IN THE TRIAL CHAMBER

Before:
Judge Richard May, Presiding
Judge Patrick Robinson
Judge O-Gon Kwon

Registrar:
Mr. Hans Holthuis

Order of:
16 April 2003

PROSECUTOR
v.
SLOBODAN MILOSEVIC

DECISION ON PROSECUTION MOTION FOR THE ADMISSION OF EVIDENCE-IN-CHIEF OF ITS WITNESSES IN WRITING

The Office of the Prosecutor

Ms. Carla Del Ponte
Mr. Geoffrey Nice
Mr. Dermot Groome

The Accused

Slobodan Milosevic

Amici Curiae

Mr. Steven Kay, QC
Mr. Branislav Tapuskovic
Mr. Timothy L.H. McCormack

THIS TRIAL 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 ("International Tribunal"),

BEING SEISED OF an application by the Prosecution to be allowed to submit the evidence-in-chief of its witnesses in writing, whereby the witnesses would adopt a statement or summary of a statement signed by them as being true, and would thereafter be available for cross-examination,[1]

NOTING the Prosecution arguments in favour of its application, that:

(a) the adoption of this procedure will save substantial court time;
(b) the witness would be able to attest to the truth of the statement adopted under oath;
(c) the witness would be available for cross-examination and so no prejudice to the Accused arises;
(d) such a procedure is used in other jurisdictions, notably the civil courts of the United Kingdom,

CONSIDERING that although a partial form of such a practice has been employed in other proceedings before this Trial Chamber,[2] the Rules of Procedure and Evidence ("Rules") have subsequently been amended, providing specifically for the introduction of this form of hearsay evidence by way of Rule 92 *bis*,

CONSIDERING that the Appeals Chamber has, in this respect, stated 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)".[3] Thus, under the present Rules, such written statements are only admissible under Rule 92 *bis* and by no other means,

CONSIDERING FURTHER that Rule 92 *bis* contains safeguards, 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,

CONSIDERING THEREFORE that the Rules do not provide for the

admission of evidence in the manner proposed by the Prosecution,

NOTING HOWEVER that Rule 92 *bis* provides an appropriate method by which parties may seek, within the limits set out in that Rule, to admit written statements in whole or in part in lieu of oral testimony,

PURSUANT TO Rules 54 of the Rules

BY A MAJORITY, HEREBY DENIES THE APPLICATION.

The Dissenting Opinion of Judge Kwon is appended to this Decision.

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

_____
Richard May
Presiding

Dated this sixteenth day of April 2003
At The Hague
The Netherlands

[Seal of the Tribunal]

JUDGE KWON'S DISSENTING OPINION

1. In a separate declaration to this Trial Chamber's decision regarding the admissibility of written statements under Rule 92 *bis*,[4] I averred, *inter alia*, that written statements not going to the acts and conduct of the accused should be generally admitted if the following prerequisites are met by the maker of the statement: (i) he or she appears before the International Tribunal to testify as to the veracity of the contents of his or her written statement ; and (ii) he or she is subject to cross-examination by the opposing party. I take this opportunity to reaffirm my position.

2. The Appeals Chamber set out that Rule 92 *bis* is the *lex specialis* which takes the admissibility of written statements of prospective witnesses out of the scope of the *lex generalis* of Rule 89 (C).[5] Specifically, Rule 92 *bis* has been interpreted to be the only rule

under which written statements could be admitted as evidence, while the issue of allowing for cross-examination is a separate matter within the discretion of the Trial Chamber . However I do not agree with this interpretation. Rather, I read Rule 92 *bis* to be applicable to evidence in the form of written statements where the maker of the written statement is not subject to cross-examination. My reasons are as follows.

3. Rule 89 (F) expressly states that a "Chamber may receive the evidence of a witness orally or, where interests of justice allow, in written form." In light of the fact that Rule 89 (F) was added to our Rules at the same time as Rule 92 *bis*,[6] our Rules are clearly not rigid in contemplating written statements being admitted as evidence when justice allows.

4. Rule 92 *bis* (B) sets out some technical safeguards to ensure the authenticity and veracity of the written statements. For instance, it requires an attachment of a written declaration from the maker of the statement, which is witnessed and verified in writing by a presiding officer appointed by the Registrar of the International Tribunal. Additionally, even if the written statements are not in the form prescribed by Rule 92 *bis* (B), there are exceptions provided under Rule *92bis* (C) in which written statements may nevertheless be admissible. In consideration of the fact that the exceptions provided under Rule 92 *bis* (C) only entail circumstances when cross-examination of the maker of the statement is not possible , and that the safeguards under Rule *92bis* (B) are not necessary if the witness comes to the court to testify, Rule 92 *bis* should be interpreted as being applicable to the admissibility issue of written statements when they are to be admitted without cross-examination. In essence, if the witness is able to attest to the authenticity and veracity of his or her written statements at the International Tribunal and is subject to cross-examination, the concerns of Rule 92 *bis* are not present and Rule 89 (F) remains applicable.[7]

5. Finally, in light of the trials of such vast scale as this case at hand and the fact that justice is meted out in the International Tribunal, not by a jury, but by a panel of professional Judges with the experience and ability to discern the contents of evidence and to give it the appropriate weight, I welcome approaches that allow for flexibility. Such adoptions shall work to enhance the International Tribunal's ability to more efficiently and expeditiously handle its cases.

6. For the foregoing reasons, the Prosecution's Application 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.

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

_____
Judge O-Gon Kwon

Dated this sixteenth day of April 2003
At The Hague
The Netherlands

[Seal of the Tribunal]

---

1 - The application was first made in a confidential "Report by the Prosecution Concerning the Time Remaining for the Prosecution Case", filed on 11 December 2002. It was then reiterated in a confidential "Supplement to Report by the Prosecution Concerning the Time Remaining for the Prosecution Case and Request for Hearing", filed on 10 January 2003. In both filings, the application is very concisely presented, but was elaborated upon in oral submissions made in open session before the Trial Chamber, on 2 April 2003 (see Transcript Pages 18481-18489).
2 - See, for example, *Prosecutor v. Kordic & Cerkez.*
3 - *Prosecutor v. Galic*, "Decision on Interlocutory Appeal Concerning Rule 92*bis*(C)", Case No. IT-98-29-AR73.2, 7 June 2002, para 31.
4 - See Declaration of Judge O-Gon Kwon, IT-02-54-T, Decision on Prosecution's Request to Have Written Statements Admitted under Rule 92 bis, 21 March 2002.
5 - *Prosecutor v. Stanislav Galic*, IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92 *bis* (C), 7 June 2002, para. 31. The facts of that case were makers of the written statements had both died since making their statements, leaving cross-examination impossible.
6 - Amendment by the 19th Revision of the Rules (13 December 2000).
7 - In this context, it should be of note that this Trial Chamber admitted the written statement of a court witness, Dr. Helena Ranta, even though it was not in the form of Rule 92 *bis* (B). She was ordered by the Chamber to provide a statement prior to testifying and appear before the International Tribunal and be subject to examination by both parties. *Prosecutor v. Slobodan Milosevic*, IT-02-54-T, Order to Dr. Helena Ranta to Provide Written Statement Prior to Testifying, 21 January 2003.