



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: 8 July 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: 8 July 2002

PROSECUTOR

v.

SLOBODAN MILOŠEVIĆ

**DECISION ON THE PROSECUTION'S MOTION TO ADMIT
A WITNESS STATEMENT**

Office of the Prosecutor:

Mr. Geoffrey Nice
Mr. Dirk Ryneveld
Ms. Hildegaard Uertz-Retzlaff
Mr. Dermot Groome

The Accused:

Slobodan Milošević

Amici Curiae:

Mr. Steven Kay
Mr. Branislav Tapušković
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 an application made in private session on 27 May 2002 by the Office of the Prosecutor (“Prosecution”) to admit as an exhibit a witness statement made by Witness K21 (“Witness Statement”). This application was further developed in the “Prosecution’s Motion to Admit the Witness Statement of K21” filed confidentially on 25 June 2002 (together “Prosecution’s Motion”),

NOTING that the Witness Statement was given by Witness K21 to a Prosecution investigator on 17 and 18 March 1999,

NOTING that Dr. Eric Baccard testified as an expert witness before the Trial Chamber on 21 and 22 May 2002 and that his expert report, entitled “Medico-Legal Analysis and Synthesis Report About the Forensic Expertises Missions Conducted in Kosovo during the Year 1999” (“Expert Report”), was admitted in evidence as Prosecution Exhibit 168,

NOTING that apart from the Witness Statement, all the other supporting documents which Dr. Baccard examined for his assessment of the Račak site in his Expert Report were contained in the ‘Račak binder’, which was admitted as Prosecution Exhibit 156,

NOTING that these supporting documents include the Report of Medical Examination on Mortal Remains (Prosecution Exhibit 156, Tab 6), which was compiled by Witness K21, (“Witness Report”),

NOTING that on 7 May 2002, pursuant to Rule 92bis of the Rules of Procedure and Evidence (“Rules”), Witness K21 had an opportunity to testify about the contents of the Witness Statement, but declined to do so, and that pursuant to the principles set out in the Trial Chamber’s “Decision on Prosecution’s Request to have Written Statements Admitted under Rule 92bis” of 21 March 2002, the Witness Statement was not admitted as a Rule 92bis statement,

CONSIDERING the “Skeleton Argument of *Amici Curiae* as to the Issue of the Witness Statement of K21 within the Expert Report of Dr. Eric Baccard” (“*Amici Curiae* Skeleton Argument”) filed by the *Amici Curiae* on 7 June 2002,

CONSIDERING the arguments put forward in the Prosecution’s Motion,

CONSIDERING Rule 89 of the Rules, in which paragraph (B) provides that 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 Statue and the general principles of law, and in which paragraph (D) provides that a Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial,

CONSIDERING the Appeals Chamber’s “Decision on Interlocutory Appeal concerning Rule 92bis(C)” of 7 June 2002 in the Galić case, and in particular paragraph 31 of that Decision, which provides that “[a] party cannot be permitted to tender a written statement given by a prospective witness to an investigator of the OTP under Rule 89(C) in order to avoid the stringency of Rule 92bis.”,

CONSIDERING that the Witness Report compiled by Witness K21 has been admitted in evidence as part of the ‘Račak binder’ and that, as noted in the Prosecution’s Motion, it contains opinions by Witness K21 in relation to two dead bodies, but that it does not follow that the Witness Statement, containing many more opinions, should be admitted,

CONSIDERING that the Witness Statement contains evidence which should have been given by Witness K21; however this witness declined to give evidence. Therefore, the accused did not have the opportunity to cross-examine the witness on the contents of the Witness Statement. As pointed out in the *Amici Curiae* Skeleton Argument, in those circumstances it would not be fair to introduce the Witness Statement into evidence as an exhibit which would amount to introducing it by a 'backdoor route',

PURSUANT TO Rule 89 of the Rules,

HEREBY DENIES the Prosecution's Motion to admit in evidence the Witness Statement.

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


Richard May
Presiding

Dated this eighth day of July 2002
At The Hague
The Netherlands

[Seal of the Tribunal]