denial of the admissibility of the statements into evidence: if the evidence sought to be admitted goes to proof of matters other than the acts or conduct of the accused, it passes the first test of admission. The Defence, however, did not identify any portion of a statement or transcript which could correctly be said to fail that test. It is a separate matter, for the Chamber to determine, whether cross-examination of a particular witness is warranted.

25. While finding that the material in question is admissible under the Rules, the Trial Chamber is not in a position to finally decide which material to admit into evidence pursuant to Rule 92*bis* before it has received the Prosecution's revised witness list. As for cross-examination, the Trial Chamber will hear any *specific* reasons the Defence may have for wanting to cross-examine a Rule 92*bis* witness after the Prosecution has submitted its witness list. Should the Defence make any submissions to this end, the Prosecution will have the right of reply.

26. The Scheduling Order of 25th November 2002 permitted the Prosecution to call a maximum of 119 *viva voce* witnesses and to present evidence of a maximum of 178 witnesses

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by way of Rule 92*bis*. In light of the present Decision's grant of judicial notice of a large number of adjudicated facts and taking into consideration the variation of the Scheduling Order's limitation of the maximum numbers for individual categories set down in Annex A of the Order,[18] the Chamber resets the maximum permissible number of viva voce and Rule 92*bis* Prosecution witnesses to 101 and 168, respectively.

FOR THE FOREGOING REASONS,

PURSUANT TO RULES 54, 65*ter*, 73*bis*, 92*bis* and 94 OF THE RULES,

THE TRIAL CHAMBER:

ALLOWS the Prosecutions First and Second Motions in respect of the following adjudicated facts, of which it will take judicial notice: facts numbered:[19] 1-213, 215-242, 244-256, 259-283, 290-308, 311-320, 325-332, 335-340, 343, 345-347, 351, 360-368, 381-384, 389-390, 392, 397-401, 404-406, 409-411, 418-419, 421, 450-601, 603-604, 606-613, 619, 622-646, 919-932, 934-957, 959-960, 962, 973, 978, 1.005-1.033, 1.040-1.047, 1.074, 1.077, and 1.079;

AND OTHERWISE DENIES the First and the Second Motions;

DECIDES to modify the Scheduling Order issued by Trial Chamber III on 25th November 2002 to the effect that the Prosecution may call a maximum of 101 witnesses *viva voce* during trial and may present a maximum of 168 witnesses by way of statements and transcripts pursuant to Rule 92*bis*;

DECLARES ADMISSIBLE, under Rule 92bis, the statements and transcripts submitted by the Prosecution in the first, second, third, and fourth 92*bis* Motions;

VARIES the Scheduling Order issued by Trial Chamber III on 25th November 2002 to the effect that the Prosecution is not required to limit the number of viva voce witnesses and witness statements under Rule 92*bis* in respect of each municipality to any particular maximum or to have any maximum of expert, "international" or "general" witnesses;

ORDERS the Prosecution to submit a list of witnesses (maximum 101) to be called *viva voce* at trial and a list of witness statements and transcripts (pertaining to a maximum of 168 witnesses) to be admitted under Rule 92*bis* within 15 days of the date of this Decision, and to

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[17] *Prosecutor v. Momčilo Krajišnik and Biljana Plavšić*, "Scheduling Order", 25th November 2002.
[18] As requested in the "Prosecution's Request for Further Time to File Revised Witness List and for Variation of Scheduling Order", 8th January 2003.
[19] First and last fact number *both included*.

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submit, along with these lists, a chart showing the distribution of witnesses and witness statements or transcripts per municipality;

RESERVES its decision as to which Rule 92*bis* statements and transcripts will be finally admitted and which Rule 92*bis* witnesses (if any) may be called for cross-examination until such time as the Prosecution has submitted its revised witness list and the Trial Chamber has heard the parties on any specific argument of the Defence against admission of a statement or transcript and in favour of cross-examination.

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

Dated this twenty eighth day of February 2003,
At The Hague
The Netherlands

Liu Daqun
Presiding

[Seal of the Tribunal]

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