IN THE TRIAL CHAMBER

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

Registrar:
Mr. Hans Holthuis

Order of:
21 March 2002

PROSECUTOR

v.

SLOBODAN MILOSEVIC

DECISION ON PROSECUTION'S REQUEST TO HAVE WRITTEN STATEMENTS ADMITTED UNDER RULE *92BIS*

Office of the Prosecutor:

Mr. Geoffrey Nice

Mr. Dirk Ryneveld

Ms. Hildegaard Uertz-Retzlaff

Mr. Dermot Groome

The Accused:

Slobodan Milosevic

Amici Curiae:

Mr. Steven Kay

Mr. Branislav Tapuskovic

Mr. Michaïl Wladimiroff

I. BACKGROUND

1. On 25 January 2002 the Office of the Prosecutor ("Prosecution") disclosed to the *Amici Curiae* three witness statements which it intended to apply to have introduced under Rule *92bis* of the Rules of Procedure and Evidence ("Rules "). The Prosecution has informed the Trial Chamber that it will seek to tender evidence of a number of witnesses in the form of Rule *92bis* statements in relation to Indictment IT-99-37 ("Kosovo Indictment") and has now disclosed the statements of the first 23 witnesses which it seeks to have admitted under the Rule .

2. The *Amici Curiae* submitted an "*Amici Curiae* Brief on Rule *92bis* Procedure" on 20 February 2002 ("*Amici Curiae* Brief") to which the Prosecution responded in "Prosecution's Response to '*Amici Curiae* Brief on Rule *92bis* Procedure' and Motion for Admission of Statements Pursuant to Rule *92bis* dated 26 February 2000 ("Prosecution's Response") and in "Prosecution's Additional Response to '*Amici Curiae* Brief on Rule *92bis* Procedure' and Motion for Admission of Statements Pursuant to Rule *92bis*" dated 11 March 2002. A hearing on the matter was held on 11 March 2002 during which the Prosecution, the *Amici Curiae* and the accused presented their views on the application of Rule *92bis* ("Hearing").

3. The Trial Chamber gave its oral decision on the day after the Hearing, and now issues the written reasons for its ruling.[1]

II. THE LAW

4. The relevant parts of Rule *92bis* provide:

> (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.

[…]

(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.

5. There is thus a discretion under Rule *92bis* whether to admit the evidence of a witness in written form which does not relate to

the acts and conduct of the accused charged in the indictment. In the International Tribunal, there is some limited jurisprudence on the application of Rule *92bis*.

6. In *Sikirica* Trial Chamber III, dealing with the admissibility of transcripts under Rule *92bis* (D),[2] stated generally that this rule does not supplant or modify the general requirements for the admissibility of evidence set out in Rule 89(C) and (D), namely that a Chamber "may admit any relevant evidence which it deems to have probative value" and may exclude evidence "if its probative value is substantially outweighed by the need to ensure a fair trial".[3]

7. The Trial Chamber also said that the principal criterion for determining whether a witness should appear for cross-examination under Rule *92bis* (E) is the overriding obligation of a Chamber to ensure a fair trial under Articles 20 and 21 of the Statute of the International Tribunal ("Statute"): "[in] that regard, among the matters for consideration are whether the transcript goes to proof of a critical element of the Prosecution's case against the accused [...]".[4] For example, in the case of one witness the Trial Chamber was of the opinion that his evidence, "while not related to the acts or conduct of any of the three accused, bears upon this case in such a significant and direct way that all three accused should be given an opportunity to cross-examine the witness."[5]

8. Dealing with the cumulative nature of evidence, Trial Chamber II in *Brdjanin and Talic* emphasised that regardless of how repetitive the evidence is, it cannot be admitted if it goes directly to the acts or conduct of the accused. For matters that do not go directly to the acts or conduct of the accused the fact that the evidence is of a cumulative nature is relevant to the exercise of the Trial Chamber's discretion.[6] Further, the Trial Chamber stated that in cases involving alleged superior responsibility, it would exercise extreme caution before admitting written statements going to the acts and conduct of the subordinates for which the accused is allegedly responsible.[7] Finally, it noted that a party is expected to give some general information about which other witnesses will give similar evidence and the nature of the overlap, and that the parties should assist the Trial Chamber by adequately addressing the relevant factors specified in the Rule.[8]

ARGUMENTS OF THE PARTIES

9. In the *Amici Curiae* Brief the Trial Chamber was requested to provide guidance to the parties by setting out specific criteria to be applied in considering whether to admit statements under Rule *92bis* in the instant case. Further, in their Brief and during the Hearing, the *Amici Curiae* also raised the following matters:

(a) if the Trial Chamber is satisfied with the oral evidence presented, Rule *92bis* statements might not be necessary;

(b) how should the Trial Chamber deal with hearsay in statements where there can be no test of the reliability of the source;

(c) would the right of the accused to cross-examine witnesses against him as set out in Article 21(4) of the Statute be violated;

(d) how should the Trial Chamber deal with the nature of the information related to the crime base contained in the statements which could constitute proof of a critical element of the Prosecution case, and therefore necessitate cross-examination.[9]

10. In their Response, the Prosecution requested that the statements of the 23 witnesses be admitted into evidence pursuant to Rule *92bis* of the Rules. They submitted that the statements are all those of "crime base" witnesses who give evidence about the crimes committed in Kosovo and not about the acts and conduct of the accused : therefore the Trial Chamber should exercise its discretion to admit the statements . They further submitted that since the evidence is of a cumulative nature it is appropriate for admission because the statements corroborate facts, *inter alia* , contained in the evidence of the first 11 *viva voce* witnesses; and the challenges of the accused to the oral testimony makes necessary the presentation of additional corroborative evidence.[10] The Prosecution also submitted that the international community has a very strong public interest in seeing the timely completion of the trial and that no public interest favours the oral presentation of the evidence.[11]

11. The Prosecution further submitted that the presence of

hearsay evidence does not , by itself, deprive the evidence of probative value: Rule 89 (C) and (D) permit the admission of any relevant evidence which a Chamber deems to have probative value , although the Chamber may exclude the evidence if its probative value is substantially outweighed by the need to ensure a fair trial. The Prosecution also pointed out that there are indicia of reliability in the statements in that they were provided under the formal procedures of Rule *92bis* (B) and the hearsay parts are generally consistent with the oral testimony presented.[12]

12. The Prosecution also referred to the above-mentioned decision in *Sikirica* [13] and submitted that in this particular case the phrase "critical element" should be interpreted more narrowly to encompass just the specific acts and conduct of the accused and co-accused. It stated that a broader definition would result in the cross-examination of a large number of witnesses, and thereby vitiating the purpose of the rule, namely to save time and judicial resources.[14]

13. During the Hearing the accused stressed that he was opposed to any written statements being admitted. He stated that he should have the right to test the circumstances of the evidence in chief and to cross-examine the witnesses in order to test their credibility.[15]

14. The accused also referred to the right to a public hearing and of the right of a person charged with a criminal offence to cross-examine witnesses against him, and stated that public interest demands that all witnesses appear before the court.[16]

IV. DISCUSSION

15. The first issue for the Trial Chamber is to determine whether the statements are admissible as going to proof of a matter other than the acts and conduct of the accused. In order to do so, it is important to consider the nature of the Prosecution's case against the accused.

16. The Prosecution case in relation to the crimes committed in Kosovo is as follows . The accused is charged as being individually responsible under Article 7(1) of the Statute for having committed, etc., a widespread or systematic campaign of terror and violence directed at Kosovo Albanian civilians and executed by the Armed Forces of the FRY ("VJ") and units of the

Serbian Ministry of Internal Affairs ("MUP") (together "Serb forces"). In the Kosovo Indictment "committed" is said to refer to the accused's participation in a joint criminal enterprise as a co-perpetrator .[17] The campaign was undertaken with the objective of removing a substantial proportion of the Kosovo Albanian population in a well-planned and co-ordinated operation which featured widespread destruction of property, expulsions using acts of brutality to perpetuate a climate of terror , harassing the convoys, looting, pillaging, and systematically seizing identity documents.[18] The Pre-Trial Brief particularises the campaign as occurring between 23 March and 20 June 1999 when the Serb forces launched co-ordinated attacks against the Kosovo Albanians to expel a significant proportion, these attacks being characterised by a similar pattern and features involving units of the MUP or local defence forces with support of the VJ units attacking Kosovo Albanian villages expelling the inhabitants and committing murder and assaults.[19] In addition , the accused is charged as being individually responsible for the acts or omissions of his subordinates pursuant to Article 7(3) of the Statute.[20]

17. The case was expanded in the Prosecution's Opening, where they referred to this being primarily a deportation case, resulting in 800,000 Kosovo Albanians being forced from their homes. The Prosecution accepts that there was an ongoing conflict between the Kosovo Liberation Army ("KLA") and the Serb forces (the KLA having first launched attacks on the Serb police in 1996). This case also involves persecution against civilians, by means of deportation and forcible transfers, murders, sexual assaults and wanton destruction of religious sites. The campaign intensified at the end of March 1999 when the international monitors were withdrawn: about 90, 000 Kosovars fleeing in the previous week. This was not due to NATO bombing but the architects of the campaign took advantage of the bombing to intensify their actions, the plan being to round up Kosovars in as short a time as possible in a concerted attack. There was a similar pattern of attacks on the Kosovo villages , surrounding them, leaving only one avenue of escape, expelling the inhabitants and destroying houses so there was no home to return to, providing transport for refugees out of Kosovo, together with additional cover up by exhuming bodies from grave sites and transporting them to Serbia for reburial.[21]

18. Therefore, the Prosecution sets out to prove that:

(a) there was a campaign by the Serb forces aimed at expelling the Kosovo Albanians;

(b) the campaign was carried out by concerted action in well-planned and co-ordinated operation in a series of similar attacks on Kosovo Albanian villages which involved killings, sexual assaults and destruction of religious sites.

19. On the other hand, the case for the accused involving Kosovo (as per his Opening) is as follows. The Serb forces were struggling against the terrorism of the KLA and also defending the country against oppression in the form of the NATO bombing . The movement of people coincided with this bombing. The population was expelled by the KLA and through NATO air strikes. Crimes may have been committed by individuals and groups but not by the Army and police who defended their country with honour and chivalry.[22]

20. Therefore, the issue for the Trial Chamber in this connection is whether the deportations and killings were the result of concerted Serb actions to expel the Kosovo Albanians , or occurred as a result of the actions of the KLA and NATO.

21. The Trial Chamber has examined the statements and has found that they meet the formal requirements of Rule *92bis* (B), and that they relate to the alleged attacks of Serb forces in six municipalities in Kosovo, beginning on 24-28 March 1999. The attacks were in the municipalities about which oral evidence has been given: Orahovac/Rahovec; Prizren; Srbica/Skenderaj; Suva Reka/Suharekë; Pec/Pejë; and Kosovska Mitrovica/Mitrovicë. The statements relate to the crime base only and there is no relevant mention made of the accused.[23]

22. As the Prosecution notes, the Kosovo Indictment expressly states that the Prosecution does not intend to suggest that the accused committed any of the crimes charged personally in a physical sense.[24] The phrase “acts and conduct of the accused” in Rule *92bis* is a plain expression and should be given its ordinary meaning: deeds and behaviour of the accused.[25] It should not be extended by fanciful interpretation. No mention is made of acts and conduct by alleged co-perpetrators, subordinates or, indeed,

of anybody else. Had the rule been intended to extend to acts and conduct of alleged co-perpetrators or subordinates it would have said so. The fact that conduct is that of co-perpetrators or subordinates is relevant to whether cross-examination should be allowed and not to whether a statement should be admitted. Consequently, having examined the 23 written statements, the Trial Chamber finds that the statements go to proof of matters other than the acts and conduct of the accused.

23. The next issue is whether the Trial Chamber should exercise its discretion in favour of admitting the written statements into evidence. Of the factors set out in the Rule, the fact that the evidence is of a cumulative nature is a factor in favour of admission.[26] The Prosecution also submitted that Rule *92bis* grants the Trial Chamber a discretion to employ the International Tribunal's limited resources in a judicious and efficient manner . They stated that the calling of live evidence places significant burdens on the various sections of the International Tribunal which in this particular case will involve an unusually large expenditure of resources and delays if crime based witnesses on all three indictments are to be called.[27]

24. Analysis of the statements reveals that all relate to alleged attacks by Serb forces on Kosovo municipalities and the resulting deportations and killings. The accused has put this evidence into issue and vigorously put forward a contrary case. There is, therefore, an important issue for the Trial Chamber to try. The evidence relates to a 'critical element of the Prosecution's case' or, put another way, to a live and important issue between the parties, as opposed to a peripheral or marginally relevant issue.

25. In these circumstances, in the view of the Trial Chamber the requirements of a fair trial demand that the accused be given the right to cross-examine the witnesses in order to fully test the Prosecution's case. This course will also address any concerns about the reliability of the evidence and any hearsay.

26. The Trial Chamber notes the Prosecution submissions about the length of the trial and has in mind the obligation upon it to ensure that the trial is both fair and expeditious.[28] These ends can best be achieved by admitting the witness statements under Rule *92bis* (E), thereby saving the substantial time taken in examination-in-chief, and requiring the witnesses to attend for cross-examination.

27. Thus, the Trial Chamber has decided that it will admit the statements under Rule *92bis*, subject to two conditions: (1) Because of the cumulative nature of the evidence and the fact that it will increase the already very extensive number of witnesses proposed to be called by the Prosecution in this case, and bearing in mind the need for an expeditious trial, the Prosecution will be limited to four witnesses per municipality in relation to the deportation charges, including the *viva voce* witnesses already called. The Prosecution must select which of the Rule *92bis* statements it wishes to have admitted for those municipalities where, at the moment, more than four witnesses are proposed; (2) Because, in the view of the Trial Chamber, the evidence proposed to be given is subject of an important issue in this case, those witnesses whose statements will be admitted will be required to attend for cross-examination. In the event that a witness fails to appear for cross-examination, his or her written statement will not be admitted in evidence .

28. In each case, the Prosecution will be allowed to ask some introductory questions to the witness so that he or she becomes adjusted to giving testimony before facing cross-examination.

29. The Trial Chamber will consider any necessary adjustment to the timetable for finishing the Prosecution case, and any application to extend the number of witnesses, on good cause being shown.

V. DISPOSITION

30. For the foregoing reasons, the Trial Chamber **DECIDES** that it will admit the written statements, upon the Prosecution having made a selection as per criteria herein, and upon these selected witnesses appearing for cross-examination.

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

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Richard May

Presiding

Judge Robinson appends a Separate Opinion and Judge Kwon appends a Declaration to this Decision.

Dated this twenty-first day of March 2002

At The Hague

The Netherlands

[Seal of the Tribunal]

SEPARATE OPINION OF JUDGE PATRICK ROBINSON

1. I agree with the Decision that the accused be allowed to cross-examine witnesses whose statements have been admitted. However, as the process by which I have arrived at that conclusion is different from that in the Decision, I now set out my reasoning .

2. Cross-examination is a fundamental right of an accused person both under the International Covenant on Civil and Political Rights and the Statute of the Tribunal . The importance that the Tribunal's legal system attaches to cross-examination is illustrated by the care that is taken in protecting the accused's right to cross -examination when regimes are established in which evidence may be admitted without cross-examination, e.g. although it is possible for a deposition to be taken under Rule 71 without cross-examination, an accused has "the right to attend the taking of the deposition and cross-examine the person whose deposition is being taken." Similarly, under Rule 94 *bis*, although the statement of an expert witness may be admitted in evidence without cross-examination, the accused may indicate that he wishes to cross-examine that witness.

3. But cross-examination consumes time and in order to expedite trial proceedings , Rule 92 *bis* was devised to obviate examination in chief and cross-examination in certain circumstances. Under Rule 92 *bis* (A), a written statement may be admitted, without either examination in chief or cross-examination, if it "goes to proof of a matter other than the acts and conduct of the accused as charged in the indictment." However, a statement that goes to proof of the acts and conduct of the accused as charged in the indictment may not be admitted into evidence, that is to say, it must be subject to the ordinary process of examination in chief

and cross-examination.

4. The essential difference between the two regimes just described is that, while under the first, the Trial Chamber, having admitted the statement, is left with a discretionary power as to whether to allow cross-examination, under the second , it has no such power, and cross-examination is the right of the accused. The Chamber is obliged to grant cross-examination.

5. This distinction is, in my view, of crucial importance in the interpretation of Rule 92 *bis*. The rationale of the distinction is that statements that go to proof of matters other than the acts and conduct of the accused do not implicate the accused in a critical way and may, therefore, be admitted, subject to the discretionary power of the Chamber to allow cross-examination. However, in relation to statements that go to proof of the acts and conduct of the accused, the Chamber has no discretionary power and must rule out those statements, because they implicate the accused in a critical way, and to establish a regime that deprives him of the right to cross -examine in such circumstances would be in breach of his statutory right to cross -examination.

6. The phrase "acts and conduct of the accused" is open to two interpretations . The first is set out in paragraphs 7, 8 and 9, and the second in paragraph 10 .

7. Responsibility under Article 7(1) is direct and personal; responsibility under Article 7(3) is indirect and derivative. But it matters not whether the statement relates to responsibility under Article 7(1) or responsibility under Article 7(3), and it matters not that the phrase "acts and conduct of the accused" does not appear to cover statements under Article 7(3), which deals with the responsibility of a superior for the acts of his subordinates. What matters is that the statement , be it under Article 7(1) or Article 7(3), exposes the accused to responsibility in relation to what was described in *Sikirica* as "a critical element of the Prosecution's case."[29] The Rule must be interpreted in light of the statutory right to cross-examine. In fact, the Rule reinforces the statutory right to cross-examination in any matter that exposes the accused to liability in relation to a critical element of the Prosecution's case . The phrase "acts and conduct of the accused", when taken literally, would seem to be confined to personal responsibility under Article 7(1), and to exclude statements that expose the accused to responsibility under Article

7(3). However, those who oppose that interpretation would no doubt say that a literal interpretation is only permissible when the meaning is clear, and the meaning is anything but clear in the light of the responsibility of the accused under Article 7(3). Article 31(1) of the Vienna Convention on the Law of Treaties provides for an interpretation of a treaty "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose ". The ordinary meaning here has to be construed in light of the context in which it arises: the general question of an accused's responsibility under Article 7, of which paragraph 3, which deals with the responsibility of the accused for the acts of his subordinates, is an integral part. The phrase "acts and conduct of the accused" must also be interpreted in light of the object and purpose of the Rule, which is to facilitate expeditiousness without jeopardising the right of the accused to cross-examination in matters that implicate him in a critical way. It would be wrong to interpret the Rule as though it was drafted without taking into account responsibility under Article 7(3). In fact, the jurisprudence of the Tribunal is that such responsibility is an aggravating factor in sentencing.

8. It is not so much that the phrase "acts and conduct of the accused" means acts and conduct of his subordinates (though, on the basis of the doctrine of derivative , command responsibility he bears responsibility for those acts), as that the phrase "acts and conduct of the accused" must be construed in light of the responsibility of the accused under Article 7 as a whole, including Article 7(3), and thus, whatever protective regime the Rule establishes for the accused, by way of a right to cross -examine, must apply equally to both kinds of responsibility, that is under Article 7(1) and 7(3).

9. According to this line of interpretation, which, in my view, is quite cogent , a statement that exposes the accused to responsibility under Article 7(3), as the statements in question do, would not be admitted since they implicate the accused in a critical way. Trial Chamber II in *Prosecutor v. Brdjanin and Talic,* comes very close to this line of reasoning, but it adopts what could be described as a cautionary middle ground. It says "Rule 92 *bis* refers only to the ' acts and conduct of the accused'. However, in cases involving alleged superior responsibility, the Trial Chamber will exercise extreme caution before admitting written statements going to the acts and conduct of the subordinate units for which the accused

is allegedly responsible."[30]

10. However, if one accepts that the phrase "acts and conduct of the accused" is to be construed as being confined to personal responsibility under Article 7(1), then the Trial Chamber is entitled to admit statements that expose the accused to liability under Article 7(3). I have, after much thought, gone along with this approach, but, in my view, if it is to be followed, then, since the statements expose the accused to liability in relation to a critical element of the Prosecution's case, cross-examination is not at the discretion of the Trial Chamber; it is a right of the accused. In the same way that the accused would be entitled to cross-examine on statements that expose him to liability under Article 7(1) in relation to a critical element of the Prosecution's case, he should also be entitled to cross-examine on a statement admitted by a Trial Chamber, but which exposes him to liability under Article 7(3) in relation to a critical element of the Prosecution's case; in other words, in such a case the Chamber is under an obligation to grant cross-examination . However, the advantage to the Chamber in terms of expeditiousness, whether by my process of reasoning or that of the Decision, is relatively limited, since all that is gained is the time saved by the elimination of examination in chief.

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

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Patrick Robinson

Dated this twenty-first day of March 2002

At The Hague

The Netherlands

[Seal of the Tribunal]

DECLARATION OF JUDGE O-GON KWON

1. I agree with the Trial Chamber's decision to admit the written statements of 23 Prosecution witnesses into evidence under Rule 92 *bis*. I believe that the meaning of the phrase "acts and conduct of the accused" as set out in Rule 92 *bis* (A) is clear, and ought to

be interpreted by the Trial Chamber to mean the deeds and behaviour of the accused. As none of the witness statements refer to the accused, Slobodan Milosevic, actually personally perpetrating or participating in any of the crimes alleged to have been committed in the Kosovo Indictment, or his alleged role as superior, then no obstacle exists to prevent the statements being admitted under Rule 92 *bis*. Furthermore, I am satisfied that the Trial Chamber's discretion to order the makers of the statements to attend for cross-examination has been exercised correctly in this case (although I consider that discretion to be closer to a duty upon the Trial Chamber to call the maker when the statements are related to important elements of the crime other than acts and conducts of the accused). I would, however, wish to express my point of view in relation to the general issue of the admission of witness statements as evidence during trial.

2. Under Rule 92 *bis* (A), as it currently stands, a Trial Chamber may admit the evidence of a witness in the form of a witness statement in lieu of oral testimony, but only insofar as the statement is limited to evidence tending to prove "matters other than the acts and conduct of the accused as charged in the indictment". The general practice of Trial Chambers before the International Tribunal is to rely solely upon the testimony of a witness provided before the Chamber during trial, with prior written statements not being admitted as evidence, except in cases where a witness has been rigorously cross-examined as to inconsistencies between his or her testimony and their prior written statement(s). In those circumstances, a witness' prior statement(s) may be admitted into evidence, as has happened during the course of this trial. This approach rather contrasts with the approach of the civil courts where it is common practice to admit written statements, and it is not entirely clear as to how the practice of the International Tribunal not to admit witness statements as a matter of course has developed. While I appreciate that the International Tribunal is an amalgam of the legal systems of common law and civil law countries , I do not see the reason for limiting the circumstances in which the written statement of a witness can be introduced into evidence before the court. It is my opinion that if

> (i) the defence consents (either counsel for the accused or the accused him or herself in cases such as the instant one where the accused is unrepresented); or

(ii) the maker of the statement comes to court to testify as a witness and testifies as to the veracity of the contents of the statement, and is cross-examined by the opposing party;

then written witness statements should be admitted into the record of evidence before the Trial Chamber.

3. My reasons for such a view are as follows. First, the general provisions relating to the admissibility of evidence as expressed by Rule 89(C) and 89(D) suggest a rather flexible approach to the admission of evidence, particularly considering that accused at the International Tribunal are tried by professional Judges and not by jury. Secondly, by having a more flexible approach to the admission of witness statements, a Trial Chamber's ability to manage trials of a vast scale, such as this one, more efficiently would be improved. Thirdly, a Trial Chamber would be assisted by being able to find the truth more easily: a witness at trial may not give his or her evidence fully due to time constraints, embarrassment or for some other reason. In a written statement, however, a witness can provide a more detailed and accurate version of the events that they experienced. While the risk will always exist that a statement may not provide a truthful account of events, or only a partially true one, this should not preclude the general admission of witness statements into evidence. Professional Judges will be alert to such dangers, and have the ability to note discrepancies between written witness statements and actual testimony, and determine what weight should be granted to the evidence. Fourthly, as noted, it is common practice to admit written witness statements in civil law legal systems . In the Republic of Korea, for example, the system with which I am most familiar , statements prepared by the prosecution or judicial police may be admitted so long as the maker of the statement attests as to the genuineness of the statement at a preparatory hearing or during trial.[31]

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

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O-Gon Kwon

Done this twenty first day of March 2002

At The Hague,

The Netherlands.

[Seal of the Tribunal]

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1 - Oral ruling by the Trial Chamber, 12 March 2002, Transcript pages ("T.") 1974-75.
2 - Rule 92*bis* (D) provides that "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."
3 - Prosecutor v. *Sikirica et al*, Case No. IT-95-08-T, "Decision on Prosecution's Application to Admit Transcripts Under Rule 92bis", 23 May 2001, para. 3 ("Sikirica Decision").
4 - Sikirica Decision, para. 4; followed in *Brdjanin and Talic*, Case No. IT-99-36-T, Confidential Decision entitled "Decision on 'Objection and/or Consent to Rule 92*bis* Admission of Witness Statements Number One' Filed by Brdanin on 16 January 2002 *and 'Opposition du Général Talic à l'admission des Dépositions Recueillies en Application de l'Article 92 B* (sic) *du Règlement'* Filed by Talic on 21 January 2002", 30 January 2002, paras 4-5 ("Brdjanin and Talic Decision"). *See also* Prosecutor v. *Naletilic and Martinovic*, Case No. IT-98-34-PT, "Decision regarding Prosecutor's Notice of Intent to Offer Transcripts under Rule 92*bis* (D)", 9 July 2001.
5 - Sikirica Decision, para. 35.
6 - Brdjanin and Talic Decision, para. 30.
7 - *Id.*, paras 17-18.
8 - *Id.*, para. 30.
9 - *Amici Curiae* Brief, 20 February 2002, paras 13-14, and submissions during the Hearing, T. 1959-64.
10 - Prosecution's Response, paras 6-8, and submissions during the Hearing, T. 1956-59. The Prosecution also relied on the fact that several of the written statements contain facts regarding the impact of crimes upon victims, Prosecution's Response, para. 8.
11 - Prosecution's Response, para. 10.
12 - Prosecution's Response, paras 11-14, and submissions during the Hearing, T. 1972.
13 - *See supra*, para. 6.
14 - Prosecution's Response, paras 15-16.
15 - Submissions during the Hearing, T. 1964, 1966, 1969-70.
16 - *Id.*, T. 1965.
17 - Kosovo Indictment, paras 16-18.

18 - Kosovo Indictment, paras 53-54; Kosovo Pre-Trial Brief, paras 52-54.
19 - Kosovo Pre-Trial Brief, paras 52–54.
20 - Kosovo Indictment, paras 19-28.
21 - Prosecution Opening Statement, T. 179-190, 205-206, 211-215.
22 - The Accused’s Opening Statement, T. 249-253, 284.
23 - There is a limited reference to the accused in the written statement by Mehmet Aliu, where it is stated that in the 1990s Kosovo Albanians were removed from government posts and that Kosovo Albanian children were not being able to go to the schools that they had attended with Serb children by order of Mr. Milosevic and his government.
24 - Prosecution’s Response, para. 6; Kosovo Indictment, para. 16.
25 - *See* The New Shorter Oxford English Dictionary, 1993. The French version of the Rule refers to “*les actes et le comportement de l’accusé*”.
26 - The fact that some of the statements contain statements relating to the impact of crimes upon victims is not a factor which can weigh heavily in this case. It would be different if the statements purely related to such an impact. Here, this is part of a much wider whole.
27 - Prosecution’s Response, paras 20-22.
28 - Article 20(1) of the Statute.
29 - Prosecutor v. *Dusko Sikirica*, Case No. IT-95-8-T, Decision on Prosecution’s Application to Admit Transcripts under Rule 92 *bis*, 23 May 2001, para. 4.
30 - *Prosecutor v. Brdjanin and Talic*, Case No. IT-99-36-T, Decision on the “Objection and/or Consent to Rule 92 *bis* Admission of Witness Statements Number One” Filed by Brdjanin on 16 January 2002 and “Opposition du General Talic a l’Admission des Depositions Recueillies en Application de l’Article 92 B du Reglement” filed by Talic on 21 January 2002, 30 Jan. 2002, para. 17.
31 - See Art. 312(1) of the Code of Criminal Procedure of the Republic of Korea. Similarly, in the legal systems of Belgium, France and the Netherlands, previous statements by a witness to the police or investigating body would ordinarily form part of the material before the court. See Criminal Procedure Systems in the European Community (Van den Wyngaert et al. (eds.), Butterworths, 1993), pp. 23-41, 117-130, and 292-311.