UNITED
NATIONS

11597
D11597 - D11588 mcj

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-94-1-T

Date: 5 August 1996

Original: English & French

IN THE TRIAL CHAMBER

Before: **Judge Gabrielle Kirk McDonald, Presiding**
Judge Ninian Stephen
Judge Lal C. Vohrah

Registrar: **Mrs. Dorothee de Sampayo Garrido-Nijgh**

Decision of: **5 August 1996**

PROSECUTOR

v.

DUŠKO TADIĆ a/k/a"DULE"

DECISION ON DEFENCE MOTION ON HEARSAY

The Office of the Prosecutor:

Mr. Grant Niemann
Ms. Brenda Hollis
Mr. Alan Tieger
Mr. Michael Keegan

Counsel for the Accused:

Mr. Michail Wladimiroff
Mr. Alphons Orie
Mr. Steven Kay
Ms. Sylvia De Bertodano

I. INTRODUCTION

Pending before the Trial Chamber is the Motion on Hearsay ("Motion") filed by the Defence on 26 June 1996 pursuant to Rule 54 of the Rules of Procedure and Evidence of the International Tribunal ("Rules"). The Prosecution filed its response on 10 July 1996. Oral argument was heard on 16 July 1996.

THE TRIAL CHAMBER, HAVING CONSIDERED the written submissions and the oral arguments of the parties,

HEREBY ISSUES ITS DECISION.

II. DISCUSSION

A. The Pleadings

1. This Motion raises the issue of the admissibility of hearsay evidence during trial before 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"). In bringing this Motion, the Defence contends that the admission of hearsay evidence would violate the right of the accused to examine the witnesses against him provided by in Article 21(4)(e) of the Statute of the International Tribunal ("Statute"). On this basis, the Defence avers that the International Tribunal should refuse to admit evidence directly implicating the accused in the crimes charged unless it first finds that the probative value of this evidence substantially outweighs its prejudicial effect. Further, the Defence asserts that the Trial Chamber should rule on the admissibility of such statements without hearing its content. Instead, the Defence requests that the Trial Chamber make such a ruling only after a review of the circumstances under which the evidence was received.

2. While acknowledging that the International Tribunal is not bound by any national rules of evidence, the Defence asserts that the Rules are more akin to the adversarial common law system and that most such systems contain a general exclusionary rule against hearsay. Even accepting that there are exceptions to this general rule because some types of hearsay may have sufficient probative value to be admissible - for example, instances of excited utterances and dying declarations - the Defence argues that the Trial Chamber should not admit any hearsay evidence unless the Prosecution first demonstrates that the evidence has substantial probative value that outweighs any prejudicial effect on the accused.

3. In opposition to the Defence, the Prosecution argues that the International Tribunal's omission of a Rule excluding hearsay evidence was clearly deliberate and is consistent with both the International Tribunal's procedure of trials in which judges are the finders of fact, and with the civil law system in which the basic rule is that all relevant evidence is admitted. The Prosecution contends that the Judges of the International Tribunal are fully capable of determining the weight that should be afforded to such evidence. In the Prosecution's view, the

position of the Defence extends beyond even most common law systems in that these systems allow the admission of hearsay evidence that meets certain exceptions without requiring a further showing. Finally, the Prosecution maintains that the Defence's arguments run contrary to the spirit and intent of the Rules and that adoption of its requests would necessitate a formal amendment requiring approval of the Judges of the International Tribunal.

B. Analysis

4. The power of the Trial Chamber to regulate the conduct of the parties and the presentation of evidence during trial arises from the provisions of the Statute and the Rules. Relevant to the Motion under review is Article 21 of the Statute, which provides for the rights of the accused. The relevant portion states:

> 4. In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:
> . . .
> (e) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
> . . .

5. The International Tribunal's Rules, originally adopted in February 1994, govern the admission of evidence. *See generally* Rules 89-98. Despite the adoption of several amendments to the Rules since their creation, there is no Rule that calls for the exclusion of out-of-court, or hearsay, statements.

6. Rule 89, entitled *General Provisions*, reads as follows:

> (A) The rules of evidence set forth in this Section shall govern the proceedings before the Chambers. The Chambers shall not be bound by national rules of evidence.
>
> (B) In cases not otherwise provided for 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.

> (C) A Chamber may admit any relevant evidence which it deems to have probative value.
>
> (D) A Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.

Rule 95 provides additional guidance regarding the admissibility of evidence. This Rule, entitled *Evidence Obtained by Means Contrary to Internationally Protected Human Rights,* declares:

> 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.

7. It is clear from these provisions that there is no blanket prohibition on the admission of hearsay evidence. Under our Rules, specifically Sub-rule 89(C), out-of-court statements that are relevant and found to have probative value are admissible. Although Sub-rule 89(A) clearly provides that the Trial Chamber is not bound by national rules of evidence, in determining the validity of the Defence Motion, it is instructive to review the practice regarding admissibility of evidence in civil and common law systems.

8. In common law systems, evidence that has probative value is generally defined as "evidence that tends to prove an issue." Henry C. Black, *Black's Law Dictionary* 1203 (6th ed. 1991). Relevancy is often said to require implicitly some component of probative value. For example, the Supreme Court of Canada, in *R. v. Cloutier,* relied on the following statement of Sir Rupert Cross:

> "For one fact to be relevant to another, there must be a connection or nexus between the two which makes it possible to infer the existence of one from the existence of the other. One fact is not relevant to another if it does not have real probative value with respect to the latter."

R. v. Cloutier, 2 S.C.R. 709, 731 (Canada Sup. Ct. 1979) (*quoting* Sir Rupert Cross, *Cross on Evidence* 16 (4th ed. 1974)). Another commentator, in a discussion of United States law, expressed a similar opinion:

> There are two components to relevant evidence: materiality and probative value. Materiality looks to the relation between the propositions for which the evidence is offered and the issues in the case. . . . The second aspect of relevance is probative value, the tendency of evidence to establish the proposition that it is offered to prove.

Charles T. McCormick, *McCormick on Evidence* 339-40 (4th ed. 1992).

9. Thus, it appears that relevant evidence "tending to prove an issue", must have some component of reliability. In some common law systems, the general exclusion of hearsay evidence is based upon its presumed lack of reliability. However, this is not an absolute rule. For example, the United States Federal Rules of Evidence provides for twenty-seven specific situations in which hearsay evidence is admissible. *See* U.S. FED. R. EVID. 803-04. In addition to the circumstances explicitly provided for, the United States rules allow for the admission of statements

> not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable effort; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

U.S. FED. R. EVID. 803(24); *see also* U.S. FED. R. EVID. 804(b)(5). The Evidence Act of the Laws of Malaysia, while not explicitly defining hearsay, also stipulates the circumstances in which statements by persons who are unavailable to be called as witnesses are declared relevant and thus admissible. *See* Malay. EVID. ACT, 1950 § 32 (rev. 1971).

10. Despite these relatively strict limitations on the admission of hearsay, judges in non-jury common law cases often take a slightly different approach:

> Where the admissibility of evidence is . . . debatable, the contrasting attitudes of the appellate courts towards errors in receiving and those excluding evidence seem to support the wisdom of the practice adopted by many experienced trial judges in non-

> jury cases of provisionally admitting debatably admissible evidence if objected to with the announcement that all questions of admissibility will be reserved until the evidence is all in.

McCormick on Evidence 86-87.

11. In civil law systems, however, there exists no general rule against the admissibility of hearsay evidence. Out-of-court statements are included in a case file of all evidence, prepared by the investigating magistrate, which is considered fully by the judges during the trial proceeding. This difference in criminal procedure between the civil and common law systems is explained primarily by the inquisitorial nature of the civil system, especially in the pre-trial phase, and the absence of a jury. Procedure in these systems, as one commentator noted when discussing the French legal system, is guided by the principle that "[a]ll forms of evidence are admissible as long as they do not conflict with the ethics of [the] system of criminal procedure." *Criminal Procedure Systems in the European Community* 118 (Christine Van Den Wyngaert et al., eds. 1993). Similarly, in criminal matters in Belgium, "the facts may be proven by all possible means" and the trial judge need only rely on his "intimate conviction" regarding whether a fact has been proven after assessing the weight of the evidence presented. *Id.* at 20-22.

12. Article 6(3)(d) of the European Convention on Human Rights provides for the right of the accused to examine witnesses against him. In interpreting this provision, the European Court of Human Rights has held that while the use of witness statements made out of court does not, in and of itself, violate this provision, "[a]s a rule, these rights require that an accused should be given an adequate and proper opportunity to challenge and question a witness against him." *Delta v. France*, 191-A Eur. Ct. H.R. (ser. A) 15 (1990). However, the European Court of Human Rights has not directly addressed hearsay as such, and indeed, has clearly stated that the admissibility of evidence is primarily a matter of regulation under national law. *Schenk v. Switzerland*, 145 Eur. Ct. H.R. (ser. A) 29 (1988).

13. In sum, the prohibition on the admissibility of hearsay that fails to meet a recognised exception is a feature of criminal procedure primarily limited to common law systems. In the

civil law system, the judge is responsible for determining the evidence that may be presented during the trial, guided primarily by its relevance and its revelation of the truth.

14. The International Tribunal, with its unique amalgam of civil and common law features, does not strictly follow the procedure of civil law or common law jurisdictions. In view of this, the Trial Chamber recognizes the value to the parties of knowing the standards it will apply in determining whether hearsay evidence is admissible. Moreover, in this first trial before the International Tribunal, an analysis of the Rules will further the ever-present goal of transparency of the proceedings.

15. The Trial Chamber is bound by the Rules, which implicitly require that reliability be a component of admissibility. That is, if evidence offered is unreliable, it certainly would not have probative value and would be excluded under Sub-rule 89(C). Therefore, even without a specific Rule precluding the admission of hearsay, the Trial Chamber may exclude evidence that lacks probative value because it is unreliable. Thus, the focus in determining whether evidence is probative within the meaning of Sub-rule 89(C) should be at a minimum that the evidence is reliable[1].

16. In evaluating the probative value of hearsay evidence, the Trial Chamber is compelled to pay special attention to indicia of its reliability. In reaching this determination, the Trial Chamber may consider whether the statement is voluntary, truthful, and trustworthy, as appropriate.

17. The Defence, however, argues that the Trial Chamber should exclude hearsay evidence implicating the accused in one of the crimes charged unless it finds that its probative value substantially outweighs its prejudicial effect. The Trial Chamber is asked to balance hearsay evidence with the possible prejudicial effect on the Defence before ruling on its admissibility. Further, the Defence would require that the Trial Chamber rule on the admission of such evidence without actually hearing its content. This procedure, while possibly appropriate if trials before the International Tribunal were conducted before a jury, is not warranted for the

[1] Rule 95, while concerned with the methods by which evidence is obtained, also allows for its exclusion if it is unreliable.

trials are conducted by Judges who are able, by virtue of their training and experience, to hear the evidence in the context in which it was obtained and accord it appropriate weight. Thereafter, they may make a determination as to the relevancy and the probative value of the evidence.

18. Moreover, Sub-rule 89(D) provides further protection against prejudice to the Defence, for if evidence has been admitted as relevant and having probative value, it may later be excluded. Pursuant to this Sub-rule, the trial Judges have the opportunity to consider the evidence, place it in the context of the trial, and then exclude it if it is substantially outweighed by the need to ensure a fair trial.

19. Accordingly, in deciding whether or not hearsay evidence that has been objected to will be excluded, the Trial Chamber will determine whether the proffered evidence is relevant and has probative value, focusing on its reliability. In doing so, the Trial Chamber will hear both the circumstances under which the evidence arose as well as the content of the statement. The Trial Chamber may be guided by, but not bound to, hearsay exceptions generally recognised by some national legal systems, as well as the truthfulness, voluntariness, and trustworthiness of the evidence, as appropriate. In bench trials before the International Tribunal, this is the most efficient and fair method to determine the admissibility of out-of-court statements.

III. DISPOSITION

For the foregoing reasons, **THE TRIAL CHAMBER**, being seized of the Motion filed by the Defence and

PURSUANT TO RULE 54,

BY MAJORITY DECISION HEREBY DENIES THE MOTION.

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

Gabrielle Kirk McDonald
Presiding Judge

Judge Stephen appends a Separate Opinion to this Decision.

Dated this fifth of August 1996
At The Hague
The Netherlands

[Seal of the Tribunal]