



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: 15 April 2005
Original: ENGLISH

IN THE TRIAL CHAMBER

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

Registrar: Mr. Hans Holthuis

Decision: 15 April 2005

PROSECUTOR

v.

SLOBODAN MILOŠEVIĆ

**DECISION ON TESTIMONY OF
DEFENCE WITNESS DRAGAN JASOVIĆ**

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 (“International Tribunal”),

NOTING the following:

- (1) on 14 April 2005, the Trial Chamber orally delivered a decision granting the Accused leave to add Dragan Jasović (“witness”) to his list of witnesses and stating that the Trial Chamber would make a further decision as to when the witness may be called and whether his evidence would be restricted to particular areas;¹
- (2) on 14 April 2005, the Trial Chamber made an oral order that the witness would begin his testimony on 19 April 2005 and then return for cross-examination at a date to be determined later;² and
- (3) it is contemplated by the Accused that he will adduce through the witness, who was a policeman at the secretariat of the interior in Urosevac, approximately 57 to 89 statements of people interviewed by him in 1998 and 1999 (“statements”) purporting, *inter alia*, to identify members of the KLA in and around Račak,³ and the issue before the Trial Chamber is whether or not and on what terms such statements may be used and/or admitted during the testimony of the witness,

NOTING that the Prosecution objected to the addition of the witness to the Accused’s witness list, making the following submissions:

- (1) there were no grounds for adding the witness to the Accused’s witness list;
- (2) the witness was being called in order to produce statements of other people (“declarants”), that such statements were inadmissible (except through the procedural mechanisms provided for in Rules 92*bis* and 89(F)), and that the declarants should be called by the Accused to testify in court;
- (3) the Prosecution has not been given adequate notice of the witness’ proposed testimony, nor of the documents sought to be adduced through him as a witness;
- (4) the Appeals Chamber jurisprudence does not allow for admission of the statements;

¹ T. 38503 (14 April 2005).

² T. 38529-38531 (14 April 2005).

³ T. 38244, 38250, 38307, 38329, 38436-38437 (12-13 April 2005).

- (5) the situation is no different to that of an investigator who summarises the content of witness statements and which has been ruled inadmissible in these proceedings; and
- (6) the statements lack sufficient indicia of reliability in order to render them admissible,⁴

NOTING that the Assigned Counsel made the following submissions in support of the addition of the witness to the Accused's witness list:

- (1) the statements are relevant to and probative of issues in the case raised by the Prosecution;
- (2) the Prosecution is aware of the statements because the witness has been a Prosecution witness in another case before the International Tribunal;
- (3) the present situation is distinguishable from circumstances in which an investigator in the same proceedings summarises the contents of witness statements;
- (4) the statements are distinguishable from materials created for use in litigation because they are contemporaneously-made statements located in the files of law-enforcement agencies; and, as such, the Accused should be permitted to rely upon them to prove matters relevant to the issue of his state of mind;
- (5) the time afforded to the Accused for the presentation of his Defence case does not allow for the testimony of all the declarants;
- (6) the Appeals Chamber has stated that Rule 92*bis* applies to statements taken for litigation; and
- (7) the admission of the statements is consistent with other decisions in these proceedings concerning the evidence of Human Rights Watch and the witness Vasiljević,⁵

NOTING the submissions of the Accused in support of the addition of the witness to his witness list:

- (1) it would not be possible for him to bring the declarants as witnesses in this case because of the political climate in Kosovo;
- (2) the statements were taken in a manner consistent with the laws governing the Ministry of the Interior;

⁴ T. 38242-38246, 38436-38443 (12-13 April 2005). See also arguments made on 14 April 2005. T. 38482-38503.

⁵ T. 38246-38248, 38330-38333 (12 April 2005). See also arguments made on 14 April 2005. T. 38482-38503.

(3) the statements contain relevant and probative information; and

(4) the Accused contacted the witness at the earliest opportunity regarding the possibility of his testifying in this case,⁶

HAVING CONSIDERED all the arguments of the parties,

NOTING that the Motion to add the witness arose because of the Prosecution's challenge to the witness Marinković that she knew that the statements provided to her were obtained by means of oppression, including by the proposed witness,

CONSIDERING that the Trial Chamber has been informed that some of the documents may be untranslated; if this is indeed the case, any untranslated documents tendered by the Accused for admission into evidence may only be marked for identification pending translation and further Order of the Trial Chamber, and that provision will have to be made to allow the Prosecution reasonable opportunity to review the translated statements and cross-examine the witness in respect of them,⁷

NOTING the terms of Rule 89(C) that "A Chamber may admit any relevant evidence which it deems to have probative value",

CONSIDERING the Appeals Chamber has held, with respect to Rule 89(C), that it

permits the admission of hearsay evidence (that is, evidence of statements made out of court), in order to prove the truth of such statements rather than merely the fact that they were made. Hearsay evidence may be oral, as where a witness relates what someone else had told him out of court, or written, as when (for example) an official report written by someone who is not called as a witness is tendered in evidence. Rule 89 (C) clearly encompasses both these forms of hearsay evidence.⁸

CONSIDERING that the Appeals Chamber has held that hearsay evidence is only admissible where a Trial Chamber is satisfied that the evidence is reliable,⁹

⁶ T. 38248-38251 (12 April 2005). See also arguments made on 14 April 2005. T. 38482-38503.

⁷ T. 38244, 38248, 38334, 38439 (12-13 April 2005). The Prosecution informed the Trial Chamber that it had been able to locate English translations of most of the statements. T. 38439 (13 April 2005).

⁸ *Prosecutor v. Galić*, "Decision on Interlocutory Appeal Concerning Rule 92bis(C)", Case No. IT-98-29-AR73.2, 7 June 2002, citing other Appeals Chamber jurisprudence in support (footnotes omitted).

⁹ *Ibid* at para. 27.

CONSIDERING that the Appeals Chamber has held 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”, but that “Rule 92bis has no effect upon hearsay material which was not prepared for the purposes of legal proceedings”,¹⁰

CONSIDERING that, in the opinion of the Trial Chamber, the reference by the Appeals Chamber to material “prepared for the purposes of legal proceedings”, was intended to relate to material prepared for the purposes of legal proceedings before this Tribunal, such as a witness summary prepared by an OTP investigator of the content of statements given by witnesses for the purposes of this case,¹¹

CONSIDERING FURTHER that the statements the Accused seeks to introduce through the witness may be admissible as hearsay evidence pursuant to Rule 89(C) if the reliability of the statements is sufficiently established,

PURSUANT to Rules 54 and 89 of the Rules of Procedure and Evidence of the International Tribunal,

HEREBY ORDERS as follows:

- (1) The witness may be examined on the statements;
- (2) The statements the Accused seeks to tender into evidence through the witness are admissible if they are found to have sufficient indicia of reliability;
- (3) Determination of the admissibility of a statement will only be made after it has been translated and the evidence of the witness has been concluded; and
- (4) The Trial Chamber will make further orders in respect of this witness and the statements as necessary.

¹⁰ *Ibid* at para. 31, cited with approval by the Appeals Chamber in *Prosecutor v. 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, at paras 12-13.

¹¹ *Prosecutor v. Milošević*, “Decision on Admissibility of Prosecution Investigator’s Evidence”, Case No. IT-02-54-AR73.2, 30 September 2002.

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



Judge Robinson
Presiding

Dated this fifteenth day of April 2005
At The Hague
The Netherlands

[Seal of the Tribunal]