



International Tribunal for the
Prosecution of Persons
Responsible for Serious Violations
of International Humanitarian Law
Committed in the Territory of the
former Yugoslavia since 1991

Case No.: IT-05-87-T

Date: 1 September 2006

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IN THE TRIAL CHAMBER

Before: Judge Iain Bonomy, Presiding
Judge Ali Nawaz Chowhan
Judge Tsvetana Kamenova
Judge Janet Nosworthy, Reserve

Registrar: Mr. Hans Holthuis

Decision of: 1 September 2006

PROSECUTOR

v.

**MILAN MILUTINOVIĆ
NIKOLA ŠAINOVIĆ
DRAGOLJUB OJDANIĆ
NEBOJŠA PAVKOVIĆ
VLADIMIR LAZAREVIĆ
SRETEN LUKIĆ**

**DECISION ON EVIDENCE TENDERED THROUGH
SANDRA MITCHELL AND FREDERICK ABRAHAMS**

Office of the Prosecutor

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Mr. Tomislav Višnjić and Mr. Norman Sepenuk for Mr. Dragoljub Ojdanić
Mr. John Ackerman and Mr. Aleksander Aleksić for Mr. Nebojša Pavković
Mr. Mihajlo Bakrač and Mr. Đuro Čepić for Mr. Vladimir Lazarević
Mr. Branko Lukić and Mr. Dragan Ivetić for Mr. Sreten Lukić

THIS TRIAL CHAMBER of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 (“Tribunal”) is seised of several submissions from the parties, which request certain relief with regard to the written statements and other documents tendered through witnesses Sandra Mitchell and Frederick Abrahams. Accused Milutinović, Šainović, Ojdanić, Pavković, Lazarević, and Lukić (collectively, “Accused”) object to the admission of these documents on several grounds, while the Office of the Prosecutor (“Prosecution”) counters that all should be admitted in whole or in part. The Trial Chamber hereby renders its decision.

I. PROCEDURAL HISTORY

1. On 10 July 2006, the Prosecution called Sandra Mitchell, its first witness in this case.¹ Ms. Mitchell was the Director of the Human Rights Division of the Mission of the Organization for Security and Co-operation in Europe (OSCE) to Kosovo between October 1998 and April 2000 (“OSCE-KVM”), and testified about, *inter alia*, the preparation of Volume I of the OSCE report *Kosovo/Kosova: As Seen, As Told*, and the conclusions drawn therein with regard to the crimes charged in the Indictment.² The admissibility of the report was discussed before, during, and after Ms. Mitchell’s testimony. Counsel for five of the six Accused raised oral objections to the admission of this report and any statements or testimony of the witness, to the extent that the latter relied on the report;³ the Prosecution argued in response that the report was admissible under the Rules of Procedure and Evidence of the Tribunal (“Rules”) and would be helpful to the Trial Chamber’s consideration of the issues in the case.⁴

2. On 13 July 2006, after Ms. Mitchell’s testimony had concluded, the Trial Chamber ordered the Prosecution to make further submissions in writing in response to certain questions relating to the report *As Seen, As Told*. In particular, the Prosecution was ordered:

- (1) to indicate which parts of the report it accepts should not be part of the evidence in the case;

¹ *Prosecutor v. Milutinović, Šainović, Ojdanić, Pavković, Lazarević, and Lukić*, Case No. IT-05-87-T (“*Milutinović et al.*”), Transcript, T. 492 (10 July 2006).

² See *Milutinović et al.*, Transcript, T. 496, 501–502 (10 July 2006).

³ See *Milutinović et al.*, Sreten Lukić’s Motion *in Limine* to Bar the Prosecution From the Introduction Into Evidence of the OSCE Report “Kosovo/Kosova, As Seen, As Told,” and to Bar the Prosecution from Adducing Oral Testimony Based on the Same, 10 July 2006 (“Lukić Initial Submission”); *Milutinović et al.*, Transcript, T. 493, 501–506 (10 July 2006), T. 638–640 (11 July 2006) (counsel for Accused Lukić); *ibid.* T. 506–507 (10 July 2006), T. 647–655 (12 July 2006) (counsel for Accused Ojdanić); *ibid.* T. 507 (10 July 2006), T. 655–659 (12 July 2006) (counsel for Accused Milutinović); *ibid.* T. 507–508 (10 July 2006) T. 659–660 (12 July 2006) (counsel for Accused Šainović); *ibid.* T. 508–509 (10 July 2006), T. 661 (12 July 2006) (counsel for Accused Lazarević).

⁴ See *Milutinović et al.*, Transcript, T. 662–682 (12 July 2006).

- (2) to expand upon the submissions already made about the reasons for completion of the forms which are the basis for the report, focusing on the question of whether the information thereby provided on the movement of persons within Kosovo and over the border into Albania and Macedonia was transmitted to the Prosecution for the purposes of litigation before the Tribunal; and
- (3) to expand on earlier submissions regarding how the Trial Chamber could use the report if it were admitted into evidence—that is:
 - (a) how it could assist the Trial Chamber in corroborating evidence relating to crime sites;
 - (b) how it would help the Chamber’s deliberations on whether the conduct charged was widespread and systematic;
 - (c) how it could assist the Chamber on the question of notice to the Accused of events within Kosovo; and
 - (d) how the report might assist the Chamber on an analysis of the background to the conflict.⁵

The Chamber reserved its decision on the Accused’s objections with regard to documents tendered through Ms. Mitchell until after the parties filed their written submissions.⁶

3. On 13 July 2006, the Prosecution called Frederick Abrahams, its third witness in this case.⁷ Mr. Abrahams is a researcher for the non-governmental organisation Human Rights Watch (HRW) and the co-ordinator and a principal author of the HRW report entitled *Under Orders: War Crimes in Kosovo*.⁸ Objections similar to those raised in connection with *As Seen, As Told* were made orally by the Defence to *Under Orders* and other documents tendered through Mr. Abrahams;⁹ similar responses and explanations were offered by the Prosecution.¹⁰ The Chamber reserved its decision on the Accused’s objections with regard to documents tendered through Mr. Abrahams until after the witness’ testimony had concluded and the parties had been given an opportunity to present their arguments.¹¹

⁵ *Milutinović et al.*, Transcript, T. 797–798 (13 July 2006) (“Oral Order”).

⁶ *Ibid.* T. 509–510 (10 July 2006) (reserving decision until after witness’ testimony concluded); *ibid.* T. 797, 799 (13 July 2006) (reserving decision until after written submissions).

⁷ *Ibid.* T. 800, 828 (13 July 2006).

⁸ *See ibid.* T. 800, 823 (13 July 2006).

⁹ *See, e.g., Milutinović et al.*, Transcript, T. 821, 828 (13 July 2006), 851 (14 July 2006). *See especially ibid.* T. 1051–1055 (7 August 2006) (all Accused objecting to admission of *As Seen, As Told, Under Orders*, and Mr. Abrahams’ 2002 Rule 92 *bis* statement, Ex. P2228).

¹⁰ *See ibid.* T. 1056–1059 (7 August 2006).

¹¹ *See ibid.* T. 828–829 (13 July 2006).

4. On 19 July 2006, the Prosecution filed the “Prosecution’s Submission in Response to 13 July 2006 Order Regarding Documentary Exhibit As Seen, As Told” (“Prosecution Submission”), in which it responded to the questions presented in the Oral Order. Recognising that similar issues of law and fact are raised in connection with the evidence tendered through both witnesses, the Prosecution Submission discusses both the OSCE Report *As Seen, As Told* and the HRW Report *Under Orders* (collectively, “challenged reports”). On 31 July 2006, the Trial Chamber received responses from the Defence for all Accused.¹² In their responses, all Accused oppose the admission of the reports *As Seen, As Told* and *Under Orders* into evidence.¹³

5. Supplemental submissions on these issues were filed by counsel for Accused Lukić on 10 August 2006,¹⁴ and Accused Ojdanić on 2 and 11 August 2006.¹⁵ The Prosecution’s Response to these additional submissions was filed on 14 and 15 August 2006.¹⁶ The Trial Chamber notes that these additional submissions are not consistent with either the Rules governing written submissions by the parties¹⁷ or the Chamber’s own Order on Procedure and Evidence.¹⁸ Nevertheless, the Chamber finds that they have aided its consideration of the issues raised by the parties, and grants leave to file these submissions.

¹² See *Milutinović et al.*, General Ojdanić’s Response to Prosecution’s Submission on Admissibility of *As Seen As Told* and *Under Orders*, 31 July 2006 (“Ojdanić Response”); *Milutinović et al.*, Joint Defence Response: ‘Prosecution Submission in Response to 13 July 2006 Order Regarding Documentary Exhibit As Seen As Told, 31 July 2006 (“Lazarević and Šainović Response”); *Milutinović et al.*, Sreten Lukić’s Further Submission Relating to Inadmissibility of ‘As Seen As Told’, Pursuant to the Order of 13 July 2006, 31 July 2006 (“Lukić Response”); *Milutinović et al.*, Pavković Joinder in Ojdanić Response to Prosecution’s Submission on Admissibility of *As Seen As Told* and *Under Orders*, 31 July 2006 (“Pavković Joinder”); *Milutinović et al.*, Mr. Milutinović’s Motion to join General Ojdanić’s Response to Prosecution’s Submission on Admissibility [sic] of *As Seen As Told* and *Under Orders*, 31 July 2006 (“Milutinović Joinder”).

¹³ Ojdanić Response, *supra* note 12, para. 26; Lazarević and Šainović Response, *supra* note 12, para. 24; Pavković Joinder, *supra* note 12; Milutinović Joinder, *supra* note 12. See also *Milutinović et al.*, Transcript, T. 1051–1052 (7 August 2006) (counsel for Accused Lukić reprising objections originally raised to *As Seen, As Told* for *Under Orders*).

¹⁴ *Milutinović et al.*, Sreten Lukić’s Second Supplemental Submission Relating to Inadmissibility of “As Seen As Told”, 10 August 2006 (“Lukić Supplemental Submission”).

¹⁵ *Milutinović et al.*, General Ojdanić Notice of Objection to Portions of Exhibit P2228, 2 August 2006 (“Ojdanić P2228 Objection”) (requesting that 15 of the 19 pages of Mr. Abrahams’ 2002 Rule 92 *bis* Statement be excluded on grounds similar to those identified in the Ojdanić Response, *supra* note 12); *Milutinović et al.*, General Ojdanić’s Supplemental Memorandum on Admissibility of *As Seen As Told* and *Under Orders*, 11 August 2006 (“Ojdanić Supplemental Submission”). See also *Milutinović et al.*, Transcript, T. 1049 (7 August 2006) (counsel for Accused Ojdanić modifying the Ojdanić P2228 Objection in oral argument, and seeking the exclusion of the entire statement).

¹⁶ *Milutinović et al.*, Prosecution’s Response to Supplemental Submissions by Lukić and Ojdanić Defence on the Admissibility of “As Seen, As Told”, 14 August 2006; and *Milutinović et al.*, Addendum to Prosecution’s Response to Supplemental Submissions by Lukić and Ojdanić Defence on the Admissibility of “As Seen, As Told”, 15 August 2006 (collectively, “Prosecution Response to Supplemental Submissions”).

¹⁷ See Rules of Procedure and Evidence of the Tribunal (“Rules”), Rules 126 *bis* and 127. The only possible exception would be the Ojdanić P2228 Objection, *supra* note 15, which could be considered a new motion because it requests different relief.

¹⁸ *Milutinović et al.*, Order on Procedure and Evidence, 11 July 2006, paras. 10–13. This Order was modified by the “Decision on Joint Defence Motion for Modification of Order on Procedure and Evidence” of 16 August 2006, but these paragraphs were unaffected.

II. APPLICABLE LAW

6. The parties' arguments, which have all been considered by the Trial Chamber, are set out in great detail in the transcripts and written submissions cited in Part I of this Decision. The Chamber will neither reproduce nor summarise these arguments, but will instead refer to them, where applicable, in the course of its discussion of the law and facts relevant to its determination of the motions before it.

7. During the oral hearings and in their written submissions, the parties raised questions concerning the different forms of written evidence and the means by which it can be admitted into evidence. The Chamber considers it helpful to set forth the relevant legal rules and principles that govern admission and guide a Trial Chamber's discretion in this area.¹⁹

8. Rules 89 and 92 *bis* provide, in relevant part:

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.

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.

[...]

- (ii) Factors against admitting evidence in the form of a written statement include whether:

¹⁹ For another helpful review of the applicable law, see *Prosecutor v. Strugar*, Case No. IT-01-42-T, Decision on the Admissibility of Certain Documents, 26 May 2004, paras. 11–19.

[...]

- (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) 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) [...]; and
- (ii) finds from the circumstances in which the statement was made and recorded that there are satisfactory indicia of its reliability.

9. Although certain early decisions of the Tribunal held that reliability is not a precondition for the admission of evidence tendered by the parties,²⁰ the text of the Rules and more recent appellate and trial jurisprudence make clear that reliability is relevant to the admissibility of evidence, particularly if the evidence in question is an out-of-court written statement.²¹ Indeed, this Trial Chamber has held that “reliability of a hearsay statement is a necessary prerequisite for probative value under Rule 89(C)”.²²

10. The jurisprudence of the Tribunal has delineated different categories of documentary evidence that are governed by either Rule 89 or Rule 92 *bis*, and which are admissible or inadmissible under these provisions and the decisions interpreting them.²³ These categories are defined and distinguished by three principal characteristics: (1) whether the proposed evidence is the statement of a potential witness; (2) whether the proposed evidence is a summary of several statements, or was originally provided in the form in which it is currently tendered; and (3) whether the proposed evidence was provided to, or summarised by, a party to proceedings before the ICTY.

²⁰ See, e.g., *Prosecutor v. Blaškić*, Case No. IT-95-14-T, Decision on the Standing Objection of the Defence to the Admission of Hearsay with No Inquiry as to Its Reliability, 21 January 1998, para. 13 (“[T]he Judges are the ones who will, in due course and in each case, determine the reliability to be accorded to ... testimony, according to the circumstances in which it was obtained and to its content. ... Thanks to their training and experience, the Judges can give the appropriate weight to testimony declared admissible in light of its reliability. Such an evaluation can logically be made only *a posteriori* once the Parties have presented all their claims.”).

²¹ See Rule 92 *bis* (portions quoted above); see also, e.g., *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-AR73.5, Decision on Appeal Regarding Statement of a Deceased Witness, 21 July 2000 (“*Kordić and Čerkez* Appeal Decision”), paras. 23–24 (quoting a passage from an earlier Appeals Chamber decision in *Prosecutor v. Aleksovski* on hearsay statements, and concluding that “[t]his passage ... supports the proposition that the reliability of a statement is relevant to its admissibility, and not just to its weight”); *Prosecutor v. Naletilić and Martinović*, Case No. IT-98-34-A, Judgement, 3 May 2006, para. 516 (“Since hearsay is admitted as substantive evidence in order to prove the truth of its contents, it is important that its reliability be established.”).

²² Order on Procedure and Evidence, *supra* note 18, para. 4. This portion of the order has not been challenged by any party to these proceedings.

²³ For the purposes of this Decision, the Trial Chamber will not discuss other types of documentary evidence, such as maps, photographs, official reports, and similar material, which are not the testimonial statement of an individual.

11. Before discussing these categories, the Chamber notes that the term “witness” is not defined in the Rules. Given the terms, context, and drafting history of Rules 89 and 92 *bis*, it is clear that a “witness”, for the purpose of those Rules, refers to an individual who either testifies in person before a Chamber of the Tribunal, or has given a statement or been interviewed specifically with a view towards that person giving evidence before the Tribunal.²⁴ When this Chamber uses the term “potential witness”, therefore, it is referring to someone who has given a statement to, or been interviewed by, a party to proceedings before the Tribunal.

12. There are four categories of documents, governed by Rules 89 and 92 *bis*, which are relevant to the Chamber’s consideration of the submissions of the parties:

- (1) statements given to parties for the purposes of litigation before the Tribunal;
- (2) summaries, authored by parties, of statements by potential witnesses;
- (3) statements given to non-parties; and
- (4) summaries or reports, authored by non-parties, of statements made by persons who are neither witnesses nor potential witnesses.

Each of these categories is discussed below.

13. Written statements given to parties by potential witnesses—that is, statements prepared for the purposes of proceedings before the Tribunal—are admissible only under Rule 92 *bis* or Rule 89(F).²⁵ Statements made by individuals unable to testify may be susceptible to admission under Rule 92 *bis*(C).²⁶ Statements given to other entities, such as domestic law enforcement agencies, for use in other courts are not included within this category, but may be admissible under Rule 89(C).²⁷

14. Summaries authored by a party of written statements made by potential witnesses are inadmissible under either Rule 89(C) or Rule 92 *bis*. Such summaries are, by definition, not witness statements within the meaning of Rule 92 *bis*: the subparagraphs of Rule 92 *bis* set forth a

²⁴ See *Prosecutor v. Milošević*, Case No. IT-02-54-T, Decision on Testimony of Defence Witness Dragan Jasović, 15 April 2005 (“*Milošević* Decision”), p. 5; *Milošević*, IT-02-54-AR73.2, Decision on Admissibility of Prosecution Investigator’s Evidence, 30 September 2002 (“*Milošević* Appeal Decision”), para. 22.

²⁵ *Milošević* Appeal Decision, *supra* note 24, para. 18; *Milošević* Decision, *supra* note 24, p. 5; *Prosecutor v. Milošević*, Case No. IT-02-54-AR73.4, Decision on Interlocutory Appeal on the Admissibility of Evidence-in-Chief in the Form of Written Statements, 30 September 2003 (holding that “the Rules allow for the admission of a written witness statement under Rule 89(F) when the witness ... is present in court, ... is available for cross-examination and any questioning by the judges, and ... attests that the statement accurately reflects his or her declaration and what he or she would say if examined”). A witness whose statement is offered under Rule 89(F) is therefore required to appear for testimony in court, and the Accused have the right to cross-examine him or her; under Rule 92 *bis*, it is within a Chamber’s discretion to order that the witness be made available for cross-examination.

²⁶ Rule 92 *bis*(C).

²⁷ See generally *Milošević* Decision, *supra* note 24; see also *infra* para. 15.

number of requirements that must be fulfilled before a witness statement is admissible, whether or not cross-examination is ordered; a document that does not fulfil these criteria cannot be admitted under that Rule. Even if one discounts the formal distinction between a party-prepared summary of several statements and the underlying statements themselves, and considers that the content of the former is identical to the content of the latter, the proffered summary is nonetheless inadmissible if the underlying statements do not comply with the requirements of Rule 92 *bis*.²⁸ Moreover, the Appeals Chamber has held that “Rule 92*bis* is the *lex specialis* which takes the admissibility of ... written statements of prospective witnesses and transcripts of evidence out of the scope of the *lex generalis* of Rule 89(C), although the general propositions which are implicit in Rule 89(C)—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*.”²⁹ Consequently, parties may not attempt to circumvent the strict requirements of Rule 92 *bis*, which include making the declarant-witness available for cross-examination if the Chamber so orders, by tendering summarising material under Rule 89(C).³⁰ Summaries of witness statements prepared by a party violate this principle, and are inadmissible.

15. If a hearsay declarant gives a statement to a non-party, the statement would not fall under Rule 92 *bis* because the declarant was not a potential witness for the purposes of the Rule. The statement could conceivably be admitted into evidence through a witness under Rule 89(C), provided that the witness through whom the statement is tendered can give evidence on the stand showing sufficient indicia of reliability.³¹ This principle is a function of the Tribunal’s acceptance of hearsay evidence in general, and a Trial Chamber would subsequently decide how much weight to accord such a statement.

16. The admission of summaries and reports created by non-parties is not affected by the rule against admitting summaries prepared by parties of statements given by potential witnesses, so such materials may be admitted pursuant to Rule 89(C).³² These documents, however, are hearsay in nature, and thus would have to possess the necessary indicia of reliability in order to be admissible.³³ *As Seen, As Told* and *Under Orders* are examples of this type of document. Indeed, the OSCE report was explicitly considered by the Trial Chamber in the *Milošević* case to be distinguishable from a summary of witness statements prepared by the Prosecution, and the

²⁸ *Milošević* Appeal Decision, *supra* note 24, para. 18(3). See also *ibid.* para. 23 (noting, with apparent approval, the Trial Chamber’s conclusion that “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 ... and [that] [i]f the statements were admitted, the summary would become unnecessary”).

²⁹ *Milošević* Appeal Decision, *supra* note 24, para. 18.

³⁰ *Ibid.* para. 19.

³¹ *Milošević* Decision, *supra* note 24, p. 5.

³² *Milošević* Appeal Decision, *supra* note 24, para. 22.

³³ *Ibid.* paras. 14, 18(2), 21–23.

Milošević Chamber concluded that the report was admissible under Rule 89(C) and not subject to the bar against admitting party-prepared summaries of statements.³⁴

III. DISCUSSION

A. Were the reports prepared for the purposes of litigation before the Tribunal?

17. In the present case, the Prosecution seeks to admit excerpts of *As Seen, As Told* and *Under Orders*,³⁵ reports created by organisations that are not, and have never been, parties to any proceeding before the Tribunal. Sections of these reports summarise, or are based upon, the statements and interviews of persons who were not potential witnesses, as the Trial Chamber has defined the term above,³⁶ at the time they gave their statements. Moreover, notwithstanding the close co-operation between the OSCE and the Prosecution,³⁷ and the brief employment of Mr. Abrahams as a research analyst with the Prosecution during the period between the drafting and publication of *Under Orders*,³⁸ the Trial Chamber does not consider that the reports themselves were prepared for the purposes of litigation before the Tribunal.

18. With regard to *As Seen, As Told*, it is clear that the OSCE provided the underlying statements to the Prosecution to facilitate investigation into alleged crimes within the jurisdiction of the Tribunal, and thereby aid the preparation of indictments and eventual litigation before the Tribunal.³⁹ Similarly, the introduction to *Under Orders* notes that one purpose of the publication is that “[t]he evidence presented [in the report] will be of assistance to war crimes investigators in putting together cases against the Serbian and Yugoslav leadership, as well as against members of the KLA.”⁴⁰ Here again, the emphasis is on aiding investigations into the crimes alleged in the

³⁴ *Ibid.* para. 2(iv) (citing, with apparent approval, *Prosecutor v. Milošević*, Case No. IT-02-54-T, Transcript, T. 5943 (30 May 2002)).

³⁵ See Prosecution Submission, paras. 4, 5 (identifying, respectively, the excerpts of *As Seen, As Told* and *Under Orders* for which the Prosecution seeks admission).

³⁶ See *supra* para. 11.

³⁷ See, e.g., *Milutinović et al.*, Ex. P473 (“*As Seen, As Told*”), p. 5 (noting that “[t]he OSCE/ODIHR is grateful for the advice and assistance of staff of the International Criminal Tribunal for the former Yugoslavia (ICTY) in the development of this report”); *ibid.* p. 15 (stating that OSCE-KVM documents and refugee interview forms were provided to the Prosecution). Unless otherwise noted, all page numbers for exhibits are those assigned in the eCourt system. See also *infra* note 39 and accompanying text; *Milutinović et al.*, Transcript, T. 520–521 (10 July 2006) (Ms. Mitchell testifying that “[e]very day the statements that were collected in the camps were centralised, and the original copies were provided to the [ICTY] Prosecutor’s office”).

³⁸ See *Milutinović et al.*, Transcript, T. 854, 859 (14 July 2006) (Mr. Abrahams testifying that he worked for the Prosecution between April and June 2000, and in August 2001, while *Under Orders* was in HRW’s editing process, but before it was published).

³⁹ *Milutinović et al.*, Transcript, T. 500, 528 (10 July 2006), T. 571 (11 July 2006). See also *As Seen, As Told*, *supra* note 37, p. 25 (also labelled with the ERN number K0350438) (noting that Security Council Resolution 1199 required the OSCE-KVM to co-operate with other UN bodies, including the Tribunal); *ibid.* p. 33 (also labelled with the ERN number K0350446).

⁴⁰ *Milutinović et al.*, Ex. P438 (“*Under Orders*”), p. 19 (also labelled with the ERN number K0360826).

report.⁴¹ Nowhere is it asserted by these organisations, either in the text of the reports or in the live testimony of the witnesses called by the Prosecution, that the purpose for which these documents were drafted was their direct admission into evidence as proof of the truth of the allegations contained therein, or to establish any material fact related to charges against potential accused, such as whether the authorities had notice of alleged crimes. On the contrary, Mr. Abrahams testified that his organisation envisaged the Prosecution making the following use of the material gathered and presented in its reports:

Firstly, to provide a context, a historical background, a political framework in which the Kosovo conflict could be better understood. Secondly, to present the various violations as we documented them so that investigators would have an image of the patterns of the chronologies, as well as the specific cases, *essentially as leads*. *So investigators can pursue on their own the specific villages or the particular violations that they deemed to be of value.*⁴²

19. In sum, the challenged reports were not drafted by a party, nor were they prepared for the purposes of legal proceedings before the Tribunal, as that phrase is used in the jurisprudence on the admissibility of hearsay evidence. For these reasons, the Trial Chamber concludes that the tendered excerpts of these reports are potentially admissible pursuant to Rule 89(C), provided that sufficient indicia of reliability are either evident in the relevant excerpts of the reports themselves,⁴³ or have been demonstrated during the testimony of the witnesses through whom they have been tendered. In addition, as always, any material tendered for admission must be both relevant to the charges in the Indictment and probative, in that it tends to prove or disprove those charges.

B. May the Prosecution use the reports for the purposes of litigation before the Tribunal?

20. When considering the indicia of reliability for this type of document, the Appeals Chamber has held that a 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

⁴¹ See especially *Milutinović et al.*, Transcript, T. 833–834 (13 July 2006), T. 904 (14 July 2006).

⁴² *Ibid.* T. 833 (13 July 2006) (emphasis added). See also *ibid.* T. 834 (13 July 2006):

JUDGE BONOMOY: That suggests to me that you envisaged—your very use of the expression “as leads” suggests to me that you expect the Prosecutor’s investigators to go and obtain their own evidence, guided by your initial inquiry.

THE WITNESS: I saw my job as facilitating that process or my work ... was a contribution that would facilitate the investigations by pointing in the right direction through the publication of our reports.

Ibid. T. 904 (14 July 2006) (Mr. Abrahams on cross-examination):

[T]he investigators of the OTP needed to conduct their own interviews, gather their own information so that they could use our reports as a guide, if you will, to determine the pattern of abuses, what villages might be of interest and which may not, but that ultimately those investigations needed to be done by their own investigators.

⁴³ See *Milošević* Appeal Decision, *supra* note 24, para. 22.

statements does not overcome the absence of the opportunity to cross-examine the persons who made them.⁴⁴

21. The Prosecution asserts that “[t]hese reports should be admitted because the method of creation provides sufficient indicia of their reliability”,⁴⁵ and places considerable emphasis on the care with which the organisations preparing the challenged reports undertook their tasks, and endeavoured to provide an objective assessment of the situation in Kosovo during the relevant period.⁴⁶ With regard to the excerpts of the challenged reports that are based on interviews and statements of persons who were reporting alleged crimes during the indictment period, however, these organisations’ careful methods can at best assure the *accuracy* of the process for recording the information contained in the eventual report, not the *reliability* of the material contents for the purposes of use in criminal proceedings.⁴⁷ While both the challenged reports use extensive footnotes throughout these excerpts, they do not identify the persons interviewed, leaving the sources of this critical information largely anonymous.⁴⁸ Moreover, Ms. Mitchell testified that she was in a supervisory role with regard to the collection and analysis of the information gathered from persons in Albania and Macedonia;⁴⁹ she did not state that she ever took any of these statements herself. Although Mr. Abrahams did testify that he personally interviewed some of the declarants, it is not possible to determine, by reading the report, which portions of the tendered excerpts from *Under Orders* are based on interviews he himself conducted.⁵⁰ Most of the tendered excerpts of the challenged reports set forth allegations of criminal conduct made by persons who claimed to be the victims of, or witnesses to, these crimes. Not having had the opportunity of hearing any of the persons upon whose statements these excerpts are based, the Chamber is not in a position to assess the reliability of the factual contentions contained therein.

⁴⁴ *Ibid.* (relying on *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-AR73, Decision on Prosecutor’s Appeal on Admissibility of Evidence, 16 February 1999, para. 15).

⁴⁵ Prosecution Submission, para. 13.

⁴⁶ *Ibid.* paras. 9, 11–12.

⁴⁷ See, e.g., *Milutinović et al.*, Transcript, T. 910 (14 July 2006) (exchange between counsel for Accused Pavković and Mr. Abrahams about *Under Orders*):

Q. All right. Thank you. That is regards that period, I accept what you stated, although we cannot verify that information, since in the footnotes to your report there are no other things, apart from the place and date. Therefore, we can’t verify that information for the very same reason.

A. I can testify that those interviews took place and were recorded accurately, based on what those individuals told us.

⁴⁸ See *As Seen, As Told*, *supra* note 37, pp. 15, 174 (explaining that the refugee forms are referred to by a code); *Under Orders*, *supra* note 40, p. 23 (explaining that “Human Rights Watch has withheld the identity of many sources” and that “many witness and victim names are presented either as initials or ... changed entirely”).

⁴⁹ See, e.g., *ibid.* T. 520–523 (10 July 2006).

⁵⁰ See *ibid.* T. 849 (14 July 2006) (Mr. Abrahams testifying that he participated in interviewing, but that “I would have to go through the report to tell you exactly which ones I wrote based on my personal research versus what they [my colleagues] wrote based on theirs.”).

22. The introduction to the section of *As Seen, As Told* containing the bulk of the tendered excerpts itself concedes that certain allegations “are based on the statement of one person only”, that other information provided by interviewees was “hearsay, rather than the statement of a direct victim or witness”, and that there are certain “inconsistencies in the details given by different interviewees about particular incidents.”⁵¹ These are the kinds of issues that go directly to the reliability of the assertions which these excerpts present, and which are best tested through the in-court examination of the declarants by the parties and the Chamber. In these circumstances, neither the report’s acknowledgement of these problems,⁵² nor the opportunity to cross-examine one of the authors and editors of the report, can adequately replace the opportunity to test the reliability of any of the persons making the statements. The Trial Chamber does not have before it sufficient material to satisfy it of the general reliability of the information on which this report is based.

23. These conclusions apply equally to *Under Orders*. Despite the apparently greater scepticism brought to HRW’s investigations and methodology,⁵³ the conditions under which its staff gathered the information contained in the sections summarising allegations of crimes between March and June 1999 are sufficiently similar to those surrounding *As Seen, As Told*, and sufficiently different from those surrounding two other HRW reports that have been tendered, that the relevant excerpts of this report prompt the same concerns in the Chamber. These other reports are specifically discussed in paragraph 32. For example, the bulk of one of these, exhibit P441, the February 1999 report entitled *A Week of Terror in Drenica: Humanitarian Law Violations in Kosovo*, is the result of both personal observation and intensive interviews of over two dozen people with regard to a single incident—the alleged murders of many members of the Delija family in the village of Gornje Obrinje in Drenica—where Mr. Abrahams and his colleague were on the scene the day after the incident. The total length of the investigation into this single incident was described as “a matter of weeks”,⁵⁴ with regard to *Under Orders*, on the other hand, Mr. Abrahams conceded that “these interviews in a few cases were quick because somebody was literally coming across the border in their tractor and we only had time to ask: Where are you from and why are you leaving?”⁵⁵ Exhibit P441 has sufficient indicia of reliability to be admitted by the Chamber, but absent testimony from some of the persons who gave interviews to HRW staff in Albania or Macedonia, the Chamber determines that *Under Orders* should also be denied admission.

⁵¹ *As Seen, As Told*, *supra* note 37, p. 174 (from a section entitled “The Municipalities”). See also *ibid.* p. 15 (from the general introduction to the report).

⁵² Both introductory passages cited above, see *supra* note 51, state that the report explicitly notes when these problems occur, as they are “made clear in the text and/or by footnotes”. *Ibid.* p. 174

⁵³ See, e.g., *Milutinović et al.*, Transcript, T. 847–848 (14 July 2006).

⁵⁴ *Ibid.* T. 807 (13 July 2006).

⁵⁵ *Ibid.* T. 847 (14 July 2006). The witness hastened to add: “But the vast majority of these interviews were done in a private and quiet setting. They last sometimes many hours, sometimes more than one session, to obtain detailed information.” *Ibid.*

24. The Prosecution proposes three ways in which the material in the challenged reports might be used in the Chamber's deliberations: (1) "the reports prove the widespread and systematic nature of the crimes because they provide evidence on activity that occurred around the charged sites, as well as the crime sites themselves";⁵⁶ (2) "the reports are admissible to corroborate the accounts of the direct witnesses on the crimes charged in the Indictment";⁵⁷ and (3) "the reports provide evidence that the Accused were on notice of the crimes committed during the Indictment period."⁵⁸ In order for the reports to be useful in the first two ways, however, the Chamber would have to accept that the excerpts based on the witness statements bore sufficient indicia of reliability to be admissible, either as evidence of underlying offences, or as evidence of the legal elements of one category of crimes with which the Accused are charged,⁵⁹ and it is not so satisfied.

25. With regard to the third argument—that the challenged reports provide indirect evidence of notice—the Prosecution asserts that

the report Under Orders describes student protests, newspaper articles, meetings between international and Kosovo Albanian political figures and FRY and Serbian officials, and other events that gave notice to the Accused of both the crimes of 1998 and 1999. Part V of As Seen, As Told makes reference to numerous OSCE-KVM incident reports. Copies of many of these reports would have been provided to relevant Serb authorities at the time of the events.⁶⁰

Instead of relying on any indirect mention or discussion of the OSCE-KVM reports in *As Seen, As Told*, the Chamber considers that it is preferable for the Prosecution to tender the original documents themselves. In fact, the Prosecution has already requested admission of various reports and other documentation of the OSCE mission from the period relevant to the Indictment,⁶¹ and the

⁵⁶ Prosecution Submission, para. 14.

⁵⁷ *Ibid.* para. 16.

⁵⁸ *Ibid.* para. 17. The Prosecution initially claimed that *As Seen, As Told* could assist the Chamber "in respect to its analysis of evidence relating to the background of the conflict and the parties involved in the conflict", and the Oral Order directed the Prosecution to make further submissions on this point. Surprisingly, however, the Prosecution Submission does not mention this fourth potential application of the reports, which at first glance would appear useful for the Chamber. Compare *Milutinović et al.*, Transcript, T. 672 (12 July 2006), and Oral Order, *supra* text accompanying note 5, with Prosecution Submission, pp. 8–9. The Chamber therefore considers that the Prosecution has decided not to pursue this argument with regard to these documents, and expects that the Prosecution will present other evidence that will serve this function.

⁵⁹ Four of the five general requirements for Article 5, which must be proved beyond a reasonable doubt for the Prosecution to establish that a crime against humanity was committed, may be summarised as requiring that the underlying offence alleged be part of a widespread and systematic attack on a civilian population. See, e.g., *Prosecutor v. Kunarac, Kovač, and Vuković*, Case Nos. IT-IT-69-23 & IT-96-23-1-A, Judgement, 12 June 2002, para. 85. Counts 1, 2, 3, and 5 of the Indictment against the Accused charge them with crimes against humanity. See *Milutinović et al.*, Redacted Third Amended Joinder Indictment, 12 June 2006 ("Operative Indictment"), pp. 33, 34, 38, 39.

⁶⁰ Prosecution Submission, para. 17.

⁶¹ See, e.g., *Milutinović et al.*, Prosecution's Motion to Admit Documentary Evidence with Annexes, 25 May 2006 ("Motion for Admission of Documentary Evidence"), Annex A, Item 4.017 (noting that "OSCE KVM Bluebook 1998–1999[,] OSCE KVM Post-Evacuation Interview Databases[, and] CD-ROM containing OSCE Kosovo Verification Mission (KVM) daily situation reports compiled from KVM Regional Centre and other reporting during the period late 1998 to May 1999" were admitted in *Prosecutor v. Milošević*, Case No. IT-02-54-T, and seeking their admission in this case); *ibid.* Item 4.055 (same request for admission with regard to a document described as "OSCE

parties are reminded that a decision on that motion will be issued in due course. It is therefore unnecessary to admit any excerpt of *As Seen, As Told* for this purpose. The same reasoning applies to *Under Orders*: any document discussed therein that is meant to have provided the Accused with notice should be tendered separately, if it has not been submitted already, and the Chamber will decide on its admissibility at that stage. For any events described in *Under Orders*, the Chamber is of the view that contemporaneous written accounts or testimonial evidence from participants would be of superior probative value to the references or discussion in the HRW report, and notes that the Prosecution either expects to present such evidence in the course of its case,⁶² or has already tendered it for admission.⁶³ Consequently, it is equally unnecessary to admit *Under Orders* for this purpose.

C. Other challenged documents tendered through Ms. Mitchell and Mr. Abrahams

26. Both Ms. Mitchell and Mr. Abrahams testified in the *Milošević* trial: a portion of Ms. Mitchell's testimony was offered in the form of a written statement under Rule 92 *bis*, and Mr. Abrahams testified as a live witness, although a statement compliant with the requirements of Rule 92 *bis* had been prepared.⁶⁴ In this case, the Prosecution has offered these witnesses' original Rule 92 *bis* statements, which were supplemented with contemporary addenda. In addition, in advance of their testimony, both witnesses signed other documents, described by the Prosecution as Rule 89(F) statements, in which they attested to the accuracy of the documents the Prosecution intended to introduce through them once on the stand. These statements have also been tendered. To complicate matters further, the Prosecution's witness list identifies Ms. Mitchell as a live witness and Mr. Abrahams as a Rule 92 *bis*(D) witness,⁶⁵ even though part of the former's testimony has been offered in the form of her written statements, and no transcript of the latter's testimony from the *Milošević* trial was tendered into evidence or uploaded into the eCourt system.⁶⁶ In order to avoid creating additional confusion, the Trial Chamber will continue to refer to each of these

Document: Record of a Meeting between KVM & Gen. LONČAR, head of FRY co-operation Commission—16-01-98"); *ibid.* Item 4.057 (same request for admission with regard to a document described as "1 February 1999 Kosovo Verification Mission RC1 (Prizren, Prizren Municipality) Record of Discussions—Visit to Commander Army of Yugoslavia Brigade Prizren, Prizren (Božidar DELIĆ)").

⁶² See *Milutinović et al.*, Prosecution's Pre-Trial Brief pursuant to Rule 65ter(E)(i), 10 May 2006, paras. 280–281, 289, 300, 302, 317, 318, 356, and accompanying citations.

⁶³ See Motion for Admission of Documentary Evidence, *supra* note 61 (seeking the admission of at least some of the documents mentioned in the citations to the paragraphs cited in note 62).

⁶⁴ See *Milošević*, Ex. 243A (statement of Sandra Mitchell, certified pursuant Rule 92 *bis*); *Milošević*, Transcript, T. 6029–6139 (3 June 2002); T. 6141–6242 (4 June 2002) (live testimony of Frederick Abrahams). See especially *ibid.* T. 6048–6049 (3 June 2002) (Chamber deciding to treat Mr. Abrahams as a live witness, notwithstanding the preparation of a Rule 92 *bis*-compliant statement).

⁶⁵ See *Milutinović et al.*, Prosecution's Submissions pursuant to Rule 65ter(E), Annex A, 10 May 2006, pp. 1, 114; *Milutinović et al.*, Notice of Filing of Revised 65 ter Witness List, Annex A, pp.1, 2.

⁶⁶ Rule 92 *bis*(D) provides:

statements as a “Rule 92 *bis* statement” or a “Rule 89(F) statement” as appropriate; the Chamber considers, however, that each is ultimately potentially admissible pursuant to Rule 89(F), which provides that “[a] Chamber may receive the evidence of a witness orally or, where the interests of justice allow, in written form.”

27. Although the Prosecution discussed Exhibit P386, a report dated March 2000 and entitled “Kosovo: Rape as a Weapon of Ethnic Cleansing”, with Mr. Abrahams, an objection raised by counsel for Accused Lukić resulted in the Prosecution apparently withdrawing this document.⁶⁷ The Chamber will therefore not admit this document.

28. As noted above, the Accused object to the admission of Ms. Mitchell’s statements, which are marked as exhibits P2225 and P2226, to the extent that they rely on *As Seen, As Told*.⁶⁸ All Accused also object to the admission of Mr. Abrahams’ Rule 92 *bis* statements, collectively marked as exhibit P2228,⁶⁹ because he expresses opinions and conclusions that are inadmissible from a fact witness.⁷⁰ Finally, counsel for Accused Lukić objected to another document tendered through Mr. Abrahams, exhibit P388, a document entitled “Kosovo Human Rights Watch Flash no. 31, Rape of Ethnic Albanian Women in Suva Reka Municipality”.⁷¹

29. Exhibit P2225, which is Ms. Mitchell’s Rule 89(F) statement of 8 July 2006, consists of a single sheet in addition to a cover page, and does not rely on *As Seen, As Told* at all; in fact, it merely confirms that the declarant has reviewed the exhibits the Prosecution intended to tender through her, and that these exhibits are true and correct copies of the documents in question. The Defence objection based on *As Seen, As Told* does not apply to this document, and it shall be admitted. Exhibit P2226 is Ms. Mitchell’s Rule 92 *bis* statement of 2 July 2002, and explains several issues relevant to *As Seen, As Told*, such as her role and responsibilities within the OSCE

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.

⁶⁷ See *Milutinović et al.*, Transcript, T. 824–825 (13 July 2006):

MR. IVETIC: Your Honour, again on this particular exhibit the date is March 2000, Kosovo rape as a weapon of ethnic cleansing. I submit if it's being presented for notice it's improper. So perhaps the Prosecution can clarify for what purposes this document is being tendered.

JUDGE BONOMOY: Mr. Stamp.

MR. STAMP: May I just -- may I with your permission just check for the date?

JUDGE BONOMOY: Yeah.

[Prosecution counsel confer]

MR. STAMP: I move on to the next document, Your Honour.

JUDGE BONOMOY: You're not able to assist us if --

MR. STAMP: The date is correct, so I will not press that one any further.

JUDGE BONOMOY: All right. Thank you.

⁶⁸ See *supra* note 3 and accompanying text.

⁶⁹ See *supra* note 9; Ojdanić P2228 Objection.

⁷⁰ See generally Ojdanić P2228 Objection; *Milutinović et al.*, Transcript, T. 1047 (7 August 2006).

⁷¹ See *Milutinović et al.*, Transcript, T. 820–822 (7 August 2006).

mission, and the methodology of the Human Rights Division that collected and analysed the underlying information and authored the report. This statement, however, does not draw any conclusions from the report or the information gathered in the field by OSCE human rights officers, so the Defence objection appears equally inapplicable. Moreover, as the Prosecution anticipates calling witnesses who were among those to give accounts to the OSCE mission, the Chamber considers that Ms. Mitchell's written explanation of the mandate and methodology of the mission is relevant, and shall admit this statement and the associated documents that explain the scope and functioning of the mission.⁷²

30. Exhibit P2228 consists of three documents, all certified as statements of Mr. Abrahams pursuant to Rule 92 *bis*: a statement signed on 11 March 1999; a statement signed on 24 January 2002; and an addendum, ostensibly to the January 2002 statement, signed on 29 May 2002. Unlike Ms. Mitchell's Rule 92 *bis* statement, these statements do include both assertions of fact and legal conclusions that are directly related to the fundamental issues the Chamber must determine at the end of this trial. Some of these assertions and conclusions summarise the content of reports that have been denied admission;⁷³ those sections of the statements shall therefore not be admitted. Others, such as certain passages in the March 1999 statement,⁷⁴ summarise the content of reports that have not been tendered as proof of the truth of their contents, but rather to establish that the Accused were given notice of alleged criminal conduct in 1998—conduct which is not charged as crimes in the Indictment, but rather included as allegations relevant to joint criminal enterprise and superior responsibility as forms of responsibility.⁷⁵ It is therefore unnecessary to admit those portions of these statements, as the reports to which they refer are to be admitted for notice purposes only.⁷⁶ Other portions of these statements are based on observations, inquiries, or research that have not been explained, cited, or tendered, so the Chamber is unable to determine whether they satisfy the standards for admission; those portions will similarly be denied admission.⁷⁷ There are, however, certain passages in these statements that, despite objections from the Defence, are relevant for the Chamber's consideration of Mr. Abrahams' testimony because they explain his understanding of the pertinent history and contemporary political context;⁷⁸ those portions of the statements shall be admitted. Moreover, like Ms. Mitchell's Rule 92 *bis* statement,

⁷² See *ibid.* T. 524–528 (10 July 2006) (Ex. P763); T. 569–572 (11 July 2006) (Ex. P765); T. 587 (11 July 2006) (Ex. P764); T. 684 (12 July 2006) (Ex. P432); T. 685 (12 July 2006) (Ex. P766); T. 685 (12 July 2006) (Ex. P761). These documents are identified in the disposition of this Decision. See *infra* para. 33(3).

⁷³ See, e.g., *Milutinović et al.*, Ex. P2228, pp. 22–26 (discussing *Under Orders*); *ibid.* p. 24 (discussing the report marked as Ex. P386).

⁷⁴ See, e.g., *Milutinović et al.*, Ex. P2228, pp. 29–33.

⁷⁵ See Operative Indictment, *supra* note 59, paras. 39, 44, 49, 54, 59, 69, 95–97.

⁷⁶ See *infra* para. 32, text accompanying note 86.

⁷⁷ See, e.g., *Milutinović et al.*, Ex. P2228, pp. 18, 21, 22.

⁷⁸ See *Milutinović et al.*, Transcript, T. 1050 (7 August 2006).

any portion of Mr. Abrahams' 92 *bis* statements that merely describes HRW's structure, methodology, or functioning in the field is relevant and will be admitted.⁷⁹ In sum, therefore, the Chamber will only admit the pages of exhibit P2228 that are identified in the disposition of this Decision.⁸⁰

31. With regard to exhibit P388, the Chamber considers that the defence objection related to the apparent date of the document was adequately resolved in the Prosecution counsel's subsequent exchange with the witness, and will admit the document based on Mr. Abrahams' confirmation that "in respect to the core allegation of rape in Suva Reka, the [document] was issued on the 28th of April, 1999".⁸¹ The Chamber notes that the Prosecution has offered this document as evidence that the Accused had notice of the commission of crimes charged in the Indictment.⁸²

32. Several other documents were discussed with Ms. Mitchell and Mr. Abrahams, and either no objection from the opposing party was made, or the objection was repelled by the Chamber.⁸³ Pursuant to the Chamber's Order on Procedure and Evidence,⁸⁴ therefore, these documents shall be admitted. Included in these admitted exhibits are seven letters sent by Human Rights Watch to government officials, ministries, and other organs of the Serbian and Yugoslav governments in July 1998, which were tendered by the Prosecution to demonstrate that inquiries in relation to allegations of human rights violations were made to the relevant organs of these governments—that is, for the purpose of proving notice.⁸⁵ These letters were sent in the course of preparing a report entitled "Humanitarian Law Violations in Kosovo", published in October 1998, which is also tendered as exhibit P437. Although this report contains sections, similar to the challenged excerpts from *As Seen, As Told* and *Under Orders*, that are based on interviews with persons claiming to be witnesses to and victims of the crimes described therein, it is clear that the Prosecution seeks to use this report for proving notice to the Accused.⁸⁶ Exhibit P441, the report on Drenica discussed

⁷⁹ See, for example, most of the May 2002 addendum, included in *Milutinović et al.*, Ex. P2228, pp. 5–8.

⁸⁰ See *infra* para. 33(3)(y). As explained above, see *supra* note 37, unless otherwise noted, all page numbers for exhibits are those assigned in the eCourt system.

⁸¹ See *Milutinović et al.*, Transcript, T. 821–822 (13 July 2006).

⁸² See *ibid.* T. 822 (13 July 2006).

⁸³ See *ibid.* T. 572–578 (11 July 2006) (Exs. 3D3, 3D4); T. 684 (12 July 2006) (Ex. P456); T. 811–812 (13 July 2006) (Ex. P441); T. 815–818 (13 July 2006) (Exs. P642, P702, P679, P653; all except the last are also part of Ex. P441, see T. 815, 817 (13 July 2006)); T. 822, 825 (13 July 2006) (Ex. P437); T. 801, 812, 822 (13 July 2006) (Ex. P2227). See also *infra* note 85. Exhibit 3D1, re-used with witness Merita Deda, was admitted on 10 August 2006; Exhibit 3D2, re-used with witness Fuat Haxhibeqiri, was admitted on 11 July 2006.

⁸⁴ See Order on Procedure and Evidence, *supra* note 18, para. 5.

⁸⁵ See *Milutinović et al.*, Transcript, T. 829–831 (13 July 2006) (Exs. P540, P541, P542, P543, P544, P545, P546).

⁸⁶ See *ibid.* T. 825 (13 July 2006) (a series of questions from the Prosecution designed to establish that the report was published during the period relevant to the indictment and was disseminated to the organs of the Serbian and Yugoslav governments). Furthermore, the Chamber notes that no Defence counsel objected to this report on any ground, including any of the arguments raised in connection with *As Seen, As Told* and *Under Orders*.

above,⁸⁷ appears to have been tendered both as proof of notice and as proof that the crimes alleged therein actually occurred.⁸⁸ The Chamber notes that, after an objection from counsel for Accused Ojdanić that was adopted by all other Accused, the Prosecution departed from the line of questioning that had elicited opinions and conclusions from Mr. Abrahams, and limited its use of the report to the factual findings contained therein.⁸⁹ For the reasons stated above,⁹⁰ the Chamber will admit this document.

33. For these reasons, and pursuant to Rules 54 and 89 of the Rules, the Trial Chamber hereby **DECIDES** as follows:

- (1) The tendered excerpts of exhibit P473, *As Seen, As Told*, are presently denied admission.
- (2) The tendered excerpts of exhibit P438, *Under Orders*, are presently denied admission.
- (3) Pursuant to paragraphs 26, and 28 to 32 above, the following exhibits are admitted:
 - (a) P388, a document dated 28 April 1999 and updated on 22 February 2000, entitled “Kosovo Human Rights Watch Flash no. 31, Rape of Ethnic Albanian Women in Suva Reka Municipality”;
 - (b) P432, a document dated 19 October 1998 and described as “Agreement on the OSCE Kosovo Verification Mission”;
 - (c) P437, a document dated October 1998 and entitled “Humanitarian Law Violations in Kosovo”;
 - (d) P441, a document dated February 1999 and entitled “A Week of Terror in Drenica: Humanitarian Law Violations in Kosovo”;
 - (e) P456, a document dated 23 September 1998 and described as “United Nations Security Council Resolution 1199 (1998) adopted by the Security Council at its 3930th meeting on 23-Sep-98”;
 - (f) P540, a letter dated 20 July 1998 from Holly Cartner, Human Rights Watch, to Minister Arandel Markičević;
 - (g) P541, a letter dated 20 July 1998 from Holly Cartner, Human Rights Watch, to Minister Zoran Knežević;
 - (h) P542, a letter dated 20 July 1998 from Holly Cartner, Human Rights Watch, to Minister Vlajko Stojiljković;
 - (i) P543, a letter dated 20 July 1998 from Holly Cartner, Human Rights Watch, to Mr. Goran Matić;

⁸⁷ See *supra* para. 23.

⁸⁸ See *Milutinović et al.*, Transcript, T. 814–815 (13 July 2006).

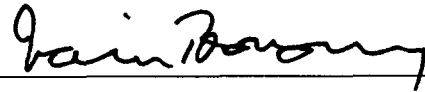
⁸⁹ See *ibid.* T. 807–810 (13 July 2006).

⁹⁰ See *supra* para. 23.

- (j) P544, a letter dated 20 July 1998 from Holly Cartner, Human Rights Watch, to “Vojska Jugoslavije, Kosovo Command, Information Service”;
- (k) P545, a letter dated 20 July 1998 from Holly Cartner, Human Rights Watch, to Mr. Vučić;
- (l) P546 a letter dated 20 July 1998 from Holly Cartner, Human Rights Watch, to Minister Sokolović;
- (m) P642, a photograph taken on 29 September 1998 of two deceased persons in Gornje Obrinje;
- (n) P653, a photograph taken on 29 September 1998 of one deceased person in Gornje Obrinje;
- (o) P679, a photograph taken on 29 September 1998 of one deceased person in Gornje Obrinje;
- (p) P702, a photograph taken on 26 September 1998 in Pločica in Gornje Obrinje;
- (q) P761, an undated document entitled “Organization for Security and Co-Operation in Europe Kosovo Verification Mission Human Rights Tasks Overview”;
- (r) P763, a document dated December 1998 and entitled “Organization for Security and Co-Operation in Europe Kosovo Verification Mission Human Rights Division Operational Plan”;
- (s) P764, a document dated March 1999 and entitled “Organization for Security and Co-Operation in Europe Kosovo Verification Mission Refugee Monitoring Plan”;
- (t) P765, an undated document entitled “Organization for Security and Co-Operation in Europe Kosovo Verification Mission Refugee Monitoring Form”;
- (u) P766, an undated document entitled “Organization for Security and Co-Operation in Europe Kosovo Verification Mission Guidelines on Classification”
- (v) P2225, the Rule 89(F) statement of Sandra Mitchell;
- (w) P2226, the Rule 92 *bis* statement of Sandra Mitchell;
- (x) P2227, the Rule 89(F) statement of Frederick Abrahams;
- (y) The following excerpts of P2228, the Rule 92 *bis* statement of Frederick Abrahams: pp. 1–17, 20, 27, 33 (last two lines) – 35 (end of third full paragraph), and 41 (the portion headed “witness acknowledgement”);
- (z) 3D3, an undated document entitled “OSCE Interview Report - HYSENI Bedri”; and
- (aa) 3D4, an undated document entitled “ICG Database Incidents - HYSENI Bedri”.

(4) Pursuant to paragraph 27 above, exhibit P386 is not admitted.

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



Iain Bonomy
Presiding

Dated this first day of September 2006
At The Hague
The Netherlands

[Seal of the Tribunal]