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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: 31 October 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: 31 October 2003

THE PROSECUTOR

v.

Slobodan MILOŠEVIĆ

# SEPARATE OPINION OF JUDGE SHAHABUDDEEN APPENDED TO APPEALS CHAMBER'S DECISION DATED 30 SEPTEMBER 2003 ON 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



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1. I append this separate opinion to the decision of the Appeals Chamber, given on 30 September 2003, pursuant to the reservation noted on the last page of the decision.

2. I understand the decision of the Appeals Chamber to mean that, if allowed by the interests of justice, a written witness statement which is offered as part of the testimony in court of the maker of the statement is admissible even to the extent that it goes to proof of "the acts and conduct of the accused" ("core matters"). I agree with the decision and propose to support it with the following remarks.

## A. The text of Rule 92*bis*

3. An exception relating to core matters is set out in paragraph (A) of Rule 92*bis* of the Rules of Procedure and Evidence of the Tribunal. That Rule reads:

> Rule 92 *bis*
> Proof of Facts other than by Oral Evidence
>
> (A) A Trial Chamber may admit, in whole or in part, the evidence of a witness in the form of a written statement in lieu of oral testimony which goes to proof of a matter other than the acts and conduct of the accused as charged in the indictment.
>
> (i) Factors in favour of admitting evidence in the form of a written statement include but are not limited to circumstances in which the evidence in question:
>
> (a) is of a cumulative nature, in that other witnesses will give or have given oral testimony of similar facts;
> (b) relates to relevant historical, political or military background;
> (c) consists of a general or statistical analysis of the ethnic composition of the population in the places to which the indictment relates;
> (d) concerns the impact of crimes upon victims;
> (e) relates to issues of the character of the accused; or
> (f) relates to factors to be taken into account in determining sentence.
>
> (ii) Factors against admitting evidence in the form of a written statement include whether:
>
> (a) there is an overriding public interest in the evidence in question being presented orally;
> (b) a party objecting can demonstrate that its nature and source renders it unreliable, or that its prejudicial effect outweighs its probative value; or
> (c) there are any other factors which make it appropriate for the witness to attend for cross-examination.



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(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.

## B. The scope of Rule 92*bis*

4. The opening sentence of paragraph (A) of Rule 92*bis* may be contrasted with Rule 89(F), which provides that a "Chamber may receive the evidence of a witness orally or, where the interests



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of justice allow, in written form". It is accepted that, to the extent to which Rule 92*bis* applies, the general admissibility of written statements under Rule 89(F) is subject to the special provisions of Rule 92*bis*. But if, as argued by the prosecution, Rule 92*bis* does not apply in this particular case, that leaves Rule 89(F) untouched, with the result that, if allowed by the interests of justice, the written statement in question is admissible under the latter Rule even if it includes core matters.

5. In support of the opposite view that Rule 92*bis* applies in this case, it may be argued that all written statements prepared for the purpose of legal proceedings – as the statement in this case was – are admissible only under the procedure prescribed by that provision, or in conformity with its substance, including the exclusion of core matters, even if the witness is at all times in court. With respect, that is not correct.

6. First, Rule 92*bis* deals with hearsay as usually understood, i.e., in the classic sense of an out-of-court statement which is sought, in the absence of the maker of the statement, to be admitted in court as evidence of the truth of the contents of the statement. True, under Rule 92*bis*(E), a Trial Chamber may require the witness to appear for cross-examination. But such cross-examination is a back-up arrangement. When the procedures of the Rule begin to unfold, the witness need not be in court. The opening sentence of Rule 92*bis*(A), together with Rule 92*bis*(A)(ii)(a) and (b) and Rule 92*bis*(C), shows that in the normal case the witness is absent from court. This is consistent with the title to the Rule – "Proof of Facts other than by Oral Evidence". The whole objective of the moving party is to have the written statement of the witness admitted in the absence of oral evidence from him; that is the advantage which he seeks and for which the Rule provides.

7. This is why Rule 92*bis*(B) lays down a careful requirement for the written statement to attach a declaration of truth made by the witness and for the declaration to be in turn witnessed by an authorised individual. No doubt, an oral attestation by the witness if he is in court could serve the same purpose, but the point of the written declaration of truth and of this having to be duly witnessed is that the witness is expected to be absent from court. If the witness is going to be in court anyhow, it is difficult to see how it could at all be reasonable to require the moving party to observe the remaining requirements of the procedures of Rule 92*bis* (including the exception of core matters), these requirements being meant for the case of an absent witness. With courtesy, it is driving a coach and six through the provisions to say that the written statement of a witness who produces the statement as part of the testimony given by him from the witness box is only admissible if core matters are excluded from it under Rule 92*bis* – a provision which, in my opinion, fundamentally visualises the case of a witness who is absent from court.



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8. Second, on the question whether the previous case law of the Tribunal requires the application Rule 92*bis* to this case, the case law deals with a situation which is too far removed from the present situation for its reasoning to apply convincingly to the latter. With respect, and without needing to go into the question of correcting an error in the case law, it does not matter how often the Appeals Chamber said what it said or held what it held; it is artificial to consider that its reasoning, however interesting, applies to a situation which is materially different from that previously passed upon.

9. In every case in which Rule 92*bis* is applicable, its requirement for the attachment of a declaration of truth is also applicable. Here, by contrast, if the Rule is applicable, it would apply without that requirement having to be observed. It is said that the same purpose is satisfied by the oral attestation of the witness in the Trial Chamber. But this is not provided for by Rule 92*bis*. The Appeals Chamber is entitled to take the position that that difference is a material one, and that what that material difference shows is that the Rule itself is not applicable. Analytical criticism of that position may of course be offered, but more than that is puzzling, however confidently made. There may therefore be left alone any suggestion that, in considering that the previous case law did not prevent them from holding as they did, the members of the majority were not performing their duties "honourably, faithfully, impartially and conscientiously" as the solemn declaration which they took when they became judges of the Tribunal required them to do.[1]

10. Third, the argument that Rule 92*bis* applies to the case in hand gives, at least *pro tanto*, no separate effect to Rule 89(F). It is not decisive to dwell on the circumstance that Rule 89(F) was introduced at the same time as Rule 92*bis* following on previous case law on the subject. The fact is that both Rules exist; effect has to be given to each. No effect is being given to Rule 89(F) insofar as its operation is limited to the scope of Rule 92*bis*.

## C. The question of demeanour

11. If the procedures sought to be applied by the prosecution are objectionable, it seems to me that the objection has to be based on grounds outside of Rule 92*bis*. One possible ground relates to opportunity to assess demeanour. Is that ground available?

[1] See, in this respect, Judge Hunt's dissenting opinion, paragraph 20.



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12. The more usual case of lack of opportunity to assess the demeanour of a person whose written statement is sought, in his absence from court, to be produced in court as evidence of the truth of the contents of the statement has been the subject of innumerable authorities; it need not be discussed. What is in issue here concerns adequacy of opportunity to assess the demeanour of a witness who is testifying in person in court but is in part doing so in written form. In the first case, there is no opportunity whatever to assess the demeanour of the person; he is absent from the court. In the second case, there is some opportunity to assess the witness's demeanour: he is present in the court.

13. The average observer, even if he has not had the advantage of experience of trials, can appreciate that matters contained in a written statement can appear different if expressed in the oral testimony of the maker of the statement. A leading work notes that "the way in which a witness responds to examination-in-chief is often more informative with regard to his reliability than his reaction to cross-examination".[2] So, it is the case that oral examination-in-chief has a value which is not possessed by the same evidence given by the same witness from the same place by adopting the contents of a previously prepared written statement. But it is useful to note that the practice of some Trial Chambers recognises that a witness may be allowed, over large areas, to testify in narrative form, that is to say, without following a question and answer sequence. When that happens, there is diminished opportunity to judge the reaction of the witness from his responses to questions asked in examination-in-chief. The real substance of the objection rests on lack of orality; it is based on the fact that the witness will be testifying by adopting the contents of his previously prepared written statement.

14. In my view, cross-examination, to which the witness would be immediately subjected, could redress any disadvantages sufficiently to satisfy the interests of justice; the efficacy of that form of scrutiny of written statements in general is well known. Thus, in one jurisdiction rules of procedure relating to civil cases provided for the witness to give his evidence-in-chief in narrative written form, followed by cross-examination and by re-examination. Upholding the procedure in a bankruptcy case, the United States Court of Appeals for the Ninth Circuit said:

> The use of written testimony "is an accepted and encouraged technique for shortening bench trials"... The bankruptcy court's procedure permits oral cross-examination and redirect examination in open court and thereby preserves an opportunity for the judge to evaluate the

[2] *Cross and Tapper on Evidence*, 8th ed. (London, 1995), p. 284.



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declarant's demeanour and credibility. The procedure is essential to the efficient functioning of the crowded bankruptcy courts.[3]

15. Admittedly, the case was a civil one, but the legal principle was clear: the Court of Appeals disagreed with the view "that the bankruptcy court's procedure raises significant due process concerns".[4] Possibly, there is room in a national common law system for attenuating the reach of this holding in criminal cases, particularly in those held before a jury, but not in my view in the system of the Tribunal: the general juridical basis on which the holding was made is intact[5] and is available for other use.

## D. Fairness in the Tribunal

16. Besides, as it has been repeatedly remarked, the fairness of a trial need not require perfection in every detail. The essential question is whether the accused has had a fair chance of dealing with the allegations against him. In my view, he would have that chance on the procedure in question. A common law preference for orality is not a necessary or the only test of what is required by the interests of justice to ensure a fair trial. This was formally recognised in December 2000 when Rule 89(F) and Rule 92*bis* were introduced. At the same time, the requirement imposed by Rule 90(A) that "witnesses shall, in principle, be heard directly by the Chambers" was deleted – the position being that, even when that requirement was in force, it applied only "in principle".

17. In this respect, and as is recognised by the decision of the Appeals Chamber, a Trial Chamber has the duty, under Rule 89(F), to exclude any written witness statement unless its admission is allowed by "the interests of justice". But I do not see that it is in "the interests of justice" mechanically to exclude core matters from every written witness statement. That Rule does not say that; it wisely leaves the matter to the judicial discretion of the Trial Chamber. Thus, under Rule 89(F) a written statement can be admitted even if it includes core matters; under Rule 92*bis* such matters have to be excluded.

18. If every written witness statement sought to be produced by the witness from the witness box is admissible only if it otherwise conforms to the requirements of Rule 92*bis*, with the result that

[3] *In re Adair v. Sunwest Bank*, 965 F.2d 777 (1992), p. 779.
[4] Ibid. The relevant rule stated: "In any matter tried to *[sic]* the Court, including matters in Bankruptcy, the judge, including the bankruptcy judge, may order that testimony on direct examination of a witness be presented by written narrative statements subject to cross-examination of the declarant at the trial". And see *Ball v. Interoceanic Corporation*, 71 F.2d 73 (1995).
[5] See in this connection Hon. Robert S. Hunter, *Federal Trial Handbook*, para. 42:1.



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core matters could not be included in any case, the moving party need not take the initiative of calling the witness. The same material (less core matters) can be produced under that Rule without the necessity of calling the witness in court, usually involving the obtaining of a visa, travelling by air from one country to another, lodging in a foreign land, social and economic dislocation, and connected expenses.

19. The proposal of the prosecution is in substance to employ a device for enabling the witness to give his evidence more quickly than in the ordinary way. Instead of deposing orally by question and answer, the witness will give his evidence-in-chief in narrative form in a written statement produced and adopted by him from the witness box. He will be present there from beginning to end. Moreover, under the procedures of the Tribunal, his written statement would have been previously available to the defence. After the witness has adopted the contents of his written statement from the witness box, the defence will have an opportunity to cross-examine him on any part of the statement in the same way that it would if he had given that part of his evidence orally, including any core matters. The cross-examination should be enough to afford reasonable redress to the fact that the evidence was not given orally, together with the circumstance that it was prepared by one side only and not collected by a neutral investigating judicial officer as in civil law countries. It may be added that the witness will be subject to re-examination by the moving party and that the judges can also ask him questions on any part of his written statement. The substance of the right of the accused to a fair trial will be retained. No solid principle presents itself in support of an argument that core matters *must* be excluded from such a written statement.

20. Indeed, it may be wondered why a procedure of this kind was not earlier employed by the Tribunal, considering the scale of cases before it together with the limitations of time which a Trial Chamber is obliged to impose on parties.[6] The answer can only lie in a predilection for orality. Useful though it is, it seems reasonable to note that the common law preoccupation with that practice developed in the context of trials for ordinary crimes; it may be questioned whether the practice would not have undergone material change if common law courts were habitually faced with the kind of trials that are ordinarily held by the Tribunal. In an unqualified form, that preference is not essential – if it is not misplaced – in an international criminal tribunal concerned with allegations of legions of very serious crimes. It was not for nothing that Rule 89(A) laid it down that a Chamber "shall not be bound by national rules of evidence".



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## E. Three closing matters

21. There are three closing matters. The first is this: As every lawyer appreciates – and many a non-lawyer too – it would not be correct for the Appeals Chamber to give priority to the Completion Strategy of the Security Council over the rights of the accused; so to do would indeed "leave a spreading stain on the Tribunal's reputation", as Judge Hunt has correctly observed.[7] It is therefore not surprising that that Strategy has not been mentioned in the decision of the Appeals Chamber: it has not been mentioned because it has nothing to do with the matter. The decision is based on the reasoning which it sets out. That reasoning may be microscopically examined, but it leaves no room for a judicial finding that a plainly inadmissible factor has been taken into account.

22. The second closing matter is this: Paragraph 118 of the Report of the Secretary-General annexing a copy of the draft Statute, both of which were approved by the Security Council, implied that decisions of the Appeals Chamber could be taken by a majority of members. That goes to the method by which the Appeals Chamber takes a decision and not to its character in taking the decision. A decision taken by the majority is still a decision of the Appeals Chamber; it does not become "the Majority Appeals Chamber's Decision", at any rate in the sense that it is a decision of the Appeals Chamber composed only of the majority. It remains a decision of the Appeals Chamber proper, this being the only body authorised by article 25 of the Statute to make decisions. No doubt, decisions of a collegiate court, acting by majority, are occasionally referred to as majority decisions or as majority opinions. The law of the case is stated by the majority[8] and no harm is done, provided one bears in mind the useful corrective given by Judge Jessup in the *South West Africa Cases,*[9] in which he said:

> In my view, whenever the Court renders judgment in accordance with the Statute, the judgment is the judgment *of the Court* [original emphasis] and not merely a bundle of opinions of individual judges. This is equally true when, in accordance with Article 55 of the Statute, the judgment results from the casting vote of the President. I do not consider it justifiable or proper to disparage opinions or judgments of the Court by stressing the size of the majority. If the Court followed the prevailing European system, the size of the majority

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[6] Some of these considerations were adverted to in a partial dissenting opinion which I appended to the decision of the Appeals Chamber in *Milošević*, IT-02-54-AR73.2, 30 September 2002; see in particular paras. 2, 19, 20 and 34-38 of that opinion.
[7] See Judge Hunt's dissenting opinion, paragraph 22.
[8] *People of the State of Illinois v. Johnson*, 279 N.E.2d 47 (1971), at p. 50; and *Stern v. Wisconsin Department of Revenue*, 217 N.W.2d 326 (1974), at p. 328.
[9] *ICJ Reports 1966,* at p. 325, footnote, dissenting opinion.



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would not be known. Throughout this opinion I shall refer to the judgment *of the Court* [original emphasis] and not to the opinion of seven of its members.

In this case, the decision was taken by a majority of 4 to 1; Judge Jessup's remark is pertinent.

23. Now for the third closing matter. Support for a view opposed to that taken by the Appeals Chamber may be sought from Lord Atkin's well-known speech in the House of Lords in *Liversidge v. Anderson.*[10] The speech is justly celebrated as a courageous protest against the convenience of the day prevailing over the enduring fundamentals of justice. It is however doubtful that the considerations to which the protest was directed would have moved that great judge, on a sober appreciation of the present considerations, to hold that core matters had to be peremptorily excluded in this case if the fundamentals of justice were to be achieved within this International Tribunal. This does not lessen appreciation of the protest; it remains both instructive to study and pleasant to read, delivered as it was with vigour – and yet with the elegant serenity customary in learned judicial discourse.

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

Mohamed Shahabuddeen

Dated 31 October 2003
At The Hague
The Netherlands

**[Seal of the Tribunal]**

[10] *Liversidge v. Anderson,* [1942] AC 206, HL.



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