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UNITED
NATIONS

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

Case No: IT-95-14-T

Date: 21 January 1998
English
Original: French

IN THE TRIAL CHAMBER

Before: **Judge Claude Jorda, Presiding**
Judge Fouad Riad
Judge Mohamed Shahabuddeen

Registrar: **Mr. Jean-Jacques Heintz, Deputy Registrar**

Decision of: **21 January 1998**

THE PROSECUTOR

v.

TIHOMIR BLAŠKIĆ

DECISION ON THE STANDING OBJECTION OF THE DEFENCE TO THE ADMISSION OF HEARSAY WITH NO INQUIRY AS TO ITS RELIABILITY

The Office of the Prosecutor

Mr. Mark Harmon
Mr. Andrew Cayley
Mr. Gregory Kehoe

Counsel for the Accused

Mr. Anto Nobilo
Mr. Russell Hayman

1. On 30 September 1997, Defence Counsel for Tihomir Blaškić (hereinafter "the Defence") submitted a Motion objecting in principle to the admission of hearsay evidence with no inquiry as to its reliability (hereinafter "the Motion"). The Prosecutor presented her arguments in her Response of 30 October 1997 (hereinafter "the Response"). On 19 November 1997, the Defence filed a Reply (hereinafter "the Reply"). Lastly, the parties debated the question during a public hearing on 28 November 1997 (hereinafter "the hearing").

The Trial Chamber will first analyse the claims of the parties and then discuss all the disputed points.

I. CLAIMS OF THE PARTIES

2. In its Motion, the Defence raises an objection in principle to the admission of hearsay evidence, with no inquiry as to its reliability, in particular, following the depositions of two witnesses who testified before the Trial Chamber on 26 and 29 September 1997.

The Defence invokes the accused's fundamental right to cross-examine the Prosecution witnesses, as provided in article 21(4)(e) of the Statute of the Tribunal (hereinafter "the Statute"). Basing itself *inter alia* on the case-law of the European Court of Human Rights, the Defence recalled that what is at stake is "a basic tenet of both national and international judicial systems". The Defence, therefore, considers that hearsay evidence should be admissible only if it is based on a proper foundation and only if found to be reliable following a detailed investigation by the Trial Chamber. In support of its Motion, the Defence refers both to the common law legal systems and Sub-rule 89(B) and Rule 95 of the Rules of Procedure and Evidence (hereinafter "the Rules") as well as to the Decision of Trial Chamber II of 5 August 1996 in respect of the Defence Motion on hearsay, *The Prosecutor v. Tadić, IT-94-1-T, CPI 2* (hereinafter "Decision on Hearsay").

3. In her Response, the Prosecutor first maintains that the common law rule against the admissibility of hearsay evidence is not directly applicable to proceedings before the International Tribunal and that the recent developments in common law jurisdiction tend to demonstrate that whether the evidence is direct or hearsay is a matter which is relevant to its weight and not its admissibility. The Prosecutor then asserts that the case-law of the European

Court of Human Rights cited by the Defence is not relevant to the matter at hand. Lastly, the Prosecutor recalls that the admissibility of hearsay evidence before the Tribunal has been well established, pursuant to Rule 89 of the Rules and the Decision on Hearsay.

II. DISCUSSION

4. The Trial Chamber must review the conditions under which hearsay evidence is admissible and *inter alia* concentrate on the question of its reliability and compatibility with a fair trial. In so doing, the Trial Chamber notes that for reasons inherent to the armed conflict which concerns us here, thousands of people were displaced, detained or even killed. Under such conditions, it can be expected that the witnesses will refer to events which others, and not they themselves, experienced. This, however, may be considered only on the basis of parity between the Parties and on respect for the rights of the accused as expressed in internationally recognised standards.

5. The Trial Chamber would first recall the rules most relevant to this case. Firstly, Sub-rule 89(A) of the Rules states explicitly that the "Chambers shall not be bound by national rules of evidence". For that reason, neither the rules issuing from the common law tradition in respect of the admissibility of hearsay evidence nor the general principle prevailing in the civil law systems, according to which, barring exceptions, all relevant evidence is admissible, including hearsay evidence, because it is the judge who finally takes a decision on the weight to ascribe to it, are directly applicable before this Tribunal. The International Tribunal is, in fact, a *sui generis* institution with its own rules of procedure which do not merely constitute a transposition of national legal systems. The same holds for the conduct of the trial which, contrary to the Defence arguments, is not similar to an adversarial trial, but is moving towards a more hybrid system.

A. Hearsay evidence is admissible

6. At the hearing, the Defence specified that it was not contesting the principle of the admissibility of hearsay evidence but the limits to such admissibility. Nevertheless, the contents of the initial Motion largely deal with the principle of the admissibility of hearsay evidence. The Trial Chamber would wish to recall its agreement in principle to the admissibility of such evidence.

7. The Trial Chamber notes that the only provision regarding the admissibility of evidence is to be found in Sub-rule 89(C) of the Rules:

> "A Chamber may admit any relevant evidence which it deems to have probative value".

This provision applies whether the evidence is direct or hearsay. In fact, when interpreted in the light of the other paragraphs of Rule 89, it is sufficiently general to include the admissibility of hearsay evidence. In respect of this point, the Rule offers a correct interpretation of the Statute.

8. Concomitantly, the Trial Chamber would point out that the case-law of the European Court of Human Rights invoked by the Defence in support of its Motion is not appropriate here. In fact, the cases mentioned relate to situations in which, because of other insufficient inculpatory evidence, the accused was convicted essentially on the basis of hearsay evidence, or even anonymous testimony. In the case *Kostovski v. The Netherlands* (ECHR, Series A, no. 166, 1989), the conviction was handed down as a result of the statements of two anonymous witnesses questioned by the police. Likewise, in the case *Windisch v. Austria* (ECHR Series A, no. 186, 1990), the conviction was based mainly on anonymous statements. In the case *Delta v. France* (ECHR Series A, no. 191, 1990), an accused was convicted without the presence of the only two prosecution witnesses and merely on the basis of the testimony of the police officer who had taken their statements. In the case *Unterpertinger v. Austria* (ECHR Series A, no. 110, 1986), the conviction was also based principally on the statements of two witnesses who refused to appear at the hearing.

9. Lastly, the Trial Chamber, as the parties, moreover, have noted, points out that case-law relative to this matter already exists within the Tribunal. Trial Chamber II in the "Decision on Hearsay" in the case *The Prosecutor v. Tadić* has already ruled on the issue. The Judges reached the conclusion that the Statute and the Rules contained no principle barring the admissibility of hearsay testimony and reaffirmed the two conditions governing the admissibility of the evidence : its relevance and its probative value.

In respect of the provisions of the Statute and the Rules, the Judges stated:

> "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." (para. 7)

Judge Stephen, in particular, affirmed:

> "The fact that evidence is hearsay does not, of course, affect its relevance nor will it necessarily deprive it of probative value". *(Separate Opinion of Judge Stephen on the Defence Motion on Hearsay,* p.2*).*

10. This Trial Chamber agrees with those conclusions and emphasises that the two criteria for admissibility - relevance and probative value - pursuant to Sub-rule 89(C) of the Rules, apply whether the testimony is direct or hearsay. In fact, direct testimony may also not be relevant or have the required probative value and thus be declared inadmissible. The direct or hearsay nature of the testimony is but one of the many factors which the Trial Chamber will consider when evaluating the relevance and probative value of such testimony. The Trial Chamber therefore considers that the admissibility of hearsay evidence may not be subject to any prohibition in principle since the proceedings are conducted before professional Judges who possess the necessary ability to begin by hearing hearsay evidence and then to evaluate it so that they may make a ruling as to its relevance and probative value. The Trial Chamber notes, finally, that the principle of the inadmissibility of hearsay evidence, as enshrined in the common law countries, has, in those very countries today, become "riddled with judicial and even legal exceptions" (Jean Pradel, *Droit pénal comparé,* Précis Dalloz, 1995, p. 406).

B. The question of the limits to the admissibility of hearsay evidence

11. As regards the limits to the admissibility of hearsay evidence, the Defence is seeking both that a general limit be placed on recourse to hearsay evidence and that the evidence be identified so that the Judges may evaluate its reliability. The principal argument in support of such limits is the absence of any cross-examination of the initial declarant. However, since the principle making hearsay evidence admissible has been accepted, the objection in respect of the absence of cross-examination is not related to admissibility but to the weight given to the evidence.

12. The right to cross-examination guaranteed by Article 21(4)(e) of the Statute applies to the witness testifying before the Trial Chamber and not to the initial declarant whose statement has been transmitted to this Trial Chamber by the witness.

The Trial Chamber does, however, note that the right to cross-examine the witness in court may be used to challenge the importance to be given to the hearsay testimony, for example, by clearly indicating the number of intermediaries who transmitted the testimony and by seeking to learn the identity and other characteristics of the initial declarant as well as the possibilities for that declarant to have learned the relevant elements or even by bringing out the other facts or circumstances which might assist the Trial Chamber in its evaluation of such evidence.

13. In the opinion of the Trial Chamber, the Judges are the ones who will, in due course and in each case, determine the reliability to be accorded to a testimony, according to the circumstances in which it was obtained and to its content. For this purpose, the Judges, if necessary, will not hesitate to ask the witness questions relating to the hearsay evidence. The proceedings of the International Tribunal are not conducted before a jury, but before professional Judges who rule on both fact and law. Thanks to their training and experience, the Judges can give the appropriate weight to testimony declared admissible in light of its reliability. Such an evaluation can logically be made only *a posteriori* once the Parties have presented all their claims.

C. The need to ensure a fair trial

14. The Trial Chamber would recall that testimony initially admitted because it satisfies the two-fold criteria of relevance and probative value may subsequently be rejected, pursuant to Sub-rule 89(D) of the Rules should the Judges deem that, within the context of the trial, such testimony no longer meets the need to ensure a fair trial. Sub-rule 89(D), in fact, states that

> "A Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a faire trial".

In its Decision on hearsay, Trial Chamber II already considered the real guarantee for the Defence in respect of the unconditional admission of evidence. It noted that

> "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" (para. 18).

Each of the parties must provide the elements which it considers necessary in order to allow the Trial Chamber to identify clearly what falls within the category of hearsay and in order to convince the Trial Chamber, as a last resort, that the testimony in question satisfies the need to ensure a fair trial. In particular, the Defence is free to demonstrate that a hearsay testimony which was declared admissible must, in the end, be excluded because its probative value is insufficient.

III. DISPOSITION

FOR THE FOREGOING REASONS,

The Trial Chamber

RULING *inter partes* and unanimously,

REJECTS the Defence Motion of 30 September 1997 on the objection in principle to the admission of hearsay evidence with no inquiry as to its reliability.

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

Done this twenty-first day of January 1998
At The Hague
The Netherlands

(signed)

Claude Jorda, Presiding Judge
Trial Chamber I