



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: 25 February 2004

Original: ENGLISH

IN THE TRIAL CHAMBER

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

Registrar: Mr. Hans Holthuis

Order of: 25 February 2004

PROSECUTOR

v.

SLOBODAN MILOŠEVIĆ

**DECISION ON PROSECUTION MOTION FOR THE ADMISSION OF
EVIDENCE OF WITNESS C-040 IN WRITTEN FORM**

The Office of the Prosecutor

Ms. Carla Del Ponte
Mr. Geoffrey Nice
Mr. Dermot Groome

The Accused

Mr. Slobodan Milošević

Amici Curiae

Mr. Steven Kay, QC
Mr. Branislav Tapušković
Mr. Timothy L.H. McCormack

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 confidential “Prosecution motion for the Admission of Evidence of Witness C-040 in Written Form”, filed on 16 February 2004 (“Motion”), in which the Prosecution seeks, due to the inability of the witness to testify due to his medical condition, to have a statement of the witness C-040:

- (a) Admitted under Rule 89 (F) of the Rules of Procedure and Evidence of the International Tribunal (“Rules”) and for cross-examination to be conducted by way of written questions and answers; or, in the alternative
- (b) Admitted (with those parts of the statement going to the acts and conduct of the Accused redacted) under Rule 92 *bis* (C) on the basis that the witness is “by reason of bodily or mental condition unable to testify”,

HAVING suspended a Subpoena Ad Testificandum to the witness in a confidential and *ex parte* Order on 22 October 2003, and refused reinstatement of the Subpoena on 17 November 2003, for reasons set out in those Orders,

NOTING that the Prosecution has not addressed in the Motion the issue of whether the witness would be willing to give evidence voluntarily or whether it intends again to seek a reinstatement of the subpoena,

NOTING the decision of the Appeals Chamber, which held that Rule 89 (F) allows for the admission of a written witness statement when the witness is, amongst other pre-requisites, present in court,¹

CONSIDERING that the ability of the Trial Chamber to see the witness when he gives his evidence, and to observe the witness’s demeanour, is an important aspect of assessing the credibility of the witness and cannot be satisfied by written responses to questions posed in writing,

¹ *Prosecutor v. Slobodan Milošević*, “Decision on Interlocutory Appeal on the Admissibility of Evidence-in-Chief in the Form of Written Statements,” Case No. IT-02-54-AR73.4, 30 September 2003, p.11.

CONSIDERING that the witness is unavailable to testify because he would not testify without a subpoena and the Prosecution failed to persuade the Trial Chamber that it should reinstate the subpoena, which was suspended on the basis of information the Prosecution should have made available to the trial Chamber at the time it sought the subpoena,

CONSIDERING THEREFORE that Rule 92 *bis* (C) is not applicable to the circumstances of this witness,

PURSUANT TO Rules 89 (F) and 92 *bis* of the Rules

HEREBY DENIES THE MOTION.

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



Patrick Robinson
Judge

Dated this twenty-fifth day of February 2004
At The Hague
The Netherlands

[Seal of the Tribunal]