



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: 1 March 2005
Original: English

IN THE TRIAL CHAMBER

Before: Judge Patrick Robinson, Presiding
Judge O-Gon Kwon
Judge Iain Bonomy

Registrar: Mr. Hans Holthuis

Decision of: 1 March 2005

PROSECUTOR

v.

SLOBODAN MILOŠEVIĆ

ORDER ON RECALLING DR. KRISTAN

Office of the Prosecutor:

Ms. Carla Del Ponte
Mr. Geoffrey Nice

The Accused:

Mr. Slobodan Milošević

Court Assigned Counsel:

Mr. Steven Kay, QC
Ms. Gillian Higgins

Amicus Curiae:

Prof. Timothy 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 (“the International Tribunal”),

HAVING issued an oral Order to the Prosecution, on 25 January 2005 (“Order”), “to make a filing identifying the areas in respect of which [the Prosecution] wish[es] to adduce evidence from Dr. Kristan should [the Prosecution] wish to recall him, and also to comment on his availability”,

NOTING the relevant history of this matter, as follows:

- (1) The Prosecution sought to introduce expert evidence on matters relating to the revocation of the autonomy of Kosovo and to the constitutional right of self-determination and secession of Kosovo from the Republic of Serbia, amongst other matters, through the expert witness, Dr. Kristan;
- (2) On 23 May 2003, the Trial Chamber issued an oral ruling¹ with respect to Dr. Kristan’s expert report concerning these matters, in which it determined that since Dr. Kristan was a judge of the Constitutional Court of the SFRY at the time when these issues were discussed and had expressed a dissenting opinion, his testimony would be “quite influenced by his participation in the court proceedings”.² Therefore, it was held that those parts of Dr. Kristan’s report dealing with (a) the autonomy of Kosovo and its revocation, and (b) Kosovo’s constitutional right of self-determination (“the two areas”), could not be admitted into evidence.³ Nevertheless, the Chamber determined that the other parts of his report were admissible and Dr. Kristan could give evidence with respect to the issues contained in those parts;⁴
- (3) The Prosecution subsequently submitted that it was unable to find experts willing or able to testify on issues of constitutional law of the former Yugoslavia.⁵ Finally, the Prosecution submitted that an additional difficulty with identifying an appropriate constitutional law expert was that the issue is “controversial ... in the

¹ T. 21160 (23 May 2003).

² T. 21162 (23 May 2003).

³ T. 21162 (23 May 2003).

⁴ T. 21162 (23 May 2003).

⁵ T. 22799 (19 June 2003). Even when they were able to find people with the required credentials to serve as a constitutional law expert in the Court those people were “on several occasions, afraid to do so.” (T. 30701, 17 December 2003).

former Yugoslavia; [i]t is not necessarily an easy legal issue, may be it is an issue that [requires] different approaches depending on where you come from”;⁶

- (4) In Order (15) of the Trial Chamber’s Omnibus Order of 17 June 2004, the Trial Chamber stated that, “Having regard to the difficulties experienced by the Prosecution in securing a constitutional expert, the Trial Chamber will issue an order, requiring submissions from the parties on certain constitutional issues in due course”;
- (5) Subsequently, the Accused called Dr. Marković as a fact witness who testified, *inter alia*, on the two areas;
- (6) During the testimony of Dr. Marković, the Trial Chamber considered whether Dr. Kristan might be recalled to testify as a fact witness on the two areas he was prohibited from testifying on as an expert, and the abovementioned order was in turn issued,

NOTING the “Prosecution’s Motion in Response to Trial Chamber Oral Order of 25 January 2005 Regarding Potential Additional Evidence to be Given by Dr. Kristan”, filed on 1 February 2005 (“Motion”), in which the Prosecution identifies a number of matters set out in paragraphs 5, 13 and 15 of its Motion, preferably on the basis of Dr. Kristan’s initial expert report, or on such other terms as the Chamber may decide,

NOTING the “Assigned Counsel Reply to Prosecution Motion in Response to Trial Chamber Oral Order of 25 January 2005 Regarding Potential Additional Evidence to be Given by Dr. Kristan”, filed on 8 February 2005 (“Reply”), in which Assigned Counsel submit that the Prosecution should be restricted to calling any further evidence from Dr. Kristan as part of its rebuttal case, and that any such evidence should be restricted to evidence given as a fact witness,

CONSIDERING that the intention of the Trial Chamber in issuing its Order was to obtain a complete picture of the evidence concerning the status of Kosovo and the relevant constitutional matters that attach to this issue within a reasonable period of hearing the evidence of Dr. Marković, so that the matters are fresh in the minds of the Chamber and parties,

⁶ T. 30702 (17 December 2003). In support of the difficulties faced by the Prosecution, two documents were produced: (1) “Constitutional law expert for Kosovo issues: contacted legal experts from the former Yugoslavia (Sept-Dec 2003)”, and (2) a letter from a contacted expert declining to testify (dated 12 January 2004).

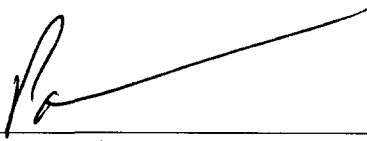
CONSIDERING FURTHER that the Trial Chamber wishes only to hear evidence of fact from Dr. Kristan on the two areas on which the Trial Chamber had ruled it was inappropriate for Dr. Kristan to testify,

PURSUANT TO Rule 54 of the Rules of Procedure and Evidence of the International Tribunal,

HEREBY ORDERS AS FOLLOWS:

- (1) The Prosecution shall be permitted to recall Dr. Kristan in respect of (a) Kosovo's autonomy and its revocation, and (b) its right to self-determination, to testify, to the extent possible, on those matters as a fact witness; and
- (2) The Trial Chamber will, after consulting the Accused and the Prosecution, identify a suitable time for Dr. Kristan to be recalled to testify.

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



Judge Robinson
Presiding

Dated this first day of March 2005
At The Hague
The Netherlands

[Seal of the Tribunal]