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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

Cases: IT-02-54-AR73.2

Date: 30 September 2002

Original: English

IN THE APPEALS CHAMBER

Before: Judge Mohamed Shahabuddeen, Presiding
Judge David Hunt
Judge Mehmet Güney
Judge Fausto Pocar
Judge Theodor Meron

Registrar: Mr Hans Holthuis

Decision of: 30 September 2002

PROSECUTOR

v

Slobodan MILOŠEVIĆ

DECISION ON ADMISSIBILITY OF PROSECUTION INVESTIGATOR'S EVIDENCE

Counsel for the Prosecutor:

Ms Carla Del Ponte, Prosecutor
Mr Geoffrey Nice
Ms Hildegard Uertz-Retzlaff
Mr Dirk Reyneveld

The Accused:

Mr Slobodan Milošević (unrepresented)

Amici Curiae

Mr Steven Kay QC
Mr Branislav Tapušković
Mr Mischa Wladimiroff

The background to the appeal

1. Pursuant to a certificate granted by the Trial Chamber in accordance with Rule 73(B) of the Rules of Procedure and Evidence ("Rules"),[1] the prosecution has appealed against the decision of the Trial Chamber excluding evidence from Mr Barney Kelly, an investigator employed by the Office of the Prosecutor ("OTP"). The evidence in question consisted of his report (entitled "Assessment of Račak Indictment Site by Barney Kelly"), which was based upon a body of material which included a summary by him of a large number of written statements made to a number of OTP investigators by prospective witnesses relating to what the Trial Chamber has accepted as a significant incident at Račak, in Kosovo, and in which he expressed his conclusions based upon those statements.[2] The prosecution did not tender the witness statements which he had summarised and upon which his conclusions were based.

2. The reasons expressed by the Trial Chamber for its decision were these:

(i) The investigator would be giving hearsay evidence as to events which he had concluded the prospective witnesses had seen or heard.[3]

(ii) Such conclusions were of little or no probative value,[4] as they trespassed upon the function of the Trial Chamber itself, and it is for the Trial Chamber to decide which evidence it will accept and which it will reject, and what conclusions should be drawn from the evidence.[5] Such evidence is normally excluded.[6]

(iii) The investigator's summary was effectively no more than a repetition of the prosecution case opened by counsel, and as such was of no assistance to the Trial Chamber.[7]

(iv) Another exhibit which had been admitted in the case, a report of the Organisation for Security and Co-operation in Europe ("OSCE") entitled "Kosovo: As Seen, As Told", was distinguishable upon the bases that, unlike the material in the present case, it had not

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1 Decision on Prosecution's Application for Certificate Under Rule 73(B) Concerning the Evidence of an Investigator, 20 June 2002, p 4, whereby the Trial Chamber considered that the resolution prior to the final judgment of the issue raised by its decision would materially advance the proceedings.

2 The Trial Chamber gave an oral ruling excluding similar evidence to be given by another OTP investigator, Mr Kevin Curtis, earlier in the trial: Transcript, 20 Feb 2002, pp 672-673. Further argument was heard subsequently in relation to the evidence of Mr Kelly, when the Trial Chamber gave another oral decision confirming and following its earlier decision: Transcript, 30 May 2002, pp 5940-5944. The appeal has been brought against the second of these rulings (which incorporated the first ruling). The Trial Chamber accepted the significance of the Račak incident at Transcript, p 5943.

3 Transcript, p 672.

4 *Ibid*, pp 672-673.

5 *Ibid*, p 5941.

6 *Ibid*, pp 5941-5942.

7 *Ibid*, p 673.

been prepared for the purposes of this particular trial, and it had been prepared by a body independent of the parties and thus had a quality of independence.[8]

(vi) Reliance could not be placed upon the use of reports by police and investigators in criminal proceedings in The Netherlands and in Spain because of the different, essentially adversarial, nature of the proceedings in this Tribunal.[9]

(vii) The admission into evidence over objection of an investigation dossier and the report of a "Committee on Enforced Disappearances" ("CONADEP") in an Argentinean trial[10] was distinguishable upon the basis that, unlike the present case, the information given by the persons interviewed was included in the CONADEP report.[11]

3. These reasons were given orally, following a short adjournment after the conclusion of the submissions which had been made. The reasons are expressed succinctly, without the elaboration which would usually have been provided in a reserved decision. In these circumstances, it is appropriate to consider also views expressed by the Trial Chamber during the course of the submissions as representing its intention in relation to those succinctly expressed reasons. The Trial Chamber made it clear that –

(a) there was no intention to impugn the professionalism of the OTP investigator;[12]

(b) the concern of the Trial Chamber in relation to the proposed evidence of the OTP investigator summarising the statements of the witnesses and expressing his conclusions based upon them was that it would not appear to the public as an independent assessment of the evidence which the makers of those statements could give;[13]

(c) there is no probative value in a summary which is little more than an outline of the prosecution case, to which has been added the investigator's own conclusions;[14]

(d) the situation might be different if the OTP were to tender the statements themselves;[15] and

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[8] *Ibid*, p 5943.
[9] *Ibid*, pp 5942-5943.
[10] *Camara Nacional de Apelaciones en lo Criminal y Correcional de la Capital Federal*, Federal Criminal and Correctional Court of Appeals, Federal District Court of Buenos Aires, Conviction of Former Military Commanders, 9 Dec 1985, 8 Human Rights Law Journal 368, at 382.
[11] Transcript, p 5943. (This is confirmed by par 28519 of the HRLJ summary of the judgment of the Court of Appeals in that case.)
[12] *Ibid*, pp 5929, 5932.
[13] *Ibid*, pp 5931-5933, 5936.
[14] *Ibid*, pp 5932-5933.
[15] *Ibid*, pp 5933, 5936-5937.

(e) if the statements were tendered, the OTP investigator's summary of them would be unnecessary, and his conclusions could be expressed by counsel as submissions by the prosecution based upon the statements in evidence.[16]

4. Counsel for the prosecution had earlier declined to tender the statements of the prospective witnesses pursuant to Rule 92*bis*,[17] upon the basis that, if the witnesses were cross-examined, the prosecution would have difficulties in meeting the time limits which the Trial Chamber had fixed for the presentation of its case in chief.[18] The Trial Chamber made it clear once more that it was for the prosecution to reduce the scope of its case to fit within the time which it had been allowed for its presentation.[19]

The prosecution's grounds of appeal

5. The grounds of appeal are stated in the following terms:[20]

"(1) The Trial Chamber erroneously found that the evidence of the summarizing witness had little or no probative value and therefore erroneously excluded the summarizing evidence;

(2) The Trial Chamber erred in the exercise of its discretion by rejecting the admission of the summarizing witness and, at the same time, restricting the time available for the presentation of the Prosecution's case-in-chief."

The submissions

6. The prosecution says that the first ground raises an issue of law, and the second an error in the exercise of the Trial Chamber's discretion.[21]

7. As to the characterisation of the evidence as having little or no probative value, the prosecution submits that the evidence was admissible as hearsay under Rule 89(C),[22] and that it is relevant to the allegations contained in the indictment.[23] Although it was hearsay evidence,

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[16] *Ibid*, pp 666-668, 5730, 5929, 5932.
[17] Rule 92*bis* is discussed in par 18(3), *infra*.
[18] Transcript, p 668.
[19] *Ibid*, pp 5935-5937. This issue is discussed at pars 25-27, *infra*.
[20] Interlocutory Appeal of the Prosecution Against Decision on Admission of Evidence of Summarizing Witness, 27 June 2002 ("Interlocutory Appeal"), par 4. A document entitled "Corrigendum to Interlocutory Appeal of the Prosecution Against Decision on Admission of Evidence of Summarizing Witness" was filed on 28 June 2002.
[21] Interlocutory Appeal, par 5.
[22] *Ibid*, pars 6, 12. Rule 89(C) provides: "A Chamber may admit any relevant evidence which it deems to have probative value." The whole of Rule 89 is set out in par 13, *infra*.
[23] Interlocutory Appeal, par 11.

the prosecution says, the Trial Chamber had "a broad discretion to admit relevant hearsay if satisfied that the evidence is 'probative', ie reliable for the purpose of proving the truth of its contents", and that, for the purpose of assessing this, the Trial Chamber "may consider both the contents of the hearsay statement and the circumstances under which the evidence arose".[24] The OTP investigator had personally interviewed some of the witnesses, and the task he had undertaken was to assess all the statements for both consistency and any inconsistencies, and to determine whether they were confirmed or corroborated by independent forensic findings already in evidence.[25] The prosecution concludes:

> These indicia of reliability found in the underlying material for the summarizing evidence of Barney Kelly lend probative value to his hearsay testimony. The Trial Chamber apparently ignored these indicia when it made its decision to exclude this evidence.[26]

The prosecution asserts that any suggestion that summary evidence is *ipso facto* unreliable is clearly wrong,[27] and it gives a number of instances where such evidence has already been admitted in the present case and where it has been given in other cases. The prosecution takes issue with what is said to be the suggestion of the Trial Chamber that the summarizing evidence of the OTP investigator lacks reliability because it was prepared for this litigation.[28]

8. As to the ground of appeal relating to the exercise of discretion, the prosecution says that the decision to exclude the evidence of the OTP investigator, "while at the same time imposing strict time limits on the presentation of the Prosecution's case-in-chief", will have the effect of placing Trial Chambers in "the untenable position of rendering Judgements without the fullest possible range of evidence available to them",[29] whereas "[t]he use of summarizing evidence will provide a relatively rapid method for this Trial Chamber, and other Chambers, to ascertain the broadest possible scope of inculpatory and exculpatory evidence available to it".[30]

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[24] *Ibid*, par 12, citing *Prosecutor v Aleksovski*, IT-95-14/1-AR73, Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 Feb 1999 ("*Aleksovski* Decision"), par 15.
[25] *Ibid*, par 13.
[26] *Ibid*, par 13. This rather Delphic assertion is better understood by an example given by the prosecution later in the same document (at par 30): "The summary material has *some* weight in itself; ie if there are 1000 signed statements saying that people were driven out by Serbs there is some evidential value in the fact". The Appeals Chamber interprets this statement as meaning that, in order to establish that the people had been driven out by the Serb forces, there can be some probative value in the fact that 1000 statements assert that that is what happened, even without the credit of those who made the statements being tested.
[27] Interlocutory Appeal, par 15.
[28] *Ibid*, par 22.
[29] *Ibid*, par 28.
[30] *Ibid*, par 31.

9. The accused objected to the evidence at the trial,[31] but he did not file any submissions in the appeal.

10. The *Amici Curiae* objected to the evidence at the trial,[32] and they filed submissions opposing the prosecution's appeal.[33] They accepted the prosecution's submission that Rule 89 provides a Trial Chamber with a discretion to admit hearsay evidence, but they point out that the exercise of such a discretion depends upon its probative value and relevance as determined by the Trial Chamber.[34] That task of assessing and weighing the evidence must be left primarily to the Trial Chamber, they say, and the Trial Chamber's decision is one which can be upset only in accordance with the judgment of the Appeals Chamber in the *Prosecutor v Tadić* Conviction Appeal.[35] They interpret that judgment as saying that the only way in which the Trial Chamber's determination of this issue can be challenged is if its decision is demonstrated to be unreasonable.[36] Whatever the reliability of the summary prepared by the OTP investigator may be, they say, the reliability of the statements themselves can only be tested by cross-examination.[37] And, they also say, even if there may be some indicia of reliability within the witness statements themselves, the conclusions which the OTP investigator has expressed in relation to what those statements say are for the Trial Chamber to determine for itself.[38] As to the exercise of discretion generally, the *Amici Curiae* repeat that, as a witness of fact, the OTP investigator is not entitled to give evidence on the ultimate issue for the determination of the Trial Chamber.[39]

11. The prosecution, in its Reply, largely repeats the arguments which it made in its Interlocutory Appeal.[40] It does, however, take issue with the description of the OTP investigator's document as containing "conclusions", which it says are "merely concise summaries of the information that Mr Kelly gathered about the events in Račak during his investigation".[41] It also argues that the evidence which the investigator would give does not

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[31] Transcript, pp 671-672: "[...] in an illegal way, this repetition and the Prosecutor's accusations are being repeated to hurl these untruths and mask the truth."
[32] *Ibid*, pp 669-670.
[33] *Amici Curiae* Response/Observations on the Interlocutory Appeal of the Prosecution Against Decision on Admission of Evidence of Summarizing Witness, 8 July 2002 ("Response").
[34] Response, par 11.
[35] *Ibid*, par 12. The reference to the *Tadić* Judgement is IT-94-1-A, Judgment, 15 July 1999, par 64.
[36] Response, par 13.
[37] *Ibid*, par 31.
[38] *Ibid*, par 29.
[39] *Ibid*, par 25.
[40] Prosecution's Reply to "*Amici Curiae* Response/Observations on the Interlocutory Appeal of the Prosecution Against Decision on Admission of Evidence of Summarizing Witness", 12 July 2002 ("Reply").
[41] Reply, par 5.

relate to an ultimate issue in the case, because it "does not discuss the guilt or individual criminal responsibility of the accused Milošević, nor any other legal issue".[42] The prosecution puts its investigator forward as an expert, as his proposed evidence is "the presentation of an overview of the complex Račak site, and the events that occurred there".[43] In the alternative, the prosecution concedes that, if the conclusions do trespass upon the Trial Chamber's function, the Trial Chamber could admit only the summary and exclude the conclusions.[44] It is said that no prejudice flows from the absence of cross-examination of the makers of the statements which the OTP investigator has summarised, because his evidence can be subjected to cross-examination as to the consistency of the accounts summarised and as to his methodology.[45] In the absence of the fullest possible range of evidence available to the Tribunal, the prosecution asserts, none of its judgments, or those of any similar tribunal, "will ever withstand the test of historical scrutiny".[46]

Request for oral hearing

12. In its Reply, the prosecution requested an oral hearing of the appeal.[47] It has not identified any particular issues upon which it wishes to put oral arguments or explained why it was unable effectively to put its arguments upon those issues in writing. Having regard to the very extensive written submissions already received from the prosecution (and the inordinate degree of repetition which they already contain), and to the practical difficulties in arranging a courtroom in which to hear oral submissions, the Appeals Chamber sees no reason to depart from its usual practice of determining interlocutory appeals on the written submissions filed by the parties.[48]

Discussion

13. The prosecution relies upon the terms of Rule 89(C) in support of its argument that the evidence of its investigator was admissible. It is important to consider Rule 89(C) in its proper context:

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[42] *Ibid*, pars 6, 14.
[43] *Ibid*, par 7.
[44] *Ibid*, par 6. (The prosecution had not made such a concession when the matter was before the Trial Chamber.)
[45] *Ibid*, par 11.
[46] *Ibid*, par 15.
[47] *Ibid*, par 21.
[48] *Prosecutor v Delalić et al*, IT-96-21-A, Order Regarding Esad Landžo's Request for Oral Argument, 26 Mar 1999, p 2.

Section 3 : Rules of Evidence

Rule 89

General Provisions

(A) A Chamber shall apply the rules of evidence set forth in this Section, and shall not be bound by national rules of evidence.

(B) In cases not otherwise provided for in this Section, a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law.

(C) A Chamber may admit any relevant evidence which it deems to have probative value.

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

(E) A Chamber may request verification of the authenticity of evidence obtained out of court.

(F) A Chamber may receive the evidence of a witness orally or, where the interests of justice allow, in written form.

14. At the outset, a distinction must be made between the two issues which arise in relation to the evidence sought to be given by the OTP investigator (Mr Kelly) – one in relation to the content of that evidence, and the other in relation to the method by which he proposed to give it.

15. The content of his evidence consisted, first, of his summary of the contents of the written statements made to various OTP investigators by prospective witnesses for the purposes of these proceedings. That summary was being tendered by the prosecution to put into evidence the contents of those written statements in order to establish the truth of the statements which had been summarised. The prosecution did not wish to tender the statements themselves pursuant to Rule 92*bis*.[49] Except in relation to the statements which had been taken by Mr Kelly himself, his evidence was not hearsay evidence of what those prospective witnesses had said to Mr Kelly; rather, it was hearsay evidence of the contents of those written statements (which are themselves hearsay).

16. The content of the evidence of the OTP investigator consisted also of the conclusions which he had himself drawn from the written statements which he had summarised. The Trial Chamber's rejection of this evidence may be dealt with immediately. A passage from his "Assessment" quoted by the *Amici Curiae* is in these terms:

> Based upon my investigations, professional experience, training and knowledge, the documents and material that I have read and assessed and according to witness statements, I have concluded that,

[49] The prosecution said that the requirement in the present case that such witnesses would have had to be produced for cross-examination (see par 27, *infra*) would have prevented it from complying with the timetable imposed by the Trial Chamber: Transcript, pp 668, 5939. Rule 92*bis* is discussed in par 18(3), *infra*.

1) Serbian Forces on several occasions looted, ransacked and burned property in the village of Račak from June 1998.

2) Although there is no report of anyone being killed, Serbian Forces harassed and injured many Kosovar Albanian villagers during this period.

3) Serbian Forces surrounded Račak in the early hours on 15th January 1999 and attacked it in a horseshoe shaped operation. Over forty (40) unarmed Kosovar Albanian civilians were killed, most while trying to escape the attack. The killings occurred in six (6) locations comprising thirteen (13) scenes.

4) The attack is alleged to have been in retaliation for the recent killings by the KLA of Serbian Policeman in Dulije and Silvovo.

5) The KLA were present in Račak and had nine (9) soldiers killed that day with many others wounded.

17. The argument by the prosecution that these are not conclusions but "merely concise summaries of the information that Mr Kelly gathered about the events in Račak during his investigation" is rejected. Not only are they expressed to be conclusions, but they clearly *are* conclusions, based in large part upon events which Mr Kelly had accepted that the prospective witnesses had seen or heard. It is true, as the prosecution argues, that those conclusions do not bear directly upon the involvement of the accused in those events, but they are nevertheless facts which the Trial Chamber is obliged to consider and in relation to which it must make its own findings before coming to the issue of the accused's guilt in relation to them. That task does not require expertise beyond that which is within the capacity of any tribunal of fact, that of analysing the factual material put forward by the witnesses. Whatever expertise the OTP investigator may claim to have in relation to such a task, the Trial Chamber was entitled to decline his assistance in the very task which it had to perform for itself.

18. The substantial issue in the appeal concerns the admissibility of the summary prepared by the OTP investigator as hearsay evidence of the contents of the written statements given to the OTP investigators by prospective witnesses. Hearsay evidence has been given detailed consideration by the Appeals Chamber on three occasions. The first two were decided before the adoption of Rule 92*bis*.

(1) In *Prosecutor v Aleksovski*,[50] the Appeals Chamber stated –

(a) that Rule 89(C) gives to the Chamber a broad discretion to admit relevant hearsay evidence,[51]

(b) that it is admitted to prove the truth of its contents,

(c) that it should be admitted if it has been shown to be reliable,

[50] *Aleksovski* Decision, par 15.

[51] Rule 89(C) provides: "A Chamber may admit any relevant evidence which it deems to have probative value."

(d) that for this purpose the Chamber may consider both the content of the hearsay statement and the circumstances under which the evidence arose, and

(e) that the probative value of a hearsay statement will depend upon the context and character of the evidence in question.

The Appeals Chamber also stated that the absence of the opportunity to cross-examine the person who made the statements, and whether the hearsay is "first-hand" or more removed, are relevant to the probative value of the evidence.[52] It also acknowledged that, although it depends upon the infinitely variable circumstances of the particular case, the weight or probative value to be afforded to hearsay evidence will usually be less than that given to the testimony of a witness who has given it under a form of oath and who has been cross-examined.[53]

(2) In *Prosecutor v Kordić & Čerkez*,[54] the Appeals Chamber stated that the broad discretion given by Rule 89(C) is nevertheless limited by the requirement in Rule 89(B) that the rules of evidence applied by a Chamber must be those which best favour a fair determination of the matter before the Chamber and which are consonant with the spirit of the Tribunal's Statute and the general principles of law; the exercise of discretion under Rule 89(C) ought therefore to be in harmony with the Statute and the other Rules to the greatest extent possible.[55] The Appeals Chamber also stated that Rule 89(C) must be interpreted so that safeguards are provided to ensure that the Chamber can be satisfied that the evidence is reliable; if the evidence meets none of the requirements of the other Rules which permit a departure from the particular evidence being given orally, there must be other compensating evidence of reliability.[56] The reliability of the hearsay statement is therefore relevant to its admissibility, and not just to its weight.[57] To some extent, the *Kordić & Čerkez* Decision was dependent upon the preference in the Rules at the time for "live, in court" testimony.[58]

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[52] *Ibid*, par 15.

[53] *Ibid*, par 15.

[54] IT-95-14/2-AR73.5, Decision on Appeal Regarding Statement of a Deceased Witness, 21 July 2000 ("*Kordić & Čerkez* Decision").

[55] *Kordić & Čerkez* Decision, par 20.

[56] *Ibid*, par 22.

[57] *Ibid*, par 24. In the *Aleksovski* Decision (at par 15), the Appeals Chamber had earlier stated that, before hearsay evidence can be admitted, the Trial Chamber must be satisfied "that it is reliable for that purpose [to prove the truth of its contents], in the sense of being voluntary, truthful and trustworthy, as appropriate". In *Prosecutor v Delalić et al*, IT-96-21-AR73.2, Decision on Application of Defendant Zejnil Delalić for Leave to Appeal Against the Decision of the Trial Chamber of 19 January 1998 for the Admissibility of Evidence, 4 Mar 1998, pars 19-21, a Bench of the Appeals Chamber, when refusing leave to appeal from a decision of a Trial Chamber, quoted with apparent approval the following observation made by the Trial Chamber: "[I]t is an implicit requirement of the Rules that the Trial Chamber give due considerations [*sic*] to indicia of reliability when assessing the relevance and probative value of evidence at the stage of determining its admissibility."

[58] *Kordić & Čerkez* Decision, par 19. Rule 90(A) then provided that, subject to evidence given by dispositions or by video-conference link, "witnesses shall, in principle, be heard directly by the Chambers".

(3) The decision of the Appeals Chamber in *Prosecutor v Galić*,[59] given after the Trial Chamber's decision in the present case, is also relevant to the present appeal. In December 2001, the preference for "live, in court" testimony was qualified, and evidence is now permitted by Rule 89(F) to be given in written form "where the interests of justice allow".[60] The qualification of that preference was accompanied by the introduction of Rule 92*bis*, which permits the admission into evidence of witness statements in lieu of oral testimony where they go to proof of a matter other than the acts and conduct of the accused as charged in the indictment, provided that certain conditions as to form are complied with; however, after hearing the parties, the Trial Chamber may nevertheless require the witness to appear for cross-examination. Rule 92*bis* was introduced as a result of the *Kordić & Čerkez* Decision,[61] and it identifies a particular situation in which, once the provisions of Rule 92*bis* are satisfied, and where the material has probative value within the meaning of Rule 89(C), it is in principle in the interests of justice within the meaning of Rule 89(F) to admit the evidence in written form.[62] Rule 92*bis* as a whole is concerned with one very special type of hearsay evidence which would previously have been admissible under Rule 89(C), written statements given by prospective witnesses for the purposes of legal proceedings.[63]

Because very serious issues are raised as to the reliability of such statements (which are discussed in detail in the *Galić* Decision),[64] the Appeals Chamber held that a party cannot be permitted to tender such a statement under Rule 89(C) in order to avoid the stringency of Rule 92*bis*, and that the purpose of Rule 92*bis* was to restrict the admissibility of this very special type of hearsay to that which falls within its terms.[65] If the hearsay evidence sought to be admitted consists of written statements given by prospective witnesses for the purposes of legal proceedings, then it is admissible only if it complies with Rule 92*bis*, including the availability of the witnesses for cross-examination if the Trial Chamber so orders. By analogy, the Appeals Chamber said, Rule 92*bis* is the *lex specialis* which takes the admissibility of such written statements of prospective witnesses and transcripts of evidence out of the scope of the *lex generalis* of Rule 89(C),[66] although the general propositions which are implicit in Rule 89(C) –

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[59] IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92*bis*(C), 7 June 2002 ("*Galić* Decision").

[60] Rule 90(A) was deleted, and Rule 89(F) was added: "A Chamber may receive the evidence of a witness orally or, where the interests of justice allow, in written form."

[61] *Galić* Decision, par 28.

[62] *Ibid*, par 12.

[63] *Ibid*, par 28.

[64] *Ibid*, par 28.

[65] *Ibid*, par 31.

[66] It may perhaps be more accurate to say that the *lex generalis* is contained in Rule 89 as a whole, and particularly in Rules 89(C) and 89(F).

that evidence is admissible only if it is relevant and that it is relevant only if it has probative value – remain applicable to Rule 92*bis*.[67]

To avoid any misunderstanding, however, it is perhaps necessary to add that there is nothing in the *Galić* Decision which prevents a written statement given by prospective witnesses to OTP investigators or others for the purposes of legal proceedings being received in evidence notwithstanding its non-compliance with Rule 92*bis* – (i) where there has been no objection taken to it, or (ii) where it has otherwise become admissible – where, for example, the written statement is asserted to contain a prior statement inconsistent with the witness's evidence.[68]

19. Following the principles laid down in both the *Kordić & Čerkez* Decision and the *Galić* Decision to the OTP investigator's summary of the contents of the written statements made to OTP investigators by prospective witnesses, it appears that the prosecution was indeed seeking to avoid the stringency of the requirement under Rule 92*bis* that the witnesses must be produced for cross-examination if the Trial Chamber so orders.[69] Were the Appeals Chamber therefore to reconsider the admissibility of the OTP investigator's proposed evidence, it would rule that the contents of the written statements which the OTP investigator had summarised, and which had not been admitted into evidence under Rule 92*bis*, were inadmissible under Rule 89(C).[70]

20. In those circumstances, it would be unnecessary for the Appeals Chamber to consider whether the prosecution has demonstrated any error in the ruling which the Trial Chamber gave excluding the proposed evidence by the OTP investigator. However, as the issues have been fully debated, the Appeals Chamber considers it appropriate to state that it is not satisfied that the Trial Chamber erred in the ruling which it made. The reasons for that conclusion follow.

21. No question arises in this appeal as to the admissibility, in principle, of what has been called summarising evidence – the summarising of material which is relevant to the issues of the case. It has been admitted on many occasions in appropriate cases. Whether it is appropriate in the particular case for the evidence to be admitted will depend upon the circumstances of that case. If the material being summarised is uncontroversial, there will clearly be a considerable

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[67] *Galić* Decision, par 31.

[68] In order to avoid overloading the exhibits, it has become common practice for the prosecution to concede orally that the witness statement includes the passage which the Defence asserts is inconsistent. The transcript of that concession is a sufficient record of that statement, and the issue as to whether there is in fact an inconsistency is left to the Trial Chamber.

[69] The Trial Chamber had already at that stage ordered that the evidence of "crime base" witnesses in support of the Kosovo indictment related to a critical element of the prosecution case, and that a fair trial required those witnesses to attend for cross-examination if their Rule 92*bis* statements were tendered: see par 27, *infra*.

[70] *Prosecutor v Aleksovski*, IT-95-14/2-A, Judgment, 24 Mar 2000, par 107.

saving of time if that material is summarised either in a document or by one witness rather than given by many witnesses. In every case, the basic issue is whether the material being summarised would itself be admissible. A summary made by one person of material provided by another person is necessarily hearsay evidence in character. The admissibility of hearsay evidence pursuant to Rule 89(C) should not permit the introduction into evidence of material which would not be admissible by itself. As Rule 92*bis* requires the witness statements to be admitted into evidence and the witness to be available for cross-examination if the Trial Chamber so orders, the material summarised in the present case was not admissible as hearsay evidence.

22. Where the material summarised consists of statements made by others (other than written statements by prospective factual witnesses for the purposes of legal proceedings), so that the material summarised would be admissible pursuant to Rule 89(C), the summary still consists of hearsay evidence of those statements made by others, and the reliability of the statements made by those other persons (which are themselves hearsay) is relevant to the admissibility of the summary. As stated in the *Aleksovski* Decision (in a passage upon which the prosecution did not rely),[71] the Trial Chamber must consider whether the summary is "first-hand" hearsay (that is, whether the persons who made the statements summarised personally saw or heard the events recorded in their statements), and whether the absence of the opportunity to cross-examine those persons affects the reliability of their statements. Contrary to the submission of the prosecution, the opportunity to cross-examine the person who summarised those statements does not overcome the absence of the opportunity to cross-examine the persons who made them. In different cases, of course, the statements may contain their own indicia of reliability which does overcome the absence of that opportunity.

23. The Trial Chamber must also be satisfied as to the reliability of the method by which those statements have been summarised. This is an issue which *can* be tested by the cross-examination of the person who made the summary. The fact that the summary has been prepared for the purposes of the particular litigation may be relevant to whether it should be admitted, but, as the prosecution submits, it would be quite wrong to suggest that such a summary is *ipso facto* unreliable. The Trial Chamber, however, did not make any such suggestion. What the Trial Chamber in effect said was that, where the summary of material is prepared by an employee of

[71] *Aleksovski* Decision, par 15.

the party who seeks to rely upon the summary (particularly where the accused is unrepresented by counsel):

(i) a summary of that material should not be regarded as reliable unless the material itself is in evidence so that the Trial Chamber may make its own assessment of the material;

(ii) were the Trial Chamber to rely upon the summary without having the opportunity to make its own assessment of its reliability, the public perception of a verdict based upon that summary would be that the verdict was unsafe; and

(iii) if the statements were admitted, the summary would become unnecessary.

24. The Appeals Chamber is not satisfied that, in the particular circumstances of this case, the Trial Chamber erred in taking that approach in relation to the summary which the OTP investigator had made.[72] Contrary again to the submission of the prosecution,[73] in the circumstances of this case it is not an answer to the concern expressed by the Trial Chamber that the witness statements being summarised were available to the accused and to the Trial Chamber itself to check the reliability of the summary. The Trial Chamber was entitled to take the view that it could not safely rely upon the Defence to follow up these issues, where the accused is unrepresented by counsel and the *Amici Curiae* have no instructions from the accused, despite the fact that all of them have participated in the cross-examination of witnesses. It would of course be quite wrong for the Trial Chamber, in determining the issues in the trial, to refer to material which may be available to it but which is not in evidence, and it was entitled to take the view that, in the circumstances of this case, it was inappropriate for the Trial Chamber itself to cross-examine upon such material when that material was not in evidence.[74] It is in relation to these deficiencies that the Trial Chamber's rejection of the summary as having little or no probative value was in part intended. The first ground of appeal is rejected.

25. The arguments put forward by the prosecution in support of its second ground of appeal – that the Trial Chamber erred in the exercise of its discretion by rejecting the summary prepared by the OTP investigator and, at the same time, restricting the time available for the presentation of its case-in-chief – constitute a further, albeit indirect, attempt to argue that the Trial Chamber had erred in the exercise of its decision to impose a time limit within which the prosecution had

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[72] Because the persons who made the written statements could not be cross-examined, such an approach might perhaps have also been justified in the circumstances of the present case under Rule 89(D) ("A Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial."), but it is unnecessary for that issue to be determined in the present appeal.

[73] Transcript, pp 5927, 5934.

[74] This was made clear to the prosecution during the submissions it made to the Trial Chamber: Transcript, p 5933.

to complete its case-in-chief. It is clear, from the repeated references which the prosecution has made in its submissions to the need for "the fullest possible range" and "the broadest possible scope" of evidence available to be admitted, that it is again disputing the right of the Trial Chamber to require it to reduce the scope of its case as it did by the decision under appeal.

26. The time limitation and the scope of the prosecution case were issues debated earlier in the trial. The time limit of fourteen months was imposed on 7 April last, and was the subject of an unsuccessful application for leave to appeal.[75] The view which the Trial Chamber had expressed was that – subject to its power to reconsider its decision –

(a) it was necessary for the anticipated length of the prosecution case to be reduced so as to make the trial manageable;

(b) this was not the case in which it was appropriate to establish every serious violation for which evidence was available;

(c) the prosecution would have fourteen months in which to present its case; and

(d) as a consequence, it had to reduce the number of incidents to be proved to those which it could prove within that period.[76]

When refusing leave to appeal from that decision, the Bench of the Appeals Chamber held that, in the circumstances of this case, which were exceptional, the Trial Chamber was entitled to take the course it did, and that no error in the exercise of its discretion had been established.[77] It was emphasised that a Trial Chamber could always reconsider a decision it had previously made, and not only because of unforeseen circumstances,[78] but that whether or not a Trial Chamber does reconsider a decision is itself a discretionary matter.[79]

27. When the Trial Chamber decided to impose a time limit on the prosecution case, it had already determined that – because the accused was vigorously contesting the prosecution case in relation to the Kosovo indictment that the deportations and killings there were a result of attacks by the Serb forces and not (as he asserted) the result of terrorism attacks by the Kosovo

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[75] Decision on the Prosecution Application for Leave to File an Interlocutory Appeal, 25 Apr 2002, p 3. The reasons for this decision were delivered later: Reasons for Refusal of Leave to Appeal From Decision to Impose Time Limit, 16 May 2002 ("Reasons for Refusal of Leave").

[76] Reasons for Refusal of Leave, par 16.

[77] *Ibid*, par 16.

[78] *Ibid*, par 17, citing *Prosecutor v Galić*, IT-98-29-AR73, 14 Dec 2001, par 13, and, *inter alia*, *Semanza v Prosecutor*, ICTR-97-20-A, Decision on the Appeal Against the Oral Decision of 7 February 2002 Dismissing the Motion for Review of the Decision of 29 January 2002 Relating to the Appearance of the French Expert Witness Dominique Lecomte and the Acceptance of his Report, 16 Apr 2002, p 2.

[79] Reasons for Refusal of leave, par 17, citing *Bagosora et al v Prosecutor*, ICTR-98-41-A, Decision – Interlocutory Appeal from Refusal to Reconsider Decisions Relating to Protective Measure and Application for a Declaration of "Lack of Jurisdiction", 2 May 2002, par 10.

Liberation Army and bombing by the NATO forces – the evidence of the "crime base" witnesses in the present case related to a critical element of the prosecution case and therefore that a fair trial required those witnesses to attend for cross-examination if their Rule 92*bis* statements were tendered.[80] At that time, the Trial Chamber had well in mind the effect which the need for Rule 92*bis* witnesses to be cross-examined would have on the time which the prosecution case would take.[81] It could not be suggested that the Trial Chamber overlooked the connection between the two issues to which it had earlier drawn attention. Indeed, the Trial Chamber stated expressly at the time it rejected the OTP investigator's evidence that it was conscious of the constraints placed upon the prosecution by the time limitation.[82]

28. In these circumstances, the prosecution has not demonstrated that the Trial Chamber misdirected itself either as to the principle to be applied, or as to the law which is relevant to the exercise of the discretion, or that it has given weight to extraneous or irrelevant considerations, or that it has failed to give weight or sufficient weight to relevant considerations, or that it has made an error as to the facts upon which it has exercised its discretion.[83] No error in the exercise of that discretion has been established. The second ground of appeal is also rejected.

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[80] Decision on Prosecution's Request to Have Written Statements Admitted Under Rule 92*bis*, 21 Mar 2002 ("Rule 92*bis* Decision"), pars 23-27.

[81] Rule 92*bis* Decision, pars 26, 29.

[82] Transcript, pp 5943-5944. The decision that "crime base" witnesses were to attend for cross-examination was given concerning Rule 92*bis* statements of witnesses in support of the Kosovo indictment. It has not been suggested that the decision applies also to Rule 92*bis* statements of witnesses in support of the Bosnia and Croatia indictments.

[83] *Prosecutor v Milošević*, Reasons for Decision on Prosecution Interlocutory Appeal From Refusal to Order Joinder, 18 Apr 2002, par 5.

Disposition

29. The Appeal is dismissed, Judge Shahabuddeen dissenting in part.

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

Dated this 30th day of September 2002,
At The Hague,
The Netherlands.

Judge Mohamed Shahabuddeen
Presiding

Judge David Hunt

Judge Mehmet Güney

Judge Fausto Pocar

Judge Theodor Meron

Judge Shahabuddeen appends a partial dissenting opinion to this Decision

[Seal of the Tribunal]

PARTIAL DISSENTING OPINION OF JUDGE SHAHABUDDEEN

A. Preliminary

1. As observed in paragraph 20 of the Appeals Chamber's decision, "[n]o question arises in this appeal as to the admissibility, in principle, of what has been called summarising evidence – the summarising of material which is relevant to the issues of the case. It has been admitted on many occasions in appropriate cases." The statement goes on to say, "Whether it is appropriate in the particular case for the evidence to be admitted will depend on the circumstances of the case". So the principle of admitting summarising evidence is accepted, and there have been many cases in which such evidence has been admitted; the narrow question is whether it is appropriate to admit it in this particular case.

2. In answering that question, it is helpful to notice the circumstances of the Tribunal. They involve the management of cases which sprawl over time and space and stretch over the testimony of hundreds of witnesses. That difficulty has long troubled international tribunals. It was a problem at Nuremberg. It is believed that, though in practice free of the difficulty, at one stage within the recent past the International Court of Justice was faced with the perplexing prospect. And of course the problem is well known to this Tribunal: if allowed to run in the ordinary way, some trials at first instance could extend to five years and beyond.

3. In the circumstances, the Tribunal has had to take power to determine the time available to a party for presenting evidence,[1] it being understood that the power has to be exercised subject to the superior requirement that the trial has to be fair to both sides,[2] any necessary variations of a previous exercise of the power being made from time to time.[3] To their credit, parties generally recognise the need for these restrictions; in my view, the present question does not concern the legality of the power to impose limits or whether these should have been extended. The limits in force at any one time can, however, give rise to problems. Some of these are involved in the question which now arises.

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[1] See Rule 73*bis*(E) and Rule 73*ter*(E) of the Rules of Procedure and Evidence of the Tribunal. The former provides: "After having heard the Prosecutor, the Trial Chamber shall determine the time available to the Prosecutor for presenting evidence". The latter relates in corresponding terms to the defence.

[2] This is a large area, involving a discretionary consideration of main and collateral issues in the case, cumulative and undisputed facts, opinion matters, the size of exclusions in relation to the importance of the particular issue, and other factors which are generally designed to exclude arbitrariness. See a number of United States cases usefully collected in B.H.Glenn, *Limiting Number of Noncharacter Witnesses in Criminal Case,* 5 A.L.R. 3d 238.

4. The question, in concrete terms, is whether an oral witness in the employ of the prosecution may summarise the written statements of uncalled witnesses, the summarising evidence including the oral witness's observations and conclusions on those statements. I agree in part with the answer now given by the Appeals Chamber. However, I have the misfortune to be of another opinion on another part, and respectfully offer the following explanation of my difficulty.

B. The background

5. The accused is indicted in respect of Croatia, Bosnia and Kosovo, and in relation to events occurring over much time. Subject to the exercise of its discretion to vary, the Trial Chamber has had to impose a limit of 14 months on the prosecution for the presentation of its evidence in relation to all three territories. With regard to Kosovo, the indictment concerns 24 sites, including one at Račak. To respect the time limit imposed by the Trial Chamber, the prosecution has had in turn to limit the number of witnesses it would call per site. Generally, it would restrict itself to five witnesses per site. Of these, it would call one or two as live witnesses; in respect of the remaining four or three, it would tender witness statements under the procedure prescribed by Rule 92*bis*.[4] It could call more witnesses if it wished, but must bear in mind the consequences of doing so on its obligation to keep within the overall period fixed by the Trial Chamber.

6. The Trial Chamber accepts that Račak "was a significant incident". The prosecution allegation is that over 40 unarmed people were killed there, apart from others who were wounded. The killings allegedly occurred in six locations comprising 13 scenes. The prosecution says that a limited number of witnesses cannot give a whole view of the events. It has many witnesses. It will not call all of them; it will, however, be easier for it to work within the time limit fixed by the Trial Chamber if one of its witnesses is allowed to summarise the evidence contained in the written statements of 60[5] of the other witnesses and to give his observations and conclusions thereon in a report to be submitted by him. Mr Kelly, the witness in question, was an investigator attached to the office of the Prosecutor. In respect of some of the statements, he had personally interviewed the witnesses concerned; in respect of other statements, the interviews were conducted by his colleagues; but he had read them all. All of the witness statements were footnoted in his report,

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[3] Rule 73*bis*(F) of the Rules reads: "During a trial, the Trial Chamber may grant the Prosecutor's request for additional time to present evidence if this is in the interests of justice". Rule 73*ter*(F) relates in corresponding terms to the defence.
[4] Transcript, Trial Chamber, 20 February 2002, pp. 661 and 665, Mr Nice for the prosecution.
[5] Transcript, Trial Chamber, 28 May 2002, pp. 5717, 5735 and 5934, Mr Nice.

though not appended thereto; they were not in evidence but were available to the accused and to the Trial Chamber.

C. The Trial Chamber's decision

7. These were the circumstances in which the prosecution offered the evidence of Mr Kelly. The Trial Chamber declined the offer. It did not take the position that the prosecution should have come under Rule 92*bis* and not under Rule 89(C) as the prosecution did. Its decision rested on the view that "for a witness to give his or her conclusions upon the evidence is to trespass on the function of the Trial Chamber" and on the fact that Mr Kelly was employed by the office of the Prosecutor. It concluded that Mr Kelly's evidence was unreliable, of "little or no probative value", and therefore inadmissible. While excluding Mr Kelly's evidence, the Trial Chamber did say that "[s]hould significant issues be raised during the Defence case, it will always be open to the Prosecution to call further evidence in rebuttal, not that we are encouraging this course". The prosecution was not encouraged, and for the reason, I would think, that evidence in rebuttal is more restricted than evidence in chief: with variations which are not relevant, the decision of the court rests on the *ex improviso* principle. The fact that an issue is significant may well suggest that it was anticipated by the prosecution and could not therefore be the subject of rebuttal evidence. The rebuttal course would also erode the time available for the presentation of the evidence of the prosecution.

D. The basic position taken in this opinion

8. I support the Appeals Chamber's decision that the conclusions offered by Mr Kelly on his summary of the written statements of the absent witnesses were inadmissible. As recalled in paragraph 10 of the decision of the Appeals Chamber, the prosecution concedes that, if the conclusions trespass on the Trial Chamber's function, the Trial Chamber could admit only the summary and exclude the conclusions. But the Appeals Chamber holds that the summary is also inadmissible. It is this holding which gives me difficulty.

E. Applicable provisions

9. Rule 89 (C) was adopted in February 1994; it reads: "A Chamber may admit any relevant evidence which it deems to have probative value". It is common ground that, under this Rule, hearsay evidence is admissible. Rule 89(F) was adopted in December 2001; it reads: "A Chamber

may receive the evidence of a witness orally or, where the interests of justice allow, in written form". Rule 92*bis*, also adopted in December 2001, 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.

(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

(iii) 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.

F. The decision of the Appeals Chamber

10. The decision of the Appeals Chamber takes the view that Mr Kelly's summarising evidence cannot be admitted because -

(a) the summarising evidence did not provide an opportunity to cross-examine the maker of the summarised statements and was prepared by a person employed by the prosecution. For these and other reasons, it was unreliable; it was therefore not probative and not admissible. Thus, it was not admissible as hearsay evidence even under Rule 89(C), on which the prosecution relied. This was enough to put an end to the case;

(b) even apart from (a), the written witness statements summarised by Mr Kelly had been prepared for purposes of legal proceedings; written witness statements of that special type were now admissible only under Rule 92*bis*. The prosecution did not move under this Rule;

(c) the prosecution was indirectly attempting to argue that the Trial Chamber had erred in the exercise of its discretion to impose a time limit; but this matter was already settled.

G. The argument that Mr Kelly's summarising evidence is not admissible hearsay evidence

11. As to (a), there is, in my view, no substance in arguments other than those relating to cross-examination and employment by the prosecution. One small point which may be picked up concerns an apparent absence of connection between Mr Kelly and the written statements taken by his colleagues. The gap could have been filled by oral evidence from him. He was in the box; had he been allowed to reach the matter, he could have shown that his colleagues had passed on the written statements to him with explanations. Subject to weight, hearsay upon hearsay can be admitted and has been admitted. Thus, a connection could have been made. This point apart, consideration will be limited to the two matters mentioned.

12. First, then, as to cross-examination. In a preliminary way, it may be recalled that the Appeals Chamber's decision accepts that summarising evidence "has been admitted on many occasions in appropriate cases". It seems to me that the objection that there is no maker of an original statement to be cross-examined in the case of summarising evidence should, if sound, have applied to bar admissibility in those cases.

13. The argument is not advanced by a contention that, if Mr Kelly's evidence was received, there would be a denial of the right of the accused to examine witnesses, as conferred by Article 21(4)(e) of the Statute of the Tribunal. Where hearsay evidence is allowed to be given by a witness, it is the settled jurisprudence of the Tribunal that, if the other party wishes to challenge anything in the evidence he must do so by cross-examining the witness giving the hearsay evidence, and, or, by producing witnesses in his own turn. The rest is addressed by the duty of the Trial Chamber to weigh the evidence, especially in the light of the fact that the original sources were not tested in cross-examination. The Trial Chamber may of course require the attendance of the original witness; but, to the extent that it does so, the evidence is not really hearsay evidence. The approach to hearsay evidence proper is as mentioned above. That approach is consistent with the practice of judges in many legal systems who evaluate the evidence, including hearsay material, on the basis of their "intimate conviction". For the reasons given later, that practice cannot be disregarded.

14. Paragraph 1 of the Appeals Chamber's decision, and much in the remaining text, correctly note that the prosecution did not tender the witness statements summarised in Mr Kelly's report.

The defence is entitled to verify the accuracy of a summary upon reference to the full witness statements on which the summary is based. So, the point in question draws on a principle of weight; but, with respect, it does so without substance. The prosecution pointed out that the witness statements were footnoted in Mr Kelly's summary. They were not formally in evidence, but were available both to the Trial Chamber and to the accused. Indeed, the prosecution twice asked the Trial Chamber to read them.[6] Thus, on the basis of Mr Kelly's own report, both the Trial Chamber and the defence would have been directed to available means of verifying the accuracy of the summary.

15. That is what is important – the opportunity to verify the accuracy of the summary. But to do that, it is not necessary to cross-examine the maker of the original written statement; and so, for this purpose, it was not necessary for the statement to be in evidence. To verify the accuracy of the summary it was sufficient to cross-examine Mr Kelly himself: it was he who made the summary. To cross-examine him, it was necessary for the original statements to be available to the cross-examiner, as distinct from being in evidence. A party may have a right to material being made available to it by the other side; whether the material goes into evidence is another matter. Thus, even if the witness statements were not in evidence, the fact that they were at the disposal of the defence – and indeed of the Trial Chamber - was not without legal value. The right to have the material available was respected.

16. In my respectful view, it is not relevant to the question of law concerning admissibility, which is being examined, to take account of the fact that the accused was legally unrepresented. If prosecution evidence is admissible in the case of a legally represented accused, I have difficulty in appreciating how it can be inadmissible in the case of a legally unrepresented accused. Respect is due to the right of an accused to choose to be legally unrepresented. I do not appreciate how the exercise of that right affects admissibility. Weight is another matter. Otherwise, there would be an incongruity in the case of two co-accused, one having elected to be legally unrepresented, the other being legally represented. Material which would be admissible in the case of the latter would be inadmissible in the case of the former, and this solely by reason of the circumstance of legal representation.

17. Second, as to the argument of unreliability because of employment by the prosecution. Again, there is a preliminary observation: if sound, the argument should also have barred

[6] Transcript, Trial Chamber, 30 May 2002, pp. 5927 and 5933.

admissibility in other cases in which summarising evidence was admitted if that evidence was also produced through prosecution personnel.

18. As to the soundness of the argument, the jurisprudence in some domestic jurisdictions rightly regards the fact that a witness is a member of the prosecution team, or is associated with it, as going to weight and not, as held by the Trial Chamber, as going to admissibility. The Prosecutor is a party, but it is recognised that she represents the public interest of the international community and has to act with objectivity and fairness appropriate to that circumstance.[7] She is in a real sense a minister of justice. Her mission is not to secure a conviction at all costs; the Rules relating to disclosure of exculpatory evidence show that. This in substance applies within common law systems.[8] It is equally visible in continental systems. It is an aspect which a criminal tribunal acting on the international plane has to bear in mind, more especially in view of the solemn declaration taken by the witness.

19. Distinctions in matching precedents are often possible and must of course be regarded; yet it is thought that the broad sweep of previous practice[9] in the Tribunal corresponds with the view that summarising evidence given by prosecution personnel is admissible. So too in the case of courts in The Netherlands and in Spain; to attempt, as the Trial Chamber did, to distinguish their experience on the basis that it belongs to non-adversarial jurisdictions is to exaggerate the common law character of the Tribunal and to relegate the respectable habits of other legal systems. For, when it is said that the Statute established the Tribunal on the adversarial model, it has to be remembered that it also established the Tribunal as an international tribunal.

20. In this respect, the Statute established the Tribunal on the basis that its judiciary was to be composed of judges coming from all legal systems and that they should all be able to function as from the first day. This they could not do if they were also required immediately to shed their basic traditions and instantly to don a new one. Also, it has to be borne in mind that the Tribunal was set up to deal with problems arising in non-common law areas. It follows that the Statute itself falls to be construed on the footing that, although it was framed on the basis of the adversarial model, it did not intend that model to be exclusive of other influences. There is nothing which compels that exclusion, as much in the jurisprudence of the Tribunal shows.

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[7] The Prosecutor recognised this in her Regulation No. 2 of 1999 in which she said that prosecutors represent "the international community" and should "promote principles of fairness and professionalism".
[8] *R v. Banks* [1916] 2 KB 621 at 623, per Avory J.
[9] Collected in footnote 40 of "Interlocutory Appeal of the Prosecution against Decision on Admission of Evidence of Summarizing Witness" of 27 June 2002.

H. The argument that Mr Kelly's summarising evidence was admissible only under Rule 92bis

21. As to (b), I gather from paragraph 17(3) of the Appeals Chamber's decision that it is considered that the prosecution was obliged to proceed under Rule 92*bis*. The argument is that the written witness statements were prepared for the purpose of legal proceedings, that that is a special purpose, and that (with exceptions which do not seem applicable) written witness statements prepared for that special purpose can only be given under Rule 92*bis* where, as was apparently the case here, such evidence "goes to proof of a matter other than the acts and conduct of the accused as charged in the indictment" With respect, I am not persuaded that there is such a restriction.

22. Written witness statements prepared for the purpose of legal proceedings can of course be given in evidence under Rule 92*bis*, but it is difficult to locate a basis for the further proposition that such statements can only be given in evidence under that Rule. The Rule does not say, or reasonably imply, that written witness statements prepared for the purpose of legal proceedings can be given in evidence only under that Rule; if that was the intent of the Rule, it might have been made clear and not left to be inferred, with some difficulty as it seems to me, by an international readership drawn from different legal systems.

23. Rule 92*bis* imposes no compulsion on the moving party to use the procedure which it establishes. There would be compulsion only if it was the case that the Rule *required*, as distinct from *permitted*, a party to move under the procedure which it established. As is shown by the text reproduced above, the Rule is directed to the *competence* of a Trial Chamber to receive evidence in certain cases; it is not directed to the *obligation* of a party to use the machinery which it lays down.

24. The position being that Rule 92*bis* does not impose an obligation on a party who wishes to adduce evidence of the contents of a written witness statement (in the cases visualised by that Rule) to do so only under the procedure which it establishes, the correct interpretation of the Rule is that it does not prohibit a party from adopting an alternative procedure under another Rule. No doubt, a party who desires the advantages afforded by Rule 92*bis* is obliged to observe the particular procedure prescribed by that Rule. But that obligation does not apply where he proposes to seek an alternative solution under another provision. This being the case, no benefit is derivable from an analogy with the *lex specialis* principle.

25. In effect, the Rules provide for a choice, as the Rules could; they provide for alternative solutions for a basic problem. Even taking into account the exceptions provided by paragraph (C) of

Rule 92*bis*, the moving party may for good reason not be in a position to satisfy the conditions prescribed by paragraph (B) of the Rule for direct adduction: without resiling from the contents of his written witness statement, the original witness may simply be reluctant to provide a declaration as required by paragraph (B), or there may be some other difficulty in completing the procedures which is not covered by paragraph (C). Because of reasons of this kind, the moving party may not be in a position to invoke the Rule. It is difficult to see why he should not be permitted give hearsay evidence through another witness of the contents of the witness statement under Rule 89(C). The only restraint proceeds from the requirement for the trial to be fair as stated in paragraphs (B) and (D) of Rule 89. But that requirement did not preclude recourse to Rule 89(C) before the adoption of Rule 92*bis*, the question being one of weight; I am unable to see why it should preclude recourse now.

26. As to discretion, it may be recalled that the Trial Chamber itself did not dispute the prosecution's submissions, referred to in paragraph 10 of the Appeals Chamber's decision, that Mr Kelly's summarising evidence did not "relate to an ultimate issue in the case, because it 'did not discuss the guilt or individual criminal responsibility of the accused …'".

27. There is no question that prior to the adoption of Rule 92*bis*, Rule 89(C) did allow for hearsay evidence to be given by an oral witness (such as Mr Kelly) of the contents of a written statement of an absent witness, whether or not the statement had been prepared for the purpose of legal proceedings. Rule 92*bis* does not address such a case, namely, one in which an oral witness is testifying as to the contents of the written statement of an absent witness; it provides for direct adduction of the written witness statement. Any impact which it has on Rule 89(C) – a very broad provision - is directed to the latter only in so far as the latter concerns a question of direct adduction of a written witness statement, a matter now treated of also in Rule 89(F).

28. It is worth considering also that, if the Rule 92*bis* procedure excluded recourse to Rule 89(C), it would by implication be repealing Rule 89(C) *pro tanto*. Was there such a repeal?

29. It may be remembered that "repeal by implication is not favoured… If, therefore, earlier and later statutes can reasonably be construed in such a way that both can be given effect to, this must be done".[10] Prior to the adoption of Rule 92*bis*, the provisions of Rule 89(C) did authorise the giving of hearsay evidence by a witness of the contents of written statements of prospective witnesses prepared for the purpose of legal proceedings. To hold that it is no longer possible to take

[10] *Maxwell on Interpretation of Statutes*, 12th ed. (London, 1969), p. 191.

that course notwithstanding that Rule 89(C) continues in the same shape as before necessarily means that the operation of the Rule has been impliedly repealed to that extent. No doubt, the sixteen permanent judges of the Tribunal can impliedly repeal their own Rule as to an aspect of its earlier operation even though they continue it in the same textual form as before; and a smaller body of the same judges, acting judicially, can say that this is what the full body, acting legislatively, intended. But I am not persuaded that that is what the full body had in mind.

30. It may be added that there does not appear to be a basis for a view that the prosecution is opposed to the prospect of cross-examination presented by Rule 92*bis*(E), as may be suggested in paragraph 18 of the Appeal Chamber's decision. As has been seen, the Trial Chamber imposed a time limit of 14 months on the prosecution for the presentation of its evidence. To respect that limit, the prosecution limited itself in general to presenting five witnesses in respect of each site. It puts one or two witnesses in the box and then submits written witness statements in respect of the remaining four or three under Rule 92*bis*.[11] In respect of all such witnesses, both "live" and "non-live", it regularly faces the possibility of cross-examination. Further, if there were no time limit, it has to be presumed that the prosecution would be prepared in the ordinary way to have all its other witnesses cross-examined. So it would not be correct to ascribe to the prosecution any reluctance to face cross-examination under Rule 92*bis*(E).

31. But the prospect of cross-examination under Rule 92*bis*(E) could have operated in another way: it could have lengthened out the process, as indicated by the position of the prosecution which is recalled in paragraph 3 of the Appeals Chamber's decision. Dealing with 60 witness statements under Rule 92*bis*, complete with cross-examination, could occupy some time – especially if any necessary re-examination were taken into account. The case concerned the particular site at Račak. Apart from that, there were 23 sites to be dealt with in Kosovo. A fair interpretation is that the prosecution considered that the Rule 92*bis* procedure could not be employed in relation to the 60 witness statements consistently with the overall time limit of 14 months fixed by the Trial Chamber. The motivation was not to avoid cross-examination but to find a way of presenting the necessary material within the available time.

32. Finally, the Trial Chamber did not say that Rule 92*bis* stood in the way. It would seem that the Trial Chamber did not consider that it was open to the prosecution to proceed under that Rule and that, not having done so, the prosecution was barred from proceeding under Rule 89(C). I

[11] Transcript, Trial Chamber, 20 February 2002, pp. 661 and 665, Mr Nice for the prosecution.

respectfully disagree with the Trial Chamber on some things, but I share its assumption that Rule 92*bis* did not preclude recourse to Rule 89(C). Were it otherwise, one has only to think of the innumerable objections which may be raised whenever hearsay evidence is being given in the course of the testimony of an oral witness who is dealing with several matters: on each occasion, if it happens that recourse could have been made to Rule 92*bis*, it could be argued that the particular hearsay evidence is not receivable because it could have been given under that Rule.

I. The argument that the prosecution was indirectly contending that the Trial Chamber had erred in the exercise of its discretion to impose a time limit

33. As to (c), in the past the prosecution did complain about the exercise of the power of the Trial Chamber to impose a time limit; the complaint was settled, and it would be wrong for the prosecution now to seek to reopen it indirectly. But I do not think that that is being done. The Trial Chamber has a competence to extend the time limit; but the time limit, as it stands at any given moment, is still a time limit. As such, it exerts constraint. What the prosecution is saying is that it would help to stay within the existing time limit if it were allowed to adduce in evidence Mr Kelly's summary of the written statements of the 60 other witnesses; if the procedure of Rule 92*bis* were to be adopted, the time limit for the time being in force would be exceeded. It appears to me that that is not the same thing as an indirect attempt to argue that the Trial Chamber erred in exercising its discretion to fix the existing time limit.

J. Conclusion

34. As has been seen, paragraph 20 of the Appeals Chamber's decision accepts that summarising evidence is in principle admissible in the Tribunal and "has been admitted on many occasions in appropriate cases". I am not able to appreciate why this is not an appropriate case. The case spans vast swaths of territory, much time and endless lists of witnesses; it obviously calls for special evidential machinery. Some domestic systems and the Nuremberg trials suggest models which may be drawn upon. Variations are possible; but the common idea is to avoid unsafe conclusions based on partial evidence. That idea is realised by a method which enables the court to appreciate the fullness of all relevant evidence within a reasonable time and which is yet consistent with essential notions of justice. Both parties are entitled to an expeditious hearing; but this is not a

reason for sacrificing evidential completeness. The desirable solution is one that permits speed to be reconciled with comprehensiveness.

35. In this respect, the principle of the procedures employed at Nuremberg would enable an international criminal court to receive the testimony of witnesses although it was conveyed in the form of summarising evidence to the court through prosecution personnel, provided that the accused had the possibility of access to the original statements. In these and other ways those procedures would enable the court to form an overall view of the situation in question without an oppressive extension of time.

36. There is much in the argument that the telescoped approach taken at Nuremberg has been overtaken by the increasing emphasis which has since been given to human rights. But the problem at Nuremberg remains, and so does the need to find a solution. A solution which violates fundamental norms is of course not satisfactory. But there need be no conflict if essentials are regarded. The essentials show that the duty to be fair is not a duty to be infallible.[12] The fairness of a trial is the result of the fairness of the system of justice employed. The latter depends on the striking of a balance between two competing public interests. First, there is the justly publicised public interest in respecting the rights of the accused. Second, there is the less proclaimed but equal public interest in ensuring that crimes are properly investigated and duly prosecuted.

37. I do not see how both of these important public interests can be satisfied if a position is taken which effectively means that the Trial Chamber's appreciation will rest on partial material; even taking into account possible variations, it is not credible to argue that that will not be the practical result in this case. If that is the result, the Trial Chamber will have less than a full grasp of what took place and will not be in a position to make a judgement that can stand objective scrutiny. The exclusion of Mr. Kelly's summarising evidence will have that artificial effect. More importantly, it will put in doubt the viability of the Tribunal.

38. The last remark brings me to this point. In my understanding - if not also the general understanding - a decision of the Appeals Chamber is in strict law not a binding authority on that Chamber; but of course it is highly persuasive on that Chamber and should only be departed from

[12] See remarks of Judge Hackworth, dissenting, in *Effect of Awards of Compensation made by the United Nations Administrative Tribunal, Advisory Opinion, I.C.J.Reports 1954*, p. 47, at p. 86; of Lord Diplock in *Maharaj v. Attorney-General of Trinidad and Tobago (No. 2)*, [1979] A.C. 385, P.C., at 399, stating that the "fundamental human right is not to a legal system that is infallible but to one that is fair"; and of Lord Templeman in *Bell v. Director of Public Prosecutions (Jamaica)*, [1985] 1 A.C. 937, P.C.

sparingly.[13] I consider that the viability of the Tribunal and of other international criminal courts established or to be established provides cogent reason for exercising the power to depart from the particular case followed by the Appeals Chamber if it means that Mr Kelly's summarising evidence was inadmissible.

39. Finally, I support the decision of the Appeals Chamber to dismiss the appeal, but only in respect of Mr Kelly's conclusions. As regards his summary, I consider that this was admissible under Rule 89(C) and would allow the appeal to this extent.

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

Mohamed Shahabuddeen

Dated this 30th day of September 2002
At The Hague
The Netherlands

[13] "The real question is whether ... there is cause not to follow the reasoning and conclusions of earlier cases", as it was put by the International Court of Justice in *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v.Nigeria), Preliminary Objections, I.C.J. Reports 1998*, p. 275, at p. 292, para. 28. In the view of the Appeals Chamber of the ICTY, "in the interests of certainty and predictability, the Appeals Chamber should follow its previous decisions, but should be free to depart from them for cogent reasons in the interests of justice". See *Prosecutor v. Aleksovski*, IT-95-14/1-A of 24 March 2000, para. 107.