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UNITED
NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991

Case No. IT-04-83-T

Date: 24 July 2007

Original: English

IN TRIAL CHAMBER I

Before: **Judge Bakone Justice Moloto, Presiding**
Judge Frederik Harhoff
Judge Flavia Lattanzi

Registrar: **Mr. Hans Holthuis**

Decision of: **24 July 2007**

PROSECUTOR

v.

RASIM DELIĆ

PUBLIC

DECISION ADOPTING GUIDELINES ON THE ADMISSION AND PRESENTATION OF EVIDENCE AND CONDUCT OF COUNSEL IN COURT

The Office of the Prosecutor

Mr. Daryl A. Mundis
Ms. Laurie Sartorio
Mr. Kyle Wood
Mr. Aditya Menon

Counsel for the Accused

Ms. Vasvija Vidović
Mr. Nicholas David Robson

TRIAL CHAMBER I ("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 ("Tribunal");

NOTING that at the pre-Trial Conference on 2 July 2007, the Trial Chamber informed the Parties of its intention to adopt guidelines covering the presentation and admission of evidence and the conduct of counsel in court;[1]

NOTING that on 9 July 2007, the Trial Chamber requested the Parties to provide it with any comments by way of email by close of business on Monday, 16 July 2007;

NOTING that such comments were received from both Parties on Monday, 16 July 2007;

NOTING in particular, that the Defence proposed the addition of a paragraph stipulating that the Prosecution not be permitted to adduce new evidence which would attempt to prove the alleged guilt of the Accused during the Defence case;

NOTING that on 17 July 2007, the Trial Chamber gave the Parties an opportunity to provide it with responses on the comments of the other side, by way of email by 19 July 2007;

NOTING that a response was received from the Prosecution on 19 July 2007 in which the Prosecution objected to the Defence's proposed addition on the basis that, *inter alia,* the proposed addition was inconsistent with Rule 90(H) of the Rules of Procedure and Evidence ("Rules"), which it stated, gives parties considerable latitude in conducting their cross-examinations;

CONSIDERING that the Guidelines attached in the Annex to the present Decision will promote fair and expeditious trial proceedings;

CONSIDERING that the attached Guidelines are in conformity with the Statute and the Rules, notably Rules 89 and 90 of the Rules of Procedure and Evidence ("Rules"), and that the Guidelines are reflective of the jurisprudence of the Tribunal;

NOTING that Rule 90 (H) provides:

> (i) Cross-examination shall be limited to the subject-matter of the evidence-in-chief and matters affecting the credibility of the witness and, where the witness is able to give evidence relevant to the case for the cross-examining party, to the subject-matter of that case.

[1] Pre-Trial Conference, 2 July 2007, T. 190.

(ii) In the cross-examination of a witness who is able to give evidence relevant to the case for the cross-examining party, counsel shall put to that witness the nature of the case of the party for whom that counsel appears which is in contradiction of the evidence given by the witness.

(iii) The Trial Chamber may, in the exercise of its discretion, permit enquiry into additional matters;

CONSIDERING that Trial Chamber finds that the terms of Rule 90 (H) apply to cross-examinations carried out during both the Prosecution and Defence cases and that the Defence's proposed additional paragraph is therefore not in keeping with the provisions of Rule 90 (H);

PURSUANT TO Article 20(1) of the Statute of the Tribunal and Rules 54, 89 and 90 of the Rules,

HEREBY adopts the Guidelines, attached as an Annex to this Decision, which shall govern the admission and presentation of evidence and the conduct of counsel in court in this case.

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

Judge Bakone Justice Moloto
Presiding

Dated this twenty-fourth day of July 2007
At The Hague
The Netherlands

[Seal of the Tribunal]

ANNEX

A. Standards governing presentation of evidence and conduct of counsel in court

(a) Order of calling witnesses

1. Each Party shall provide the other Party and the Trial Chamber with a list indicating the order of witnesses due to testify and the scheduled date of their appearance at trial. The Trial Chamber requires the Parties to inform it of the calling order of witnesses at the end of every week for the coming two weeks. Furthermore, the Parties shall inform the Trial Chamber five working days in advance of any changes to the calling order. Moreover, the Parties shall provide a list of documents which they intend to use for the examination-in-chief of each witness at least two working days before the start of the testimony.

(b) Long, complicated or compound questions

2. The Parties are requested to bear in mind that long, complicated or compound questions risk confusing witnesses and making the trial record unclear and unnecessarily lengthy. Therefore, in the interest of effective presentation of evidence, the Parties are advised to put one question at a time to the witnesses.

(c) Admission into evidence of a prior statement of a testifying witness

3. In accordance with the principle of orality, which is expressed in Rule 89 (F),[2] prior statements of a witness should not be tendered into evidence where relevant portions thereof have been read out and entered on the record or where the witness has otherwise commented on the statement in his or her live testimony.[3]

(d) Referring to prior testimony or statements of a witness

4. The Parties are requested to avoid interpreting or paraphrasing what a witness has previously either stated or testified.[4] The Trial Chamber considers that such interpreting or

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[2] *Prosecutor v. Sefer Halilović*, Case No. IT-01-48-AR73.2, Decision on Interlocutory Appeal Concerning Admission of Record of Interview of the Accused from the Bar Table, 19 Aug 2005, paras 16-17. *See also Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30/1-A, Judgement, 28 Feb 2005, paras 122-126; *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-AR73, Decision on Prosecutor's Appeal on Admissibility of Evidence, Dissenting Opinion of Judge Patrick Robinson, 16 Feb 1999, para. 10; *Prosecutor v. Zoran Kupreškić et al.*, Case No. IT-95-16, Decision on Appeal by Dragan Papić Against Ruling to Proceed by Deposition, 15 Jul 1999, para. 18.

[3] *Prosecutor v. Miroslav Kvočka et al.*, 04 Jul 2000, T. 3490. *See also Prosecutor v. Milan Martić*, Case No. IT-91-11, Revised Version of the Decision Adopting Guidelines on the Standards Governing the Presentation of Evidence and the Conduct of Counsel in Court, 19 May 2006.

[4] This concerns both what the testifying witness has stated, or testified at prior hearings, and what other witnesses, whose testimony has concluded, have stated or testified.

paraphrasing increases the risk of mischaracterising the prior statement or testimony and unnecessarily lengthens the trial record.

5. Instead, the Parties are encouraged to quote from the statement or transcript. However, the Parties are requested to restrict such quoting to situations when it is *strictly necessary* for the understanding of the question asked. In such cases, the quote shall be restricted to the part of the transcript that is directly relevant to the question. Furthermore, when referring to a prior statement or testimony, the Parties are asked to provide exact page and line references to the statement or transcript in question.

(e) Refreshing the memory of a witness using a prior statement

6. Prior statements of the testifying witness, whether in evidence or not, may be used to refresh a witness's memory both during examination-in-chief and during cross-examination.[5] The Trial Chamber recalls the Appeals Chamber's finding that also unadmitted portions of a statement made pursuant to Rule 92 *bis* may be used to refresh the memory of a witness during examination-in-chief[6] and during cross-examination.[7]

7. The Trial Chamber may consider the means and circumstances by which this process was conducted when assessing the reliability and credibility of the witness's testimony.[8]

(f) Scope of the cross-examination

8. The Trial Chamber recalls Rule 90 (H)(i) of the Rules of Procedure and Evidence, which requires the parties to restrict cross-examination to:

> the subject-matter of the evidence-in-chief and matters affecting the credibility of the witness and, where the witness is able to give evidence relevant to the case for the cross-examining party, to the subject-matter of that case.

9. In this respect, the Parties are reminded that, when dealing in cross-examination with questions relating to the historical, political and military context of the case, they are requested to state the purpose and relevance of questions to the allegations raised in the Indictment against the

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[5] *Prosecutor v. Enver Hadžihasanović and Amir Kubura*, Case No. IT-01-47-AR73.2, Decision on Interlocutory Appeal Relating to the Refreshment of the Memory of a Witness, 02 Apr 2004, p. 2, referring to *Prosecutor v. Blagoje Simić et al.*, Case Nos IT-95-9-AR73.6 & IT-95-9-AR73.7, Decision on Prosecution Interlocutory Appeals on the Use of Statements not Admitted into Evidence Pursuant to Rule 92*bis* as a Basis to Challenge Credibility and to Refresh Memory, 23 May 2003, paras 18-20. *See also Prosecutor v. Milan Martić*, Case No. IT-91-11, Revised Version of the Decision Adopting Guidelines on the Standards Governing the Presentation of Evidence and the Conduct of Counsel in Court, 19 May 2006.

[6] *Ibid.*

[7] *Prosecutor v. Blagoje Simić et al.*, Case No. IT-95-9 & IT-95-9-AR73.7, Decision on Prosecution Interlocutory Appeals on the Use of Statements not Admitted into Evidence Pursuant to Rule 92*bis* as a Basis to Challenge Credibility and to Refresh Memory, 23 May 2003, paras 18, 20.

Accused.[9] Furthermore, it is recalled that this Tribunal does not recognise *tu quoque* as a valid defence and has accepted, but only to a very limited extent, evidence relating to crimes allegedly committed by other parties to the conflict.[10] As a consequence, the Trial Chamber may disallow questions which are irrelevant either because they are beyond the Indictment's temporal scope or are unrelated to the specific facts of the violations alleged in the Indictment.[11]

10. The Trial Chamber acknowledges that Rule 90 (H)(i) does not limit the matters that may be raised during a cross-examination which is directed solely at the credibility of the witness. However, cross-examination must still be conducted within some reasonable limits.[12] The Trial Chamber may therefore disallow improper, repetitive, irrelevant or unfair questions, including those which constitute an unwarranted attack on the witness or which fall outside the above parameters.[13]

11. In this respect, the Trial Chamber notes that the cross-examining party may confront a witness with the testimony of another witness in order to impeach or challenge the credibility of that witness or the testifying witness. The cross-examining party shall put to the testifying witness the evidence of the previous witness *without* identifying from whom the information has come.[14] Moreover, the Trial Chamber reminds the Parties that while they may ask the witness whether or

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[8] *Ibid.*

[9] *Prosecution v. Zoran Kupreškić et al.*, Case No. IT-95-16, Decision on Evidence of the Good Character of the Accused and the Defence of *Tu Quoque*, 17 Feb 1999; *Prosecutor v. Enver Hadžihasanović et al.*, Case No. IT-01-47, Decision on Defence Motion for Clarification on the Oral Decision of 17 December 2003 Regarding the Scope of Cross-examination Pursuant to Rule 90 (H) of the Rules, 28 Jan 2004, p. 3.

[10] *Prosecution v. Zoran Kupreškić et al.*, Case No. IT-95-16, Decision on Evidence of the Good Character of the Accused and the Defence of *Tu Quoque*, 17 Feb 1999, pp 3-5; *Prosecutor v. Enver Hadžihasanović et al.*, Case No. IT-01-47, Decision on Defence Motion for Clarification on the Oral Decision of 17 December 2003 Regarding the Scope of Cross-examination Pursuant to Rule 90 (H) of the Rules, 28 Jan 2004, p. 4; and *Prosecutor v. Kupreškić et al.*, Trial Judgement, paras 515-520; *Prosecutor v. Kordić and Čerkez* Trial Judgement, para. 520.

[11] The Trial Chamber recalls in this regard that, for example, certain adjudicated or agreed facts may fall outside of the temporal scope of the Indictment.

[12] *Prosecution v. Momčilo Krajišnik*, Case No. IT-00-39-T, Decision on Cross-Examination of Milorad Davidović, 15 Dec 2005.

[13] *Ibid.* In that case the Trial Chamber, by recalling its duty to protect witnesses set out in Article 22 of the Statute, retained the discretion to disallow a question or sustain an objection against a question in cross-examination where, in the Trial Chamber's view, it constituted an unwarranted attack on a witness. An example of such an attack was the allegation by the cross-examining party that a witness had engaged in serious criminal conduct, without showing reasonable grounds to do so at the time the allegation was made. A similar solution is found in the practice of the ICTR, *see Prosecutor v. Bagosora*, Case No. ICTR-96-7, Oral Decision on Cross Examination, 9 May 2005, T. 27-28.

[14] *Prosecutor v. Blagoje Simić et al.*, Case No. IT-95-9 & IT-95-9-AR73.7, 13 Mar 2003, T. 16636; *ibid.*, 29 Apr 2003, T. 18809-10; *Prosecutor v. Radoslav Brđanin and Momir Talić*, Case No. IT-99-36-T, 14 Oct 2002, T. 10654:

> JUDGE AGIUS: [...] it's not right that you present the witness with information leading him to understand that another witness also coming from the political arena gives a completely different story to his with regard to some details at least.

Miroslav Kvočka et al., Case No. IT-98-30/1, 28 Aug 2000, T. 4220-21. *Prosecution v. Momčilo Krajišnik*, Case No. IT-00-39-T, 05 Dec 2005, T. 19215.

not he agrees or disagrees with the evidence of the previous testimony, the Parties should not ask witnesses to comment on the credibility of other witnesses.[15]

12. The Trial Chamber recalls that Rule 90 (H)(ii) requires the cross-examining party to put to a witness, who is able to give evidence relevant to the case for that party, the nature of its case that is in contradiction to the witness' evidence. The Trial Chamber, in accordance with the practice of the Tribunal, notes that Rule 90 (H)(ii) allows for certain flexibility depending on the various circumstances at trial and interprets the rule to mean that the cross-examining party is required to put the *substance* of the contradictory evidence and not every detail that the party does not accept.[16]

(g) Length of examination

13. A system for monitoring the use of time shall be established by the Registry, who will be responsible for recording time used.

14. The examination-in-chief of a witness will be limited to the time indicated by each Party, under the control of the Trial Chamber.

15. In the interest of ensuring fair and expeditious conduct of the trial proceedings, the Parties are requested to adhere to the principle that the time for cross-examination of a witness should not exceed the time allotted for the examination-in-chief of that witness, unless there are particular circumstances requiring that the cross-examination be extended.[17] Such circumstances include situations where there has been a particularly brief examination-in-chief, where the witness is an expert witness, or where fairness to the accused so requires.

16. Re-examination of a witness shall be limited to matters raised in cross-examination.

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[15] *Prosecutor v. Blagoje Simić et al.*, Case No. IT-95-9, 04 Jun 2002, T. 8820-8821; *Prosecutor v. Miroslav Kvočka et al., ibid*; *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2, 24 Nov 1999, T. 10336-7; *Prosecutor v. Radoslav Brđanin and Momir Talić*, Case No. IT-99-36-T, 14 Oct 2002, T. 10651.

[16] *Prosecutor v. Radoslav Brđanin and Momir Talić*, Case No. IT-99-36-T, Decision on "Motion to Declare Rule 90 (H)(ii) Void to the Extent it is in Violation of Article 21 of the Statute of the International Tribunal" by the Accused Radoslav Brđanin and on "Rule 90(H)(ii) Submissions" by the Accused Momir Talić, 22 Mar 2002. *See also Prosecution v. Naser Orić*, Case No. IT-03-68-T, Decision on Partly Confidential Defence Motion Regarding the Consequences of a Party Failing to Put its Case to Witnesses Pursuant to Rule 90 (H)(ii),17 Jan 2006.

[17] *Prosecutor v. Mladen Naletilić and Vinko Martinović*, Case No. IT-98-34, 10 Jun 2002, T. 12248 (closed session); *Prosecutor v. Goran Jelisić*, Case No. IT-95-10, 07 Sep 1999, T. 1063. In the *Krajišnik* case, the Trial Chamber requested the parties to limit the time devoted to the cross examination to 60 per cent of the time employed in the examination in chief. *See e.g., Prosecution v. Momčilo Krajišnik*, Case No. IT-00-39-T, 23 Apr 2004, T. 2652. However, the Trial Chamber interpreted the "60 per cent practice" with a certain degree of flexibility. *See* in this regard, *ibid.*, 27 May 2004, T. 3068-3069. In particular, under the 89 (F) procedure which drastically reduces the examination-in-chief the Trial Chamber has admitted derogation from the "60 per cent practice", *ibid.*, 03 Sep 2004, T. 5421. In *Milošević,* after the prosecution case, an order was issued on the use of time in the defence case. In that order, the judges stated that 60 percent of the time allocated to the Accused to present his case in chief would be allocated to the Prosecution for cross-examination during the Defence case, *Prosecution v. Slobodan Milošević*, Case No. IT-02-54, Third Order on the Use of Time in the Defence Case and Decision on Prosecution's Further Submissions on the Recording and Use of Time During the Defence Case, 19 May 2005.

(h) 92 *bis* witnesses appearing for cross-examination

17. Where a witness whose previous testimony or statement has been admitted into evidence pursuant to Rule 92 *bis*, has been called solely for the purposes of cross-examination, the *calling party* should not introduce new evidence through examination-in-chief. Furthermore, the cross-examination of such witnesses shall be carried out in accordance with Rule 90 (H)(i) and (ii) with the limitation that questions relating to the "subject matter of the evidence-in-chief":

1. shall be restricted to the matters for which the Trial Chamber has decided to allow the witness to be called for cross-examination;[18] and

2. shall not include questions relating to the summary of the witness's 92 *bis* statement or transcript, which the calling party reads out at the start of the testimony, unless related to item 1, above.

(i) 92 *ter* witnesses

18. The party calling a witness under Rule 92 *ter* may be permitted by the Trial Chamber to conduct a limited direct examination of the witness where such examination is focused on clarifying or highlighting particular aspects of the statements which have been admitted pursuant to that Rule. In addition, the calling party will be permitted to show documents to the witness during the direct examination of a 92 *ter* witness and such documents may be tendered into evidence.

(j) Use of large documents in court

19. The Trial Chamber considers that it is not an efficient use of in-court time to read out large passages of a document which is subsequently tendered for admission into evidence. This is particularly so where the party does not ask concise and specific questions on the information contained in the document but merely requests the witness to verify what is written on the page in front of the witness. In this respect, counsel are reminded of the possibility of tendering such evidence from the bar table.[19] Where the Parties wish to present passages of a long document to a witness, they are urged to provide the relevant parts of the document to the witness and give the witness time to study it either in court or, preferably, during a break, and then ask concise questions

[18] *See e.g., Prosecutor v. Milan Martić,* Case No. IT-95-11-T, Decision on Prosecution's Motion For the Admission of Written Evidence Purusant to Rule 92 *bis* of the Rules, 16 Jan 2006.

[19] Rule 89 (C) provides "a Chamber may admit any relevant evidence which it deems to have probative value"; *Prosecutor v. Sefer Halilović,* Case No. IT-01-48-AR73.2, Decision on Interlocutory Appeal Concerning Admission of Record of Interview of the Accused from The Bar Table, 19 Aug 2005, para. 14. *See also Prosecutor v. Milan Martić*, Case No. IT-91-11, Revised Version of the Decision Adopting Guidelines on the Standards Governing the Presentation of Evidence and the Conduct of Counsel in Court, 19 May 2006.

on the substance of the relevant parts of the document. Smaller portions of a document may be read out by counsel in court.

20. Barring exceptional circumstances with the leave of the Trial Chamber, the Parties may not tender into evidence lengthy documents, such as books, where only portions thereof are relevant to the evidence of the witness through whom the document is tendered. Rather, when seeking the admission into evidence of such documents, be it during examination-in-chief, cross-examination or re-examination, each Party is requested to specify which portions of the document it seeks to have admitted. Each tendering Party is also requested to submit electronic versions of the portions of the document sought to be admitted.

(k) Use of hardcopies of documents

21. Parties are reminded that as this trial uses E-Court, the principle is that all documents shall be handled through the E-Court system. Hardcopies of a document may be used by a party only where the party has been unable, due to unforeseen circumstances, to put a document into the E-Court system. Parties are also reminded that when the use of hardcopies of a document is permitted, sufficient copies should be provided to the witness, the opposite party, the Bench, the Registrar and the interpreters. Finally, the Parties are reminded to make use of the drawing functionality of E-Court when asking a witness to make a drawing or annotate a document.

(l) Tendering of exhibits through witnesses

22. Where one of the Parties seeks the admission of a document through a witness it must demonstrate to the Trial Chamber the relation between the witness and the document. The Trial Chamber may not allow the admission, through that particular witness, of documents which lack such relation.

(m) General terms of behaviour

23. The Parties are encouraged to contact the Trial Chamber Legal Officer to resolve issues that can be addressed informally.

24. The Parties should endeavour to take all steps to preserve the public character of the proceedings. In particular, the Parties should seek only those specific protective measures, such as face or voice distortion, which they deem strictly necessary for the protection of the witnesses. It should be noted that closed session will only be ordered on an exceptional basis, after a party has presented the Trial Chamber with sufficient information warranting the taking of such a measure.

B. The admission of evidence

25. The Trial Chamber will begin any analysis on the admissibility of evidence by recalling Rule 89(C) of the Rules, which provides that "[a] Chamber may admit any relevant evidence which it deems to have probative value", and Rule 89(D) of the Rules, which provides that "[a] Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial."

26. Parties should always bear in mind the basic distinction that exists between the admissibility of documentary evidence and the weight that documentary evidence is given under the principle of free evaluation of evidence. The practice will be, therefore, in favour of admissibility.

27. The admission of a document into evidence does not, in itself, signify that the information contained therein will necessarily be deemed to be an accurate portrayal of the facts.[20] Factors such as authenticity and proof of authorship will naturally assume the greatest importance in the Trial Chamber's assessment of the weight to be attached to individual pieces of evidence. As has previously been stated, "[t]he threshold standard for the admission of evidence [...] should not be set excessively high, as often documents are sought to be admitted into evidence, not as ultimate proof of guilt or innocence, but to provide a context and complete the picture presented by the evidence in general".[21]

28. The fact that this Trial Chamber may rule on the admissibility of a particular document or other piece of evidence will not prevent that ruling from being reversed. Therefore, a decision not to admit a piece of evidence may be quashed at a later stage if good cause is shown for doing so, for example, where further evidence emerges which is relevant, has probative value and thus justifies the admission of the evidence in question.[22]

29. There is no general prohibition on the admission of documents simply on the grounds that their purported author has not been called to testify. Similarly, the fact that a document is unsigned or unstamped does not, *a priori,* render it void of authenticity.[23]

30. When objections are raised on grounds of authenticity or reliability, this Trial Chamber will follow the practice of this Tribunal, namely, to admit documents and/or video recordings and then

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[20] *Prosecutor v. Zejnil Delalić et. al*, Case No. IT-96-21-T, Decision on the Motion of the Prosecution for the Admissibility of Evidence, 19 January 1998, para. 20.
[21] *Ibid.*
[22] *Prosecutor v. Milan Martić*, Case No. IT-95-11-T, Decision Adopting Guidelines on the Standards Governing the Admission of Evidence, 19 January 2006, Annex A, para. 4.
[23] *Ibid.*, para. 5.

decide on the weight to be given to them within the context of the trial record as a whole.[24] As provided for in Rule 89(E) of the Rules, the tendering party may be requested to provide the Trial Chamber with verification of the authenticity of evidence obtained out of court. Additionally, when an objection is made on the ground of reliability, the tendering party may be required to produce sufficient indicia of reliability to make a *prima facie* case for the admission of the document, audio tape or video in question.[25] On the request of a party or *proprio motu*, the Trial Chamber may order the party tendering copies of evidence to present the original or the best legible, audible or visible copy available.

31. The "best evidence rule" will be applied in the determination of matters before this Trial Chamber. This means that the Trial Chamber will rely on the best evidence available in the circumstances of the case, and parties are directed to keep this rule in mind when submitting evidence to the Trial Chamber. What is considered the best evidence will depend on the particular circumstances attached to each document the complexity of the case and the preceding investigations.

32. Hearsay evidence is admissible. Out of court statements, which a Trial Chamber considers relevant and probative, are admissible under Rule 89(C).[26] As stated by the Appeals Chamber in *Aleksovski*:

> Trial Chambers have a broad discretion under Rule 89(C) to admit relevant hearsay evidence. Since such evidence is admitted to prove the truth of its contents, a Trial Chamber must be satisfied that it is reliable for that purpose, in the sense of being voluntary, truthful and trustworthy, as appropriate; and for this purpose may consider both the content of the hearsay statement and the circumstances under which the evidence arose; or, as Judge Stephen described it, the probative value of a hearsay statement will depend upon the context and character of the evidence in question. The absence of the opportunity to cross-examine the person who made the statements, and whether the hearsay is "first-hand" or more removed, are also relevant to the probative value of the evidence. The fact that the evidence is hearsay does not necessarily deprive it of probative value, but it is acknowledged that the weight or probative value to be afforded to that evidence will usually be less than that given to the testimony of a witness who has given it

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[24] *See Prosecutor v. Zejnil Delalić et. al*, Case No. IT-96-21-T, Decision on the Motion of the Prosecution for the Admissibility of Evidence, 19 January 1998; *Prosecutor v. Dario Kordić and Mario Čerkez*, Decision on Appeal Regarding Statement of a Deceased Witness, Case No. IT-95-14/2-AR73.5, 21 July 2000; *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-T, Decision on the Defence Motion for Reconsideration of the Ruling to Exclude from Evidence Authentic and Exculpatory Documentary Evidence, 30 January 1998.

[25] *See Prosecutor v. Zejnil Delalić et. al*, Case No. IT-96-21-AR 73.2, Decision on the Application of Defendant Zejnil Delalić for Leave to Appeal against the Decision of the Trial Chamber of 19 January 1998 for the Admissibility of Evidence, 4 March 1998, para. 20: "The implicit requirement that a piece of evidence be *prima facie* credible – that it have sufficient indicia of reliability – is a factor in the assessment of its relevance and probative value. To require absolute proof of a document's authenticity before it could be admitted would be to require a far more stringent test than the standard envisioned by Sub-rule 89(C)."

[26] Since "evidence is admissible only if it is relevant and it is relevant only if has probative value", the reliability of hearsay evidence is a necessary prerequisite of its probative value under Rule 89(C), *Prosecutor v. Galić*, Case No. IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92*bis*(C), 7 June 2002, para. 35. See also *Prosecutor v. Milutinović at. al.*, Case No. IT-05-87-T, Order on Procedure and Evidence, 11 July 2006, para. 4.

> under a form of oath and who has been cross-examined, although even this will depend upon the infinitely variable circumstances which surround hearsay evidence.[27]

33. Rule 95 of the Rules provides for the exclusion of improperly obtained evidence. It declares that no evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage the integrity of, the proceedings. Accordingly, the Trial Chamber makes it clear at the very outset that statements which are not voluntary, but rather are obtained by means including oppressive conduct, cannot be admitted. If there are *prima facie* indicia that there was such oppressive conduct, the burden is on the party seeking to have the evidence admitted to prove that the statement was voluntary and not obtained by oppressive conduct.

34. The Trial Chamber considers circumstantial evidence as being evidence of circumstances surrounding an event or an offence from which a fact at issue may be reasonably inferred.[28] The Trial Chamber recognises that circumstantial evidence may be necessary in order to establish an alleged fact, particularly in criminal trials such as those before this Tribunal, where there is often no eye-witness or conclusive documents relating to a particular alleged fact. The Trial Chamber does not consider circumstantial evidence to be of less value than direct evidence.[29] The Trial Chamber further considers that while individual items of evidence by themselves may be insufficient to establish a fact, when taken together, they may be revealing and decisive. In evaluating circumstantial evidence, this Trial Chamber takes particular notice of the Trial Chamber in *Krnojelac*, which stated that "[a] circumstantial case consists of evidence of a number of different circumstances which, taken in combination, point to the existence of a particular fact upon which the guilt of the accused person depends because they would usually exist in combination only because a particular fact did exist."[30] The Appeals Chamber further added that "[t]he standard is only satisfied if the inference drawn was the only reasonable one that could be drawn from the evidence presented."[31]

35. The Trial Chamber emphasises what it considers to be an over-riding principle in matters of admissibility of evidence. The Trial Chamber is, pursuant to the Statute of the Tribunal, the guardian and guarantor of the procedural and substantive rights of the accused. In addition, it has the obligation to strike a balance in seeking to protect the rights of victims and witnesses. As a trial

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[27] *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-T, Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 February 1999, para. 15.

[28] Richard May and Stephen Powell, Criminal Evidence, 5th Edition, Sweet & Maxwell Ltd., London, 2004.

[29] The Appeals Chamber noted that "[t]here is nothing to prevent a conviction being based upon such evidence. Circumstantial evidence can often be sufficient to satisfy a fact finder beyond reasonable doubt." *Kupreskić* Appeal Judgement, para. 303.

[30] *Krnojelac* Trial Judgement, para. 67.

[31] *Stakić* Appeal Judgement, para. 219. See also *Krnojelac* Trial Judgement, para. 67.

is often a complex journey in search for the truth in relation to the alleged individual criminal responsibility of the Accused, bearing in mind that "the truth" can never be fully satisfied, the Trial Chamber considers that questions of admissibility of evidence do not arise only when one of the parties raises an objection to a piece of evidence sought to be brought forward by the other party. This Trial Chamber has an inherent right and duty to ensure that only evidence which qualifies for admission under the Rules will be admitted. For this purpose, as may turn out to be necessary from time to time, the Trial Chamber will intervene *ex officio* to exclude from these proceedings those pieces of evidence which, in its opinion, for one or more of the reasons laid down in the Rules, ought not to be admitted in evidence.[32]

36. Finally, pursuant to Rule 98 of the Rules, the Trial Chamber may be obliged *proprio motu* to summon witnesses and order their attendance in order to address any outstanding questions regarding the individual criminal responsibility of the Accused emanating from the presentation of evidence by the parties.

[32] *Prosecutor v. Milan Martić*, Case No. IT-95-11-T, Decision Adopting Guidelines on the Standards Governing the Admission of Evidence, 19 January 2006, Annex A, para. 11.