IT-95-13/1-T
D 7792 - D 7778
09 OCTOBER 2006

7792

UNITED NATIONS

	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991	Case No. IT-95-13/1-T Date: 9 October 2006 Original: English

IN TRIAL CHAMBER II

Before: **Judge Kevin Parker, Presiding**
Judge Christine Van Den Wyngaert
Judge Krister Thelin

Registrar: **Mr Hans Holthuis**

Decision: **9 October 2006**

PROSECUTOR

v.

MILE MRKŠIĆ
MIROSLAV RADIĆ
VESELIN ŠLJIVANČANIN

DECISION CONCERNING THE USE OF STATEMENTS GIVEN BY THE ACCUSED

The Office of the Prosecutor:

Mr Marks Moore
Mr Philip Weiner
Mr Vincent Lunny
Ms Meritxell Regue
Mr Alexis Demirdjian

Counsel for the Accused:

Mr Miroslav Vasić and Mr Vladimir Domazet for Mile Mrkšić
Mr Borivoje Borović and Ms Mira Tapušković for Miroslav Radić
Mr Novak Lukić and Mr Momčilo Bulatović for Veselin Šljivančanin

1. Background and Parties' submissions

1. This decision of the Trial Chamber is in respect of a request by the Prosecution to have statements, made by each of the Accused to authorities of the former Yugoslavia in Belgrade, which, today, is in Serbia,[1] prior to trial ("Statements"), admitted for the purposes of cross-examination ("Motion"). The first Statements were given to investigators of the military security organ in Belgrade in early 1998, when each Accused was interviewed about events the subject of the present Indictment. The second Statements were given some months later before a Military Investigating Judge in Belgrade and concern the same subject matter. On 12 June 2006, before it closed its case, the Prosecution gave notice of its intention to seek to use these Statements in cross-examination of any Accused who gave evidence. The Prosecution does not seek to rely on the statements as part of its substantive case.[2] The matter was to be addressed at a later stage. On 30 August 2006, having objected to the references to the Statements the Prosecution made during the cross-examination of a witness called by the Accused Mr Mrkšić, a joint request was made by all Defences for leave to file written submissions on the matter.

2. On 7 September 2006 the Defence filed its joint written submission ("Defence Submission"),[3] in which it is requested that the Prosecution be prevented from using the Statements during cross-examination. The Defence contends, in particular, that the Statements are inadmissible because procedural safeguards were not observed when they were given. The Defence also argues that it is not apparent whether the Accused were on notice of the Indictment in this Tribunal when the Statements were made.

3. In its response filed on 15 September 2006 ("Prosecution's Response"),[4] the Prosecution seeks to refute some of the Defence's factual allegations of shortcomings in the procedure for the taking of the Statements, and describes the procedure in more detail, with copies of the disputed Statements enclosed. The Prosecution, in particular, submits that the Accused were informed of the Indictment and even responded in the Statements to specific allegations contained therein. Further, it contends that the present case is different from the one considered in the *Čelebići* decision,[5] which concerned the admission of statements given by one of the accused in that case to Austrian authorities, when interviewed in respect of proceedings instituted by the Prosecution to secure the

[1] For convenience we will refer to these authorities as Serbian and the Statements as having been given in Serbia or Belgrade.
[2] T 10291-10292.
[3] Joint Defence Submission in Respect of the Prosecution's Request for Use of the Statements of the Accused Given Before the National Organs in Course of These Proceedings.
[4] Prosecution's Response to the Joint Defence Submission in Respect of the Prosecution's Request for Use of the Statements of the Accused Given before National Organs in Course of These Proceedings.
[5] Reference is made to *Prosecutor v. Zejnil Delalić et al. (Čelebići)*, Case No.: IT-96-21-T, Decision on Zdravko Mucić's Motion for the Exclusion of Evidence, 2 September 1997 ("*Čelebići* decision").

transfer of the accused to this Tribunal. In this case the Prosecution submits that it neither requested Serbian authorities to initiate investigations or proceedings in 1998, nor was it involved in their implementation. Noting differences in the procedures of the investigators of the military security organ and the Investigating Judge, the Prosecution seeks the admission of all the Statements for the purposes of cross-examining Defence witnesses, or, alternatively, the admission of the Statements given to the Investigating Judge for the same purpose. On 18 September 2006, the Prosecution filed a corrigendum to its Response.[6] The Trial Chamber takes note of its content.

4. On 25 September 2006, the Defence filed confidentially a reply to the Prosecution's Response ("Reply").[7] The Defence lists matters which are not contested. They include the following. The Statements given in February and March 1998 contain no reference to the capacity in which the Accused were questioned and no information whether they were advised of their right to refuse to give an answer which might expose them to the risk of prosecution. During the interviews held on 17 December 1998 before the Investigating Judge the Accused had the status of witnesses and were advised of their right under Article 229 of the Law on Criminal Procedure.[8] In any event, in the contention of the Defence, the references in the Statements to the facts of the Indictment merely reflect what was explained to the Accused by the Investigating Judge in his own words, not the actual words of the Indictment. The Defence seeks to rely on the *Čelebići* decision.

5. On 27 September 2006, with leave of the Chamber, the Prosecution filed a submission addressing some of the issues raised in the Defence's Reply.[9] In connection with the Defence's contention that the Statements were given with regard to allegations in the Indictment, the Prosecution submits that the interviews were conducted in relation to crimes committed at Ovčara rather than only those alleged in the Indictment and that some of the facts discussed by the Accused are not raised by the Indictment. The Prosecution further submits that, it should be inferred, contrary to the Defence's assertion, that the Indictment had been served on the Accused in the course of the proceedings.

---

[6] Corrigendum to Prosecution's Response to the Joint Defence Submission in Respect of the Prosecution's Request for Use of the Statements of the Accused Given before National Organs in Course of These Proceedings.
[7] The Second Joint Defence Response in respect of the Prosecution's Request for Use of Statements of the Accused.
[8] Article 229 of the FRY Law on Criminal Procedure guarantees the right not to be compelled to testify against oneself. The Article reads:

> A witness is not required to answer a particular question if it is likely that he would thereby expose himself or close relative (Article 227, para 1, item 1 through 3) to disgrace, considerable financial loss or criminal prosecution.

[9] Prosecution's Leave to Reply and Reply to the Second Joint Defence Response in Respect of the Prosecution's Request for Use of the Statements of the Accused.

6. On 15 September 2006, the Prosecution filed a motion for extension of the word limit for its Response.[10] Relying on the complexity of issues raised in the Defence Submission, the Prosecution requests leave to file a submission exceeding the limit of 3,000 words. The Trial Chamber observes that the motion for extension was filed only a few hours before the Prosecution Response and thus it would not have been practicable for the Chamber to give any directions to the Prosecution at such a late stage. The Chamber grants leave for extension, up to 5,000 words, in this instance. However, this should not become an ordinary practice.

7. The Defence also filed a joint motion, on 18 September 2006, seeking the removal of copies of the Statements in question from the annex to the Prosecution's Response.[11] As will be apparent later in this decision, the Trial Chamber has found it necessary to refer to some of the contents of the Statements to determine the validity of some of the submissions made by the Parties. It therefore denies the motion for removal. Of course, the Chamber is well conscious of the limited use it might make in this trial of those contents.

2. Law and discussion

8. While the issue may be confused by the terms of the Prosecution's Motion, which is to have the Statements admitted into evidence for the purpose of cross-examination, the submissions have clarified that the Prosecution does not seek to have the Statements admitted as substantive evidence of the guilt of the Accused. Even if the Motion is granted, no Accused will be at risk of either of the Statements made by that Accused to the authorities in Serbia in 1998 standing against him as evidence of the facts, *i.e.* he could not be convicted on the basis of what he, or any Accused, may have said in these Statements. Instead, the Prosecution only seeks to be able to make use of the Statements when cross-examining Defence witnesses, including any Accused who elects to give evidence in his own defence. As only Mr Radić and Mr Šljivančanin intend to give evidence, this will have no direct application to Mr Mrkšić.

9. Given the essentially adversarial system established under the Rules of Procedure and Evidence ("Rules"), what is proposed by the Prosecution does not require the admission as exhibits of the Statements into evidence on any basis. If one of the Statements is put to an Accused or another Defence witness during cross-examination by the Prosecution, that Statement does not

[10] Prosecution's Motion for Extension of Word Limit for the Response to the Joint Defence Submission in Respect of the Prosecution's Request for Use of the Statement of the Accused Given before National Organs in course of these Proceedings.

[11] Urgent Joint Defence Motion for Removal of the Statements of the Accused from the Attachment of the Prosecution's Response to the Joint Defence Submission in Respect of the Prosecution's Request for Use of the Statements of the Accused Given before National Organs in Course of These Proceedings and Motion for Leave to Reply the Prosecution's Response.

thereby become evidence in the trial. However, what the witness may say about the contents and the making of the Statement, when cross-examined and re-examined (should that occur), will be part of the evidence in the trial. Normally, it is the oral evidence of the witness about the contents and the making of an earlier statement which will constitute evidence in the trial, not the statement itself.[12]

10. The Chamber is conscious that this distinction between the mere use of the statement for the purpose of cross-examination and its admission into evidence as an exhibit solely for the purpose of cross-examination may not be observed in some adversarial legal systems.[13] It would appear to be the position under the Rules of this Tribunal. However, under some systems of procedure, or in some circumstances, a past statement of an Accused may be received into evidence as an identified exhibit, but only for the limited purpose of cross-examination and not as evidence of the truth of its content so as to form part of the case against the accused. This appears to be the basis on which the Prosecution has proceeded in bringing its Motion. The Chamber would observe, however, that for reasons which will appear in the course of this decision, while the distinction identified above may affect the reasoning to be followed in dealing with this Motion, the eventual result would appear to be the same whether, or not, the distinction is observed and whatever procedural course is followed with regard to the Statements.

11. The essence of the Defence position appears to be that requirements of the Statute of the Tribunal and the Rules were not complied with when (or before) one, or other, or both of the Statements were given by each Accused in 1998, in response to questioning by Serbian authorities.

12. The Statute sets out rights of a suspect (Article 18(3)) and an accused (Article 21). The Rules provide more detail and specifically cover rights applicable to the questioning of a suspect (Rules 42(B) and 43) and of an accused (Rule 63).

13. By Article 16(1) of the Statute, it is the Prosecutor of this Tribunal who is responsible for the investigation of persons for offences within the jurisdiction of this Tribunal, including the questioning of suspects and accused. As Rule 37(B) makes clear, the Prosecutor's powers and functions may be exercised by staff members authorised by the Prosecutor, or by persons acting under the Prosecutor's direction. It is the scheme of the Statute, which is also reflected in the Rules, that investigations of suspects and accused are those conducted by the Prosecutor, the Prosecutor's authorised staff, or persons acting under the Prosecutor's directions.

[12] Of course, if the witness adopts the contents of the statement as true when cross-examined, the practical effect could be to incorporate the statement into his oral testimony given in court.
[13] Most civil law legal systems do not make such a distinction.

14. From its language and context, it is apparent that Article 18(3), like the whole of Article 18, is directed to investigations by the Prosecutor (understood in the sense of Rule 37(B)). Similarly, the whole of Rule 42, with Rules 41 and 43, is directed to questioning and investigations by the Prosecutor (understood in the sense of Rule 37(B)). Rule 63 similarly deals with questioning of an accused by the Prosecutor (understood in the sense of Rule 37(B)). The guaranteed rights of an accused set out in Article 21(4) of the Statute are in the context of "the determination of any charge", as is also apparent from the precise terms of paras (a) to (g) of that Article.

15. The circumstances in which the Statements were given by the Accused in 1998 do not indicate that the investigators of the military security organ, or the Military Investigating Judge, in Serbia, were acting under the ICTY Prosecutor's direction. Clearly nor were they members of the staff of the ICTY Prosecutor. On the contrary, what is revealed by the material before the Chamber is that the questioning by investigators of the military security organ in early 1998, and the Statement of each Accused given at that time, occurred at the instigation of the Military Prosecutor in Belgrade. It may well be that he initiated this action as a reaction to the Indictment against the Accused which had been filed in this Tribunal in 1995. But it is not shown that the Serbian military questioning was other than for Serbian military purposes. In particular, it is not shown to have been in any way at the direction of, or request of, or even to assist, the ICTY Prosecutor. Some further confirmation that this questioning was for Serbian military purposes is provided by the circumstance that at a time later in 1998, but before the Accused appeared before the Military Investigating Judge in Belgrade, an internal investigation had concluded that there were "no grounds" for indicting the three Accused.[14] Whether they were questioned and made their Statements in early 1998 as witnesses or suspects is not clear, but having regard to the conclusion reached by the internal investigation, this Chamber prefers to proceed on the basis that they were then questioned as suspects. Following that conclusion, however, it is apparent that they were no longer suspects so that the proceedings in late 1998 before the Military Investigating Judge were for the purpose of formally recording their Statements as mere witnesses of events at Ovčara. As the record of those proceedings discloses, the Statements were recorded for the purpose of potential proceedings against persons, not then identified, who might come to be charged in respect of the events at Ovčara. As far as appears, this is in accordance with military justice procedure applicable at the time.

16. In reaching these views the Chamber has taken into account that two officers of the ICTY Prosecutor were permitted to be present during, but took no part in, the proceedings before the Military Investigating Judge. That does not, of course, bring those proceedings within Rule 37(B).

[14] *See* Annex D to the Prosecution Response.

The Chamber also notes that some further confirmation that the Serbian authorities were pursuing their own investigations of the events at Ovčara may be seen in the fact that war crimes proceedings in respect of those events were commenced in 1998 in Belgrade after the Statements were taken by the Military Investigating Judge. In those proceedings a number of men were charged in respect of deaths the subject of the trial before this Chamber. The three Accused before this Chamber were not charged in these proceedings in Belgrade.

17. Given the above circumstances, the provisions of the Statute and the Rules regulating the questioning of an Accused, that have been referred to in the Defence submissions, did not apply to the questioning of the Accused by the authorities in Belgrade in 1998. Neither did the provisions of the Statute and Rules of this Tribunal apply to the circumstances in which those Statements were obtained. As far as is revealed by the material before this Chamber that questioning and the obtaining of the Statements the subject of this Motion in 1998 was regulated by the law applicable to those authorities in Belgrade at that time. It is not shown that there was any illegality in what was done under the law then applicable in Serbia, or that there was any failure to observe the requirements of that law.

18. From some Defence submissions it may also be the case that it is contended that there had been a failure to comply with Rule 55, paras (C), (E), and (F). These provisions regulate the procedure to be followed in respect of Arrest Warrants issued by this Tribunal at the time that an accused is arrested on such a Warrant. In this case, while Arrest Warrants were issued and transmitted to the national authorities in Belgrade in 1995, the Accused were not transferred to the seat of this Tribunal until 2002 (Mile Mrkšić) and 2003 (Miroslav Radić and Veselin Šljivančanin), respectively. There is nothing to support the view that they had actually been arrested on the Warrants of this Tribunal in or before 1998, notwithstanding the obligation of State co-operation expressed in Rule 56. The evidence in this trial would suggest that the Accused continued to conduct their personal lives, and in some case to perform their military duties, until 2002 or 2003, respectively. It appears that it was not until after changes in official attitudes in Belgrade to cooperation with this Tribunal that occurred in this century that the Accused were arrested on the 1995 Arrest Warrants of this Tribunal. Hence, it is not shown that Rule 55 had any application in 1998 when the Statements were given to the authorities in Belgrade.

19. Although the submissions of the parties have not fully dealt with the proposition, the Chamber must therefore also consider whether there is some further basis on which the Prosecution should not be permitted to refer to these Statements for the purposes of its cross-examination of Defence witness, including any of the Accused who elect to give evidence in their own defence.

20. While the Chamber takes the view, for reasons identified earlier, that this need not involve the admission into evidence in this trial of these Statements as exhibits and does not involve them ever being substantive evidence relevant to the guilt or innocence of the Accused in the trial, what is contemplated clearly involves the use of these Statements by the Prosecution as a basis for cross-examination. The purpose identified by the Prosecution is to assist in the determination of the credibility of the evidence given in the trial by the Accused and other Defence witnesses. The reaction of Defence witnesses other than the Accused to one or more of these earlier Statements of the Accused may well also give cause to question the credibility of other Defence witnesses, or cause them to deal with things in evidence to which they would not otherwise have turned. The course proposed by the Prosecution may, therefore, be of some significance in the trial. It warrants careful consideration.

21. As has been indicated, there is no express provision of the Statute or the Rules which regulates the questioning or taking of statements from persons who are then accused in an indictment filed in the Tribunal, or are suspects, by persons or authorities who have no relevant connection with the ICTY Prosecutor. Nor is there, subject to provisions which will shortly be considered, any provision regulating the use, or the admission into evidence, in a trial in this Tribunal, of statements obtained in such circumstances. The responsibilities of the Tribunal are not, however, limited only to ensuring strict and literal application of the Statute and the Rules.

22. So far as is revealed in the material before us, had the Statements in question been obtained by or at the direction of the Prosecutor, in a number of respects there would have been a failure to observe provisions of the Statute of the Tribunal and the Rules regulating the questioning of suspects and accused. Without exhaustively considering the issue, in particular, while it would appear that before both the military investigators and the Military Investigating Judge each Accused readily answered all questions, and while the answers given and recorded in the Statements may well be considered to be "self-serving" in character, it appears that under the law applicable in Serbia the Accused were obliged to answer questions of the investigators of the military security organ, and the Military Investigating Judge, although before the Judge they could refuse to answer incriminating questions and they were advised of this.[15] As far as the materials reveal, the Accused did not have counsel present when questioned by either authority and there is nothing to suggest that the Accused had voluntarily or expressly agreed to proceed without counsel present. They did not, however, expressed a desire to have counsel. The Accused were not informed of the rights they had as suspects, or cautioned as provided by Rule 43. Reference has also been made to the failure of the investigators and the Judge to expressly detail the terms of the ICTY indictment to the

[15] Articles 227, 231 and 229, respectively, of the FRY Law on Criminal Procedure.

Accused although it is clear from the record before the Investigating Judge that the Accused were aware of its existence and at least its general effect. It would be difficult indeed to think otherwise. The Indictment had been filed and Arrest Warrants issued in 1995. They were not confidential. The assistance of the authorities in Belgrade had been sought at that time to have the Accused arrested and sent to The Hague. These events could only have been matters of some notoriety in Serbia and of grave interest to the Accused.

23. This Tribunal is expressly charged with the responsibility of ensuring that its trials are conducted fairly, that the rights of an accused are respected in its proceedings, and that due regard is shown for the protection of victims and witnesses. That much is made clear by Article 20(1) of the Statute which provides:

> "1. The Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses."

Article 21(2) reiterates the entitlement of an accused to a fair trial and, as noted earlier, Article 21(4) enumerates a number of minimum guarantees of the rights of an accused which are to be observed in a determination of a charge. This would not necessarily appear to be an exhaustive statement.

24. There are also a number of provisions of the Rules of some relevance to the fairness of a trial and the rights of an accused. In addition to those already mentioned, the Chamber would, in particular, draw attention to

a) Rule 89(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 consistent with the spirit of the Statute and the general principles of law.

b) Rule 89(C):

> A Chamber may admit any relevant evidence which it deems to have probative value.

c) Rule 89(D):

> A Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.

d) Rule 95:

> No evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings.

25. Of course, these provisions of the Rules literally deal with the admission of evidence. As discussed earlier, the Chamber prefers the view that the use of the Statements in question solely for the purposes of cross-examination as to credibility, need not involve the admission into evidence as an exhibit of the Statements. Even if that view is correct, however, in the context of the fairness of trial procedure and the rights of an accused, it is the view of the Chamber that this procedural distinction ought not to be the basis of decision. Whether the issue is approached as a matter of mere procedure, or one of evidence, in the view of the Chamber, the underlying policies reflected in these Rules provide a useful and appropriate guide to the determination of the procedure to be followed as to the use of a statement solely for purposes of cross-examination as to credit, as much as they may expressly deal with the admission into evidence of that statement solely for the same purpose.

26. The Statements in question were each given by an Accused person in the present trial and deal with the role of that person in the events which found the charges in the Indictment. The statements are clearly relevant to, and have probative value, in the trial. An important issue, therefore, is whether the probative value of the use of the Statements solely for the purpose proposed, is substantially outweighed by the need to ensure a fair trial (Rule 89(D)). An important further issue is whether the methods by which the Statements were obtained cast substantial doubt on their reliability, or whether the use of these Statements solely for the purpose proposed would be antithetical to, and would seriously damage, the integrity of the proceedings (Rule 95).

27. There is no evidence before this Chamber from any of the Accused as to the circumstances of the giving of these Statements. The observations in this decision are therefore, necessarily, merely tentative in the sense that should an Accused elect to give evidence in his Defence a quite different position might be disclosed which could materially affect the Chamber's understanding of these circumstances. As has been indicated earlier, while it is not apparent that safeguards to protect rights of accused persons in the context of questioning by or for the Prosecutor were observed at the times these Statements were made, it is not suggested that the procedure followed in any way infringed the law in Serbia which was applicable to them, *i.e.* they were lawfully taken. As has been indicated, the circumstances do not disclose that the Statements were taken other than for Serbian military justice purposes, *i.e.* the Serbian authorities were not acting at the direction of the ICTY Prosecutor or in some way to further the purpose of the ICTY Prosecutor. This is a situation different from that dealt with in the *Čelebići* Decision[16] where an accused was interviewed without the assistance of counsel by Austrian authorities in respect of proceedings which had been instituted at the instigation of the ICTY Prosecutor to secure the transfer of an accused to the

[16] *Supra*, footnote 5.

Tribunal. In that case the Prosecution sought to use the Austrian statement as substantive evidence relevant to the guilt of the Accused. It may further be observed that the circumstances revealed a closer connection between the questioning by the Austrian authorities and the ICTY Prosecutor than is demonstrated in the Prosecution's Response. The circumstances also differ from those considered in the *Nadayambaje* decision[17] where the questioning was by ICTR investigators who were bound by the applicable rules when questioning.

28. The circumstances reveal no suggestion that the wills of the Accused were overborne, or that they were influenced by coercion, inducement, or other impropriety. As far as may be judged from what is before the Chamber, the Accused readily responded to the questioning directed to them on each occasion. While the contents of the Statements may be thought to be self-serving, there is nothing to indicate that they do not reflect the account of events intended to be given by the respective Accused. It is clearly accepted that the Statements were in fact given by the respective Accused. They were given in 1998, concerning events in 1991 whereas, should an Accused elect to give evidence in his own defence in this trial, that will be some 15 years after the relevant events.

29. For very proper reasons the Prosecution does not seek to rely on any of the Statements as substantive evidence against the Accused *i.e.* as evidence to be considered in determining guilt or innocence. Enough has been said so far in this decision to indicate why the Chamber would not have allowed the admission of any of these Statements as substantive evidence, had the Prosecution sought to rely on it. No one of the Accused, therefore, will be at risk of being convicted on the basis of any of the Statements or questioning which failed to observe the requirements of the Rules which would have been applicable to questioning had it been conducted by the ICTY Prosecutor, or of requirements directed to the protection of the rights of that Accused.

30. Should an accused elect to give evidence in his own defence, however, the primary issue that arises is whether the Prosecution should be able to test the credibility of that Accused, *inter alia,* by seeking to demonstrate (if it is the case) by cross-examination that the evidence given by that Accused in the trial is inconsistent with one or more earlier Statements made by that Accused. The only issue affected by this is whether or not the evidence given by the Accused in the trial is accepted by the Chamber.

31. Given the circumstances revealed by the material presently before the Chamber, it is not apparent to the Chamber that the methods by which the Statements of the Accused were obtained cast substantial doubt on the reliability of their contents. Neither is it apparent that the use of the

[17] *Prosecutor v. Élie Ndayambaje et al.,* Joint Case No.: ICTR-98-42-T, Decision on Kanyabashi's Oral Motion to Cross-Examine Ntahobali Using Ntahobali's Statements to Prosecution Investigators in July 1997, 15 May 2006.

earlier Statements of an Accused, solely for the specific and limited purpose of assessing the credibility of the evidence actually given in the trial by that Accused, would be antithetical to the integrity of the proceedings, notwithstanding the deficiencies (by the standards of this Tribunal) attending the giving of those Statements by that Accused. It is even less apparent that such use of the Statements of an Accused would seriously damage the integrity of the proceedings. In truth, the view is open that the integrity of the proceedings could be open to greater threat if an Accused was not tested in cross-examination about an earlier account he had given which was materially inconsistent with his evidence given in the trial. That is so whether, for example, the inconsistency is explicable by confusion or lapse of memory given the lapse of years since the events, or to deliberate falsity of the evidence given in the trial. In the former case, without cross-examination on the inconsistency, a material but innocent error in the evidence of the Accused could go undetected. In the latter case, the Chamber may be misled by perjury concerning a material matter. Further, given the specific and limited purpose for which the earlier Statements of an Accused might be used, the potential probative value as to the credibility of the evidence of the Accused given in the trial can hardly be substantially outweighed by the need to ensure fair trial. As discussed earlier, the Statements deal, to some extent, with the facts underlying the charges against the Accused in the Indictment and what each Accused had said in the Statements say about these facts has an appearance of being self-serving. The Chamber has also considered that the Accused appear not to have had the assistance of counsel when giving the Statements. Nonetheless, it finds that any scope for unfairness, given the proposed specific and limited use of the Statements in the trial, would appear at most to be somewhat scant and indirect, whereas the probative value may well be substantial and direct as to the credibility of the actual evidence the Accused elected to give in his own defence in the trial.

32. Viewed from another viewpoint, in circumstances such as those disclosed by the material before the Chamber, it can hardly be considered necessary in the interests of fairness, or supportive of the integrity of trial proceedings, that an Accused's evidence in the trial remain unquestioned, even though it may be directly contradicted by an earlier statement of the Accused. Of course, the Accused well knows the circumstances in which the earlier statement was made and any considerations which adversely affected the correctness or honesty of the earlier statement. If tested about material differences between his earlier statement and his evidence he is well able to draw attention to such matters with a view to satisfying the Chamber that the evidence given in the trial is truthful and reliable, notwithstanding any earlier inconsistent statements that he had made.

33. For these reasons, in the present circumstances, the Chamber is not persuaded there is any reason to preclude the use of either of the 1998 Statements made by each of the Accused to military authorities in Belgrade, solely for the specific and limited purpose of cross-examining that Accused

with a view to testing the credibility of the evidence given by that Accused in this trial. In addition to the matters expressly considered above, in the view of the Chamber, such a course would also further the interests of justice. For reasons indicated earlier this course would not be inimical to the fairness or the integrity of the trial.

34. The Chamber is further confirmed in this view in that a similar approach has been adopted in some adversarial legal systems. For example, the Supreme Court of the United States has held that the prosecution is allowed to use otherwise inadmissible evidence in order to impeach the credibility of a testifying defendant.[18] A defendant's earlier conflicting statements, obtained by the police in violation of the defendant's rights under the Fourth Constitutional Amendment, may be used by the prosecution in cross-examination in order to impeach the defendant's testimony given in direct examination.[19] The Supreme Court accepted that a defendant's privilege to testify in his own defence or to refuse to do so cannot be construed to include the right to commit perjury, that the impeachment process would provide a valuable aid in assessing the defendant's credibility, and that the likelihood that admissibility of such evidence would encourage police misconduct is only a speculative possibility.[20] However, the position is differently viewed with respect to impeachment of defence witnesses other than the defendant. The United States Supreme Court has held that illegally obtained evidence, in particular, illegally obtained defendant's statements, may not be used to impeach other defence witnesses' testimony.[21] The Court accepted that expanding the class of impeachable witnesses beyond testifying defendants "would not promote the truth-seeking function to the same extent", that "it would significantly weaken the exclusionary rule's deterrent effect on police misconduct" and that it "likely would chill some defendants from presenting their best defence."[22]

35. This position is not universally accepted in all adversarial systems. For example, the traditional view, which is still applied in England, is that an accused may not be cross-examined by the prosecution on an inadmissible confession,[23] and nor may his co-accused.[24] However, one accused may cross-examine another on such a confession.[25] This view has developed in the context of exceptions to the rule against hearsay evidence, which does not apply in this Tribunal. It has been influenced by the role of legally untrained jurors in England as the triers of fact, whereas in this Tribunal Judges would perform the task of confining the use of an impugned earlier statement

[18] *Walder v. United States*, 347 U.S. 62 (1954).
[19] *Harris v. United States*, 401 U.S. 222 (1971).
[20] *Id.* at 225.
[21] *James v. Illinois*, 493 U.S. 307 (1990).
[22] *Id.* at 313, 314, 317, 315.
[23] *R v Treacy* [1944] 2 All ER 229.
[24] *R v Rice* [1963] 1 QB 857.
[25] *R v Rawson* [1986] QB 174.

to the issue of the credibility of the evidence of the witness, and also by the perceived desirability, in the wider interests of justice in England, of discouraging any temptation to abuse police investigation powers. In our respectful view, in the context of trials in this Tribunal, the reasoning of the US Supreme Court appears more persuasive.

36. Very generally speaking, civil law systems do not distinguish between the use of prior statements of accused for the purpose of testing the credibility of the accused's evidence given in court and for the purpose of establishing the accused's guilt or innocence. Hence, they aver only limited assistance when considering the present Motion. In some countries, however, prior statements of an accused may be read out in court in certain circumstances such as if inconsistencies arise between the accused's evidence given in court and his prior statements. In some of these countries, however, in such cases, the accused's prior inconsistent statements may be used in court only if procedural safeguards have been observed when the statements were made.[26]

37. The Chamber is not similarly persuaded, however, about the use of the 1998 Statements of the three Accused by the Prosecution to cross-examine Defence witnesses other than the Accused who made the Statement. Whereas the Accused, who has given evidence which is inconsistent with an apparent earlier statement of his, is in a position to confirm or deny whether the statement is actually his own, and to account for any inconsistencies between what he may have said in the statement and his evidence given in the trial, other Defence witnesses, including other Accused, are not likely to be able to do so. The cross-examination of a Defence witness by reference to what another person may or may not have said in a previous statement is, therefore, unlikely to be of significant probative value as to the credibility of the evidence given in court of that Defence witness. Further, the Defence witness may well be misled or confused by the process and could well be encouraged to conjecture. There is not a sufficient prospect of evidence of probative value resulting from such cross-examination. The reasoning of the US Supreme Court in *James v Illinois*[27] referred to above, at least in some respects, has relevance to the circumstances of trials in this Tribunal and also commends itself in this context.

38. For these reasons, the Chamber would confine the use which the Prosecution may make of the two 1998 Statements of each Accused, solely to the cross-examination of that Accused, and then

[26] As one example of such a system, under Polish law, statements given by an accused in the course of investigations or other proceedings can be read out in court, only to the extent relevant, when the accused refuses to give testimony, or testifies differently than previously, or states that he does not remember certain facts. After the statement has been read out, the president of the chamber requests the accused to comment on its content and explain the inconsistencies (Article 389 of the Code of Criminal Procedure). Statements given in circumstances precluding free expression or obtained by means of coercion or threat. (Article 171 paras 5 and 7 of the Code) Statements given abroad at the request of a Polish court or prosecutor can be read out in court if the manner in which they were obtained is not contradictory to the principles of legal order in Poland (Article 587 of the Code).

[27] *Supra*, footnote 21.

solely for the purpose of testing the credibility of the evidence, which at his election has been given in this trial by that Accused. The Chamber notes that no issue has arisen concerning cross-examination by one of the Accused of another Accused, relying on the 1998 Statements of the other Accused.

39. In its Reply the Defence requests that the parts of transcript recording the evidence of witnesses given in response to the Prosecution's questions based on the Statements of the Accused be struck out. The Chamber considers it inappropriate for such a measure to be taken. However, in its assessment of the evidence before it, the Chamber will have no regard to the parts of witnesses' testimony that were prompted by questions based on the 1998 Statements of the Accused.

3. Disposition

For the foregoing reasons the Chamber:

1. **GRANTS** the Prosecution motion for extension of the word limit for its Response.

2. **DENIES** the joint Defence motion for removal of copies of Statements given by the Accused from the annex to the Prosecution's Response.

3. **ALLOWS**, to the extent and for the purposes indicated in paragraph 38 of this decision, the use of the Statements of Miroslav Radić, given before the investigators of the military security organ on 5 March 1998 and before the Investigating Judge of the Belgrade Military Court on 17 December 1998, in the cross-examination of Miroslav Radić.

4. **ALLOWS**, to the extent and for the purposes indicated in paragraph 38 of this decision, the use of the Statements of Veselin Šljivančanin, given before the investigators of the military security organ on 14 February 1998 and before the Investigating Judge of the Belgrade Military Court on 17 December 1998, in the cross-examination of Veselin Šljivančanin.

5. Otherwise **DENIES** the Motion.

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

Judge Kevin Parker
Presiding

Dated this ninth day of October 2006
At The Hague
The Netherlands

[Seal of the Tribunal]