



International Tribunal for the  
Prosecution of Persons Responsible  
for Serious Violations of International  
Humanitarian Law Committed in the  
Territory of The Former Yugoslavia  
since 1991

Case No.: IT-01-47-T  
Date: 2 August 2004  
Original: English  
French

**IN TRIAL CHAMBER II**

**Before:** Judge Jean-Claude Antonetti  
Judge Vonimbolana Rasoazanany  
Judge Bert Swart

**Registrar:** Mr Hans Holthuis

**Decision of:** 2 August 2004

**THE PROSECUTOR**

v.

**ENVER HADŽIHASANOVIĆ  
AMIR KUBURA**

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**DECISION TO UNSEAL CONFIDENTIAL DECISION ON THE  
ADMISSIBILITY OF CERTAIN CHALLENGED DOCUMENTS  
AND DOCUMENTS FOR IDENTIFICATION**

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**The Office of the Prosecutor:**

Mr Daryl Mundis  
Ms Tecla Henry-Benjamin

**Defence Counsel:**

Ms Edina Rešidović and Mr Stéphane Bourgon for Enver Hadžihasanović  
Mr Fahrudin Ibrišimović and Mr Rodney Dixon for Amir Kubura

**Trial Chamber II** (“Chamber”) of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (“Tribunal”),

**NOTING** the confidential Decision on the Admissibility of Certain Challenged Documents and Documents for Identification rendered by the Chamber on 16 July 2004, including its confidential Annexes A and B (“Decision”),

**NOTING** the Corrigendum to the Decision of 27 July 2004 which set out certain amendments to be made to the Decision and provided an amended version of confidential Annex A,

**NOTING** the Decision on the Public Amended Version of the Decision, rendered on 27 July 2004, which unsealed the amended version of the Decision,

**NOTING** the Order of 31 July 2004 which again placed the public amended Decision of 27 July 2004 under seal,

**CONSIDERING** that it is appropriate to render a new public version of the Decision which includes all the preceding amendments and removes all confidential information from the Decision, including in its Annexes A and B,

**FOR THE FOREGOING REASONS,**

**PURSUANT** to Rule 54 of the Rules of Procedure and Evidence,

**DECIDES** to render a public version of the Decision and Annexes A and B, amended and attached to this Decision.

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

/signed/

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Presiding Judge of the Chamber  
Jean-Claude Antonetti

Done this second day of August 2004  
At The Hague  
The Netherlands

**[Seal of the Tribunal]**



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***PUBLIC AMENDED VERSION***

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## I. INTRODUCTION

1. Trial Chamber II ("Chamber") of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ("Tribunal") is seised of the question of the admissibility of a certain number of documents which the Office of the Prosecutor ("Prosecution") has requested be admitted into the proceedings. Furthermore, the Chamber will decide on documents submitted for identification purposes by the Prosecution during the trial. This last item will be considered in paragraph V of this decision.

## II. PROCEDURAL BACKGROUND

2. On 23 February 2004, counsel for the Accused ("Defence") and the Prosecution orally requested the Chamber to clarify the procedure to be used for the admission of documents into proceedings during the trial.<sup>1</sup> During discussion on this point, the Prosecution indicated that this clarification was all the more necessary since it intended to request the admission of "about one thousand documents comprised of more than 3000 pages".<sup>2</sup> On 24 February 2004, in response to this request by the parties, the Chamber asked the Prosecution to transmit to it by 10 March 2004 a consolidated list of all the documents which the Prosecution had requested or would request to be admitted into the proceedings.<sup>3</sup> The Chamber also requested the Defence to make its observations on the Prosecution's consolidated list before 25 March 2004, identifying in particular the documents, if any, whose admissibility as evidence it challenged.<sup>4</sup>

3. In the Prosecution's Consolidated Exhibit List and Motion to Amend its List of Exhibits filed on 10 March 2004 ("Motion"), the Prosecution provided a list in Annex A of 947 documents whose admission had been or would be requested ("List"). The material on the List included documents and other evidence such as video tapes, photos, orders from the ABiH and transcripts of telephone taps. Moreover, the Prosecution requested leave to add to the List 19 exhibits which it had inadvertently omitted ("Other Documents"). In the Joint Defence Response to Prosecution's Consolidated Exhibit List and Motion to Amend its List of Exhibits dated 29 March 2004 ("Response"), the Defence agreed that 286 exhibits on the

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<sup>1</sup> T.3289, 3294-3295 and 3299-3300.

<sup>2</sup> T.3300.

<sup>3</sup> T.3338-3339.

List be admitted into the proceedings. Nevertheless, it challenged the admissibility of 659 other exhibits on the List,<sup>5</sup> and of 7 of the Other Documents.<sup>6</sup>

4. In the Decision on Admissibility of Documents for the Purposes of Identification of 2 April 2004, the Chamber granted the Prosecution leave to add the Other Documents to the List. It also identified the documents on the List thus modified (“New List”) whose admissibility had been agreed on by the parties and which were assigned a provisional identification number.<sup>7</sup> These documents were admitted into the proceedings on 7 April 2004.<sup>8</sup>

5. On 2 April 2004, the Chamber orally requested the Defence to explain to it “in writing the grounds for contesting the documents [regarding the admissibility of documents on the New List], document by document”<sup>9</sup> before 15 April 2004. The Chamber subsequently set a time-limit of 19 April 2004 and requested the Defence also to identify amongst the documents on the New List those which it considered could be tendered only through a witness.<sup>10</sup> Furthermore, the Chamber requested the Prosecution to provide another version of the New List before 19 April 2004 stating the origin, chain of transmission and relevance of the documents contained therein.<sup>11</sup> In response to the Chamber’s request, the parties filed two documents on 19 April 2004, one entitled Joint Defence Filing concerning the Admissibility of Documents and Materials Included in the Prosecution Consolidated Exhibit List of 10 March 2004 (“Defence Clarifications”) and the other “[Prosecution] Communication of the Further Detailed Consolidated Exhibit List (“Prosecution Clarifications”).

6. The Chamber indicated orally on 23 April 2004 that it wished to devote a certain number of hearings to examining the question of the challenged documents with the parties. It requested the Prosecution, in particular, to provide additional information on the origin of the documents and asked the Prosecution and the Defence to give their viewpoints on the following points relating to the challenged documents on the New List: (i) their source and

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<sup>4</sup> T.3339.

<sup>5</sup> The Defence did not state its position with regard to 2 documents on the List. See annex A of the Response.

<sup>6</sup> See Annex B of the Response.

<sup>7</sup> Decision on Admissibility of Documents for the Purposes of Identification of 2 April 2004.

<sup>8</sup> T.5700-5701.

<sup>9</sup> T.5433-5434.

<sup>10</sup> T.5586. The Chamber also stated that it was asking the Defence to state, for each of the challenged documents, “in one or two lines the reasons for which they are contesting each document”. T.5586.

<sup>11</sup> T.5587-5588.

authenticity, (ii) technical problems such as the illegibility of some of them, (iii) their relevance, (iv) the possible prejudice which their admission into evidence might cause to the Accused, pursuant to Rule 89(D) of the Rules, and (v) the need to tender some of those documents through a witness appearing at trial.<sup>12</sup> The hearings on these points took place on 27, 28 and 29 April 2004 and 14 May 2004. At one of these hearings, the Chamber requested the Prosecution to provide another version of the New List setting out the documents in chronological order,<sup>13</sup> which the Prosecution did on 13 May 2004.<sup>14</sup>

7. During its deliberations on the challenged documents, on 17 May 2004 the Chamber orally requested the Prosecution to:

- provide all information on the documents furnished to it by governments, either of their own accord or in response to a request from the Prosecution,
- call as witnesses the archivists responsible for the Sarajevo and Zenica archives,
- as far as possible, inform the Trial Chamber of any material it has in its possession that proves that these documents were sent and received,
- call as a witness a former high-ranking member of the ABiH who held a position of commander in order to testify about the drafting and transmission of orders, the power of delegating, and the follow-up of orders in 1993 in that army,
- provide the Trial Chamber with examples of the accused's signatures,
- inform the Trial Chamber in a revised submission of the origin of the documents provided by the governments, with the exception of the archives from Sarajevo and Zagreb,
- provide all the operational logs and war diaries with full translations into English and French,
- provide a list of witnesses who might be in a position to authenticate the challenged documents and mention the challenged documents relating to those witnesses,
- provide the challenged documents which are partially or entirely missing, including missing translations,

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<sup>12</sup> T.6007-6018.

<sup>13</sup> T.6445.

<sup>14</sup> See Submission on the Prosecution's Further Detailed Consolidated Exhibit List in Chronological Order, filed by the Prosecution on 13 May 2004.

- provide a full transcript of the text on the videotapes with a view to their being broadcast in public at a subsequent hearing or during the testimony of some Prosecution witnesses, and
- concerning the telephone taps, disclose the origin and the order in which these intercepts were forwarded.<sup>15</sup>

Furthermore, the Chamber ordered Mika Tauru to appear in relation to the sketches and photos linked to the testimony of witness ZI.

8. Pursuant to this decision, on 8 June 2004 the Prosecution filed a confidential Prosecution's Submission pursuant to the Trial Chamber's Oral Order of 17 May 2004 ("Prosecution Submission") in which it provided certain clarifications with regard to telephone taps and witnesses who could authenticate some of the challenged documents. It also stated in its Submission that it "...[would make] the missing material available to the Trial Chamber and Defence as it receives such material from CLSS".<sup>16</sup> On 1 July 2004, the Prosecution submitted the its Further Submission pursuant to the Trial Chamber's Oral Order of 17 May 2004, in which it provided material in its possession relating to the sending and receipt of certain challenged documents. Moreover, the Prosecution communicated to the Chamber and the Defence certain challenged documents and missing translations.

9. In a written decision of 18 May 2004, the Chamber ordered witness ZP to appear in order to testify about certain challenged documents. This witness testified from 14 to 18 June 2004.

10. On 20 May 2004, the Chamber orally granted the Prosecution's request not to have 19 persons testify, who had been initially called to appear.<sup>17</sup> The Chamber nevertheless asked the Prosecution to reconsider its request for one of these persons, Vlado Adamović, stating that, in view of the fact that he was a judge, he would perhaps be able to provide clarification on certain challenged documents relating to the civilian and military courts in central Bosnia.<sup>18</sup>

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<sup>15</sup> T.7475-7477.

<sup>16</sup> Para. 16 of the Prosecution Submission.

<sup>17</sup> T.7718.

<sup>18</sup> T.7718.



The Prosecution reconsidered its request regarding Mr Adamović,<sup>19</sup> who finally appeared on 24 June 2004.

11. On 2, 3, 4 and 7 June 2004, the video tapes which were part of the challenged documents were shown in open court. The parties made their observations about the video tapes after they had been shown. On 7 June 2004, the Prosecution stated also that it was no longer requesting that some of the video tapes be admitted into the proceedings.<sup>20</sup>

12. Lastly, on 21 and 22 June 2004 and 30 June and 1 July 2004, Adem Omerkić, Smriko Sahabudin, Senad Selimović and Muradif Mekić testified about the drafting and transmission of orders within the ABiH and about the archives of the Sarajevo region, pursuant to the oral decision of 17 May 2004. On 23 June 2004, Mika Tauru testified about the sketches and photos linked to the testimony of witness ZI.

### III. SUBMISSIONS OF THE PARTIES

#### A. By the Prosecution

13. In support of its request for admission of documents into proceedings, the Prosecution submits that: a) the challenged documents are relevant to the Indictment,<sup>21</sup> b) some of the challenged documents are relevant because they are originals which in some cases bear official stamps<sup>22</sup> or are certified copies,<sup>23</sup> c) the admissibility of the challenged documents must be assessed within the context of all the said documents,<sup>24</sup> d) the Defence sometimes objects to the admission of certain HVO documents, challenging their reliability, whereas it has itself requested the admission of documents from that army,<sup>25</sup> e) some documents fall outside the period covered by the Indictment but are nonetheless admissible since they relate, for example, to the formation of units which are identified in the Indictment as having committed crimes,<sup>26</sup> f) a significant number of documents signed by the Accused demonstrate their knowledge of the facts alleged in the Indictment,<sup>27</sup> g) the jurisprudence of the Tribunal

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<sup>19</sup> T.7718-7719.

<sup>20</sup> T.8701-8702.

<sup>21</sup> See the chart of the Prosecution Clarifications.

<sup>22</sup> T.6236 and 7433.

<sup>23</sup> See the chart of the Prosecution Clarifications.

<sup>24</sup> T.6237.

<sup>25</sup> T.6239.

<sup>26</sup> T.6242-6243 and 6282.

<sup>27</sup> T.6286.

makes it possible to admit documents into proceedings without going through a witness,<sup>28</sup> h) the Prosecution indicated the sources of the video tapes which are amongst the challenged documents,<sup>29</sup> and i) the Prosecution also provided detailed information about the transcripts of telephone taps which the Defence used, moreover, in its own cross-examinations.<sup>30</sup>

### **B. By the Defence**

14. The Defence reasoned its objection to the challenged documents' admission into the proceedings by stating that: a) it contested their authenticity and/or relevance,<sup>31</sup> b) some of the said documents could not be admitted without being discussed before the Chamber,<sup>32</sup> c) it could not "establish the procedure according to which [some of] those documents were drafted"<sup>33</sup>, d) it was preferable to admit those documents into proceedings through witnesses appearing before the Chamber, although this is not required,<sup>34</sup> e) it was necessary to clarify the circumstances in which the Prosecution managed to obtain possession of certain documents from the Sarajevo archives<sup>35</sup> and on the manner in which these documents arrived at those archives,<sup>36</sup> f) the source or author of some of the documents is unknown,<sup>37</sup> thus making it impossible to establish their reliability,<sup>38</sup> g) the way in which certain documents were obtained and transmitted to the Prosecution is unknown,<sup>39</sup> h) the Defence did not receive a translation of certain documents,<sup>40</sup> i) certain documents are only summaries of other documents,<sup>41</sup> j) certain documents include only incomplete translations,<sup>42</sup> k) certain documents are illegible,<sup>43</sup> l) certain documents contain annotations from an unknown source,<sup>44</sup> m) certain documents, including video tapes, are outside the period covered by the Indictment,<sup>45</sup> n) it is necessary for the Defence to be able to cross-examine witnesses about

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<sup>28</sup> T.6333.

<sup>29</sup> T.7445.

<sup>30</sup> T.7446.

<sup>31</sup> See T.6299 and para. 3 of the Response and Annex A of the Defence Clarifications.

<sup>32</sup> See T.5334 and Annex A of the Defence Clarifications.

<sup>33</sup> T.5341. See also T.6216-6218.

<sup>34</sup> See T.5342 and 5504-5505.

<sup>35</sup> See T.5343-5344.

<sup>36</sup> T.6188.

<sup>37</sup> See T.5492 and Annex A of the Defence Clarifications.

<sup>38</sup> See T.6210 and para. 1 of the Defence Clarifications.

<sup>39</sup> See T.5492.

<sup>40</sup> See T.5506.

<sup>41</sup> See para. 1(d) of the Defence Clarifications.

<sup>42</sup> See T.6374 and para. 1(d) of the Defence Clarifications.

<sup>43</sup> See para. 1(d) of the Defence Clarifications.

<sup>44</sup> See para. 1(d) of the Defence Clarifications.

<sup>45</sup> See T.6348 and annex A of the Defence Clarifications.

certain documents, particularly those relating to the acts and conduct of the Accused,<sup>46</sup> o) some of the documents were signed on the Accused's behalf<sup>47</sup> or were not signed,<sup>48</sup> p) it is impossible to verify whether certain documents were in fact sent and received by the recipients which appear on the documents<sup>49</sup> and sometimes the recipients are not even clearly identified,<sup>50</sup> q) some of the documents are statements which can only be admitted under Rules 89(F), 90 or 92 *bis* of the Rules,<sup>51</sup> r) to admit certain documents into the proceedings without going through a witness might frustrate the fairness of the trial in the meaning of Rule 89(D) of the Rules,<sup>52</sup> s) the individuals who took the photos which appear on the New List must be identified,<sup>53</sup> t) complete and certified translations of the challenged documents must be provided,<sup>54</sup> u) certain documents could have been admitted into the proceedings through witnesses who have already appeared, which the Prosecution omitted to do, thus depriving the Accused of the right to cross-examination,<sup>55</sup> v) there are inconsistencies between the different translations provided for the one document,<sup>56</sup> w) certain persons who were members of the ABiH and the HVO at the material time are available and could appear to authenticate certain documents,<sup>57</sup> x) the written transcripts of telephone taps are not a faithful reproduction but rather a summary prepared by someone for an unspecified reason,<sup>58</sup> y) the challenged documents are hearsay evidence whose source must be identified,<sup>59</sup> and z) certain documents amongst those challenged are comprised of unrelated pages.<sup>60</sup>

15. With regard to the video tapes which were part of the challenged documents, the Defence stated also that: a) for some of the tapes both maker and editor are unknown,<sup>61</sup> b) certain tapes contain commentaries whose reliability cannot be verified,<sup>62</sup> c) certain tapes have been technically manipulated,<sup>63</sup> d) the identity or background of persons who appear in

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<sup>46</sup> See annex A of the Defence Clarifications.

<sup>47</sup> See T.6398 and Annex A of the Defence Clarifications.

<sup>48</sup> T.6215.

<sup>49</sup> See T.6216 and Annex A of the Defence Clarifications.

<sup>50</sup> T.6379.

<sup>51</sup> See para. 1(c) of the Defence Clarifications.

<sup>52</sup> See Annex 1(c) of the Defence Clarifications.

<sup>53</sup> T.6222-6223.

<sup>54</sup> T.6248.

<sup>55</sup> T.6317.

<sup>56</sup> T.6380.

<sup>57</sup> T.6346.

<sup>58</sup> T.7444.

<sup>59</sup> T.7451.

<sup>60</sup> T.7458.

<sup>61</sup> T.8465.

<sup>62</sup> T.8466.

<sup>63</sup> T.8475.

the tapes is not always known,<sup>64</sup> e) the date and location of some of the events filmed have not been established,<sup>65</sup> f) the Defence cannot cross-examine the individuals who provide commentaries on some of the tapes,<sup>66</sup> and g) the person who provides commentaries on one particular tape came to testify during the trial, but the Prosecution omitted to show the tape to the witness during his testimony.<sup>67</sup>

## IV. DISCUSSION

### A. Applicable Law

16. The practice of the Tribunal which adheres to the Statute and the Rules – a combination of procedural regulations from common law and civil law – does not conform to any particular system; this practice is followed solely in order to rule fairly on the case while safeguarding the rights of the accused. The question of admissibility of evidence before the Tribunal is governed by Section 3 of the Rules. Rule 89(C) of the Rules provides that a Chamber may admit any relevant evidence which it deems to have probative value and Rule 89(D) sets out that a Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial. Rule 89(D) provides for the possibility of **exclusion** and not **unconditional obligation** for any instance where evidence might infringe the rights of accused in any way. The Tribunal's approach, upheld on several occasions,<sup>68</sup> is to lay down a structure with due regard to the accused's right to a fair and public hearing; within this structure the Chamber has the responsibility of ensuring that the trial is fair and expeditious and that the proceedings are conducted in accordance with the Statute of the Tribunal and the Rules with respect for the rights of the accused.

17. Moreover, Rule 89(A) of the Rules provides that the Chamber shall not be bound by national rules governing the administration of evidence and that, with this in mind, the Chamber shall not be hindered by technical rules in its search for the truth, apart from the provisions of Rule 89. There is no reason to follow general rules relating to the exclusion of evidence applied in common law systems, due to the very fact that the Chamber is composed

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<sup>64</sup> T.8474 and 8557.

<sup>65</sup> T.8487.

<sup>66</sup> T.8489.

<sup>67</sup> T.8676.

<sup>68</sup> See, for example, *The Prosecutor v. Radoslav Brdanin and Momir Talić*, case no. IT-99-36-T, Order on the Standards Governing the Admission of Evidence, 15 February 2002 ("*Brdanin Order*"), para. 9.

of professional judges who are in a position to consider the probative value of testimony or a document. This position has been clearly stated in the jurisprudence of the Tribunal.<sup>69</sup>

18. The guidelines have been determined by several Chambers.<sup>70</sup> These guidelines, accepted by this Chamber, may be summarised as follows:

- parties should bear in mind the basic distinction between the admissibility of documentary evidence and the weight that documentary evidence is given under the principle of free evaluation of evidence;
- the fact that a document is not admitted does not prevent the decision that ruling being reversed at a later stage as further evidence emerges that is relevant, has persuasive value and justifies the admission of a challenged document;
- the mere admission of a document into evidence does not, in itself, signify that its content will be deemed to be an accurate portrayal of the facts;
- when objections are raised on grounds of authenticity and when documents and video recordings have been admitted, the weight to be given to them will be assessed in light of the trial record as a whole;
- there is no blanket prohibition simply on the grounds that the purported author of the documents has not been called to testify;
- hearsay evidence is admissible;<sup>71</sup>
- the “best evidence” rule will be applied, that is this Chamber will rely on the best evidence available in the circumstances of the case and
- improperly obtained evidence will be excluded.

19. In the Defence Response and Clarifications, in order to justify its objection to the admission into evidence of 659 documents produced by the Prosecution, the Defence set out five categories of grounds which were subsequently used as a structure for the oral discussion regarding the challenged documents which took place on 27 to 29 April and on 14 May 2004.

<sup>69</sup> See, for example, the *Brđanin* Order, paras. 5-26 and *The Prosecutor v. Zejnil Delalić et al.*, case no. IT-96-21-T, Decision on the Motion of the Prosecution for the Admissibility of Evidence, 19 January 1998 (“*Delalić Decision*”), para. 20.

<sup>70</sup> See, for example, *The Prosecutor v. Milomir Stakić*, case no. IT-97-24-T, Order on the Standards Governing the Admission of Evidence, 16 April 2002, and *The Prosecutor v. Vidoje Blagojević et al.*, case no. IT-02-60-T, Guidelines on the Standards Governing the Admission of Evidence, 23 April 2003.

<sup>71</sup> See, in particular, on this point *The Prosecutor v. Zlatko Aleksovski*, case no. IT-95-14/1-T, Decision on Prosecutor’s Appeal on Admissibility of Evidence, 16 February 1999, para. 15, *The Prosecutor v. Tihomir Blaškić*, Decision on the Standing Objection of the Defence to the Admission of Hearsay with no Inquiry as to its

The Chamber will, thus, examine the question of the admissibility of the challenged documents in relation to these five categories.

### **B. General observations**

20. The Chamber notes that, out of a total of 659 challenged documents (of which 120<sup>72</sup> documents were withdrawn by the Prosecution and 11 were admitted during the trial) in its Clarifications, the Defence challenged 271 documents for their lack of reliability, 241 documents for their lack of relevance and probative value, 144 documents on technical grounds (illegible, not translated, etc.), 475 documents on the ground that they were not produced through a witness and 269 documents for their lack of legal basis (Articles 89(D), 90 and 92 *bis* of the Rules prevent their admission).

21. Given the high number of objections raised (over 1400), the Trial Chamber will not justify the admission of each document individually. However, for each group of documents as set out above, it will provide the grounds which led to their admission. The documents deemed inadmissible by the Chamber will be discussed separately.

### **C. The source, origin and use made of the challenged documents**

22. In its Response and Clarifications, the Defence identified 269 challenged documents whose admission should be refused on the ground that they lack “authenticity”. These are documents 8, 9, 15-20, 22-29, 31, 35, 37, 38, 42, 46-49, 54, 56, 62-67, 69-73, 75-77, 79-81, 83, 86, 91, 94, 96, 101-103, 105-108, 110, 112-114, 118, 120, 124, 126, 141, 154-156, 157, 159, 166, 167, 169, 170, 175-182, 184, 190, 195, 196, 200, 206, 208-213, 215, 221, 224, 229-232, 234, 235-237, 239, 240, 242-245, 247, 249, 260-272, 274, 276, 278, 280, 281, 283, 285-288, 290-300, 302, 303, 305-317, 319, 320, 322, 323, 325, 327, 332, 333, 335, 337, 341, 342, 345-347, 349-351, 354, 359, 363-366, 368, 369, 371, 376, 377, 381, 382, 385, 387, 398, 400, 401, 403, 405-407, 409, 412-425, 428, 430, 432, 437, 439, 443, 445-449, 452, 480-482, 484, 485, 487, 488, 499, 500, 503-506, 529, 532, 555-557, 560, 561, 564, 565, 567-573, 580, 584, 590, 636, 650, 652-654, 656 and 657.

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Reliability, 21 January 1998, and *The Prosecutor v. Duško Tadić*, case no. IT-94-1-T, Decision on Defence Motion on Hearsay, 5 August 1996.

<sup>72</sup> 30, 57, 61, 111, 117, 121, 122, 134, 143, 144, 168, 192, 194, 201, 205, 207, 225, 238, 250, 282, 289, 352, 353, 373, 384, 386, 388, 389, 399, 402, 404, 408, 411, 431, 436, 444, 453-465, 467-472, 473-475, 581, 582, 585, 586, 587, 588, 589, 592, 593-596, 598-635, 637-646, 651 and 659.

23. At the hearing of 27 April 2004, the parties addressed the question of the source of the challenged documents. The Prosecution explained that the large majority of the challenged documents on the exhibit list are from Sarajevo Collections I and II, which contain the archives of the ABiH, the presidential archives of Sarajevo and the archives of the 7<sup>th</sup> Mechanised Brigade from Zenica.<sup>73</sup> Another significant group comes from the Croatian archives in Zagreb, including the HVO archives and some ABiH documents.<sup>74</sup> The Prosecution provided clarification on how searches were conducted and how documents are kept.

24. Following these explanations, the Defence pointed out the importance of obtaining additional information on the source of the documents. It requested additional explanations, in particular on the “authenticity” of the documents and on the drafting and transmission of military orders.<sup>75</sup> It also noted the jurisprudence in the *Brdanin and Talić* case according to which the Prosecution must establish *prima facie* proof of reliability before a document may be admitted pursuant to Rule 89(C) of the Rules.<sup>76</sup> According to the Defence, reliability comprises three aspects – where the documents come from, how they are kept and their authenticity.<sup>77</sup> The Defence put forward several separate categories of challenged documents in order to determine the information needed to establish *prima facie* proof of reliability. It established these categories on the basis of the source of the documents, that is from archives,<sup>78</sup> governments,<sup>79</sup> private sources,<sup>80</sup> the United Nations and the European Union,<sup>81</sup> orders from the 3<sup>rd</sup> Army Corps<sup>82</sup> as well as those from external sources,<sup>83</sup> the HVO,<sup>84</sup> and based on the type of document, that is operational logs and war diaries,<sup>85</sup> telephone taps,<sup>86</sup> video recordings and photographs.<sup>87</sup> The Defence indicated also that the documents from unidentified sources should not be admitted.<sup>88</sup> It stated also that the documents admitted in

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<sup>73</sup> T.6169, 6170.

<sup>74</sup> T.6183.

<sup>75</sup> T.6203.

<sup>76</sup> T.6207.

<sup>77</sup> T.6208, 6209.

<sup>78</sup> T.6210.

<sup>79</sup> T.6213.

<sup>80</sup> T.6213.

<sup>81</sup> T.6213.

<sup>82</sup> T.6214.

<sup>83</sup> T.6216, 6217.

<sup>84</sup> T.6217, 6218.

<sup>85</sup> T.6219, 6220.

<sup>86</sup> T.6220, 6221.

<sup>87</sup> T.6222-6224.

<sup>88</sup> T.6211.

other cases should satisfy all the conditions for admissibility and not be presumed to be reliable.<sup>89</sup>

25. Defence for Amir Kubura added that evidence, the author of which had been withdrawn from the list of Prosecution witnesses, should also be withdrawn.<sup>90</sup> Moreover, it objected to the admission of evidence dating from before or after the period covered by the Indictment.<sup>91</sup>

26. The Prosecution provided some additional explanations<sup>92</sup> and suggested calling archivists in order to determine how the documents came to the archives and how they were kept.<sup>93</sup>

27. On 21 and 22 June 2004, the Chamber heard archivists Adem Omerkić and Sabahudin Smriko as witnesses. Witness Omerkić provided detailed information about the military archives of the ABiH. He described the circumstances in which the documents were obtained and how they were kept in the archives.<sup>94</sup> He explained also how the documents were classified by category. Moreover, the witness identified the following elements as indicia of a document's authenticity: delivery by correspondence, addressee, format, signature, stamp and handwritten notes.<sup>95</sup> In particular, he clarified the use of stamps.<sup>96</sup> He explained that the archives have moved several times and how this has affected their condition.<sup>97</sup> Lastly, he spoke of how the persons concerned and investigators of the Tribunal had consulted the archives.<sup>98</sup> Witness Sabahudin Smriko provided similar clarification about the archives of the 7<sup>th</sup> Mechanised Brigade which took over from the 7<sup>th</sup> Muslim Mountain Brigade.<sup>99</sup>

28. On 30 June and 1 July 2004, the Chamber heard witnesses Senad Selimović and Muradif Mekić in relation to the drafting and transmission of orders within the ABiH. Witness Senad Selimović, former head of the transmission department of the 3<sup>rd</sup> Army Corps,

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<sup>89</sup> T.6211.

<sup>90</sup> T.6229, 6230.

<sup>91</sup> T.6230.

<sup>92</sup> T.6236-6242.

<sup>93</sup> T.6190, 6237.

<sup>94</sup> T.9223, 9243, 9248, 9258.

<sup>95</sup> T.9225, 9228, 9252.

<sup>96</sup> T.9226.

<sup>97</sup> T.9218, 9236, 9245, 9268.

<sup>98</sup> T.9281.

<sup>99</sup> T.9299-9334.



provided clarifications, in particular on the drafting and form of orders.<sup>100</sup> He described how the orders were drafted. He explained where the information regarding the sender, recipient, subject and responsible commander appear in the order. He provided information on the signing of orders and their certification<sup>101</sup> as well as the means by which they were transmitted and received<sup>102</sup>.<sup>103</sup> Witness Muradif Mekić, former Chief of Staff of the Supreme Command of the 3<sup>rd</sup> Corps, presented significant clarification on the testimony of Senad Selimović, particularly regarding the different types of stamps used by the 3<sup>rd</sup> Army Corps and the codes contained in the registration numbers of the documents.<sup>104</sup>

29. The Chamber subscribes to the jurisprudence of the Tribunal which sets out that reliability is a requirement of admissibility under Rule 89(C) of the Rules.<sup>105</sup> However, in order for a document to be admitted as evidence, *prima facie* proof of its reliability is sufficient.<sup>106</sup> The Chamber considers that this *prima facie* proof may take different forms, for example the source of the document, its form (signature, stamp), its structure (fax or letter), method of transmission, content or purported use.<sup>107</sup> The Chamber holds, however, that it is not necessary for these elements to be found in conjunction. It notes, in this respect, that the criteria for the admission of evidence must not be too strict and that a final decision on the relevance and probative value of a document is taken only at the end of the trial when assessing the evidence as a whole.

30. The four witnesses cited above helped the Chamber towards a better understanding of the system of drafting and transmitting orders within the ABiH. They also provided important information on the reliability of the documents contained in the Sarajevo archives. This information provided the Chamber with the possibility of examining the challenged documents and establishing some indicia of reliability. The Chamber relied on two criteria of reliability in particular: the appearance of the challenged documents and the place from which they came. The documents from the Sarajevo archives appear to be reliable precisely because

<sup>100</sup> T9862,9863,9866, 9883, 9887, 9933.

<sup>101</sup> T.9863-9868, 9888.

<sup>102</sup> T.9884-9886, 9917.

<sup>103</sup> The witness provided information on the challenged documents 35, 41, 162 and 649.

<sup>104</sup> Moreover, he acknowledged the challenged documents 41, 162, 329, 433, 442, 546, 573 and 649, several of which bear his signature.

<sup>105</sup> *Delalić* Decision, para. 18.

<sup>106</sup> *Brdanin* Order, para. 25.

<sup>107</sup> *The Prosecutor v. Alfred Musema*, case no. ICTR-96-13-T, Judgement and Sentence, 27 January 2000 (*Musema* Judgement), paras. 66 and 67.

of their provenance.<sup>108</sup> These are official archives and most of the documents in question were obtained through official requests for assistance. The official nature of the documents itself seems to be sufficient indicia of reliability. The same applies to the challenged documents from governments<sup>109</sup> and the Croatian archives in Zagreb.<sup>110</sup> Moreover, these documents were also considered admissible in the *Kordić and Čerkez* case.<sup>111</sup> Documents from witnesses and documents of a special nature, particularly war diaries and operational logs, video tapes and telephone taps, will be discussed at a later stage.

In light of the grounds set out above, it should be stated that there is no reason to deny the Prosecution's request in this respect.

#### **D. "Technical questions" concerning the challenged documents**

31. In its Response and Clarifications, the Defence identified 144 challenged documents whose admission should be refused on technical grounds, particularly on the grounds that there is no translation or B/C/S version. These are 2, 3, 5, 7, 10-14, 20, 21, 35, 39, 40, 42, 45, 50, 53, 60, 68-70, 78, 82, 91-94, 98, 99, 101, 114, 115, 120, 126, 141, 148, 151, 152, 157, 163, 170, 173, 174, 185, 186, 188, 189, 190, 193, 214, 215, 218, 220, 224, 227, 229, 231, 234, 239, 240, 241, 243, 244, 246, 248, 249, 251-261, 263-274, 276-279, 283-285, 288, 301, 304, 315, 319, 324, 325, 344, 375, 377, 387, 398, 407, 419-421, 440, 442, 447, 451, 452, 478, 480, 481, 482, 491, 493, 495, 497, 498, 500-502, 526, 528, 531, 536, 555-557, 560, 561, 567, 568, 572, 573, 650 (144 in all).

The Prosecution subsequently provided the Chamber and the Defence with six series of missing documents. When the last series was admitted on 15 July 2004, the Chamber stated that the challenged documents were complete.

<sup>108</sup> Challenged documents 2-13, 17-29, 31, 32, 34-51, 53, 56, 59, 60, 62-86, 92-97, 99, 100, 103, 104, 106-109, 112, 120, 123-133, 135, 137-142, 145-148, 150-153, 156, 160-167, 169, 171-175, 177, 179-184, 196-200, 202-204, 208-210, 212-214, 223, 224, 226-237, 239-245, 247, 248, 275, 280, 283, 284, 286, 287, 288, 290-297, 299-309, 311, 316, 322-330, 333-337, 339, 340, 342, 344-351, 356, 357, 360-367, 369, 370, 372, 374, 376, 378, 379, 382, 383, 385, 387, 390, 413-418, 422, 423, 426, 427, 428, 432-435, 437-440, 442, 443, 445, 446, 448, 449, 452, 484-584, 590, 647-650, 652-657.

<sup>109</sup> 15, 55, 119, 249, 320, 368, 381, 392, 393, 394, 395, 396, 397, 419, 420, 421, 429, 430, 576, 624, 658.

<sup>110</sup> 16, 91, 136, 149, 155, 157, 170, 176, 185, 186, 187, 188, 189, 190, 191, 193, 195, 215, 216, 217, 218, 219, 220, 246, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 276, 277, 278, 279, 285, 310, 313, 314, 315, 317, 318, 319, 321, 341, 343, 359, 371, 375, 377, 447, 478, 483, 577, 578.

### **E. The relevance and probative value of the challenged documents**

32. In its Response and Clarifications, the Defence identified challenged documents whose admission should be refused on grounds of lack of relevance and probative value. A number of those documents have since been withdrawn by the Prosecution.<sup>112</sup> The Chamber is required to rule on the relevance and probative value of 241 documents – 4, 6, 8, 9, 15-19, 22, 23, 25-29, 31, 37, 46-56, 59, 62, 63-67, 72-77, 79-81, 83-86, 89, 92, 96, 98, 100-108, 110, 112, 113, 118, 120, 123, 126-123, 135, 139, 141, 145, 147, 148, 150, 153, 155, 156, 158, 159, 163, 164, 166, 175-182, 184, 187, 195, 196, 200, 203, 206, 208-214, 218, 221, 229, 230, 232, 234-237, 242, 244, 245, 247, 262, 275, 276, 280, 281, 283, 287, 290-300, 302, 303, 305-309, 311, 312, 316, 322, 323, 326, 328, 332, 334, 337, 340, 342, 346-349, 351, 354, 356-358, 360-366, 374, 376, 377, 379, 380, 383, 396, 398, 400, 401, 403, 405-407, 409, 410, 412, 423, 437-439, 443, 445, 446, 450, 451, 476, 484-489, 497-506, 528, 529, 542-545, 559, 561, 569, 571, 579, 580, 584, 636, 650, 652-654 and 656.

33. Further to the Chamber's request, on 19 April 2004 the Prosecution submitted another version of the New List, stating for each challenged document on the List the paragraph in the Indictment to which the document related. In a discussion on the challenged documents, the parties gave their observations on the relevance of those documents on 27 and 28 April 2004.

34. The notions of relevance and probative value, which presuppose a link between two facts, cannot be readily defined in a clear and simple manner in the absence of context. The application of these notions depends, above all, on the specific circumstances of a case and on the nature of the documents whose admission into the proceedings is being requested.<sup>113</sup> The case before the Chamber is different from other cases before the Tribunal in that it is dealing solely with command responsibility under Article 7(3) of the Statute, to the exclusion of other forms of individual criminal responsibility. Another characteristic of this case lies in the fact that the Indictment refers to a great many different events which would incur the Accused's criminal responsibility. This diversity of events is borne out particularly with regard to the persons who allegedly committed crimes, to the victims, places and the time and circumstances of the alleged facts. Consequently, problems of evidence may arise other than

<sup>111</sup> *The Prosecutor v. Dario Kordić and Mario Čerkez*, Decision on Prosecutor's Submissions Concerning "Zagreb Exhibits" and Presidential Transcripts, 1 December 2000, para. 43.

<sup>112</sup> Numbers 61, 30, 134, 117, 143, 144, 168, 282, 289, 352, 353, 399, 402, 404, 411, 467, 468, 469, 470, 471, 472, 474, 475, 585, 586 and 592 were withdrawn by the Prosecution.

<sup>113</sup> *Delalić* Decision, para. 17.

those encountered in a case dealing with an individual's criminal responsibility under Article 7(1) of the Statute or involving a more limited number of alleged facts.

35. Thus, the specific nature of this case on these two points requires that the notions of relevance and probative value be applied in a circumspect and flexible manner and that admission of a document should not be too hastily refused. Other reasons also support such an approach. A proper understanding of the functioning of a complex institution such as an army in wartime requires a great deal of information be taken into consideration. In this case, the problem would be more a lack of information than an overabundance thereof. Moreover, a document which could appear insignificant and of little relevance at first sight might assume much greater importance when considered in light of other documents or testimony. The Chamber asserts that if a document cannot, as such, be relevant with regard to the facts covered in the Indictment, it does not necessarily mean that it must be excluded, since a document must be placed in the wider context formed by testimony and other documents. Furthermore, a document admitted during the Prosecution's presentation of evidence may subsequently be contradicted by witnesses or documents adduced by the Defence; at the end of the trial the Judges will, then, assess the evidence and attribute to it a greater or lesser weight when deliberating in secret.

36. What applies to the relevance and probative value of documents in general applies also to documents which date from before or after the period covered by an indictment. Documents relating to a prior period may allow for a better understanding of events or developments which took place in the period covered by an indictment. The same reasoning may be applied to documents from a period following that covered by the Indictment. This is all the more true since the period during which a commander carries out his duties does not necessarily coincide with the period in which certain events referred to in the Indictment allegedly occurred.

37. Moreover, the Chamber notes that, during the trial, it always demonstrated a liberal approach to the relevance of the documents with regard to their admissibility. This approach was justified by the fact that knowledge of the context surrounding certain events or an armed conflict in general is necessary in order to be able to understand these events properly.<sup>114</sup>

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<sup>114</sup> See, for example, the Final Decision on Judicial Notice of Adjudicated Facts dated 20 April 2004 and Decision on Defence Motion for Clarification of the Oral Decision of 17 December 2003 regarding the Scope of Cross-Examination pursuant to Rule 90 (h) of the Rules dated 28 January 2004.

38. In order to be admitted, a document must have “*some* relevance” and “*some* probative value”.<sup>115</sup> On the basis of the observations above, the Chamber considers that none of the challenged documents should be set aside merely in view of their relevance and probative value, aside from some documents cited in the section of this decision devoted to videotapes.<sup>116</sup>

#### **F. The need to tender the challenged documents through witnesses**

39. In its Joint Submission of 19 April 2004, the Defence challenged the admissibility of certain documents on the grounds that they should be tendered through a witness. The Prosecution subsequently withdrew a number of documents.<sup>117</sup> The 472 remaining documents are the following: 2-29, 31, 32, 34-51, 53, 54, 56, 59, 60, 62-86, 90-110, 112-116, 118-120, 123-133, 135-142, 145-167, 169, 170, 172-182, 184-191, 193, 195, 196-200, 202-204, 206, 208-221, 223, 224, 226-237, 239-249, 251-276, 278-281, 283-288, 290-337, 340-351, 354-372, 374-379, 381-383, 385, 387, 398, 400, 401, 403, 405-407, 409, 410, 412-430, 432-435, 437-443, 445-452, 466, 476, 478, 480-482, 484-495, 479-503, 504-507, 526, 528-532, 534, 536-541, 546, 550, 551, 552, 554-557, 560-565, 567-573, 576, 577, 580, 583, 584, 590, 591, 636, 647-650, 652-657.

40. The parties made their general observations at the hearing of 28 April 2004.

41. The Prosecution Brief, together with Annexes A and B, provided details of witnesses who could authenticate certain documents. The Prosecution submitted that some 160 witnesses would be needed to introduce all the challenged documents.

42. On 21 and 22 June 2004, the Chamber heard the archivists Adem Omerkić and Sahabudin Smriko as witnesses working in the archives which provided the Prosecution with a large number of documents. On 30 June and 1 July, the Chamber heard as witnesses former military personnel and members of the 3<sup>rd</sup> Corps of the ABiH Senad Selimović and Muradif

<sup>115</sup> *Musema* Judgement, para. 56.

<sup>116</sup> Paras. 65 and following.

<sup>117</sup> The 78 documents bearing numbers 30, 57, 61, 111, 117, 121, 134, 143, 144, 168, 192, 194, 201, 205, 207, 225, 238, 250, 282, 289, 352, 353, 373, 384, 386, 388, 389, 399, 402, 404, 411, 431, 436, 444, 453-465, 467-475, 581, 582, 585, 586, 588, 589, 592-594, 596, 598, 624-627, 629, 631-635 and 659 were withdrawn by the Prosecution.

Mekić in relation to the drafting and transmission of orders within the Army of Bosnia and Herzegovina. On this occasion, witness Selimović gave particulars regarding challenged documents 35,<sup>118</sup> 41,<sup>119</sup> 162,<sup>120</sup> and 649.<sup>121</sup> Witness Muradif Mekić acknowledged the challenged documents 41,<sup>122</sup> 162,<sup>123</sup> 329,<sup>124</sup> 433,<sup>125</sup> 442,<sup>126</sup> 546,<sup>127</sup> 573<sup>128</sup> and 649<sup>129</sup> and provided information and commented on them. Witness ZP was heard between 14 and 18 June 2004. This witness acknowledged two notes which he had personally written - challenged documents [...] and [...]. He also acknowledged challenged documents [...], [...], [...], [...],<sup>130</sup> [...] and [...], and provided some clarification in relation to challenged documents [...],<sup>131</sup> [...]<sup>132</sup> and [...].

43. The question of whether or not a document may be admitted other than through a witness is closely linked to the application of Rule 89(D) of the Rules of Procedure and Evidence. Thus, the following observations by the Chamber must be read in relation to its observations and decisions on the application of that Rule in the following section of this Decision. The purpose of these observations is to prepare the groundwork.

44. The Chamber notes firstly that, according to the established jurisprudence of this Tribunal and the Rwanda Tribunal, there is no general or absolute rule which would require a document to be excluded merely on the grounds that the purported author was not called to testify at trial.<sup>133</sup> The Chamber holds that the same applies to a witness who, after appearing, does not acknowledge a document of which he or she is the alleged author or which that witness is supposed to recognise in some other capacity. The Chamber applies this approach also to a situation where a witness who appears before a Chamber without having been shown by the party that called him or her to appear a document which that party wishes to admit into

<sup>118</sup> T.9897-9900.

<sup>119</sup> T.9900-9991.

<sup>120</sup> T.9892-9897.

<sup>121</sup> T.9991-9904.

<sup>122</sup> T.9973, 9985.

<sup>123</sup> T.9973.

<sup>124</sup> T.9966-9970.

<sup>125</sup> T.9972-9973.

<sup>126</sup> T.9987-9988.

<sup>127</sup> T.9971-9972.

<sup>128</sup> T.9971.

<sup>129</sup> T.9973.

<sup>130</sup> T.8866, 8867.

<sup>131</sup> T.8861, 8862.

<sup>132</sup> T.8927.

<sup>133</sup> *Delalić* Decision, para. 22; *The Prosecutor v. Radoslav Brdanin and Momir Talić*, Decision on Interlocutory Appeal, 11 December 2002, para. 52.

does not acknowledge a document of which he or she is the alleged author or which that witness is supposed to recognise in some other capacity. The Chamber applies this approach also to a situation where a witness who appears before a Chamber without having been shown by the party that called him or her to appear a document which that party wishes to admit into the proceedings and on which the witness could perhaps have commented. However, a party seeking to admit a document without the assistance of a witness is running a certain risk. In doing so, the probative value of the document in question may be diminished and, in some instances, the document may be excluded on the basis of Rule 89(D) of the Rules.

45. In the case before this Chamber, the Defence underscored on several occasions the importance of introducing documents through a witness in order to have questions answered about the origin and source of a document, the use made of it, and other issues relating more to its form than its content. Witnesses Omerkić, Smriko, Selimović and Mekić appeared before the Chamber in order to provide general clarification on a series of questions raised by the Defence. This information on the “external reliability” of a very large number of documents is supplemented by a study presented by the Prosecution in its Submission of 1 July 2004 regarding the sending and receipt of documents which the Prosecution is seeking to have admitted, as well as by the information which the Chamber is able to draw from the original documents which the Prosecution provided to it at the Chamber’s request.

46. The problem of the witness arises secondly with regard to a document’s content, that is its relevance and “material” probative value. In this instance, the need to hear a witness is dependent on a number of various factors, the most important of which the Chamber will summarise. The first determining factor is the nature of a document. Is it an official document or a document written by someone in their official capacity, or was it written on a private basis? The second factor concerns a document’s content. The document can relate to the acts or conduct of an accused, the acts of persons allegedly under the accused’s command and which are characterised in an indictment as specific violations of international humanitarian law, or other acts and events. The third element to be taken into consideration is whether or not a document contains hearsay if it relates the words of persons other than the author of the document. In line with these criteria, the Chamber called witness ZP *proprio motu*, since it considered that challenged documents 211 and 221 could not be admitted without giving the Defence the possibility of questioning the author of those documents.

### **G. Questions linked to Rules 89(F), 90 and 92 *bis* of the Rules**

47. In its Clarifications, the Defence objected to the admissibility of certain documents, pleading Rules 89(F), 90 and 92 *bis* of the Rules. Most of those challenged were withdrawn by the Prosecution. The remaining documents are 216, 249, 319, 325 and 636.

48. Documents 216, 249, 319, 325 and 636 contain statements written on a private basis by individuals on events which they experienced. Such statements can be admitted only under Rules 89(F), 90 or 92 *bis* of the Rules. Since the Prosecution did not request their admission on the basis of one of these Rules, they must be excluded.

49. For the above reasons, the Chamber is also excluding challenged document 158.

### **H. Questions related to Rule 89(D) of the Rules**

50. Rule 89(D) of the Rules of Procedure and Evidence provides that a Chamber may exclude any evidence whose probative value is substantially outweighed by the right to a fair trial.

51. In its Clarifications, the Defence challenged the admissibility of 269 documents, stating that this Rule applies in these instances. Those documents are 2, 8-17, 20, 24, 26, 31, 35, 39-46, 48, 50, 52, 54, 67, 69, 70, 71, 77, 82, 91-95, 97, 99, 100, 101, 106, 109, 112, 114, 116, 120, 124-126, 136-138, 140-142, 146, 148, 149, 151, 152, 154, 157, 158, 160-165, 167, 169, 170, 172-174, 184-186, 188-191, 193, 197-199, 202, 204, 210, 214-221, 223, 224, 226-229, 231, 233, 234, 237, 239, 240, 241, 243, 244, 246, 248, 249, 251, 252-261, 263-274, 276, 278, 279, 281, 283-286, 288, 290, 300, 301, 310, 313-321, 324, 325, 327, 329, 330, 333, 335, 336, 341, 343-345, 347, 350, 355, 359, 364, 367-372, 375-378, 381, 382, 385, 387, 398, 406, 413-422, 424-430, 432-435, 440-443, 447-449, 452, 491-495, 500, 507, 526, 530-532, 534, 536-541, 546, 550-552, 554-557, 560-565, 567, 568, 570, 572, 573, 590, 647-650, 655 and 657.

52. The parties gave their general observations orally at the hearing held on 28 April 2004.



53. The first question which arises is whether the admission of a document without its purported author or another individual who could testify to the document being called as a witness constitutes, in itself, a violation of the Rules of Procedure and Evidence. As already stated by the Chamber in the previous section of this Decision, the jurisprudence of the Tribunal is clear on this matter. There is no principle of blanket prohibition of such documents. The Trial Chamber in the *Delalić et al.* case already noted that there is “no ground [either] for a general finding to the effect that the probative value of documents of this category is so outweighed by any prejudicial effects that they should be considered generally inadmissible”.<sup>142</sup> It stated further: “It is a different matter that the probative value of such evidence by necessity will be affected by the fact that it has not received the scrutiny involved in the cross-examination of a witness. This is an important factor to which the Trial Chamber will give due consideration at the stage of assessing the weight to be attached to exhibits of this nature.” This Chamber holds that, in general, the same principles and considerations apply in the case of a witness who is called to testify but does not acknowledge a document and that of a witness who is not requested by a party to give an opinion on a document.

54. In its Clarifications, the Defence stated that “if at the admissibility stage the probative value of a proposed exhibit, standing on its own, is such that without the benefit of additional evidence (in most cases, witness testimony) it is of no assistance to the Chamber in adjudicating factual issues in dispute, it would be unfair to admit the exhibit”. During the oral discussion on 28 April 2004, it reiterated its viewpoint in similar terms.<sup>143</sup> The Defence concludes that, in this instance, Rule 89(D) of the Rules requires that the document be excluded.

55. This observation and the other observations of the Defence on this matter are open to several interpretations. They may be interpreted as requiring that any uncertainty on the exact probative value of a document be resolved. In this case, the Chamber does not share the view of the Defence. Since it is always possible to question a document, whatever its source or content, a strict application of the Defence criteria might result in it being impossible to admit

<sup>142</sup> *Delalić* Decision, para. 22.

<sup>143</sup> Defence Submissions, p. 3. For example, during the oral discussion on 28 April 2004, the Defence paraphrased the criteria in the following manner: “... reliability [Mr President] still exists and when the Chamber withdraws and looks at the document before it, will the Chamber be able to use that document without asking themselves what that document represents and where it is going according to the Prosecution case? If once they have the document in their possession the Chamber has questions about its reliability, to such an extent that it cannot use that document without engaging in hypothesis about that document, then there is clearly a prejudice to

any further documents. The Chamber holds that for a document to be admissible it is sufficient that it has *some* relevance and *some* probative value.<sup>144</sup> Since a document's reliability affects its relevance and probative value, the same principle applies to the reliability of documents. The Chamber wishes to state, furthermore, that it examined the admissibility of each document separately. When a document is being considered for admission, the examination is limited in that other documents, whether or not they have been admitted, are not usually taken into account in determining whether a document may be admitted. The weight to be attached to the evidence will be decided at trial stage when the probative value of a document can be considered in relation to other available evidence. However, if the Defence meant that Rule 89(D) means that a document can be admitted only if there is sufficient indicia of relevance and probative value, including reliability, the Chamber can only subscribe to that opinion.

56. With more specific regard to the origin, source and use of the challenged documents – questions which relate to the “external reliability” of the documents – the Chamber has already in previous sections of its Decision indicated which criteria it applies in adjudicating questions affecting the admissibility of those documents and which general information it received from four witnesses. The four witnesses and the Chamber's examination of the originals of a large number of documents supplement the information which may be inferred from the documents produced by the Prosecution following its Motion of 10 March 2004. The Chamber notes that all the documents whose admission has not already been refused contain sufficient indicia of “external reliability” and determines that they should not be excluded on the basis of Rule 89(D).

57. With regard to the content of the documents, that is their relevance and “material” probative value, the Defence submits that any official document which relates, directly or indirectly, to the acts or conduct of an accused, can only be admitted through a witness or another document.<sup>145</sup> The Chamber does not subscribe to this viewpoint. The Chamber holds that Rule 92 *bis* of the Rules should not be applied by analogy, as suggested by the Defence. An official document cannot, as such, be compared to a witness' written statement, the purpose of which is to serve as evidence in criminal proceedings. There is no reason, therefore, for Rule 89(D) of the Rules to be applied unconditionally to such documents. The

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the rights of the accused because the accused ... [will not have had] occasion to present his arguments on that document...”

<sup>144</sup> *Musema* Judgement, para. 56.

Chamber did not find individual documents whose admission would require a witness to be heard, except perhaps for document 211, which is, moreover, of rather a personal than an official nature. This witness was heard.

58. Some challenged documents and exhibits for identification raise the question of whether they may be admitted in view of the fact that they express, in part, the author's own views or relate, in some measure, the words of other persons. These documents will be discussed below.<sup>146</sup>

## **I. Other questions: the "special" categories of challenged documents**

### **1. War diaries and operational logs**

59. The Prosecution submitted many extracts from war diaries and operational logs for admission into the proceedings which were challenged by the Defence. These extracts are contained in the challenged documents 10, 11, 12, 13, 14, 20, 27, 28, 141, 163, 173, 174, 229, 231, 239, 240, 243, 288, 297, 339, 345, 346, 350, 376, 445, 452, 555, 556 and 557.

60. At the request of the Defence, the Prosecution agreed to request admission into the proceedings of not only single extracts as on previous occasions, but entire war diaries and operational logs from which the extracts were taken.<sup>147</sup> In its order rendered orally on 17 May 2004, the Chamber requested the Prosecution to provide all of these diaries and logs.<sup>148</sup>

61. The challenged documents are taken from ten war diaries, operational logs or various other types of notes. The sources of the documents are the 3<sup>rd</sup> Corps, the "Bosanska Krajina" Operations Group and the 306<sup>th</sup> Mountain Brigade. There are multiple authors, sometimes within the one document, who are often unknown. Dated between 26 January 1993 and 9 September 1993, the documents are all from the period covered by the Indictment.

62. The Defence maintained that it was necessary to know who had written in the various war diaries and operational logs, what possible directions had to be respected by the authors with regard to the content of the diary and on which sources these writings were based. The

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<sup>145</sup> T.6341-6343.

<sup>146</sup> See paras. 59 ff.

<sup>147</sup> T.6385-6386; 6395.

Defence also underscored the need to know the period in which the diaries were written. It raised the problem of war diaries not having any official marking which would make it possible to guarantee the origin or author of the document. The Defence insisted, therefore, that the source of the war diaries be known and that it be open to cross-examination.

63. The Chamber does not consider it inappropriate to admit copies of war diaries where the author is unknown. This anonymous aspect is part of their authenticity. The Chamber notes that such documents are important contemporary accounts of the facts whose nature is enough to attest to their authenticity.<sup>149</sup> The same applies to operational logs. The Chamber considers that the copies of the war diaries and operational logs present sufficient indicia of reliability, relevance and probative value and decides, thus, to admit them into the proceedings.

64. The Chamber has decided to attribute a number to each war diary and operational log. Several documents might thus be attributed the same number if they are from the same war diary or operational log. A single number will therefore be attributed to all the following groups of challenged documents: 10, 11, 12, 13, 163, 174 and 445; 20, 27, 28, 229, 288 and 297; 231 and 240; 173, 243, 346 and 557; 141, 350 and 452; 555 and 556.

## 2. Videotapes

65. On 19 April 2004, the Prosecution requested the admission of a number of videotapes. In its Clarifications of 19 April 2004, the Defence challenged the admissibility of all the documents mentioned. Some of the challenged documents were later withdrawn by the Prosecution from its List. The documents on which the Chamber must still adjudicate are 87, 88, 281, 332, 354, 398, 400, 401, 403, 405, 406, 409, 466 and 582.

66. Sections from challenged documents 87 and 88 were shown at the public hearing of witness Živko Totić on 20 February 2004. These sections were assigned reference numbers P 70 and P 69.

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<sup>148</sup> T.7476.

<sup>149</sup> *The Prosecutor v. Dario Kordić and Mario Čerkez*, case no. IT-95-14/2, Decision on Prosecutor's Submissions Concerning "Zagreb exhibits" and Presidential Transcripts, 1 December 2000, para. 44.

67. The challenged videotapes were transmitted at the public hearings on 2, 3, 4 and 7 June 2004. At these hearings the Prosecution provided additional information regarding the origin of the tapes and how they had been transmitted. The Prosecution specified further that it was requesting the admission of the tapes for the purposes of being shown.<sup>150</sup> The parties presented their views on the admissibility of the videotapes in detail.

68. Challenged document 87 addresses the situation of the “Mujahedin” in Central Bosnia in 1992 and 1993. Since it considers that this document contains sufficient indicia of relevance and probative value and is not prohibited by Rule 89(D) of the Rules of Procedure and Evidence, the Chamber admits the videotape.

69. Challenged document 88 deals with the abduction of Živko Totić and an exchange of prisoners of which he was part. Since it considers that the document contains sufficient indicia of relevance and probative value and is not prohibited by Rule 89(D) of the Rules of Procedure and Evidence, the Chamber admits the videotape.

70. Challenged document 281 shows a visit by the former President of Bosnia and Herzegovina Alija Izetbegović to the 7<sup>th</sup> Muslim Mountain Brigade from Zenica. Since it considers that the document contains sufficient indicia of relevance and probative value and is not prohibited by Rule 89(D) of the Rules of Procedure and Evidence, the Chamber admits the videotape.

71. Document 332 deals with “Mujahedin” soldiers. Since it considers that the document contains sufficient indicia of relevance and probative value and is not prohibited by Rule 89(D) of the Rules of Procedure and Evidence, the Chamber admits the videotape.

72. Challenged document 354 shows several corpses in Zenica morgue. Since it considers that the document contains sufficient indicia of relevance and probative value and is not prohibited by Rule 89(D) of the Rules of Procedure and Evidence, the Chamber admits the videotape.

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<sup>150</sup> T.8686.

73. Challenged document 398 deals with the abduction of Živko Totić. Since it considers that the document contains sufficient indicia of relevance and probative value and is not prohibited by Rule 89(D) of the Rules of Procedure and Evidence, the Chamber admits the document.

74. Challenged document 401 shows the “Mujahedin” again. Since it considers that the document contains sufficient indicia of relevance and probative value and is not prohibited by Rule 89(D) of the Rules of Procedure and Evidence, the Chamber admits the videotape.

75. Document 405 contains, *inter alia*, a section which shows events in the town of Vareš after its occupation by troops of the 3<sup>rd</sup> Corps. Since it considers that the section contains sufficient indicia of relevance and probative value and is not prohibited by Rule 89(D) of the Rules of Procedure and Evidence, it is admitted by the Chamber.

76. Challenged document 406, produced by Ivo Misković in 1997, shows destruction in a number of villages in Central Bosnia, including villages referred to in the Indictment. Since it considers that the document contains sufficient indicia of relevance and probative value and is not prohibited by Rule 89(D) of the Rules of Procedure and Evidence, the Chamber admits the videotape. All the assumptions and conclusions in the oral commentary and written text of the commentary will be dismissed by the Chamber and will not form part of the evidence which it will consider in ruling on the innocence or guilt of an accused.

77. Challenged documents 407 and 466 were produced at the request of the Office of the Prosecutor in 2002. They bear the same ERN number: V000-3971-V000-3971. These videotapes show buildings and premises referred to in the Indictment as places of detention in the period covered by the Indictment. Since it considers that the tapes contain sufficient indicia of relevance and probative value and are not prohibited by Rule 89(D) of the Rules of Procedure and Evidence, they are admitted by the Chamber. All the assumptions and conclusions in the oral commentary and written text of the commentary will be dismissed by the Chamber and will not form part of the evidence which it will consider in ruling on the innocence or guilt of an accused.

78. Challenged document 409 contains images of the 7<sup>th</sup> Muslim Brigade. Since it considers that the document contains sufficient indicia of relevance and probative value and

is not prohibited by Rule 89(D) of the Rules of Procedure and Evidence, it is admitted by the Chamber.

79. Challenged document 582 was withdrawn by the Prosecution.

80. The Chamber refuses to admit videotapes 105, 400 and 403, since it considers that these documents are not relevant enough to satisfy the requirements of Rule 89(C) of the Rules. On the same grounds, the Chamber also refuses to admit the part of the videotape 405 dealing with Croatian refugees in the town of Vareš before the attack of 4 November 1993.

### 3. Telephone taps

81. The Prosecution submitted transcripts of telephone taps between Sefer Halilović and Enver Hadžihasanović, the admission of which has been challenged by the Defence. These telephone taps report three conversations which took place on 16 June, 20 June and 26 July respectively, contained in challenged documents 480, 481 and 482. These documents come from the security services of the Ministry of the Interior of the State of Bosnia and Herzegovina.

82. The Defence observed that these challenged documents were not transcripts of telephone conversations recorded on a tape but notes taken by a person who was listening to the conversation through an electronic tap. The Defence considers this to be very different from a telephone tap, which allows the transcript of the conversation to be recorded on a tape. The notes were, in fact, taken in draft form and the documents have no stamp or proof of origin.

83. The Defence wishes to have proof of the way in which the conversation was heard in order to ensure that a minimum degree of reliability may be attributed to the document. The context in which the conversation was recorded is unknown. The Defence submits that it is uncertain whether they were in fact identified, or that the person who conducted the taps and took notes heard the conversation properly. The Defence holds that this diminishes even further the reliability or use which the Chamber could make of those documents.

84. The Defence finds it very significant also that the Ministry of the Interior conducted electronic taps within its own army and holds that this is a factor which the Chamber must take into consideration.

85. On 17 May 2004, the Chamber rendered an oral decision in which it requested the Prosecution to provide any information on documents transmitted to it by governments and on the material in its possession which proves that the documents were sent and received and to inform the Chamber of where the government-produced documents had come from.<sup>151</sup> The Chamber's request concerned, *inter alia*, the documents relating to the telephone taps.

86. In response,<sup>152</sup> the Prosecution provided the Chamber with information relating to the procedure used to obtain the transcripts of the telephone taps producing, *inter alia*, correspondence relating to a request for assistance of 14 January 2002 in which the Office of the Prosecutor requested all the files of the security services of the State of Bosnia and Herzegovina regarding Sefer Halilović from June 1993 to December 1996, the list of transmissions intercepted by those security services regarding Sefer Halilović in that period, the proposed decision regarding the execution of operative and technical measures against Sefer Halilović, which legally authorised the interception of communications, and the four intercepted transmissions contained in the challenged documents in question.

87. The Chamber notes that, on a technical level, the method by which the taps were conducted cannot be established with certainty since the Government of Bosnia and Herzegovina did not supply videotapes but only transcripts of conversations. The Chamber observes, however, that the documents are from an organ of the State of Bosnia and Herzegovina. Moreover, the telephone taps were ordered and the conversation transcripts were prepared by State security services, which is sufficient guarantee of reliability. Furthermore, the purpose of the taps was to keep a check on Sefer Halilović, who was a member of the BiH staff, and the superior of one of the accused. The direct link between Halilović and that accused, and the content of the conversations, make it possible to attribute sufficient relevance and probative value to the documents. The Chamber has decided, therefore, to admit into the proceedings the documents relating to the telephone taps.

## V. EXHIBITS FOR IDENTIFICATION

<sup>151</sup> T.7475-7476.



1. Photos and sketches linked to the testimony of witness ZI and Mika Tauru

88. On 4 February 2004, on the basis of Rule 92 *bis* of the Rules of Procedure and Evidence ("Rules") the Chamber admitted into evidence the written statement of witness ZI of 18 November 2003. Attached to this statement was a series of 28 sketches by an investigator for the Prosecution, Mika Tauru, which the Chamber also admitted into proceedings.<sup>153</sup> The sketches were related to alleged destruction in the villages of Ovnak, Šušanj, Miletići, Brajkovići, Grahovčići, Donje Čukle and Gornji Čukle, referred to in Count 5 of the Indictment. The Chamber also authorised the Defence to cross-examine witness ZI. In a letter dated 1 March 2004, the Prosecution provided the Chamber and the Defence with new copies of the aforementioned sketches and seven new sketches of the villages of Guča Gora and Maline, also by the investigator, Mika Tauru. On 4 and 5 March 2004, witness ZI appeared before the Chamber. At the hearing of 5 March 2004, the Prosecution requested the Chamber to admit into the proceedings a series of 41 aerial photographs by investigator Mika Tauru of the villages of Ovnak, Šušanj, Miletići, Brajkovići, Grahovčići, Guča Gora, Maline, Donje Čukle and Gornji Čukle and new sketches of those villages, also by the same investigator. These documents were admitted for identification under the provisional reference numbers P 81 id – P 89 id.

89. At the hearing of 5 March 2004, the Defence objected to the admission into evidence of sketches and photos linked to the testimony of witness ZI and Mika Tauru.<sup>154</sup> The Defence reasoned this objection by stating that the sketches attached to the witness statement of 18 November 2003 and the other sketches produced by the Prosecution at the hearing of 5 March 2004 are not reliable and that they were based on unknown information and hearsay, particularly with regard to the period in which houses and other buildings in the villages in Central Bosnia were allegedly destroyed. Moreover, they had very little or no probative value. The Defence submitted also that witness ZI received instructions from investigator Mika Tauru, who was not available to confirm those instructions.

90. With regard to the photos, the Defence stated that the numbers in the photos raised a problem since they referred to the aforementioned sketches. According to the Defence, the

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<sup>152</sup> In the Prosecution Submission and Annex C of those Submission.

<sup>153</sup> The statement and sketches were assigned reference number P 80.

<sup>154</sup> These documents have the provisional reference numbers of P 81 id – P 89 id.

photos would not provide any additional information about the sketches as far as the responsibility of the Accused was concerned. The Defence also considered that the sketches and photos should not be admitted as evidence since their probative value was significantly outweighed by the requirement of a fair trial.<sup>155</sup> It maintained that the Prosecution was ill-founded in requesting the admission into proceedings of the said documents after the cross-examination carried out by the Defence.<sup>156</sup>

91. The Prosecutor insisted that the documents which she had presented be admitted as evidence at the same time as the aerial photographs.<sup>157</sup> In its oral decision of 11 March 2004, the Chamber stated that it preferred to wait until all the witnesses whom the Prosecution wished to question about the destruction of towns and villages had been heard before ruling on the Prosecutor's request.<sup>158</sup>

92. Witness Mika Tauru was heard on 23 June 2004. This witness provided clarification on the aerial photos and the sketches. He also testified about his work methods and contact with and instructions to witness ZI.

93. The Chamber is aware of the fact that the aerial photos taken by Mr Tauru and the sketches which he drew reflect the situation in the villages of Central Bosnia in early 2002 when the witness visited these places in order to conduct an investigation, that is after the period covered by the Indictment. Consequently, these documents do not, in themselves, provide a direct response to the question of whether the destruction of buildings which appear in those photos and sketches was not justified by military necessity said to have been committed in 1993, as alleged in the Indictment. These documents do not rule out either the possibility that the destruction which appears in them occurred after the ABiH had left or was caused, entirely or in part, by the conduct of persons who were not under the command of the Accused.

94. The Chamber observes that the sketches of Mr Tauru and the statements of witness ZI concerning the destruction of houses and buildings rely on the statements of persons who did not appear at trial or, in other words, on hearsay.

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<sup>155</sup> T.4135-4140.

<sup>156</sup> T.4072-4073.

<sup>157</sup> T.4140-4143.

95. The reasons set out above would usually argue in favour of the photos and sketches being excluded. However, these documents may serve a legitimate purpose in that they could corroborate other evidence, particularly oral testimony and written statements. For this reason the Chamber has decided to admit the challenged documents but will use them only to establish whether or not other evidence may be corroborated by one or more of the photos or sketches.

## 2. Other exhibits for identification

96. During the presentation of evidence between 1 December 2003 and 13 July 2004, the Prosecution had requested the definitive admission or admission for identification purposes of a number of documents. The Chamber admitted the following for identification: P 11 id, P 12 id, P 96 id, P 97 id, P 103 id, P 104 id, P 105 id, P 106 id, P 107 id and P 115 id. Document P 107 id was withdrawn by the Prosecution at the hearing of 22 April 2004. The Chamber must now rule on the definitive admission of the other documents.

97. With regard to documents P 12 id, P 96 id and P 97 id, the Prosecution requested their admission only for identification purposes.<sup>159</sup> Since the Prosecution has not yet requested the definitive admission of those three documents, there is no reason at present to rule on their definitive admission.

98. Document P 11 id also appears on the list of challenged documents under number 58. This is a pamphlet entitled the "Instructions to the Muslim Fighter". The flyleaf and pages 24 and 25, acknowledged by witness Kirill Ermichine, were assigned the definitive number P 11.1.<sup>160</sup> The Chamber is now admitting the entire document since it holds that the document contains sufficient indicia of reliability, is relevant *a priori* ("*prima facie*") and has some probative value.

99. Documents P 104 id and P 105 id also appear on the list of challenged documents under numbers 33 and 222. In its decision of today, the Chamber already admitted challenged documents 33 and 222 as exhibits. They should therefore be assigned numbers P 104 and P 105. Documents P 103 id and P 106 id are written statements by witness Jasmin Eminovic,

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<sup>158</sup> T.4322-4324.

<sup>159</sup> T.4714, 4711.

<sup>160</sup> T.8089.

taken as part of a discussion on the truthfulness and credibility of the witness.<sup>161</sup> The Chamber accepts the definitive admission of these documents, provided that they serve no purpose other than that of determining the credibility of the witness' oral testimony.

100. Document P 115 id is a photograph ("still"), taken from a videotape, in this case challenged document 87.<sup>162</sup> Since the Chamber has already, in this decision, admitted this videotape, it is appropriate to admit the photograph also.

## **VI. DISPOSITION**

**For the foregoing reasons,**

**TRIAL CHAMBER II:**

**DECIDES** to admit the challenged documents as indicated in Annexes A and B attached to this decision and

**DISMISSES** the admission into the proceedings of the other challenged documents, as set out in the said annexes.

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

/signed/

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Presiding Judge of the Chamber  
Jean-Claude Antonetti

Done this second day of August 2004  
At The Hague  
The Netherlands

**[Seal of the Tribunal]**

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<sup>161</sup> T.5873, 5900.

<sup>162</sup> T.8709.