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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-02-54-AR73.4

Date: 30 September 2003

Original: English

IN THE APPEALS CHAMBER

Before: **Judge Fausto POCAR, Presiding**
Judge Claude JORDA
Judge Mohamed SHAHABUDDEEN
Judge David HUNT
Judge Mehmet GÜNEY

Registrar: **Mr. Hans Holthuis**

Decision of: **30 September 2003**

THE PROSECUTOR

v.

Slobodan MILOŠEVIĆ

DECISION ON INTERLOCUTORY APPEAL ON THE ADMISSIBILITY OF EVIDENCE- IN-CHIEF IN THE FORM OF WRITTEN STATEMENTS

Counsel for the Prosecutor:
Ms. Carla Del Ponte
Mr. Geoffrey Nice

The Accused:
Mr. Slobodan Milošević (unrepresented)

***Amici Curiae*:**
Mr. Steven Kay, Mr. Branislav Tapušković, Mr. Timothy McCormack

Background

1. Pursuant to a certificate granted by the Trial Chamber in accordance with Rule 73(C) of the Rules of Procedure and Evidence ("Rules"),[1] the Prosecutor has appealed from a decision of Trial Chamber III[2] not to admit into evidence certain written statements under Rule 89. The statements are written witness statements or summaries of statements signed by the witnesses as being true and to be produced by them when testifying. The Prosecutor proposed that no oral evidence would be adduced from such witnesses in evidence-in-chief (with the possible exception of re-examination), but that the witnesses would attest orally to the accuracy of their written statements and be available for cross-examination by the Accused. The written statements may in some instances also contain material going to proof of the acts and conduct of the accused as charged in the indictment.

2. The Trial Chamber held that "under the present Rules, such written statements are only admissible under Rule 92*bis* and by no other means. . ."[3] The Trial Chamber relied in its decision on the statements of the Appeals Chamber in *Galić* to the effect that "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)."[4] The Trial Chamber further considered that Rule 92*bis* contained safeguards not found in Rule 89, including:

> (a) the fact that the statement is attested to before the witness comes to court and any alterations made;
> (b) the requirement that the Trial Chamber consider the admissibility of the statement; and
> (c) the exclusion of any evidence relating to the acts and conduct of the accused. . .[5]

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[1] *The Prosecutor v Slobodan Milošević*, Decision on Two prosecution Requests for Certification of Appeal Against Decisions of the Trial Chamber, Case No. IT-02-54-T, 6 May 2003.
[2] *The Prosecutor v Slobodan Milošević*, Decision on Prosecution Motion for the Admission of Evidence-in-Chief of its Witnesses in Writing, Case No. IT-02-54-T, 16 April 2003 (hereinafter "*Decision of the Trial Chamber*")
[3] *Ibid*, at p. 2.
[4] *Prosecutor v Galić*, Decision on Interlocutory Appeal Concerning Rule 92 *bis*(C), Case No IT-98-29-AR73.2, 7 June 2002, para. 31 (herinafter "*Galić*").
[5] *Decision of the Trial Chamber*, p. 3.

3. Judge Kwon appended a dissenting opinion, holding that the application of the Prosecution should be granted "so far as the contents of the witness statements do not go to the acts and conduct of the accused, the witnesses are available to attest under oath to the truth of the written statements at the International Tribunal and are subject to cross-examination by the Accused."[6] Judge Kwon held that Rule 92*bis* is "applicable to evidence in the form of written statements where the maker of the written statement is not subject to cross-examination."[7] Judge Kwon provided two primary reasons supporting this conclusion. First, that Rules 89(F) and 92*bis* were introduced in the same amendment to the Rules indicates that the Rules were not intended to be rigid in their application when justice allows.[8] Secondly, it was reasoned that the safeguards present in Rule 92*bis*(B) are superfluous where a witness attends court to testify, and that the exceptions provided in Rule 92*bis*(C) only apply where cross-examination of the witness is not possible.

4. The relief sought by the Prosecution includes a declaration that "(t)he Trial Chamber erroneously found that under the present Rules, written statements (as described in the Application) are only admissible under Rule 92*bis* and by no other means and that the Rules do not provide for the admission of evidence in the manner proposed by the Prosecution."[9] The Prosecution also seeks an order that "the Appeals Chamber, within its discretion, allows the Prosecution to use written statements under Rule 89(F) as evidence-in-chief whereby the witnesses adopt a statement or summary of a statement signed by them as being true, before being available for cross-examination."[10] In addition to the two orders sought by the Prosecution, it seeks a legal determination on the scope and purpose of Rules 89 and 92*bis*,

[6] *Decision of the Trial Chamber*, Dissenting Opinion of Judge Kwon, para. 6.
[7] *Ibid*, at para. 2.
[8] See *Ibid*, at para. 3.
[9] *Prosecutor v Slobodan Milošević*, Interlocutory Appeal of the Prosecution Against the Decision on Prosecution Motion for the Admission of Evidence-in-Chief of it Witnesses in Writing, Case No. IT-02-54-AR73.4, filed 13 May 2003 (hereinafter "Prosecution Brief"), part V. para. 1.
[10] *Ibid*, at part V. para 3.

as well as clarification of the legal parameters for the admission of such written statements into evidence.[11]

The Relevant Rules

5. This appeal primarily relates to Rules 89 and 92*bis* and their relationship to one another. Each appears in section 3 of the Rules (entilted "Rules of Evidence") and are quoted below 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

[11] *Ibid*, at Part V

(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.

Issues on Appeal

6. The first issue for consideration is whether as a matter of law the giving of evidence-in-chief in the form proposed by the Prosecution is consistent with the Rules.

7. Assuming that the first issue is answered in the affirmative, then it is requested by the Prosecution that the Appeals Chamber exercise its discretion and admit the evidence in question pursuant to Rule 89.

Discussion

Is the proposal consistent with the Rules?

The *lex generalis* argument

8. The Prosecution submits that Rule 89 is not *lex generalis* to Rule 92*bis*.[12] In support of this submission, the Prosecution relies upon the fact that both provisions were added to the Rules during the 19th Revision of the Rules of Procedure and Evidence on 13 December 2000 and upon the reasoning in Judge Shahabuddeen's partial dissenting opinion in a previous application in this case ("*30 September 2002 Decision*").[13]

9. The Appeals Chamber has previously dealt with the relationship between Rules 89 and 92*bis* in *Galić*. In *Galić*, the Appeals Chamber held that "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)."[14] In accordance with this decision, where Rule 92*bis* is applicable, the requirements of Rule 92*bis* must be met by the Prosecution in order for the Trial Chamber to admit evidence pursuant to Rule 89.

10. Undeniably, the approach adopted by the Appeals Chamber in both *Galić* and the *30 September 2002 Decision* was to treat Rule 92*bis* as being prohibitive in its content in the sense that, where Rule 92*bis* applies, its requirements must be met in order to admit evidence. But the prohibition does not extend to material not governed by Rule 92*bis*.

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[12] Prosecution Brief, at para. 13; see also paras 10 – 15.
[13] *The Prosecutor v Slobodan Milošević*, Decision on the Admissibility of Prosecution Investigator's Evidence, IT-02-54-AR73.2, 30 September 2002 (hereinafter "*30 September 2002 Decision*"), Partial Dissenting Opinion of Judge Shahabuddeen, paras 27-29.

The scope of the Rule

11. The next issue for consideration is whether the terms of Rule 92*bis* are applicable in this instance. It is evident from decisions of the Appeals Chamber in *Galić* and the *30 September 2002 Decision* that the Rule is not applicable to every instance where a party seeks the admission of a written statement in lieu of a witness giving oral testimony.

12. In *Galić*, the Appeals Chamber stated that:

> 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*. (italics added)[15]

13. The Appeals Chamber also cited an example of a written statement that does not fall within the terms of 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 . . . could have been admitted pursuant to Rule 89(C) if it was not prepared for the purpose of legal proceedings (as to which the evidence is silent).[16]

14. In the *30 September 2002 Decision*, the Appeals Chamber stated that "there is nothing in the *Galić* Decision which prevents a written statement given by prospective witnesses to OTP investigators or others for the purposes of legal proceedings being received in evidence notwithstanding its non-compliance with Rule 92*bis* – (i) where there has been no objection taken to it, or (ii) where it has otherwise become admissible – where, for example, the written statement is asserted to contain a prior statement inconsistent with the witness's evidence (footnote omitted)."[17]

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[14] *Galić*, at para. 31
[15] *Ibid*, at para. 31.
[16] *Ibid.*
[17] *30 September 2002 Decision*, para. 18.

15. In its submissions, the Prosecution relies on the dissenting opinion of Judge Kwon in the *Decision of the Trial Chamber*. The reasoning advanced by the Prosecution is that the requirements of Rule 92*bis* do not apply where a witness is available for cross-examination.[18] However, Rule 92*bis*(E) expressly provides that a Trial Chamber shall determine whether the witness should appear in court for cross-examination.

16. The Appeals Chamber is satisfied that the fact that the witness is present and can orally attest to the accuracy of the written statement is sufficient to place this application beyond the scope of Rule 92*bis*. Where the witness is present before the Court and orally attests to the accuracy of the statement, the evidence entered into the record cannot be considered to be exclusively written within the meaning of Rule 92*bis*. The testimony of the witness constitutes a mixture of oral and written evidence. The appearance of the witness in court to attest to a written statement, is a crucial factor which renders Rule 92*bis* inapplicable. The fact that a witness may merely give a brief oral statement to the effect that the written statement is accurate does not alter this conclusion.

17. Additionally, a determination that this evidence constitutes written evidence pursuant to Rule 92*bis*, despite the appearance of the witness, would be an unduly formalistic interpretation. Were the witness, for example, allowed by the court to read verbatim from the statement, the evidence in question would be considered oral evidence and therefore not subject to the restrictions imposed in Rule 92*bis*.

18. In effect, the fact that a written statement has been prepared for the purposes of legal proceedings does not by itself suffice to make it admissible only under Rule 92*bis* unless the statement is also intended to be *in lieu* of oral evidence. In this case, the latter is not so.

[18] Prosecution Brief, paras 12 – 13.

19. The *amici* submitted that certain safeguards apply before the introduction of evidence is permissible under Rule 92*bis*, and that when evidence relates to the acts and conduct of the accused (as some of the evidence may in this instance), the safeguards should be greater.[19] This is a factor that a Trial Chamber may take into account in determining whether to admit, or the weight to attach to, written evidence under Rule 89(F). Nonetheless, the Appeals Chamber is satisfied that the appearance of the witness in court to orally attest to the accuracy of the tendered statement is an important safeguard in itself because the witness is certifying the accuracy of the statement before the court and is available to answer questions from the bench. Rule 92*bis*(B) requires the attachment of a written declaration by the prospective witness, to the effect that the statement is true and correct to the best of his or her knowledge. The attestation of the witness in court is distinct from the attachment of a written declaration. A written declaration is not made with definitive knowledge on the part of the witness that he or she will be required to testify in court and will be subject to cross-examination at the election of the opposing party. Rather, Rule 92*bis*(E) merely provides that a witness making a written declaration may be subject to cross-examination.

Policy Considerations

20. The Prosecution and the *amici* each raise a number of issues relating to principles of fairness and the economic management of criminal trials before the Tribunal. The Prosecution submits that the consequences of denying its application include valuable savings of time and the admission of evidence in an economic fashion.[20] The *amici* cite a number of reasons why evidence should be given orally if it is called outside the scope of Rule 92*bis*. These reasons include the fact that the Trial Chamber would not be able to assess the credibility of

[19] *Prosecutor v Slobodan Milošević*, Amici Curiae Reply to Prosecution Motion for the Admission of Evidence-in-Chief of its Witnesses in Writing, Case No. IT-02-54-AR73.4, filed 21 May 2003 (hereinafter "Amici Brief"), para. 11.

witnesses in examinations-in-chief; that Prosecution evidence would be accepted at face value only to be tested in cross-examination, and that the adduction of evidence by written statement is contrary to the principle of a fair and public hearing.[21] Whilst these factors constitute important policy considerations, they do not go to the question of whether the evidence constitutes written evidence within the meaning of Rule 92*bis*, and therefore to whether the scope of Rule 92*bis* extends to this application. Nevertheless, these factors may be relevant when determining whether admitting such statements is in the interests of justice under Rule 89(F). In any case, such evidence once admitted will be subject to a determination of the weight to be given to it. Additionally, as a matter of law, the admission of evidence via this procedure is available to both parties.

Is it in the interests of justice to allow the admission of the evidence in question?

21. As aforementioned, the Prosecution seeks an order that "the Appeals Chamber, within its discretion, allows the Prosecution to use written statements under Rule 89(F) as evidence-in-chief whereby the witnesses adopt a statement or summary of a statement signed by them as being true, before being available for cross-examination."[22] The Appeals Chamber however, is of the view that a determination of the 'interests of justice' under Rule 89(F) must be made by the Trial Chamber in relation to each individual witness, in light of not only the surrounding circumstances, but also the evidence to be given by the witness.

Disposition

For the foregoing reasons:

The Appeals Chamber by majority (Judge Hunt dissenting)

Allows the appeal from the *Decision of the Trial Chamber*, in so far as it

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[20] Prosecution Brief, para. 29.
[21] Amici Brief, paras 14 – 17.

Finds that, as a matter of law, the Rules allow for the admission of a written witness statement under Rule 89 (F) when the witness: a) is present in court, b) is available for cross-examination and any questioning by the judges, and c) attests that the statement accurately reflects his or her declaration and what he or she would say if examined; and

Returns the matter to Trial Chamber III for it to consider the admission of evidence in accordance with this present Decision.

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

Dated this 30th day of September 2003,
At The Hague,
The Netherlands.

Judge Fausto Pocar
Presiding Judge

Judge Hunt will append a dissenting opinion to the present decision.
Other judges reserve the right to append opinions to the present decision.

[Seal of the Tribunal]

[22] *Ibid*, at part V. para 3.