



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-03-68-T
Date: 21 October 2004
Original: English

IN TRIAL CHAMBER II

Before: Judge Carmel Agius, Presiding
Judge Hans Henrik Brydesholt
Judge Albin Eser

Registrar: Mr. Hans Holthuis

Decision of: 21 October 2004

PROSECUTOR

v.

NASER ORIĆ

**ORDER CONCERNING GUIDELINES ON EVIDENCE AND
THE CONDUCT OF PARTIES DURING TRIAL
PROCEEDINGS**

The Office of the Prosecutor:

Mr. Jan Wubben

Counsel for the Accused:

Ms. Vasvija Vidović
Mr. John Jones

TRIAL CHAMBER II 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 Tribunal”) issues the following Order Concerning Guidelines on Evidence and the Conduct of Parties During Trial Proceedings.

I. INTRODUCTION

1. It is evident from the exchange of correspondence between the Parties in the course of the pre-trial stage as well as from the debate during the pre-trial conference held on 28 September 2004 that there is lack of agreement between the Prosecution and the Defence (“Parties”) on various basic issues in relation to the admission of documents into evidence. In addition, trial efficiency, trial fairness and the administration of justice throughout the trial, can be better served if the Parties are aware from the very beginning of the trial of the rules that the Trial Chamber will apply in admitting or excluding evidence, particularly with regard to documentary evidence. Accordingly, the Trial Chamber informed the Parties that it would provide them at the very early stages of the trial with various guidelines that will govern the proceedings in this case.

2. Following this undertaking, the Trial Chamber now issues an oral order stating guidelines which will be followed in the course of this trial. While the Parties are bound by the Statute of the Tribunal (“Statute”), the Rules of Procedure and Evidence of the Tribunal (“Rules”) and the Code of Professional Conduct of Counsel Appearing Before the International Tribunal (“Code of Professional Conduct”), the present order emphasises in particular guidelines governing the admission of evidence and the conduct of the Parties during trial proceedings.

II. DISCUSSION

3. For the purposes of the trial, evidence will be taken to mean the information which will be put before the Trial Chamber in order to prove the facts at issue and may take the following forms: a) testimony, b) documents produced for the inspection of the Trial Chamber, c) real evidence, i.e. exhibits and other material objects, and d) admissions of fact. In the exercise of deciding upon the admissibility of evidence, the Trial Chamber will categorise evidence into a) direct and indirect evidence, b) original and hearsay evidence, c) primary and secondary evidence, and d) circumstantial evidence. Hearsay and circumstantial evidence will be considered as indirect evidence with the understanding that indirect evidence may be given equivalent weight to direct evidence. The Trial Chamber views primary evidence as the best evidence. However, where only

secondary evidence is available of a relevant document, it may be admitted without prejudice, provided that the reliability is not at issue.

4. The Accused is entitled by Article 21(3) of the Statute to a presumption of innocence. This presumption places the burden of establishing the guilt of the Accused firmly upon the Prosecution, *i.e.* the burden of proving all the facts and circumstances which are material and necessary to constitute the crimes charged and the Accused's criminal responsibility. This burden of proof remains upon the Prosecution throughout the entire trial. It never changes. In accordance with Rule 87(A) of the Rules, the Prosecution must establish the Accused's guilt beyond reasonable doubt. At the conclusion of the Trial, the Trial Chamber will determine whether or not the cumulative evidence taken as a whole carries sufficient weight to establish the facts alleged beyond reasonable doubt and, ultimately, the guilt of the Accused, as charged in the Indictment.

5. The Trial Chamber acknowledges the right of the Accused to remain silent. Consequently, silence by the Accused as such may not, and will not, be used as evidence to prove guilt and may not, and will not, be interpreted as an admission of guilt.

6. In the context of the Rules, the approach of the Statute of this Tribunal is to lay down a framework or a structure, stated in general terms, with due regard to the accused's rights to a fair and public hearing. The Trial Chamber, therefore, has the responsibility to ensure that the trial is fair and expeditious and that the proceedings are conducted in accordance with the Tribunal's Rules, with full respect for the procedural and substantive rights of the accused and also for the protection of victims and witnesses.

7. The Rules are based upon a mixture of common and civil law rules of procedure and evidence. Thus, in matters of admissibility of evidence the procedure of this Tribunal does not purport to conform to any particular system or tradition. Rather, it is inspired by the need for a fair determination of the matter before it.

8. The question of admissibility of evidence before this Tribunal is governed by Section 3 of the Rules. Rule 89(A) makes it clear that a Trial Chamber shall not be bound by national rules of evidence whether from the common law or civil law traditions. The Appeals Chamber in *Aleksovski* held that "there is no reason to import such rules into the practice of the Tribunal which is not bound by national rules of evidence [...]. The purpose of the Rules is to promote a fair and expeditious trial and the Trial Chambers must have the flexibility to achieve this goal."¹

¹ *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-T, Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 January 1999, para. 19.

9. In contrast to common law systems, where questions of admissibility and the exclusion of evidence occupy a prominent place in criminal proceedings, the provisions of the Rules regulating all evidentiary matters in Tribunal proceedings do not contain a detailed set of technical rules relating to admissibility and the exclusion of evidence.² Apart from those listed in Section 3 of the Rules, the Trial Chamber is not restricted in its choice of methodology for the search to uncover the truth. Indeed, in the opinion of this Trial Chamber, the most important rule in this context is Rule 89, which lists the general evidentiary provisions. Sub-paragraph (B) provides that

[i]n cases not otherwise provided in this Section, a Chamber shall apply rules of evidence, which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law.

10. Sub-paragraph 89(C) permits the Chamber to admit any relevant evidence with probative value. Sub-paragraph 89(E) allows a Trial Chamber to request verification of the authenticity of evidence obtained out of court. It is clear that the approach adopted in the Rules is one that favours the admissibility of evidence, provided it is relevant and has probative value.³ Needless to say, irrelevant evidence must be, and will be, excluded in the most unequivocal way in the interest of a fair and expeditious trial. This has resulted in practice of the Trial Chambers in this Tribunal towards firstly admitting the evidence and, secondly, in assessing its relative weight at a later stage in the context of the whole trial record.⁴ The Trial Chamber will follow this practice throughout these proceedings.

11. Another conspicuous practice that has been followed by the Trial Chambers of this Tribunal, and which will be followed by this Trial Chamber, is that the general rules relating to the exclusion of evidence applied in common law systems will not be followed as a rule.⁵ The reasoning is that the common law rules on the exclusion of evidence were developed in the context of trials by jury. In a jury trial it is imperative that lay jurors are kept away from any prejudicial material of little or no relevance or probative value that may have a detrimental influence on decision-making. By contrast, proceedings before this Tribunal are conducted by professional judges. This Trial Chamber attaches great importance to this characteristic. The position was made very clear by the *Čelebići* Trial Chamber in its “Decision on the Admissibility of Evidence”:

While the importance of the rules on admissibility in common law follows from the effect which the admission of a certain piece of evidence might have on a group of lay jurors, the trials before

² Ibid., para. 15.

³ *Prosecutor v. Zejnil Delalić et. al*, Case No. IT-96-21-T, Decision on the Motion of the Prosecution for the Admissibility of Evidence (“*Delalić* Decision on Admissibility of Evidence”), para. 16.

⁴ *Vide, Prosecutor v. Radoslav Brdanin and Momir Talić*, Case No. IT-99-36-T, Order on the Standards Governing the Admission of Evidence, 15 February 2002, para. 13.

⁵ Sub-paragraph 89(D) allows a Trial Chamber to exclude any evidence if the probative value is substantially outweighed by the need to ensure a fair trial.

the International Tribunal are conducted before professional judges, who by virtue of their training and experience are able to consider each piece of evidence which has been admitted and determine its appropriate weight.⁶

III. GUIDELINES ON EVIDENCE

- (i) The Parties should always bear in mind the basic distinction that exists between the legal admissibility of documentary evidence and the Trial Chamber's judgement as to its weight.
- (ii) The Trial Chamber will reject evidence if it is not satisfied of its relevance and probative value, whereby the burden of prove with respect to relevance and probative value lies on the party seeking to introduce a particular piece of evidence. The Trial Chamber will follow the principle that the Prosecution must prove relevance, probative value and reliability of such evidence beyond reasonable doubt, whereas the Defence is only required to prove the admissibility of its evidence on a balance of probabilities.⁷
- (iii) The "mere admission of a document into evidence does not, in itself, signify that the statements contained therein will necessarily be deemed to be an accurate portrayal of the facts. 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".⁸ This Trial Chamber agrees that "the threshold standard for the admission of evidence [in terms of introducing it into the proceedings] 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".⁹
- (iv) The fact that the Trial Chamber may, at some point in the course of the proceedings, issue a ruling upon the admissibility of a particular document or other piece of evidence, will not prevent that ruling being reversed at a later stage as further evidence emerges that is relevant to the admissibility of the evidence in question.
- (v) When objections are raised on grounds of authenticity, the Trial Chamber will follow the practice this Tribunal has previously adopted, namely, to admit documents and video recordings and also telephone intercepts unless this appears to be manifestly inappropriate to

⁶ *Delalić* Decision on Admissibility of Evidence, para. 20.

⁷ *R v Matthey* [1995] 2 Cr App R 409; *Rush v. DPP* [1994] RTR 268.

⁸ *Delalić* Decision on Admissibility of Evidence, para. 20.

do so. The Trial Chamber will then decide what weight to give them in the context of the trial record as a whole.¹⁰

(vi) There is no blanket prohibition on the admission of documents simply on the grounds that their purported author has not been called to testify.¹¹ Similarly, an unsigned and unstamped document does not, *a priori*, render it void of authenticity. Factors, such as proof of authorship, will naturally assume the greatest importance in the Trial Chamber's final assessment of the weight to be attached to individual pieces of evidence.

(vii) As far as hearsay evidence is concerned, the Trial Chamber reiterates the position of the Appeals Chamber in *Aleksovski* that "it is well settled in the practice of the Tribunal that hearsay evidence is admissible."¹² Thus, relevant out of court statements, which a Trial Chamber considers probative, are admissible under Rule 89(C).¹³ 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 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.¹⁴

(viii) In determining the matter before this Trial Chamber, the so-called "best evidence rule" will be applied, provided that such evidence is evidently available. This essentially means that the Trial Chamber will rely on the best evidence available in the circumstances of the case and the Parties are directed to regulate the production of their evidence along

⁹ *Delalić* Decision on Admissibility of Evidence, para. 20; *R v Matthey* [1995] 2 Cr App R 409; *Rush v. DPP* [1994] RTR 268.

¹⁰ *Vide, Prosecutor v. Radoslav Brdanin and Momir Talić*, Case No. IT-99-36-T; Order on the Standards Governing the Admission of Evidence, 15 February 2002, para. 19.

¹¹ *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 March 1998, para. 22.

¹² This is being stated without prejudice to the Motion of the Prosecution of requesting the authorisation of the Trial Chamber to tender evidence in pursuance of Rule 92 Bis (C).

¹³ *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-T, Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 January 1999, para. 15. See also, *Prosecutor v. Dusko Tadić*, Case No. IT-94-1-T, Decision on Motion on Hearsay, 5 August 1996; *Prosecutor v. Tihomir Blaškić*, Decision on Standing Objection of the Defence to the Admission on Hearsay with no Inquiry as to its Reliability, 26 January 1998.

these lines when possible. What is the best evidence will, of course, depend on the particular circumstances attached to each document and to the complexity of this case and the investigations that preceded it, as well as the difficulties that this Tribunal can encounter in its attempts to acquire documents and other pieces of evidence. The Trial Chamber is also aware that this rule has lost much of its importance in some common law jurisdictions. The Trial Chamber will exercise its discretion in the spirit that lies at the basis of the Statute and the Rules.

(ix) The Trial Chamber considers circumstantial evidence as being the evidence of circumstances surrounding an event or an offence from which a fact at issue may be reasonably inferred.¹⁵ Crimes are often committed without the presence of eye witnesses. This is especially true with the nature of criminal trials before this Tribunal. It can therefore be difficult, if not impossible, to establish an alleged fact by relying solely upon the direct and positive testimony of eye-witnesses or by conclusive documents. Here, circumstantial evidence may become necessary. The individual items of such evidence may by themselves be insufficient to establish a fact, but, when taken together, their collective and cumulative effect may be very revealing and sometimes decisive.¹⁶ The Trial Chamber endorses the principle that “it is no derogation of evidence to say that it is circumstantial.”¹⁷ Consequently, the Trial Chamber will not consider circumstantial evidence to be of less substance than direct evidence. In evaluating circumstantial evidence, the Trial Chamber will take notice of the definition arrived at by the Trial Chamber in the *Krnojelac* case, namely: “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 depends would usually exist in combination only because a particular fact did exist.”¹⁸ In that same case, the Trial Chamber added that such a conclusion must be the *only* reasonable conclusion available.¹⁹

(x) The Trial Chamber draws the attention of the parties to Rule 95, which provides that evidence that was obtained by methods which cast substantial doubt on its reliability or

¹⁴ *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-T, Decision on Prosecutor’s Appeal on Admissibility of Evidence, 16 January 1999, para. 15.

¹⁵ Richard May and Stephen Powell, *Criminal Evidence*, 5th Edition, (Sweet & Maxwell Ltd., London, 2004).

¹⁶ “[...] Thus it may be in circumstantial evidence - there may be a combination of circumstances, no one of which would raise a reasonable conviction or more than a mere suspicion, but the whole taken together may create a conclusion of guilt with as much certainty as human affairs can require or admit of”: *Exall* [1866] 4 F. & F. 922, 929.

¹⁷ *Taylor, Weaver and Donovan* [1928] 21 Cr. App. R. 20, 21, *per* Lord Hewart C.J.

¹⁸ *Krnojelac* Trial Judgement, para. 67.

¹⁹ *Krnojelac* Trial Judgement, para. 67 (emphasis in original). The *Krnojelac* Trial Chamber referred to *Čelebići* Appeal Judgement, para 458.

evidence that is antithetical to, and would seriously damage, the integrity of the proceedings, is not admissible. The Trial Chamber makes it clear at the very outset that involuntary statements, obtained from witnesses by oppressive means, cannot pass the test under Rule 95.²⁰ The burden of proof in establishing that a statement was voluntary lies on the party seeking to introduce it, whereby the standards discussed under guideline B shall be applicable.

(xi) It seems that the Rules implicitly require that reliability be a component of admissibility and indeed, following previous case-law of this Tribunal on the matter,²¹ this Trial Chamber agrees that reliability is an inherent and implicit component of each element of admissibility. This is largely because if the evidence put forward is unreliable, then it cannot be either relevant or of probative value. Therefore such evidence will be inadmissible in terms of Sub-paragraph 89(C). However, in respect to other documentary evidence, the Trial Chamber makes it clear that the determination of the issue of reliability, when it arises, should not, and will not, be seen as a separate, first step in assessing a piece of evidence offered for admission.

(xii) Pursuant to the Statute, the Trial Chamber is the guardian of the procedural and substantive rights of the Accused. As a trial is an often complex journey in the search for truth, the Trial Chamber considers that questions of admissibility of evidence do not merely arise when one of the parties raises an objection to a piece of evidence brought forward by the other party. When there is no objection to the authenticity of a document, the task of admitting evidence will be made easier. However, 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.

²⁰ *Prosecutor v. Zejnil Delalić et. al.*, Case No. IT-96-21-T, Decision on Zdravko Mucić's Motion for the Exclusion of Evidence, 2 September 1997, para. 43: "it is extremely difficult for a statement taken in violation of Rule 42 to fall within Rule 95, which protects the integrity of the proceedings by the non-admissibility of evidence obtained by methods which cast substantial doubts on that reliability".

²¹ *Prosecutor v. Dario Kordić & Mario Čerkez*, Case No. IT-95-14/2-T, Decision on Appeal Regarding Statement of a Deceased Witness, A.C., 21 July 2000: Although the Trial Chamber in that case discussed the issue in context of hearsay evidence, this Trial Chamber understands it to be a general statement regarding hearsay evidence.

IV. GUIDELINES ON THE CONDUCT OF PARTIES DURING TRIAL PROCEEDINGS

- (i) The Trial Chamber envisages the possibility of *ex parte* meetings with the Trial Chamber upon the request of either party. When justified, such meetings will be held and the other party will be informed accordingly.
- (ii) The Parties shall demonstrate respect, integrity and courtesy for legal assistants and staff members of the Tribunal and for all persons who facilitate and participate in the proceedings.
- (iii) The Parties shall not seek to influence or communicate with a Judge, legal assistant or other staff member of the Tribunal by means prohibited by the Statute, the Rules or the Code of Professional Conduct. In particular, communications between the Parties and any of the members of the legal team of this Trial Chamber ought to be restricted to administrative and house-keeping matters.
- (iv) Each party shall recognise the representatives of the respective other party as professional colleagues and shall act fairly, honestly and courteously towards them.

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

Dated this 21th day of October 2004,

At The Hague

The Netherlands

Carmel Agius

Presiding Judge

[Seal of the Tribunal]