



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-02-54-T
Date: 20 June 2002
Original: English

IN THE TRIAL CHAMBER

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

Registrar: Mr. Hans Holthuis

Decision of: 20 June 2002

PROSECUTOR

v.

SLOBODAN MILOŠEVIĆ

**DECISION ON PROSECUTION'S APPLICATION FOR CERTIFICATION UNDER
RULE 73 (B) CONCERNING THE EVIDENCE OF AN INVESTIGATOR**

The Office of the Prosecutor

Mr. Geoffrey Nice
Mr. Dirk Ryneveld

The Accused

Slobodan Milošević

Amici Curiae

Mr. Steven Kay
Mr. Branislav Tapušević
Mr. Michail Wladimiroff

THIS TRIAL CHAMBER of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (“International Tribunal”),

BEING SEISED of a “Prosecution’s Application for Certification Under Rule 73 (C)” filed by the Office of the Prosecutor (“Prosecution”) on 12 June 2002 and subsequent Corrigendum bringing the application under the newly formulated Rule 73 (B) dated 13 June 2002 (“Application”), in which the Prosecution seeks certification from the Trial Chamber for interlocutory appeal of its decision excluding evidence from an OTP investigator (Mr. Barney Kelly) which incorporates, *inter alia*, summary by that investigator of witness statements and other material related to events alleged to have taken place in Racak,

NOTING the Prosecution’s arguments in favour of its Application, that:

- (a) the admission of the evidence would have a significant positive effect on the ability of the Trial Chamber to arrive at a proper assessment of the large volume of evidence relating to these events;
- (b) the admission of such evidence will expedite the trial proceedings;
- (c) given the time constraints placed on the Prosecution by the Chamber, such evidence will better enable the Trial Chamber to have an overview of events at this and other crime sites;
- (d) summarising evidence of this nature has probative value in itself, being a form of hearsay evidence, which is admissible in this Tribunal;
- (e) the evidence would provide a potential assessed basis of information against which the Chamber would be able to test any provisional findings;
- (f) the evidence would assist the Chamber in identifying with specificity sources of additional material in the form of live evidence that would be available to it;
- (g) the admissibility of summarising evidence of this sort poses a significant issue not only for the Kosovo segment of these proceedings, but for the Croatia and Bosnia segments as well;
- (h) consideration of this issue by the Appeals Chamber is highly desirable to resolve inconsistencies in practice by different Trial Chambers (for example, the admission of such evidence in the *Krstic* and *Jelusic* cases),

NOTING the Trial Chamber's oral ruling rejecting the admission of the evidence on 30 May 2002 ("the Decision"), the relevant parts of which are set out as follows:

[F]or a witness to give his or her conclusions upon the evidence is to trespass on the function of the Trial Chamber. It is for the Trial Chamber to decide which evidence to accept and which to reject and what conclusions to draw from the evidence. Therefore, any evidence which trespasses on those functions is normally to be excluded.

...

We accept that the incident at Racak was a significant incident. We are also conscious of the constraints placed upon the Prosecution by the limitation of time, but some limitation is inevitable since this incident is not being considered in isolation but as one among a great many which make up the subject matter of this trial.

In these circumstances, we think it not unreasonable for the Prosecution to rely upon five witnesses, together with others, who deal with the incident in their evidence. Should 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.

It follows that this consideration is not one which leads us to depart from the principles referred to earlier.¹ Accordingly, the evidence will not be admitted. And I add for completeness that reference was made to the fact that similar evidence was admitted in *Krstic*. However, it appears no challenge was made to the admissibility of the evidence in that case, and we have not been referred to or found a recent decision on the topic from which to derive any assistance.²

NOTING that Rule 73 (B) requires two criteria to be satisfied before the Trial Chamber can exercise its discretion to certify a decision for interlocutory appeal: (1) that the issue would significantly affect the fair and expeditious conduct of the proceedings or outcome of the trial, *and* (2) an immediate resolution of the issue may, in the opinion of the Trial Chamber, materially advance the proceedings,

¹ These arguments are set out fully in the transcript at pages 5941 – 5944. Mr. Nice made several arguments for the admission of this evidence, including: (1) that the evidence relates to a significant incident in the case the field of evidence concerning which is too large to bring in the time available; (2) the OSCE Report admitted in these proceedings contains essentially the same sort of summary evidence; and (3) the admission of similar evidence was allowed in the Argentine Juntas trial and is admissible under the criminal procedure of Spain and The Netherlands. The Trial Chamber noted in its oral ruling that the criminal procedure of Spain and The Netherlands differs materially from the essentially adversarial proceedings under which the Tribunal operates. Furthermore, there is a crucial difference between the Kelly evidence and the OSCE Report, in that the latter is a report prepared by a body independent of the parties to the proceedings, whereas the Kelly evidence does not have the quality of independence since it was prepared for the very litigation with which the Chamber is dealing. Finally, the dossier and report admitted in the Argentine Juntas trial contained the statements of the witnesses and therefore involved a different procedure to that contemplated here, and the report seems more akin to the OSCE Report. The Trial Chamber also draws the attention of the Appeals Chamber to previous decisions it has made with respect to this form of evidence: in these proceedings, the evidence of Kevin Curtis (transcript pages 672-673) and John Zdrilic (transcript page 3499), and in the *Kordic and Cerkez* proceedings, its detailed decision concerning the Tulica Binder, 29 July 1999.

² Transcript pages 5941 – 5944.

CONSIDERING


- (1) the submission of the Prosecution that the admission of such evidence would significantly expedite the proceedings; and
 - (2) the opinion of the Trial Chamber that it would compromise the fairness of the proceedings by allowing the admission of material of little or no probative value,
- and therefore the resolution of this issue would significantly affect the fair and expeditious conduct of the proceedings,

CONSIDERING that this issue has not been determined by the Appeals Chamber and is the subject of different practice in different Trial Chambers, and that there have been several similar applications in this trial and more are anticipated, the Trial Chamber considers that immediate resolution of this issue would materially advance the proceedings,

PURSUANT to Rule 73 (B) of the Rules of Procedure and Evidence

HEREBY CERTIFIES the interlocutory appeal of the Decision.

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



Richard May
Presiding

Dated this twentieth day of June 2002
At The Hague
The Netherlands

[Seal of the Tribunal]