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

Case No.: IT-02-54-T

Date: 4 November 2003

Original: English

IN THE TRIAL CHAMBER

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

Registrar: **Mr. Hans Holthuis**

Order of: **4 November 2003**

PROSECUTOR

v.

SLOBODAN MILOŠEVIĆ

PUBLIC VERSION

DISSENTING OPINION OF JUDGE ROBINSON TO DECISION DATED 31 OCTOBER 2003 ON PROSECUTION MOTION FOR THE ADMISSION OF WITNESS STATEMENTS RELEVANT TO EVENTS IN GAČKO, VIŠEGRAD, ZVORNIK AND SANSKI MOST MUNICIPALITIES IN LIEU OF VIVA VOCE TESTIMONY PURSUANT TO RULES 54 and 92*BIS*

The Office of the Prosecutor

Mr. Geoffrey Nice

The Accused

Slobodan Milošević

Amicus Curiae

Mr. Steven Kay
Mr. Branislav Tapušković
Mr. Timothy McCormack

DISSENTING OPINION OF JUDGE PATRICK ROBINSON

1. In this Opinion, I explain why, in response to the Prosecution Motion for the admission of the statement of witness B-1756 without cross-examination, the Trial Chamber should exercise its discretion under Rule 92 *bis* (E) in favour of cross-examination.

2. The Accused is charged in Count 3 of the Indictment with Persecution committed in a number of territories, including Višegrad. Paragraph 35 (e) alleges sexual violence, a form of cruel and inhumane treatment, as one of the means by which this persecution was committed.

3. In the past, the Accused has maintained that the rape of women was not committed by persons linked to him, but by ordinary criminals.[1] Thus he has cross-examined victims with a view to showing that rapes were not committed by JNA soldiers.[2]

4. If his case is accepted by the Chamber, the Prosecution would not have substantiated its allegation in respect of sexual violence for those specific instances of rape, and thus, in my view, there might be a chance of a submission under Rule 98 *bis* succeeding on the basis that the evidence is insufficient to support a conviction. I make it plain that this view is confined to the allegation of sexual violence in paragraph 35 (e), since that paragraph contains allegations of cruel and inhumane treatment committed by other means; moreover, there are allegations of sexual violence committed in territories other than Višegrad.

5. In the initial part of her statement, the witness speaks of JNA soldiers in Višegrad in March and April 1992, and being told that they had to leave, and that Serbian

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1 In relation to witnesses B-1542 and B-1543, T. 19616.
2 *See, e.g.,* witness B-1405, Transcript, pp 18221-18222.

paramilitaries were planning to come to Višegrad. She later saw some men dressed in camouflage uniforms and was told that they were paramilitary soldiers.

6. In the evening, the witness and the other women were taken by three soldiers from their apartment to another building on their street. She was able to describe two of the three soldiers clearly. These two were younger than the third. One wore a camouflage jacket, a black T-shirt and blue jeans. The other wore a JNA army T-shirt and a cap. All three spoke with a Serbian accent. The soldier with the cap took the other woman out of the room. She later heard the other woman scream. The older soldier left the room. The younger of the two soldiers then jumped on her and raped her. When the other woman returned they were both raped repeatedly by the soldiers. In the morning, they went home. In the evening, two other soldiers came; they spoke with a Serbian accent. She was raped that night by one of the soldiers and the other woman was forced to have sexual contact with the other soldier. On another occasion, a day later, the other woman and herself were again raped by two soldiers, one of whom wore a black cap with an unknown insignia on it; she believes there was a kind of lion or tiger drawn on it in gold.

7. I do not know whether the Accused will adopt the same approach to this rape victim as he has taken in the past, and it would not be right for the Chamber to make a presumption as to his position. However, the point is that if he wishes to take that approach, he must be given the opportunity of challenging the witness as to the identity of her assailants so as to show that the men who raped the other woman and herself were not persons linked to him in any way, but ordinary criminals. It is clear that the Prosecution will allege that the men described by the witness as soldiers, one of whom wore a JNA T-shirt and all of whom spoke with a Serbian accent, were either members of the JNA, or members of a paramilitary group with sufficient links to the Accused to fix him with liability under Article 7 (1) or 7 (3) of the Statute. If that is not the Prosecution case, the evidence has no value.

8. The links between the JNA and the Accused as well as those between the paramilitaries and the Accused are both matters of debate between the parties. Generally, the Prosecution case is that there are such links. On the other hand, the Defence case is that there are no such links. Whether such links exist is a mixed question of law and fact that the Trial Chamber will have to determine.

9. In my view, the statement does not establish clearly whether the men who carried out the rapes belonged either to the JNA or the paramilitaries. To the extent that they might have been members of the JNA, the Accused should be allowed to cross-examine to show that they were not. To the extent that they might have been members of a paramilitary group, the Accused should be allowed to cross-examine with a view to so confirming; in which event, if the Chamber found that there was no connection between the Accused and the paramilitaries, the Prosecution charge in respect of this incident would not be substantiated. Cross-examination might also show that the men were not members of the JNA or a paramilitary group, or at any rate, that the Accused had no connection with them sufficient to fix him with liability under Article 7 (1) or 7 (3) of the Statute.

10. The Accused could be building a case for the dismissal of the charge of sexual violence, a form of cruel and inhumane treatment, under paragraph 35 (e) on the basis of a submission under Rule 98 *bis*. Not allowing him to cross examine the witness, the maker of the statement, will weaken that submission. At the same time, it will allow the Prosecution to submit either on a Rule 98 *bis* submission or at the end of the case, that the statement is an item of evidence that substantiates the charge of sexual violence, since it was not challenged by the Accused. There is no warrant for applying Rule 92 *bis* in such a way that it prejudices a Defence motion for acquittal under Rule 98 *bis* on the basis that the evidence is insufficient to sustain a conviction on a specific charge. Moreover, depriving the Accused of the right to cross-examine the witness constitutes, in the circumstances of this

case, a breach of his fair trial right, guaranteed by Article 21 (4) (e) of the Statute, to put his case to the Prosecution witnesses.

11. There is, in my view, an issue as to the identity and status of the men who raped the witness and the other woman that needs to be tried, tested and determined in the old fashioned way – by cross-examination.

12. Another reason for cross-examination is that, as far as I have been able to gather, this witness provides the sole evidence of this incident of sexual violence. The point is not that her evidence has to be corroborated. Rule 96 makes it clear that corroboration is not required. But it must be unacceptable that the Prosecution case in relation to this incident could be substantiated on the basis of a single piece of evidence that has not been subject to cross-examination.

13. The jurisprudence of the European Court of Human Rights is that it is not compatible with the rights of the defence for a conviction to be based solely or to a decisive extent on a statement when there was no opportunity to challenge it.[3] Concededly, the charge of persecution in Count 3 has many more constituent elements than this single incident of rape in paragraph 35 (e). Thus, the Accused could be convicted of persecution even if the Trial Chamber determines that the Prosecution case in respect of this incident has not been substantiated. However, in my view, it would be unsafe for the Trial Chamber to determine that the Prosecution case in respect of this segregated incident of sexual violence has been substantiated on the sole basis of the statement of this witness, since the Accused has not had the opportunity to cross-examine its maker, B-1756. In other words, the evidence in the statement relating to this incident should not contribute to a finding of guilt of cruel and inhumane treatment under paragraph 35(e), and consequentially, of persecution under Count 3 of the Indictment.

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[3] *See, e.g., Kostovski v. The Netherlands*, Judgment of 20 Nov. 1989, Series A no 166, para. 44; *Unterpertinger v. Austria*, Judgment of 24 Nov. 1986, Series A no 110, para. 33; *Lüdi v. Switzerland*, Judgment of 15 June 1992, Series A no 238, para. 47; *Saïdi v. France*, Judgment of

14. This Motion may be compared with the Prosecution application for the admission of transcripts of B-1542 and B-1543 in the Foča Decision.[4] In that case, I dissented because I was of the view that the Accused was entitled to cross-examine witnesses B-1542 and B-1543, who were also rape victims. Note, however, that that case is markedly different from this one in that there had been at least cross-examination of B-1542 and B-1543 in a previous trial,[5] which allowed the Prosecution to argue that cross-examination was adequate for the purposes of this trial – a position with which I disagreed.[6] Thus the Trial Chamber had the benefit of the previous cross-examination of B-1542 and B-1543 – an advantage that it does not have in respect of B-1756.

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

Patrick Robinson

Dated this fourth day of November 2003
At The Hague
The Netherlands

[Seal of the Tribunal]

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20 Sept. 1993, Series A no 261-C, para. 44, *Van Mechelen v. The Netherlands*, Judgment of 23 Apr 1997, Reports 1997-III, para. 63.

4 *Prosecutor v Milošević*, Decision on Prosecution Motion for the Admission of Transcripts in Lieu of Viva Voce Testimony pursuant to Rule 92*bis* (D) – Foča Transcripts, Case No. IT-02-54-T, 30 June 2003 ("Foča Decision").

5 *Prosecutor v. Kunarac et. al.*, Case No. IT-96-23-T and IT-96-23/1-T.

6 *See* Foča Decision, Dissenting Opinion of Judge Patrick Robinson, pp 19-39.