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SCSL-03-01-T
(31452-31493)

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SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
Freetown – Sierra Leone

APPEALS CHAMBER

Before: Justice Jon M. Kamanda, Presiding
Justice Emmanuel Ayoola
Justice Renate Winter
Justice George Gelaga King
Justice Shireen Avis Fisher

Registrar: Ms. Binta Mansaray

Date filed: 17 December 2010

THE PROSECUTOR **Against** **Charles Ghankay Taylor**

Case No. SCSL-03-01-T

PUBLIC, WITH REDACTIONS

PROSECUTION RESPONSE TO PUBLIC DEFENCE NOTICE OF APPEAL AND SUBMISSIONS REGARDING THE DECISION ON THE DEFENCE MOTION FOR ADMISSION OF DOCUMENTS AND DRAWING OF AN ADVERSE INFERENCE RELATING TO THE ALLEGED DEATH OF JOHNNY PAUL KOROMA

Office of the Prosecutor:
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I. INTRODUCTION

1. The Prosecution opposes the "Public Notice of Appeal and Submissions Regarding the Decision on the Defence Motion for Admission of Documents and Drawing of an Adverse Inference Relating to the Alleged Death of Johnny Paul Koroma."[1]

2. The two grounds of appeal raised by the Defence are without merit and should be dismissed, and the relief requested should be denied. The majority of the Trial Chamber ("**Majority**") did not err in fact or in law, or abuse its discretion in dismissing the Defence's Motion for Admission.[2] The language used by the Defence at page 9, in the caption above paragraph 2, is unfortunate. Characterizing a decision with which the Defence does not agree as "absurd" is disrespectful to the judges and to the dignity of the Court and is unhelpful in resolving the issues before the Court.

3. This Response is filed on a confidential basis for two reasons. [redacted]

[redacted]

[1] *Prosecutor v. Taylor,* SCSL-03-01-T-1133, "Public Notice of Appeal and Submissions Regarding the Decision on the Defence Motion for Admission of Documents and Drawing of an Adverse Inference Relating to the Alleged Death of Johnny Paul Koroma", 10 December 2010 ("**Appeal**").
[2] "**Motion for Admission**" is defined at Appeal, footnote 4.
[3] *Prosecutor v. Taylor*, SCSL-03-01-T, Trial Transcript (Private), 25 June 2008, pp. 12741-2 ("We note that by consent the evidence relating to the trips to Burkina Faso and the death of Johnny Paul Koroma will be in private session").
[4] TF1-399, TT, 12 March 2008, pp. 5936-37.

[redacted]

II. SCOPE OF THE APPEAL

4. The certificate granted by the Trial Chamber pursuant to Rule 73(B) identified the scope of this interlocutory appeal as being "the interpretation of Rule 92*bis*, and in particular, whether the exclusion of evidence going to proof of the acts and conduct of the Accused applies to exculpatory evidence tendered by the Defence."[5]

5. The Defence's submissions at paragraph 34 of the Appeal are outside the scope of the certificate as they do not involve the interpretation of Rule 92*bis* but rather a separate and second discretionary decision made by the Majority in the Admission Decision[6] as to whether exceptional circumstances existed such as to warrant a relaxation of the admission requirements under Rule 92*bis*.

6. The second ground of appeal concerning whether the Index of Disbursements and/or Letter of Indemnity satisfied the requirement of relevancy for the purposes of admission under Rule 92*bis* is also outside the scope of the certificate.[7] The Defence submissions in this regard do not argue that the Majority misunderstood the legal principle of "relevance" for purposes of Rule 92*bis*. Rather, the Defence argues that the Majority failed to consider all relevant factors and/or failed to give all relevant factors sufficient weight are simply an attempt to re-litigate the merits of the Majority's findings in the Admission Decision in the hope that the Appeals Chamber will reach a different conclusion. This attempt to re-litigate is clear from the Defence's extensive submissions seeking to establish the independent relevance of the disbursements and letter. The Defence arguments, however, while cloaked in the language used to describe the standard of review on appeal, boil down to a simple disagreement with the Majority about what facts should be considered "relevant" and do not highlight a discernable error meriting correction by the Appeals Chamber.[8]

7. Notwithstanding these Defence errors regarding the scope of the certificate, the

[5] Certification, p. 6. "**Certification**" is defined at Appeal, footnote 1.
[6] "**Admission Decision**" is defined at Appeal, footnote 2.
[7] Appeal, paras. 13 & 35-59.
[8] The arguments made in support of the independent relevancy of the Index of Disbursement and the Indemnity Letter were put before the Trial Chamber by the Defence (see Reply to Admission, paras. 8-10). "**Reply to Admission**" is defined at Appeal, footnote 4.

Prosecution addresses the arguments made by the Defence on each issue in case the Appeals Chamber exercises its discretion to determine matters outside the scope of the certificate.[9]

III. GROUNDS AND SUBMISSIONS IN RESPONSE TO THE APPEAL

Ground One: Inadmissibility of Affidavit Pursuant to Rule 92*bis*

Introduction: Majority's decision is properly based in fact & supported by law

8. Contrary to all the Defence arguments under this ground of appeal, the Majority did not err in fact[10] or law[11] or make a discernable error by either taking irrelevant factors into consideration in reaching its decision[12] or misconstruing the rationale of Rule 92*bis*.[13] As more fully discussed below, the Majority properly exercised its discretion based on an accurate understanding of the facts and in accordance with the relevant law in order to reach a decision which was reasonably open to it. The Prosecution underlines the high threshold which must be achieved before the decision of a Trial Chamber can be reversed or revised.

9. On review of the arguments made by the Defence under this ground of appeal it is clear that the primary criticism is the specific wording of the Majority's conclusion that the Affidavit "goes to proof of the acts and conduct of the Accused." In essence, because the acts and conduct of the Accused himself are not referred to in the Affidavit, the Defence contends this conclusion demonstrates an error of fact, an error of law and/or involves the consideration of an irrelevant factor.

10. The approach taken by the Defence in the Appeal, however, is unduly myopic as it is clear that the Majority based its decision on the well established extension to the restriction on the admission of evidence going to proof of the acts and conduct of the accused, an extension outlined in the ICTY Appeals Chamber decision in the *Galić*

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[9] *Prosecutor v. Galić*, IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92*bis*(C), 7 June 2002 ("***Galić* Decision**"), para. 7. Bearing in mind that this is the last case at the SCSL, the Prosecution submits that the circumstances in *Galić* which made it "beneficial" for the uncertified matters to be considered do not exist in the present proceedings.
[10] Appeal, paras. 19-23.
[11] Appeal, paras. 25-30.
[12] Appeal, para. 24.
[13] Appeal, paras. 31-33.

case and adopted into the jurisprudence of the Special Court. This extension, which is more fully discussed below concerns evidence going to proof of the acts and conduct of subordinates.

*Acts & Conduct of Subordinates of an Accused are relevant to decisions under Rule 92*bis

11. Rule 92*bis* specifically prohibits the admission of evidence which goes "to proof of the acts and conduct of the accused." This restriction is clearly stated in the Rule. However, this restriction has been extended and developed by the jurisprudence so that in certain circumstances evidence which goes to proof of the acts and conduct of a subordinate of the accused falls within this umbrella prohibition so can also either be refused admission or its admission made conditional on cross-examination. As stated above, the origins of this extension are rooted in the *Galić* case and it is instructive to consider the relevant passage in full:

> The fact the written statement goes to proof of the acts and conduct of a subordinate of the accused or of some other person for whose acts and conduct the accused is charged with responsibility does, however, remain relevant to the Trial Chamber's decision under Rule 92*bis*. That is because such a decision also involves a further determination as to whether the maker of the statement should appear for cross-examination. The proximity to the accused of the acts and conduct which are described in the written statement is relevant to this further determination. Moreover, that proximity would also be relevant to the exercise of the Trial Chamber's discretion in deciding whether the evidence should be admitted in written form at all. Where the evidence is so pivotal to the prosecution case, and where the person whose acts and conduct the written statement describes 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.[14]

12. It is evident that the Majority refused admission of the Affidavit on the basis of this extension to the "acts and conduct of the accused" limitation. The Majority understood that what was at issue was the acts and conduct of a subordinate of the Accused and, further, that under *Galić* such conduct could equally fall foul of the "acts and conduct" restriction. It was on this basis that the Majority properly exercised its discretion to conclude that the evidence in the Affidavit could not be admitted as it contained evidence which was prohibited under the extended form of the "acts and conduct of the Accused" restriction. This conclusion is supported by an analysis of the Majority's approach and reasoning in the Admission Decision.

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[14] *Galić* Decision, para. 13.

The Majority's correct application of the restriction regarding evidence going to proof of the acts and conduct of a subordinate of the accused

13. In reviewing the Majority decision, it is helpful to consider first the evidentiary posture regarding the circumstances surrounding the killing of JPK and then consider the approach taken by the Majority against this background.

14. The Prosecution evidence on record is that the Accused's subordinates, Benjamin Yeaten and Roland Duo, were both involved in the execution of JPK pursuant to the Accused's order and, indeed, passed on this order to their subordinate, DCT-032, and others.[15] According to Prosecution witnesses, DCT-032 indicated to them his involvement in the execution of JPK.[16] [redacted] However, in the latest version of DCT-032's story, set out in the Affidavit which the Defence now wishes to have admitted into evidence, DCT-032 states everything he told the Prosecution was a fabrication.

15. The significance of the evidence regarding the killing of JPK is that it is "indicative of 'consciousness of [the Accused's] criminal responsibility for the crimes charged in the Indictment."[20] The importance of this evidence and its purpose was acknowledged by the Trial Chamber in the Disclosure Decision which characterized the killing of JPK as one of the "material allegations in this trial."[21] Indeed, in the Motion for admission, the

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[15] See evidence of TF1-399, Trial Transcript, 12 March 2008, pp. 5935-5937, in particular p. 5937, lines 26-28, that the order to execute JPK came from the Accused. [redacted]

[16] See the extracts of the relevant testimony of TF1-399 [redacted] provided in Annex 2 of the Response to Admission. "**Response to Admission**" is defined at Appeal, footnote 4.

[17] DCT-032's Proffer, CMS p. 30861, provided in Annex 1 of the Response to Admission.

[18] TF1-375, Trial Transcript (Private Session), 26 August 2008, p. 14537, lines 3-14 (also included in Annex 2 of the Response to Admission).

[19] DCT-032's Proffer, CMS p. 30862, provided in Annex 1 of the Response to Admission.

[20] Disclosure Decision, para. 1. "**Disclosure Decision**" is defined at Appeal, footnote 5.

[21] Disclosure Decision, para. 25.

Defence stated that the materials were relevant "in that it affects the credibility of Prosecution allegations that Johnny Paul Koroma was killed at the behest of or by people subordinate to the Accused."[22] Therefore, any evidence which concerns the allegations of JPK's killing is clearly neither "crime base" evidence[23] nor peripheral.[24] These unsupported characterizations of the evidence related to the murder of JPK emerge for the first time in the dissent and the Appeal.

16. Against this evidentiary background, the Majority arrived at its decision. In considering the law applicable to the admission of the Affidavit under Rule 92*bis*, the Majority properly noted the *Galić* Decision's interpretation of "acts and conduct of the accused" and that this jurisprudence has been adopted by the Special Court.[25] The Majority then proceeded to note the extension to the "acts and conduct of the accused' restriction which applies when the acts and conduct of subordinates are at issue and which is also based on the *Galić* Decision.[26] This extension has already been discussed above.

17. Having properly considered the applicable law, the Majority made the following findings. First, the Majority identified that the Affidavit relates to DCT-032's denial that he was involved in the killing of JPK pursuant to the orders of the Accused.[27] The Majority then recalled the evidence of Prosecution witnesses concerning DCT-032's involvement.[28] On this basis, the Majority properly assessed the Affidavit in light of its intended use - to refute the Prosecution evidence.[29] The Majority specifically noted that the Affidavit related to the "alleged murder *committed by subordinates* of Charles Taylor on his orders."[30] Therefore, DCT-032's status as a subordinate was clearly acknowledged. In the Disclosure Decision, the Trial Chamber previously noted the

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[22] Motion, para. 21.
[23] Contra Appeal, para. 24, 28.
[24] Contra Admission Decision, Sebutinde Dissent, para. 4.
[25] Admission Decision, para. 16.
[26] Admission Decision, para. 18 citing *Galić* Decision, para. 13 and *Prosecutor v. Taylor*, SCSL-03-01-T-556, Decision on Prosecution Notice under Rule 92*bis* for the Admission of Evidence related to *inter alia* Kenema District and on Prosecution Notice under Rule 92*bis* for the Admission of the Prior Testimony of TF1-036 into Evidence, 15 July 2008, p. 4.
[27] Admission Decision, para. 23.
[28] Admission Decision, para. 24.
[29] Admission Decision, para. 25.
[30] Ibid.

significance and purpose of the allegations concerning the killing of JPK.[31] Therefore, the "pivotal" nature of any evidence related to this aspect of the Prosecution case had already been established and, as the Defence is keen to underline, the pleadings for the disclosure and admission issues are related.[32]

18. The Majority then applied the applicable law already identified by it regarding the restriction which can apply to evidence concerning the acts and conduct of a proximate subordinate of an accused on a pivotal issue to properly refuse the admission of the Affidavit. The Majority, therefore, reached a reasoned conclusion supported by jurisprudence and committed no error of law or fact and made no discernable error of law.

The Majority's decision did not involve an error of fact

19. When set in the above context, it is clear that the Defence arguments under this ground are flawed. The Defence argument at paragraphs 19 to 23 of the Appeal which appear to criticize the Majority for "reading in" to the Affidavit references to the Accused are without merit. The relevance to the conduct of the Accused is clear where DCT-032 now claims in the affidavit never to have met Johnny Paul Koroma. The Majority was plainly cognizant of DCT-032's status as a subordinate and equally cognizant that evidence of the acts and conduct of such sub-ordinates could, like that relating to acts and conduct of the accused, result in exclusion. No incorrect conclusion of fact occurred.

20. The Defence arguments at paragraphs 19 to 23 of the Appeal also take issue with the Majority's factual conclusion that the Affidavit contained a denial by DCT-032 that he was involved in the killing of JPK. However, this Defence complaint is not borne out by a plain reading of the Affidavit. At paragraph 7 of the Affidavit, DCT-032 clearly states: "I ... denied any knowledge of JPK or his death" and at paragraph 27: "I have never met Johnny Paul Koroma." Combined with the other statements contained in the Affidavit that DCT-032 fabricated the whole story he told to the Prosecution it is clear that the Affidavit amounts to a denial by DCT-032 that he was involved in the killing of

[31] Disclosure Decision, paras. 1 & 25.
[32] Appeal, paras. 4 & 7.

JPK. Any contrary argument does not withstand scrutiny.

21. It is accordingly clear that the Defence has failed to meet the standard for appeal review - that no reasonable Trial Chamber could have reached the conclusion that the Majority did on the material before it.

The Majority's decision did not involve taking irrelevant factors into consideration

22. Further, contrary to the Defence arguments set out at paragraph 24 of the Appeal, when assessing the admissibility of evidence concerning the acts and conduct of a proximate subordinate of an accused, a trial chamber is entitled to place the evidence in its wider context. Only when set in this wider context is the chamber able to properly assess whether the evidence at issue should be admitted, excluded or admitted conditional on cross-examination. An example of this approach is given in the *Galić* Decision. In *Galić*, the ICTY Appeals Chamber highlighted that the significance of certain expert evidence lay in whether it could be considered "the vital link in demonstrating that the shell which is alleged to have caused many causalities was fired from a gun emplacement manned by immediately proximate subordinates of the accused."[33] The establishment of this link was clearly not evident from the evidence itself and required the exercise of a discretion which the Appeals Chamber ultimately considered was best exercised by the Trial Chamber and so the matter was remitted back to it.

23. Indeed, this approach of assessing evidence relating to the acts and conduct of proximate subordinates in its wider evidentiary context, has been undertaken on repeated occasions in the present proceedings at the request of the Defence in relation to the admission of crime base evidence. When the Prosecution sought the admission of such evidence from numerous witnesses who had testified in previous trials, despite the absence of any specific reference to the acts and conduct of the Accused in the evidence to be tendered, the Trial Chamber determined that: "the nature of the information contained in the transcripts sought to be tendered in evidence by the Prosecution is sufficiently proximate to the Accused that its admission in the absence of an opportunity to cross-examine the makers of the statements would unfairly prejudice

[33] *Galić* Decision, para. 18.

the Accused."[34] The Defence argument that assessing evidence in its wider context, particularly as regards crime base evidence, will render Rule 92*bis* obsolete is, therefore, plainly without merit and contradicts the Defence's previous stance.

24. The Defence submissions on this point, therefore, fail to show that the Majority exercised its discretion improperly and not in accordance with the law.

The Majority's decision did not involve an error law

25. The Defence arguments in paragraphs 25 to 30 that there has been an error of law continue to erroneously focus on a narrow view of the Majority's decision and fail to acknowledge that the decision is properly based on the extension of the acts and conduct of the accused limitation which is applicable to the evidence of proximate subordinates. The arguments further invoke the issue of omission which finds no basis in the Majority's decision.

26. In relation to the Defence arguments raised in paragraph 27 of the Appeal, the significance of the evidence relating to JPK's murder and the fact that it is a pivotal issue has clearly been acknowledged by the Trial Chamber as a whole in the Disclosure Decision and is very obviously not being presented for the purposes of crime base evidence.[35] In any event, there is no temporal restriction on the type of evidence which can be admitted under Rule 92*bis*. As regards, the Defence arguments set out in paragraph 28 of the Appeal, as extensively discussed above, the evidence relates to the acts and conduct of a proximate subordinate and the jurisprudence determines that this fact means it "remain[s] relevant to the Trial Chamber's decision under Rule 92*bis*" and further may result in the evidence's complete exclusion.[36]

27. The issue of omission is erroneously raised by the Defence at paragraph 29 of the Appeal. The Majority's decision was not premised on the Affidavit being relevant to an omission of the Accused. Rather, the Majority properly assessed that the Affidavit

[34] *Prosecutor v. Taylor*, SCSL-03-01-T-556, Decision on Prosecution Notice under Rule 92*bis* for the Admission of Evidence related to *inter alia* Kenema District and on Prosecution Notice under Rule 92*bis* for the Admission of the Prior Testimony of TF1-036 into Evidence, 15 July 2008, p. 5. While cross-examination was ordered in those instances, as already noted above, the *Galić* Decision establishes such evidence may also be properly refused admission.
[35] Disclosure Decision, paras. 1 & 25.
[36] *Galić* Decision, para. 13.

concerned the acts and conduct of a subordinate and then further assessed the evidence in light of its intended use – to refute Prosecution witnesses' testimony regarding the killing of JPK.[37] This assessment was necessary in order to determine whether or not a pivotal issue was at play. Further, an analysis of the Affidavit itself also clarifies that no issue of omission arises. The Affidavit refers to the acts and conduct of DCT-032, not the Accused, which include his dealings with the Prosecution (such as his statement to Kelvin denying knowledge of JPK or his death and the steps he took to fabricate his story to the Prosecution). There is, therefore, no issue regarding the application of Rule 92*bis* to omissions to act in the context of the present appeal.

28. The arguments set out at paragraph 30 of the Appeal, do not establish that an error of law has occurred. As the Defence outline, the Majority correctly took into account what type of evidence might fall within the scope of the acts and conduct restriction and correctly identified that it encompasses evidence which proves or disproves the acts and conduct of the Accused. As admission under Rule 92*bis* is a discretionary decision, the fact that other considerations such as the impact evidence might have on a co-accused might also play a role in whether the evidence is excluded, does not mean that evidence which disproves the acts and conduct of an accused would otherwise have been admitted. The Defence, thus, fail to establish that exculpatory evidence does not fall within the scope of Rule 92*bis*.

29. The final approach of the Defence under this first ground of appeal appears to be that, even if the evidence does contain evidence going to proof of the acts and conduct of the Accused on peripheral issues, this should be admissible where the application is made by the Defence provided it meets the other requirements of Rule 92*bis*.[38] By failing to follow such an approach, the Defence argue the majority made an error of law.

30. This argument is clearly untenable and is defeated by the plain language of the rule and the case law.[39] If Rule 92*bis* were meant to only apply to Prosecution evidence, the

[37] Admission Decision, para. 25.
[38] Appeal, paras. 31-33.
[39] *Prosecutor v. Taylor,* SCSL-03-1-T-1099, "Decision on Public with Annex A Defence Motion for Admission of Documents Pursuant to Rule 92*bis*- Newspaper Article", 5 October 2010, p.4, citing at footnotes 12 and 14 to *Prosecutor v. Sesay et al.,* SCSL-04-15-T-1125, "Decision on Sesay Defence Motion and Three Defence Applications to Admit 23 Witness Statements Under Rule 92*bis*", 15 May 2008, paras.34-35) and *Prosecutor v.*

rule would say so. Both the plain language of the rule and the jurisprudence make clear that the prohibition applies to evidence introduced by both parties to "prove or disprove" the Accused's acts or conduct. Here the evidence is clearly offered to disprove that the Accused ordered the murder of Johnny Paul Koroma. The Appeals Chamber has analyzed Rule 92*bis* in the context of this case[40] and, while this analysis concerned a separate aspect of the rule, the Appeals Chamber did advocate that the words contained in the rule be "given their natural and ordinary meaning."[41] Likewise the Appeals Chamber looked to the ordinary meaning to determine that the use of the word "including" in Rule 92*bis* implied there is no express limitation on the form of the "information" that can be admitted under the rule.[42] Exactly the same analysis is appropriate in the instant case, to determine that Rule 92*bis* excludes information that goes to "proof of the acts and conduct of the accused," irrespective of whether an application is made by the Prosecution or the Defence.

31. It is, therefore, clear that the Defence has failed to establish an error of law *invalidating the decision* of the Majority.[43]

32. The Defence argument at paragraph 34 of the Appeal is not covered by the scope of the certificate as it does not concern the interpretation of Rule 92*bis*. Whether or not exceptional circumstances exist to justify a relaxation of the standard for the admission of documents pursuant to Rule 92*bis* is a separate discretionary decision made on the facts by the Majority unrelated to the interpretation of Rule 92*bis*. However, should the Appeals Chamber be minded to consider the Defence argument in this regard, the Prosecution adopts and incorporates by reference its original submissions made on this point set out at paragraph 14 of the Response to Admission. The essence of these previous submissions is that the Defence has never provided any adequate explanation as to why it could not simply call DCT-032 to testify during the 16 months its case was

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Bagosora et al., ICTR-98-41-T, "Decision on Prosecutor's Motion for the Admission of Written Witness Statements under Rule 92bis", 9 March 2004, Para. 16.

[40] *Prosecutor v. Taylor*, SCSL-03-01-T-721, "Decision on "Prosecution Notice of Appeal and Submissions Concerning the Decision Regarding the Tender of Documents", 6 February 2009 (**"Taylor Documents Decision"**); *Prosecutor v. Norman et al*, SCSL-2004-14-AR73, "Fofana – Decision on Appeal Against "Decision on Prosecution's Motion for Judicial Notice and Admission of Evidence", 16 May 2005.

[41] Taylor Documents Decision, para.30.

[42] Taylor Documents Decision, para.31.

[43] *Prosecutor v Kunarac et al.*, IT-96-23 and IT-96-23/1-A, "Judgement", Appeals Chamber, 12 June 2002, para. 38.

open, especially since, at the time the Defence first sought admission of the Affidavit and other documents, the Defence had not closed its case. Nothing in the Rules prevented the Defence from presenting the evidence of DCT-032, the Rules simply do not permit the Defence to present this evidence by way of an untested affidavit drafted by the Defence team. Further, the Defence failed to establish that the disclosure of the DNA tests, Index of Disbursements and Indemnity Letter resulted in *any* prejudice such that *any* remedy was warranted.

Ground Two: Independent Relevance of Payments & Indemnity Letter

Explanation of Relevance of Prosecution Payments and Indemnity Letter

33. As noted above, this ground of appeal falls outside the scope of the certificate. However, should the Appeals Chamber exercise its discretion to determine matters outside the scope of the certificate, then the Defence arguments under this ground should be dismissed for the following reasons.

34. The Defence fails to establish that the Majority abused its discretion when it found that, absent the Affidavit, the Index of Disbursements and the Indemnity Letter had no independent relevance and so could not be admitted under Rule 92*bis*.[44] The Prosecution notes that the original Motion for Admission also sought admission of the DNA test results but in the Appeal the request for relief is limited to the Index of Disbursements and Indemnity Letter only.[45] This Response, therefore, focuses only on the narrower request made in the Appeal.

35. The Defence's argument regarding the relevance and thus admissibility of both the Index of Disbursements and the Indemnity Letter is based on the erroneous assertion that allegedly improper payments and inducements to witnesses, potential witnesses and sources "is a live issue in this trial."[46] There is no such live issue in the present proceedings.

36. Generally, in proceedings the only issue to which disbursements and/or indemnity letters made by the Prosecution have any relevance is the issue of witness credibility.

[44] Appeal, paras. 35-59 which challenge the Majority's findings at Admission Decision, paras. 28, 29, 31 & 32.
[45] Appeal, para. 59.
[46] Appeal, para. 36.

As established in the *Karemera* case[47] and the Trial Chamber's recent decisions,[48] information relating to benefits and promises only potentially falls within the category of exculpatory material where the individual to whom such items relate is a Prosecution witness or victim.[49] It is the information's potentially exculpatory character which makes it potentially relevant. However, absent any connection to a witness who has testified (*viva voce* or via Rule 92*bis*) and whose credibility is to be tested, such information is effectively disembodied and irrelevant.

37. Despite the repeated efforts of the Defence, there is no wider issue before the Court concerning the conduct of the Prosecution to which the Defence can properly link these documents. Rather, the wider allegations by the Defence regarding improper conduct by the Prosecution related to individuals who were not called to testify as Prosecution witnesses and, at any rate, have been dismissed by the Trial Chamber.[50] But, even if *arguendo* an investigation into contempt of Court by members of the Prosecution and/or the Office of the Prosecutor is launched pursuant to a decision of this Appeals Chamber on a separate motion before it, there will still be no live issue regarding Prosecution malfeasance before the Trial Chamber.

38. The position in the present proceedings is in *direct contrast* to that before the ICC Trial Chamber in the *Lubanga* case, a case which the Defence erroneously seek to rely on in the Appeal.[51] In *Lubanga*, the Trial Chamber has *expressly* stated that "the role of certain intermediaries, as well as the alleged improper payments to intermediaries and witnesses, have become live issues in the case".[52] The issue has become live as it has progressed beyond the stage of allegations and the ICC Trial Chamber has identified

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[47] *Prosecutor v. Karemera et al.*, ICTR-98-44-PT, Decision for Full Disclosure of Payments to Witnesses, 23 August 2005, para. 7.
[48] *Prosecutor v. Taylor*, SCSL-03-01-T-1084, Decision on Defence Motion for Disclosure of Statement and Prosecution Payments Made to DCT-097, 23 September 2010, para. 21 & Disclosure Decision, para. 21.
[49] The Prosecution recalls its original position which is that DCT-032 was never a Prosecution witness but simply a source (see Response to Disclosure, paras. 6-11). "**Response to Disclosure**" is defined at Appeal, footnote 3.
[50] *Prosecutor v. Taylor,* SCSL-03-01-T-1118, Decision on Defence Motion Requesting an Investigation into Contempt of Court by the Office of the Prosecutor and its Investigators, 11 November 2010.
[51] Appeal, para. 58.
[52] *Prosecutor v. Lubanga*, ICC-01/04-01/06-2595-Red, "Redacted Decision on the Defence Request for the Admission of 422 Documents", 17 November 2010 ("**Second *Lubanga* Decision**"), para. 63. See also *Prosecutor v. Lubanga*, ICC-01/04-01/06-2434-Red2, "Redacted Decision on Intermediaries", 31 May 2010 ("**First *Lubanga* Decision**"), para. 135: "The precise role of the intermediaries (together with the manner in which they discharged their functions) has become an issue of major importance in this trial."

that certain intermediaries "may have misused their positions in varying ways."[53] Accordingly, in *Lubanga*, the ICC Trial Chamber is taking active steps to investigate this live issue before it and, as it involves payments to intermediaries and witnesses, documents which concern the same were admitted. A further significant distinction between the instant case and the *Lubanga* case is that DCT-032 was never a Prosecution intermediary tasked effectively to work as the Prosecution's agent in relation to witnesses the Prosecution wished to call.

39. Therefore, as there is: (i) no live issue concerning alleged improper payments to sources or witnesses in the present proceedings; (ii) DCT-032 is not a Prosecution intermediary; and (iii) the only issue to which disbursements and/or indemnity letters are relevant is this witness' credibility, then the Majority properly exercised their discretion to refuse admission of the Index of Disbursements and Indemnity Letter as the individual to whom they relate, DCT-032, has not given evidence in any form in this trial. The Defence has failed to prove there was any discernable error on the part of the Majority.

IV. RELIEF

40. The Appeals Chamber should dismiss the Defence request that the Appeals Chamber exercise its own discretion and order the Trial Chamber to admit into evidence the Affidavit, the Index of Disbursements and the Indemnity Letter. Should the Appeals Chamber, despite the above arguments, be minded so to act, then the Prosecution adopts its position set out in the Response to Admission regarding the admission of the three documents referred to in the Appeal. Accordingly the Prosecution adopts by reference all the relevant arguments made therein.

41. The Prosecution underlines, though, that if the Appeals Chamber grants the Defence request, then the Prosecution requests that the Appeals Chamber order DCT-032 to appear before the Trial Chamber for cross examination. To allow the documents into evidence based on their supposed critical importance to the Accused's case, but to deny the Prosecution the opportunity to cross-examine this admitted liar, would be to deny

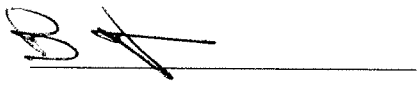
[53] Second *Lubanga* Decision, para. 60 citing to the findings of the Trial Chamber made in the First *Lubanga* Decision at para. 140.

the Prosecution its right to a fair hearing.

V. CONCLUSION

42. As argued above, the Majority did not err in fact or in law, or abuse its discretion in dismissing the Defence's Motion for Admission. The Appeal, including the request for relief, should be denied.

Filed in The Hague,
17 December 2010
For the Prosecution,



Brenda J. Hollis
The Prosecutor

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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: IT-98-29-AR73.2

Date: 7 June 2002

Original: English

IN THE APPEALS CHAMBER

Before: Judge David Hunt
Judge Mehmet Güney
Judge Asoka de Zoysa Gunawardana
Judge Fausto Pocar
Judge Theodor Meron

Registrar: Mr Hans Holthuis

Decision of: 7 June 2002

PROSECUTOR

v

Stanislav GALIĆ

DECISION ON INTERLOCUTORY APPEAL CONCERNING RULE 92*bis*(C)

Counsel for the Prosecutor:

Mr Mark Ierace, Senior Trial Attorney

Counsel for the Defence:

Ms Mara Pilipović & Maître Stephane Piletta-Zanin

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The background to the appeal

1. Pursuant to a certificate granted by the Trial Chamber in accordance with Rule 73(C) of the Rules of Procedure and Evidence ("Rules"), as Rule 73 then stood,[1] Stanislav Galić (the "appellant") has appealed against the admission into evidence of two written statements made by prospective witnesses to investigators of the Office of the Prosecutor ("OTP"). Both prospective witnesses have died since making their statements.

2. The appellant, as the Commander over a period of almost two years of the Sarajevo Romanija Corps (part of the Bosnian Serb Army), is charged in relation to an alleged campaign of sniping and shelling against the civilian population of Sarajevo conducted during that time by the forces under his command and control. He is charged with individual responsibility pursuant to Article 7.1 of the Tribunal's Statute and as a superior pursuant to Article 7.3 for crimes against humanity and for violations of the laws and customs of war. The prosecution concedes that it is no part of its case that the appellant personally physically perpetrated any of the crimes charged himself.[2] Its case pursuant to Article 7.1 is that he planned, instigated, ordered or otherwise aided and abetted the commission of those crimes by others.[3] Its case pursuant to Article 7.3 is that the appellant knew, or had reason to know, that his subordinates had committed or were about to commit such crimes and that he failed to take reasonable steps to prevent such acts or to punish those who carried out those acts.[4]

3. The first written statement admitted into evidence was made by Hamdija Čavčić. He was a chemical engineer employed by the Department for Criminal and Technical Investigations in Sarajevo as an expert in investigating the traces in the case of fire or explosions. As such, he investigated a shelling on 12 July 1993 in which twelve people had been killed. He prepared a contemporaneous Criminal and Technical Report in which he deduced the direction from which the particular shell had been fired. His written statement to the OTP investigator, which is dated 16 November 1995, annexes that report and confirms that the findings which he had made in it

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1 Certificate Pursuant to Rule 73(C) in Respect of Decisions of the Trial Chamber on the Admission into Evidence of Written Statements Pursuant to Rule 92*bis*(C), 25 Apr 2002 ("Certificate"). Rule 73, which deals with motions other than preliminary motions, then provided that, unless the Trial Chamber certified pursuant to Rule 73(C) that an interlocutory appeal during the trial was appropriate for the continuation of the trial, decisions rendered during the course of the trial on motions involving evidence and procedure were without interlocutory appeal.

2 Prosecutor's Pre-Trial Brief Pursuant to Rule 65*ter*(E)(i), 23 Oct 2001, par 68.

3 *Ibid*, par 68.

4 Indictment, par 11.

were true. He also explains in greater detail how he had reached those conclusions. In addition, the written statement describes a similar investigation of a shelling on 5 February 1994. These two incidents are identified as incidents 2 and 5 in the schedule to the indictment.

4. The second written statement admitted into evidence was made by Bajram Šopi. He was present on 7 September 1993 collecting firewood when a man was killed by a sniper's shot. His statement to the OTP investigator says that both he and the man who was killed were dressed in civilian clothes. It describes his own wounding by shooting and the damage to his house by shelling in two incidents during 1992. It also describes the injuries to his daughter by shelling at an unspecified time. He further states that there were military units behind his house in a school building which had been "levelled". Only that part of the statement which describes the incident on 7 September 1993, which is identified as incident 11 in the schedule, was tendered.

The relevant Rules

5. The appeal principally concerns two rules in Section 3 of the Rules (headed "Rules of Evidence"), Rules 89 and 92*bis*, and the interaction between them. It is convenient, therefore, to quote each of those two Rules in full:

> **Rule 89**
> **General Provisions**
>
> (A) A Chamber shall apply the rules of evidence set forth in this Section, and shall not be bound by national rules of evidence.
>
> (B) In cases not otherwise provided for in this Section, a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law.
>
> (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.
>
> (E) A Chamber may request verification of the authenticity of evidence obtained out of court.
>
> (F) A Chamber may receive the evidence of a witness orally or, where the interests of justice allow, in written form.

> **Rule 92*bis***
> **Proof of Facts other than by Oral Evidence**
>
> (A) 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.
>
> (i) Factors in favour of admitting evidence in the form of a written statement include but are not limited to circumstances in which the evidence in question:

(a) is of a cumulative nature, in that other witnesses will give or have given oral testimony of similar facts;
(b) relates to relevant historical, political or military background;
(c) consists of a general or statistical analysis of the ethnic composition of the population in the places to which the indictment relates;
(d) concerns the impact of crimes upon victims;
(e) relates to issues of the character of the accused; or
(f) relates to factors to be taken into account in determining sentence.

(ii) Factors against admitting evidence in the form of a written statement include whether:

(a) there is an overriding public interest in the evidence in question being presented orally;
(b) a party objecting can demonstrate that its nature and source renders it unreliable, or that its prejudicial effect outweighs its probative value; or
(c) there are any other factors which make it appropriate for the witness to attend for cross-examination.

(B) A written statement under this Rule shall be admissible if it attaches a declaration by the person making the written statement that the contents of the statement are true and correct to the best of that person's knowledge and belief and

(i) the declaration is witnessed by:

(a) a person authorised to witness such a declaration in accordance with the law and procedure of a State; or
(b) a Presiding Officer appointed by the Registrar of the Tribunal for that purpose; and

(ii) the person witnessing the declaration verifies in writing:

(a) that the person making the statement is the person identified in the said statement;
(b) that the person making the statement stated that the contents of the written statement are, to the best of that person's knowledge and belief, true and correct;
(c) that the person making the statement was informed that if the content of the written statement is not true then he or she may be subject to proceedings for giving false testimony; and
(d) the date and place of the declaration.

The declaration shall be attached to the written statement presented to the Trial Chamber.

(C) A written statement not in the form prescribed by paragraph (B) may nevertheless be admissible if made by a person who has subsequently died, or by a person who can no longer with reasonable diligence be traced, or by a person who is by reason of bodily or mental condition unable to testify orally, if the Trial Chamber:

(i) is so satisfied on a balance of probabilities; and
(ii) finds from the circumstances in which the statement was made and recorded that there are satisfactory *indicia* of its reliability.

(D) A Chamber may admit a transcript of evidence given by a witness in proceedings before the Tribunal which goes to proof of a matter other than the acts and conduct of the accused.

(E) Subject to Rule 127 or any order to the contrary, a party seeking to adduce a written statement or transcript shall give fourteen days notice to the opposing party, who may within seven days object. The Trial Chamber shall decide, after hearing the parties, whether to admit the statement or transcript in whole or in part and whether to require the witness to appear for cross-examination.

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The issues in the appeal

6. The appellant has raised a number of issues in his Interlocutory Appeal:

(1) The appellant says that both statements did not fall within Rule 92*bis* because they go to proof of "the acts and conduct of the accused as charged in the indictment".[5] The prosecution responds to this issue in three alternative ways. Either (a) the statements do not go to proof of the acts and conduct of the accused charged in the indictment,[6] or (if they do go to such proof) (b) Rule 92*bis*(C) does not exclude proof of the acts and conduct of the accused by a written statement of a deceased person,[7] and (c) the evidence is in any event admissible under Rule 89(C) without the restrictions of Rule 92*bis*.[8]

(2) The appellant says that the Trial Chamber did not evaluate what is said to be the requirement of Rule 92*bis*(C)(i) as to "the probability of the said statements".[9] The prosecution responds that the appellant has misread the requirements of Rule 92*bis*(C)(i).[10]

(3) The appellant says that the Trial Chamber "did not engage in establishing the question of reliability".[11] The prosecution responds that the Trial Chamber correctly determined that there were satisfactory *indicia* of the reliability of each statement in the circumstances in which it was made and recorded.[12]

(4) The appellant says that Rule 92*bis* does not relate to expert witnesses, whose evidence is admissible only under Rule 94*bis*, so that the statement of Hamdija Čavčić (described in par 3, *supra*) was inadmissible upon that basis also.[13] The prosecution responds that Rule 92*bis* is directed to any witness whose statement does not go to proof of the acts or conduct of the accused, including expert witnesses,[14] and that Rule 94*bis* is directed to experts who are not in a position themselves to testify directly about the facts upon which they base their expert opinion.[15]

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5 Appeal of the Decisions on [*sic*] the Trial Chamber of 12 April, and 18 April 2002, 2 May 2002 ("Interlocutory Appeal"), pp 2-3, 4-8.
6 Prosecution's Response to Accused Stanislav Galić's Interlocutory Appeal Pursuant to Rule 73(C) on the Decisions on Trial Chamber I of 12 and 18 April 2002, 13 May 2002 ("Response"), pars 33-49.
7 *Ibid*, pars 7-14.
8 *Ibid*, pars 15-32, 58-62.
9 Interlocutory Appeal, pp 3-4, 11.
10 Response, pars 50-57.
11 Interlocutory Appeal, p 3.
12 Response, pars 63-68.
13 Interlocutory Appeal, p 9.
14 Response, par 72.
15 *Ibid*, par 71.

(5) The appellant says that it is not in the interests of justice to admit into evidence part of a written statement, and that the other party must be given the opportunity to argue that the statement should be admitted in its entirety because he has no possibility of cross-examining the maker of the statement.[16] The appellant also argues that, if the statement includes material which is irrelevant, the whole statement must be rejected.[17] The prosecution responds that it has the prerogative to tender evidence which it deems to be relevant to its case provided that it is *prima facie* credible.[18]

Counsel for the appellant orally informed the Appeals Chamber that his client did not intend to file a reply to the prosecution's Response, but relied upon what is said in his Interlocutory Appeal in answer to the prosecution's arguments.[19]

7. The certificate given by the Trial Chamber pursuant to Rule 73(C) (as it then stood) – that it was appropriate for the continuation of the trial that an interlocutory appeal be determined – related only to the first of these issues, as to the proper interpretation of the exclusion in Rule 92*bis*(A) of statements which go to proof of "the acts and conduct of the accused as charged in the indictment".[20] It is, however, within the discretion of the Appeals Chamber to determine also other, related, issues where it considers it appropriate to do so, at least where they have been raised in the interlocutory appeal and the respondent to the appeal has had the opportunity to put his or its arguments in relation to those related issues. It is clear, from the present case and from other cases presently being tried in the Tribunal, that it will be beneficial to the Trial Chambers and to counsel generally that all of these matters be resolved in the present appeal. The Appeals Chamber proposes therefore to deal with them all.

1(a) The "acts and conduct of the accused as charged in the indictment"

8. The appellant emphasises that Rule 92*bis* excludes from the procedure laid down any written statement which goes to proof of the acts and conduct of the accused *as charged in the indictment*.[21] He says that, as the indictment charges the appellant with individual criminal responsibility –

(i) as having aided and abetted others to commit the crimes charged, and

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[16] Interlocutory Appeal, p 11.
[17] *Ibid*, p 11.
[18] Response, par 69.
[19] Communication, 22 May 2002.
[20] Certificate, p 2.
[21] Interlocutory Appeal, p 5.

(ii) as the superior of his subordinates who committed those crimes,

the acts and conduct of those others and of his subordinates "represent his own acts".[22] The appellant describes those "others" as "co-perpetrators", and he says that the "acts and conduct of the accused as charged in the indictment" encompasses the acts and conduct of the accused's co-perpetrators and/or subordinates.[23] This argument was rejected by the Trial Chamber.[24]

9. The appellant's interpretation of Rule 92*bis* would effectively denude it of any real utility. That interpretation is inconsistent with both the purpose and the terms of the Rule. It confuses the present clear distinction drawn in the jurisprudence of the Tribunal 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 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.

10. Thus, Rule 92*bis*(A) excludes any written statement which goes to proof of any act or conduct of the accused upon which the prosecution relies to establish –

(a) that the accused committed (that is, that he personally physically perpetrated) any of the crimes charged himself,[25] or

(b) that he planned, instigated or ordered the crimes charged, or

(c) that he otherwise aided and abetted those who actually did commit the crimes in their planning, preparation or execution of those crimes, or

(d) that he was a superior to those who actually did commit the crimes, or

(e) that he knew or had reason to know that those crimes were about to be or had been committed by his subordinates, or

(f) that he failed to take reasonable steps to prevent such acts or to punish those who carried out those acts.

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[22] *Ibid*, p 6.

[23] *Ibid*, p 2. The present appeal is not the occasion to consider whether the expression "co-perpetrator", rather than "perpetrator" or "principal offender", is an appropriate description of those persons who actually commit the crimes which the indictment charges the accused with responsibility.

[24] Decision on the Prosecutor's Motion for the Admission into Evidence of Written Statement by a Deceased Witness, and Related Report Pursuant to Rule 92*bis*(C), 12 Apr 2002 ("First Decision"), p 4; Decision on the Prosecutor's Second Motion for the Admission into Evidence of Written Statement by Deceased Witness Bajram Šopi, Pursuant to Rule 92*bis*(C), 18 Apr 2002 ("Second Decision"), p 4.

[25] This is not any part of the prosecution case in this present matter.

Where the prosecution case is that the accused participated in a joint criminal enterprise, and is therefore liable for the acts of others in that joint criminal enterprise,[26] Rule 92*bis*(A) excludes also any written statement which goes to proof of any act or conduct of the accused upon which the prosecution relies to establish –

(g) that he had participated in that joint criminal enterprise, or

(h) that he shared with the person who actually did commit the crimes charged the requisite intent for those crimes.[27]

Those are the "acts and conduct of the accused as charged in the indictment", *not* the acts and conduct of others for which the accused is charged in the indictment with responsibility.[28]

11. The "conduct" of an accused person necessarily includes his relevant state of mind, so that a written statement which goes to proof of any act or conduct *of the accused* upon which the prosecution relies to establish that state of mind is not admissible under Rule 92*bis*. In order to establish that state of mind, however, the prosecution may rely upon the acts and conduct of *others* which have been proved by Rule 92*bis* statements. An easy example would be proof, in relation to Article 5 of the Tribunal's Statute, of the knowledge by the accused that his acts fitted into a pattern of widespread or systematic attacks directed against a civilian population.[29] Such knowledge may be inferred from evidence of such a pattern of attacks (proved by Rule 92*bis* statements) that he *must* have known that his own acts (proved by oral evidence) fitted into that pattern. The "conduct" of an accused person may also in the appropriate case include his omission to act.

12. This interpretation gives effect to the intention of Rule 92*bis*, which (together with the concurrent amendments to Rules 89 and 90)[30] was to qualify the previous preference in the Rules

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[26] In *Prosecutor v Tadić*, IT-94-1-A, Judgment, 15 July 1999 ("*Tadić* Judgment"), at par 220, this liability is described as that of an accomplice.

[27] *Tadić* Judgment, par 196; *Prosecutor v Brđanin & Talić*, IT-99-36-PT, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26 June 2001, par 31.

[28] See also *Prosecutor v Milošević*, IT-02-54-T, Decision on Prosecution's Request to Have Written Statements Admitted Under Rule 92*bis*, 21 Mar 2002 ("*Milošević* Decision"), par 22: "The phrase 'acts and conduct of the accused' in Rule 92*bis* is a plain expression and should be given its ordinary meaning: deeds and behaviour of the accused. It should not be extended by fanciful interpretation. No mention is made of acts and conduct by alleged co-perpetrators, subordinates or, indeed, of anybody else. Had the rule been intended to extend to acts and conduct of alleged co-perpetrators or subordinates it would have said so."

[29] *Tadić* Judgment, par 248.

[30] At the same time that Rule 92*bis* was introduced, Rule 90 was amended by deleting par (A), which stated: "Subject to Rules 71 and 71*bis*, witnesses shall, in principle, be heard directly by the Chambers", and Rule 89 was amended by adding par (F), which states: "A Chamber may receive the evidence orally or, where the interests of justice allow, in written form".

for "live, in court" testimony,[31] and to permit evidence to be given in written form where the interests of justice allow provided that such evidence is probative and reliable, consistently with the decision of the Appeals Chamber concerning hearsay evidence in *Prosecutor v Aleksovski*.[32] Far from being an "exception" to Rule 89, as the appellant claims,[33] 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.[34] (The relationship between Rule 92*bis* and Rule 89(C) is discussed in pars 27-31, *infra*.)

13. The fact that the written statement goes to proof of the acts and conduct of a subordinate of the accused or of some other person for whose acts and conduct the accused is charged with responsibility does, however, remain relevant to the Trial Chamber's decision under Rule 92*bis*. That is because such a decision also involves a further determination as to whether the maker of the statement should appear for cross-examination.[35] The proximity to the accused of the acts and conduct which are described in the written statement is relevant to this further determination.[36] Moreover, that proximity would also be relevant to the exercise of the Trial Chamber's discretion in deciding whether the evidence should be admitted in written form at all.

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[31] *Prosecutor v Kordić & Čerkez*, IT-95-14/2-AR73.5, Decision on Appeal Regarding Statement of a Deceased Witness, 21 July 2000 ("*Kordić & Čerkez* Decision"), par 19.

[32] IT-95-14/1-AR73, Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 Feb 1999 ("*Aleksovski* Decision"), par 15. The relevant passage is quoted in a footnote to par 27, *infra*.

[33] Interlocutory Appeal, p 10.

[34] The admission into evidence of written statements made by a witness in lieu of their oral evidence in chief is not inconsistent with Article 21.4(e) of the Tribunal's Statute ("In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality: [...] to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; [...].") or with other human rights norms (for example, Article 6(3)(d) of the European Convention for the Protection of Human Rights and Fundamental Freedoms provides: "Everyone charged with a criminal offence has the following minimum rights: [...] to examine, or have examined, witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; [...]."). But, 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: *Unterpertinger v Austria*, Judgment of 24 Nov 1986, Series A no 110, pars 31-33; *Kostovski v The Netherlands*, Judgment of 20 Nov 1989, Series A no 166, par 41; *Vidal v Belgium*, Judgment of 22 Apr 1992, Series A no 235-B, par 33; *Lüdi v Switzerland*, Judgment of 15 June 1992, Series A no 238, par 49; *Artner v Austria*, Judgment of 28 Aug 1992, Series A no 242-A, pars 22, 27; *Saïdi v France*, Judgment of 20 Sept 1993, Series A no 261-C, pars 43-44; *Doorson v The Netherlands*, Judgment of 26 Mar 1996, par 80; *Van Mechelen v The Netherlands*, Judgment of 23 Apr 1997, Reports of Judgments and Decisions, 1997-III, pars 51, 55; *A M v Italy*, Judgment of 14 Dec 1999, 1999-IX Reports of Judgments and Decisions, par 25; *Lucà v Italy*, Judgment of 27 Feb 2001, 2001-II Reports of Judgments and Decisions, pars 39-40; *Solakov v Former Yugoslav Republic of Macedonia*, Judgment of 31 Oct 2001, appl No 47023/99, par 57.)

[35] Rule 92*bis*(E).

[36] *Milošević* Decision, par 22.

Where the evidence is so pivotal to the prosecution case, and where the person whose acts and conduct the written statement describes 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.[37] An easy example of where the exercise of that discretion would lead to the rejection of a written statement would be where the acts and conduct of a person other than the accused described in the written statement occurred in the presence of the accused.

14. The exercise of the discretion 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 Tribunal's Statute. That is because, as the jurisprudence demonstrates in cases where the crimes charged involve widespread criminal conduct by the subordinates of the accused (or those alleged to be his subordinates), there is often but a short step from a finding that the acts constituting the crimes charged were committed by such subordinates to a finding that the accused knew or had reason to know that those crimes were about to be or had been committed by them.[38] Where the criminal conduct of those subordinates was widespread, the inference is often drawn that, for example, "there is no way that [the accused] could not have known or heard about [it]",[39] or "[the accused] had to have been aware of the genocidal objectives [of his subordinates]".[40]

15. In such cases, it may well be that the subordinates of the accused (or those alleged to be his subordinates) are so proximate to the accused that *either* (a) the evidence of their acts and conduct which the prosecution seeks to prove by a Rule 92*bis* statement becomes sufficiently pivotal to the prosecution case that it would not be fair to the accused to permit the evidence to be given in written form, *or* (b) the absence of the opportunity to cross-examine the maker of the statement would in fairness preclude the use of the statement in any event. It must be emphasised, however, that the rejection of the written statement in any of these situations is not based upon any identification of that person's acts or conduct with the acts or conduct of the accused.

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[37] *Prosecutor v Brđanin & Talić*, IT-99-36-T, *(Confidential)* Decision on the Admission of Rule 92*bis* Statements, 1 May 2002, par 14 [A public version of this Decision was filed on 23 May 2002.]

[38] *Prosecutor v Delalić et al*, IT-96-21-A, Judgment, 20 Feb 2001 ("*Delalić* Judgment"), par 241. There is a helpful list of *indicia* as to whether a superior "must have known" about the acts of his subordinates provided in the Final Report of the UN Commission of Experts (M. Cherif Bassiouni, Chairman), established pursuant to Security Council Resolution 780 (1992), 27 May 1994 (S/1994/674), under the heading "II Applicable Law - D. Command Responsibility".

[39] *Prosecutor v Delalić et al*, IT-96-21-T, Judgment, 16 Nov 1998, par 770.

[40] *Prosecutor v Krstić*, IT-98-33-T, 2 Aug 2001, Judgment, par 648.

16. The Appeals Chamber is very conscious of the fact that, in many cases, the evidence tendered pursuant to Rule 92*bis* will be relevant at the same time both to (i) the prosecution case that the accused has command responsibility under Article 7.3, and (ii) its case that the accused has individual responsibility under Article 7.1 (including participation in a joint criminal enterprise) other than personally perpetrating the crimes himself. However, Rule 92*bis* was primarily intended to be used to establish what has now become known as "crime-base" evidence, rather than the acts and conduct of what may be described as the accused's immediately proximate subordinates – that is, subordinates of the accused of whose conduct it would be easy to infer that he knew or had reason to know. The Appeals Chamber does not believe, therefore, that the concerns which it has expressed as to the use of Rule 92*bis* in Article 7.3 cases where it relates to the acts and conduct of the accused's immediately proximate subordinates will unduly limit the advantages to the expeditious disposal of trials which the Rule was designed to achieve. It may be that, where the evidence which the prosecution wishes to establish by extensive use of Rule 92*bis* in a particular case is specially pivotal to that case because it deals with the acts and conduct of the accused's immediately proximate subordinates, it will have to elect between the alternative formulations of its case which it has pleaded if it wishes to take advantage of the Rule in relation to that evidence.

17. Returning to the present case, the two statements admitted into evidence by the Trial Chamber pursuant to Rule 92*bis*(C) did not go to proof of any acts or conduct of the accused, and the objection by the appellant upon this basis is rejected. The issue then arises as to whether they should nevertheless have been rejected in the exercise of the Trial Chamber's discretion.

18. The written statement by Bajram Šopi, who was present collecting firewood when a man was killed by a sniper's shot, does not indicate the source of the shot and (on its face and taken by itself) it appears to be of no particular importance to proof of the responsibility of the appellant. No question of discretion arises in relation to that statement. However, the statement of the expert (Hadija Čavčić) concerning his conclusions as to the direction from which the particular shell had been fired, could – for the reasons given in pars 15-16, *supra* – be of substantial importance to the prosecution case if it is the vital link in demonstrating that the shell which is alleged to have caused many casualties was fired from a gun emplacement manned by immediately proximate subordinates of the accused. A question of discretion would therefore

appear to arise as to whether it would be unfair to the accused to permit this evidence to be given in written form in any event, particularly as there can be no opportunity to cross-examine him.

19. The Trial Chamber's Decision in relation to the expert's statement deals in careful detail with the arguments raised as to the statement's compliance with the requirements of Rule 92*bis*,[41] but it does not discuss any issue of discretion as might have been expected if that issue *had* been considered by the Trial Chamber. This may well be because counsel for the accused appears to have rested her opposition to the application by the prosecution exclusively upon the argument that the acts and conduct of the accused included those of his subordinates and upon the absence of any opportunity to cross-examine the expert, and she did not address the issue of discretion. In the opinion of the Appeals Chamber, however, it would be preferable that a Trial Chamber should nevertheless always give consideration to the exercise of the discretion given by Rule 92*bis* whenever the prosecution seeks to use that Rule in the special and sensitive situation posed by a charge of command responsibility under Article 7.3 where the evidence goes to proof of the acts and conduct of the accused's immediately proximate subordinates.

20. In the present case, there have been two witnesses who have already given oral evidence concerning the shelling described in the expert's statement (Mirza Sabljica, who conducted the investigation with Hadija Čavčić, and Sead Besić) and a third witness (Muhamed Jusufspahić) has yet to give oral evidence concerning it.[42] The Trial Chamber concluded that the opportunity which the accused had to cross-examine those witnesses made up for the absence of such an opportunity in relation to the now deceased Hadija Čavčić.[43] It may well be – it is not possible to tell on the rather limited material before the Appeals Chamber – that the evidence of those witnesses will reduce or even remove any suggestion that the statement of Hadija Čavčić, despite the absence of the opportunity to cross-examine him, is sufficiently pivotal to the prosecution case that the shell was fired by subordinates of the accused as to render it unfair (because of their immediate proximity to him) to permit the evidence to be given in written form. The Appeals Chamber is, therefore, not in a position in this case to exercise its own discretion in the place of the Trial Chamber as it ordinarily would be.[44] In these circumstances, and in the light of the

[41] First Decision.
[42] *Ibid*, p 3.
[43] *Ibid*, p 3.
[44] cf *Prosecutor v Milošević*, IT-99-37-AR73, IT-01-50-AR73 & IT-01-51-AR73, Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder, 18 Apr 2002 ("*Milošević* Appeal Decision"), pars 4, 6.

Appeals Chamber's rejection of the other issues argued in the appeal, it will be necessary to uphold the appeal against the order made in the First Decision so that the matter may be returned to the Trial Chamber for it to consider the exercise of its discretion in accordance with this present Decision in relation to the statement of Hadija Čavčić.

21. For these reasons, it remains appropriate to deal also with the two alternative responses put forward by the prosecution in relation to the exclusion of any written statement which goes to proof of the acts and conduct of the accused.

1(b) Does the exclusion apply to Rule 92*bis*(C) written statements?

22. The prosecution tendered the two statements in question under Rule 92*bis*(C), which concerns written statements by persons who have since died or who can no longer with reasonable diligence be traced or who are unable to testify orally by reason of their bodily or mental condition. The prosecution's argument is that Rule 92*bis*(C) does not exclude proof of the acts and conduct of the accused where the person who made the statement tendered under that Rule has since died. This argument is based upon what is described as a "contextual" interpretation of the Rule.[45]

23. The prosecution submits that Rule 92*bis*(A) contemplates written statements made by persons who could still be called to give evidence, and that its purpose is to save the time of the evidence being given orally. On the other hand, the prosecution submits, Rule 92*bis*(C) contemplates statements made by persons who cannot be called to give evidence, and that its purpose is to permit the "best" evidence available to be given.[46] The prosecution claims support for this submission in the fact that, whereas both Rule 92*bis*(A) and Rule 92*bis*(D) (which concerns the admissibility of a transcript of evidence given by the witness in proceedings before the Tribunal) refer expressly to the exclusion of such written statements which go to proof of the acts and conduct of the accused, Rule 92*bis*(C) does not make any reference to that exclusion. The prosecution calls in aid the maxim *expressio unius est exclusio alterius*.[47] Such a maxim must always be applied with great care in statutory interpretation, for it is not of universal application. It is often described as a valuable servant but a dangerous master. Contrary to the

[45] Response, pars 7-8.
[46] *Ibid*, pars 12-13.
[47] The express mention of one person or thing is the exclusion of another (Co Litt 210a).

prosecution's argument, however, the context which Rule 92*bis* provides for the particular provision in Rule 92*bis*(C) demonstrates that the maxim is irrelevant to its interpretation.

24. Rule 92*bis*(A) makes admissible written statements in lieu of oral testimony, but limits such written statements to those which go to proof of a matter other than the acts and conduct of the accused as charged in the indictment. Rule 92*bis*(B) sets out the form of a declaration which must be attached to the written statement before it becomes admissible under Rule 92*bis*(A) in lieu of oral testimony. Rule 92*bis*(D) provides a separate and self-contained method of producing evidence in a written form in lieu of oral testimony by the tender of the transcript of a witness's evidence in proceedings before the Tribunal. Rule 92*bis*(C), however, does *not* provide a separate and self-contained method of producing evidence in written form in lieu of oral testimony. Both in form and in substance, Rule 92*bis*(C) merely excuses the necessary absence of the declaration required by Rule 92*bis*(B) for written statements to become admissible under Rule 92*bis*(A).

25. The prosecution argument that Rule 92*bis*(C) does not exclude proof of the acts and conduct of the accused by a written statement of a deceased person is rejected.

1(c) Admissibility under Rule 89(C) without Rule 92*bis* restrictions

26. The prosecution's third response to the appellant's arguments that the two statements admitted into evidence go to proof of the acts and conduct of the accused was that they were in any event admissible under Rule 89(C) without the restrictions of Rule 92*bis*.[48]

27. Rule 89(C) – "A Chamber may admit any relevant evidence which it deems to have probative value" – permits the admission of hearsay evidence (that is, evidence of statements made out of court), in order to prove the truth of such statements rather than merely the fact that they were made.[49] Hearsay evidence may be oral, as where a witness relates what someone else

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[48] Response, pars 15-24.

[49] *Aleksovski* Decision, par 15: "It is well settled in the practice of the Tribunal that hearsay evidence is admissible. Thus relevant out of court statements which a Trial Chamber considers probative are admissible under Rule 89(C). This was established in 1996 by the Decision of Trial Chamber II in *Prosecutor v. Tadić* [IT-94-1-T, Decision on the Defence Motion on Hearsay, 5 Aug. 1996 ('*Tadić* Decision')] and followed by Trial Chamber I in *Prosecutor v. Blaškić* [IT-95-14-T, Decision on Standing Objection of the Defence to the Admission of Hearsay with no Inquiry as to its Reliability, 26 Jan. 1998 ('*Blaškić* Decision')]. Neither Decision was the subject of appeal and it is not now submitted that they were wrongly decided. Accordingly, Trial Chambers have a broad discretion under Rule 89(C) to admit relevant hearsay evidence.
[footnote continued on next page]

had told him out of court, or written, as when (for example) an official report written by someone who is not called as a witness is tendered in evidence. Rule 89(C) clearly encompasses both these forms of hearsay evidence. Prior to the addition of Rule 92*bis*, the statement of a witness made to an OTP investigator who had died since making it had been admitted into evidence by a Trial Chamber pursuant to Rule 89(C), in *Prosecutor v Kordić & Čerkez*.[50] The Appeals Chamber overruled that decision on the basis that the discretion to admit hearsay evidence under Rule 89(C) had to be exercised so that it was in harmony with the Statute and the other Rules to the greatest extent possible,[51] and only where the Trial Chamber was satisfied that the evidence was reliable.[52] To some extent, the *Kordić & Čerkez* Decision by the Appeals Chamber was dependent upon the preference in the Rules at the time for "live, in court" testimony,[53] but its insistence upon the reliability of hearsay evidence was maintained in relation to hearsay written statements, despite the qualification of that preference (see par 12, *supra*), when Rule 92*bis* was introduced as a result of that decision.

28. Rules 92*bis*(A) and Rule 92*bis*(C) are directed to written statements prepared for the purposes of legal proceedings. This is clear not only from the fact that Rule *92bis* was introduced as a result of the *Kordić & Čerkez* Decision but also from its description of the written statement as being admitted "in lieu of oral testimony" in Rule 92*bis*(A), as well as the nature of the factors identified in Rule 92*bis*(A) in favour and against "admitting evidence in the form of a written statement". Rule 92*bis*(D), permitting the transcript of a witness's evidence in proceedings before the Tribunal to be admitted as evidence, is similarly directed to material produced for the purposes of legal proceedings. Rule 92*bis* as a whole, therefore, is concerned

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Since such evidence is admitted to prove the truth of its contents [*Tadić* Decision, pars 15-19], a Trial Chamber must be satisfied that it is reliable for that purpose, in the sense of being voluntary, truthful and trustworthy, as appropriate; and for this purpose may consider both the content of the hearsay statement and the circumstances under which the evidence arose [*Tadić* Decision, pars 15-19]; or, as Judge Stephen described it, the probative value of a hearsay statement will depend upon the context and character of the evidence in question [*Tadić* Decision, p 3 of Judge Stephen's concurring opinion]. The absence of the opportunity to cross-examine the person who made the statements, and whether the hearsay is 'first-hand' or more removed, are also relevant to the probative value of the evidence [*Blaškić* Decision, par 12]. The fact that the evidence is hearsay does not necessarily deprive it of probative value, but it is acknowledged that the weight or probative value to be afforded to that evidence will usually be less than that given to the testimony of a witness who has given it under a form of oath and who has been cross-examined, although even this will depend upon the infinitely variable circumstances which surround hearsay evidence [*Tadić* Decision, pp 2-3 of Judge Stephen's concurring opinion]."

[50] IT-95-14/2-T, 21 Feb 2000, Transcript p 14,701.

[51] *Kordić & Čerkez* Decision, par 20.

[52] *Ibid*, pars 22-24.

[53] *Ibid*, par 19.

with hearsay evidence such as would previously have been admissible under Rule 89(C). But it is hearsay material of a very special type, with very serious issues raised as to its reliability.

29. Unlike the civil law, the common law permits hearsay evidence only in exceptional circumstances.[54] When many common law jurisdictions took steps to limit the rule against hearsay by permitting the admission of written records kept by a business as evidence of the truth of what they stated notwithstanding that rule, they invariably excluded from what was to be admissible under that exception any documents made in relation to pending or anticipated legal proceedings involving a dispute as to any fact which the document may tend to establish. This exclusion reflected the fact that such documents are not made in the ordinary course by persons who have no interest other than to record as accurately as possible matters relating to the business with which they are concerned. It also rested upon the recognised potential in relation to such documents for fabrication and misrepresentation by their makers and of such documents being carefully devised by lawyers or others to ensure that they contained only the most favourable version of the facts stated.

30. The decision to encourage the admission of written statements prepared for the purposes of such legal proceedings in lieu of oral evidence from the makers of the statements was nevertheless taken by the Tribunal as an appropriate mixture of the two legal systems, but with the realisation that any evidentiary provision specifically relating to that material required considerable emphasis upon the need to ensure its reliability. This is particularly so in relation to written statements given by prospective witnesses to OTP investigators, as questions concerning the reliability of such statements have unfortunately arisen,[55] from knowledge gained in many trials before the Tribunal as to the manner in which those written statements are compiled.[56] Rule 92*bis* has introduced that emphasis.

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[54] See, generally, *Myers v Director of Public Prosecutions* [1965] AC 1001.

[55] *Kordić & Čerkez* Decision, par 27; *Prosecutor v Naletilić & Martinović*, IT-98-34-T, *Confidential* Decision on the Motion to Admit Statement of Deceased Witnesses Kazin Mežit and Arif Pasalić, 22 Jan 2002, p 4.

[56] In the usual case, the witness gives his or her statement orally in B/C/S, which is translated into English and, after discussion, a written statement is prepared by the investigator in English. The statement as written down is read back to the witness in English and translated orally into B/C/S. The witness then signs the English written statement. Some time later, the English written statement is translated into a B/C/S written document, usually by a different translator, and it is this third stage translation which is provided to the accused pursuant to Rule 66. Neither the interview nor the reading back is tape-recorded to ensure the accuracy of the oral translation given at each stage.

31. A party cannot be permitted to tender a written statement given by a prospective witness to an investigator of the OTP under Rule 89(C) in order to avoid the stringency of Rule 92*bis*. The purpose of Rule 92*bis* is to restrict the admissibility of this very special type of hearsay to that which falls within its terms. By analogy, Rule 92*bis* is the *lex specialis* which takes the admissibility of written statements of prospective witnesses and transcripts of evidence out of the scope of the *lex generalis* of Rule 89(C), although the general propositions which are implicit in Rule 89(C) – that evidence is admissible only if it is relevant and that it is relevant only if it has probative value – remain applicable to Rule 92*bis*. But Rule 92*bis* has no effect upon hearsay material which was not prepared for the purposes of legal proceedings. For example, the report prepared by Hamdija Čavčić (described in par 3, *supra*) could have been admitted pursuant to Rule 89(C) if it was not prepared for the purposes of legal proceedings (as to which the evidence is silent). The prosecution argument that the two statements admitted into evidence were in any event admissible under Rule 89(C) without the restrictions of Rule 92*bis* is rejected.

2 The "probability of the said statements"

32. The appellant submits that neither of the decisions under appeal indicates that the Trial Chamber had "engaged in evaluation of the requirements prescribed under Rule 92*bis*(C)(i)".[57] By admitting the written statement of a deceased witness "without previously attempting to establish its probability", the appellant says, the decision of the Trial Chamber is opposed to the provisions of that Rule.[58] The "failure to engage in establishing the probability of the said statements" is also alleged to have caused the Trial Chamber to fail "in a reliable manner to establish facts on the basis of which these statements will be assessed".[59] The submission is later repeated in these terms: "Trial Chamber in the contested decisions [...] did not proceed in accordance with the Rule 92*bis*(C)(i) and in view of this error, the contested decisions are legally untenable."[60]

33. The appellant has misread Rule 92*bis*(C)(i). For convenience, the terms of Rule 92*bis*(C) are repeated:

> (C) A written statement not in the form prescribed by paragraph (B) may nevertheless be admissible if made by a person who has subsequently died, or by a person who can no longer with reasonable diligence be traced, or by a person who is by reason of bodily or mental condition unable to testify orally, if the Trial Chamber:

[57] Interlocutory Appeal, p 3.
[58] *Ibid*, p 4.
[59] *Ibid*, p 4.
[60] *Ibid*, p 11.

(i) is so satisfied on a balance of probabilities; and
(ii) finds from the circumstances in which the statement was made and recorded that there are satisfactory *indicia* of its reliability.

What Rule 92*bis*(C)(i) requires is that the Trial Chamber be satisfied on a balance of probabilities that the written statement was "made by a person who has subsequently died, or by a person who can no longer with reasonable diligence be traced, or by a person who is by reason of bodily or mental condition unable to testify orally". That is made clear by the use of the words "if the Trial Chamber [...] is *so* satisfied" immediately following those words.[61] The requirements of Rule 92*bis*(C)(i) have nothing to do with the "probability" or any other characteristic of the statement itself. The assessment of the reliability of that statement is the subject of Rule 92*bis*(C)(ii).

34. There was no issue taken by the appellant before the Trial Chamber in relation to the assertion by the prosecution at the trial that the makers of the two statements admitted into evidence were dead, coupled as it was with a death certificate for each of them. This objection by the appellant is rejected.

3 The reliability of the statements

35. The appellant submits that the Trial Chamber "did not engage in establishing the question of reliability".[62] This submission has not been developed in his Interlocutory Appeal in any way. The reliability of the statements had been contested before the Trial Chamber, and the Trial Chamber in each of its decisions made findings not only that it was satisfied that the written statement of each witness and the report of Hamdija Čavčić had satisfactory *indicia* of their reliability within the meaning of Rule 92*bis*(C)(ii),[63] but also that each had "probative value within the meaning of Rule 89(C)".[64] The appellant has criticised the Trial Chamber's reference to Rule 89(C) as "an error on a question of law",[65] saying that there was no need to have recalled the general provisions of Rule 89 as Rule 92*bis* was the special rule applicable. As the Appeals Chamber has already stated, evidence is admissible only if it is relevant and it is relevant only if it has probative value, general propositions which are implicit in Rule 89(C).[66] The Trial Chamber need not have referred to Rule 89(C), but it did have to be satisfied that the evidence in

[61] Emphasis has been added to the word "so".
[62] Interlocutory Appeal, p 3.
[63] First Decision, p 3; Second Decision, p 4.
[64] First Decision, p 3; Second Decision, p 4.
[65] Interlocutory Appeal, p 9.
[66] Paragraph 31, *supra*.

the statements was relevant in that sense before they could be admitted. No error was made by the Trial Chamber.

36. The prosecution is correct in its assertion that the appellant has not in this appeal contested the finding of the Trial Chamber in accordance with Rule 92*bis*(C)(ii) that there were satisfactory *indicia* of the reliability of each statement in the circumstances in which it was made and recorded.[67] Those findings of fact can be interfered with only if the appellant demonstrates that they were ones which no reasonable tribunal of fact could have reached,[68] or that they were invalidated by an error of law.[69] There has been no attempt to do so, and the Appeals Chamber, having considered the material before the Trial Chamber, is not satisfied that those findings are open to appellate review.

37. The appellant's complaint is rejected.

4 Application of Rule 92*bis* to expert witnesses

38. The appellant submits that Rule 92*bis* does not relate to expert witnesses, whose evidence is admissible only under Rule 94*bis*, so that the evidence of Hamdija Čavčić, the chemical engineer, was inadmissible under Rule 92*bis*.[70] Rule 94*bis* provides:

> **Rule 94*bis***
> **Testimony of Expert Witnesses**
>
> (A) The full statement of any expert witness to be called by a party shall be disclosed within the time-limit prescribed by the Trial Chamber or by the pre-trial Judge.
>
> (B) Within thirty days of filing of the statement of the expert witness, or such other time prescribed by the Trial Chamber or pre-trial Judge, the opposing party shall file a notice indicating whether:
>
> (i) it accepts the expert witness statement; or
> (ii) it wishes to cross-examine the expert witness.
>
> (C) If the opposing party accepts the statement of the expert witness, the statement may be admitted into evidence by the Trial Chamber without calling the witness to testify in person.

The appellant says that this Rule makes a formal distinction between witnesses and expert witnesses, so that Rule 92*bis*, in the absence of a clear and formal statement of intention to the

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[67] Response, par 22.
[68] *Tadić* Judgment, par 64; *Prosecutor v Aleksovski* IT-95-14/1-A, Judgment, 24 Mar 2000, par 63; *Prosecutor v Furundžija*, IT-95-17/1-A, Judgment, 21 July 2000, par 37; *Delalić* Judgment, pars 434-435, 459, 491, 595; *Prosecutor v Kupreškić et al*, IT-96-16-A, Judgment, par 30.
[69] *Milošević* Appeal Decision, par 6.
[70] Interlocutory Appeal, p 9.

contrary, must be regarded as being subject to the same formal distinction.[71] The Appeals Chamber does not accept the appellant's submissions.

39. Rule 94*bis* performs two separate functions. Whereas Rule 66(A)(ii) requires the prosecution to disclose the statements of all prosecution witnesses when a decision is made to call those witnesses, and whereas Rule 65*ter* requires the accused to disclose a summary of the facts on which each of his witnesses will testify prior to the commencement of the defence case, Rule 94*bis* provides a separate timetable for the disclosure of the statements of expert witnesses whichever party is calling that expert. Once the statement of an expert witness has been disclosed, Rule 94*bis* requires the other party to react to that statement within a further time limit and, depending upon whether the other party wishes to cross-examine the expert, provides for the admission of that statement without calling the expert witness to testify. No such provision is made in relation to the witnesses whose statements are disclosed by the prosecution pursuant to Rule 66(A)(ii) or the witnesses whose summaries are to be disclosed by the accused pursuant to Rule 65*ter*. In this sense, there is a clear distinction made in Rule 92*bis* between expert witnesses and other witnesses.

40. However, Rule 94*bis* contains nothing which is inconsistent with the application of Rule 92*bis* to an expert witness. Indeed, Rule 92*bis* expressly contemplates that witnesses giving evidence relating to the relevant historical, political or military background of a case (which is usually the subject of expert evidence) will be subject to its provisions. There is nothing in either Rule which would debar the written statement of an expert witness, or the transcript of the expert's evidence in proceedings before the Tribunal, being accepted in lieu of his oral testimony where the interests of justice would allow that course in order to save time, with the rights of the other party to cross-examine the expert being determined in accordance with Rule 92*bis*. Common sense would suggest that there is every reason to suggest that such a course ought to be followed in the appropriate case.

41. There is perhaps less need for reliance upon Rule 92*bis*(C) where an expert witness has died since making his report, as it is usually possible for the party requiring that expert evidence to obtain it from another source. But, again, there is nothing in either Rule which would debar reliance upon Rule 92*bis*(C) in relation to the report of an expert witness in the appropriate case.

[71] *Ibid*, p 9.

The objection taken in the present case is to a witness whose expert evidence could not be replaced by another witness. Hamdija Čavčić describes the results of the shellings which he investigated at the time of their occurrence. His deductions as to the direction from which the shells were fired is without doubt expert evidence, but that expert evidence is based upon facts to which only he could testify directly.

42. It is unclear whether this particular objection was taken by the appellant before the Trial Chamber, but it is obvious that, if it had been, the only reasonable conclusion which would have been open to the Trial Chamber *in relation to this issue* was to have admitted the statement under Rule 92*bis*. The appellant's objection is rejected.

5 Admissibility of part of a written statement

43. The appellant submits that, in relation to the statement of Bajram Šopi (described in par 4, *supra*), it is not in the interests of justice, and it is to the detriment of his fair trial, not to have admitted that part of that statement which, it is said, states:[72]

> [...] the fact that in the school, which was located in the vicinity of his house, the army was stationed there from where it was going to the first front combat line, that he took part in bringing food for the army, and other facts which prove that he was not a civilian, and that he was present in the zone of legitimate military targets.

The appellant asserts that he should have been given the opportunity to present his stand in relation to this part of the statement, to argue that it should have been admitted because he was unable to cross-examine this witness.[73]

44. The clear suggestion in those submissions that the appellant was not given the opportunity to put these arguments at the trial is entirely without merit. A response to the prosecution's motion to admit the evidence was filed by the appellant on 8 April.[74] Its concerns were directed to what are described as the statement's "many inconsistencies and imprecise information" as to incident 11 in the schedule to the indictment, the absence of detail as to the wounding of the witness's wife (which was recounted in a part of the statement not tendered by the prosecution) and, in very general terms, the "poor and incomplete explanation of the facts from his short written statement". Significantly, the response made no mention of the arguments

[72] Interlocutory Appeal, p 11.
[73] *Ibid*, p 11.
[74] Reply to the Request of the Prosecutor to Present the Evidence in Accordance to [*sic*] Rule 92*bis*(C), 8 Apr 2002, signed by Ms Pilipović as lead counsel.

now put before the Appeals Chamber. The appeal process is not designed for the purpose of allowing parties to remedy their own failings or oversights at the trial.

45. Moreover, the written statement which was admitted into evidence makes no mention of the witness taking part in bringing food for the army, or any other fact which may prove that he was not a civilian, as the Interlocutory Appeal suggests. Even if the witness could be regarded as a combatant at some earlier time, it is not clear from the statement how he lost his civilian status when he was collecting firewood at the time the other man present was shot. There was no mention in the statement of "legitimate military targets" unless this describes the school building behind the witness's house which (the statement says) had been "levelled" the year before this incident, but which had at that earlier time been used to house military units. If this interpretation was disputed, it was open to the appellant to raise that issue in the cross-examination of another witness to the same incident, one Nura Bajraktarević. No detriment to the fair trial of the appellant has so far been demonstrated by the non-tender of this part of the statement.

46. It must be emphasised that Rule 92*bis*(C) makes specific provision for the admission of part only of a written statement of a witness,[75] and that it is for the Trial Chamber to decide, after hearing the parties, whether to admit the statement in whole or in part.[76] Notwithstanding the argument of the prosecution to the contrary,[77] it is *not* its "prerogative" to determine how much of the statement is to be admitted. Where that part of the written statement not tendered by the prosecution modifies or qualifies what is stated in the part tendered, or where it contains material relevant to the maker's credit, the absence of any opportunity to cross-examine the witness (which must be the case where Rule 92*bis*(C) is concerned) would usually necessitate the admission of those parts of the statement as well. There is no foundation for the appellant's argument that, if the statement includes material which is irrelevant, the whole of the statement must be rejected.[78]

47. The appellant's objection is rejected.

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[75] Rule 92*bis*(A).
[76] Rule 92*bis*(E).
[77] Response, par 69.
[78] Interlocutory Appeal, p 11.

Disposition

48. For the foregoing reasons:

(1) The appeal against the Trial Chamber's First Decision (given on 12 April 2002) is allowed, so that the matter may be returned to the Trial Chamber for it to consider the exercise of its discretion in accordance with this present Decision in relation to the statement of Hamdija Čavčić.

(2) The appeal against the Trial Chamber's Second Decision (given on 18 April 2002) is dismissed.

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

Dated this 7th day of June 2002,
At The Hague,
The Netherlands.

David Hunt

Judge David Hunt
Presiding Judge

[Seal of the Tribunal]