



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-99-36-T

Date: 15 February 2002

Original: English

IN TRIAL CHAMBER II

Before: Judge Carmel Agius, Presiding
Judge Ivana Janu
Judge Chikako Taya

Registrar: Mr. Hans Holthuis

Decision of: 15 February 2002

THE PROSECUTOR

v.

Radoslav BRĐANIN & Momir TALIC

ORDER ON THE STANDARDS GOVERNING THE ADMISSION OF EVIDENCE

The Office of the Prosecutor:

Ms Joanna Korner

Mr Andrew Cayley

Counsel for the Accused Radoslav Brđanin:

Mr John Ackerman

Ms. Milka Maglov

Counsel for the Accused Momir Talić

Mr. Xavier de Roux

Mr. Michel Pitron

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 on the standards governing the admission of evidence in this trial.

I. INTRODUCTION

1. During the course of the trial on 25 January 2002, disagreement arose between the prosecution and the defence on various basic issues in relation to the admission of documents into evidence and on the rules to be applied by the Trial Chamber in admitting or excluding evidence, particularly documentary evidence.

2. At the request of the prosecution, oral argument on the admission of documentary evidence was held during the sitting on 28 January 2002. Both the prosecution and counsel for Radoslav Brđanin and counsel for Momir Talić provided the Trial Chamber with written outlines, to supplement their oral arguments.¹ Having heard the submissions of the prosecution, counsel for Brđanin and counsel for Talić, the Trial Chamber issued an oral decision in the course of the session, setting out various guidelines that will govern the proceedings in this case.² In accordance with its undertaking, the Trial Chamber now issues its written decision reflecting the oral order made on 28 January 2002.

II. ARGUMENTS OF THE PARTIES

3. The prosecution submits that for documents to be admitted into evidence, the prosecution must establish the relevance and probative value of the document in question, but not its authenticity or authorship or even its source. It argues that rules, which apply in national jurisdictions, may well be of assistance when there has been no jurisprudence from the Tribunal on a particular issue. However, the prosecution is of the view that evidentiary rules in national jurisdictions are of no relevance where there is clear and unambiguous authority on the point, including decisions of the Appeals Chamber of this Tribunal. The prosecution finally submits that it is for the defence to at least make a credible argument that a document or a set of documents is irrelevant or have no probative value, or that their

¹ Only counsel for Radoslav Brđanin subsequently filed his “Memorandum of Law Regarding Admission of Documents” with the Registry.

² *Prosecutor v. Radoslav Brđanin & Momir Talić*, Case No. IT-99-36-PT, 28 January 2002, T. 956-969.

probative value is substantially outweighed by the need to ensure a fair trial. In the absence of such factors, the document should be admitted into evidence. In support of its submissions, the prosecution relies on the following decisions of this Tribunal:

- (a) Decision on the Motion of the Prosecution for the Admissibility of Evidence (“Decision on Admissibility of Evidence”), issued by the Trial Chamber in the *Čelebići* case on 19 January 1998;³
- (b) Decision on Application of Defendant Zejnil Delalić for Leave to Appeal against the Decision on the Trial Chamber of 19 January 1998 for the Admissibility of Evidence (“Appeal Decision on Admissibility of Evidence”), issued by the Appeals Chamber in the *Čelebići* case on 4 March 1998;⁴
- (c) Decision on the Defence Motion for Reconsideration of the Ruling to Exclude from Evidence Authentic and Exculpatory Documentary Evidence, issued by the Trial Chamber in *Blaškić* on 30 January 1998;⁵
- (d) Order granting Request for Admission of Documentary Evidence, issued by the Trial Chamber in *Kvočka et al.* on 17 March 1999;⁶
- (e) Decision granting Prosecution’s additional Request for Admission of Documentary Evidence, issued by the Trial Chamber in *Sikirica et. al.* on 20 December 2000;⁷

4. Counsel for Radoslav Brđanin, by contrast, submits that the prosecution is required to provide sufficient indicia of reliability to make out a *prima facie* case for a document to be admitted into evidence. He offers various examples of how a document may be authenticated in a *prima facie* way. For instance, in the case of a document that merely has a signature but no stamp, the prosecution should call a witness to establish the *prima facie* reliability of the document in question. Brđanin argues that, in view of the huge amount of documentary evidence in this case, admitting documents into evidence without requiring any threshold of reliability would entail the risk of losing control over the trial. Counsel for Momir Talić adopts the submissions of counsel for Brđanin. In addition, he contends that a document that is not credible can be neither probative value nor relevant.

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 (“Decision on Admissibility of Evidence”), 19 January 1998.

⁴ *Prosecutor v. Zejnil Delalić et. al.*, Case No. IT-96-21-T, Decision on Application of Defendant Zejnil Delalić for Leave to Appeal against the Decision on the Trial Chamber of 19 January 1998 for the Admissibility of Evidence (“Appeal Decision on Admissibility of Evidence”), 4 March 1998.

⁵ *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.

⁶ *Prosecutor v. Miroslav Kvočka et. al.*, Case No. IT-98-30/1-T, Order granting Request for Admission of Documentary Evidence, 17 March 1999.

⁷ *Prosecutor v. Dusko Sikirica et. al.*, Case No. IT-95-8-T, Decision granting Prosecution’s additional Request for Admission of Documentary Evidence, 20 December 2000.

III. DISCUSSION

5. In matters of admissibility of evidence the procedure of this Tribunal, with its unique mixture of common law and civil law rules on procedure and evidence, 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.

6. The question of admissibility of evidence before this Tribunal is governed by Section 3 of the Rules of Procedure and Evidence ("Rules"). As explained in the *Čelebići* Trial Chamber "Decision on the Admissibility of Evidence",

the approach adopted by the Rules is clearly one in favour of admissibility as long as the evidence is relevant and is deemed to have probative value (Sub-rule 89 (C)), and its probative value is not substantially outweighed by the need to ensure a fair trial (Sub-rule 89 (D)). Evidence may further be excluded on the grounds given in Rules 95 and 96. Sub-rule 89 (E) relates to the authentication of evidence at Court. Finally, Sub-rule 89 (B), perhaps one of the most important rules of evidence, contains a provision of a residual nature which, in cases not otherwise provided for in the Rules, permits the application of such rules of evidence as will best favour a fair determination of the matter in question and which are consistent with the Statute and general principle of law.⁸

7. In the same decision the Trial Chamber stated that

In contrast to the common law, where questions of admissibility and exclusion of evidence occupy a prominent place in criminal proceedings, the ten [now there are more] provisions of the Rules which regulate all evidentiary matters in the proceedings before the International Tribunal do not contain a detailed set of technical rules relating to this issue.⁹

9. In the context of rules of procedure and evidence, the approach of the Statute of this Tribunal is to lay down a framework or a structure, conceived in the broadest 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 Rules, with full respect for the procedural and substantive rights of the accused and also for the protection of victims and witnesses.

10. Rule 89 (A) makes it clear that a Trial Chamber shall not be bound by national rules of evidence whether representing the common law or civil law. The Appeals Chamber in

⁸ *Prosecutor v. Zejnil Delalić et. al*, Case No. IT-96-21-T, Decision on the Motion of the Prosecution for the Admissibility of Evidence ("Decision on Admissibility of Evidence"), para. 16.

⁹ *Ibid.*, para. 15.

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.”¹⁰ This Trial Chamber believes that it should not be hindered by technical rules in its search for the truth, apart from those listed in Section 3 of the Rules.

11. In the opinion of this Trial Chamber, the most important rule in this context is Rule 89, which lists the general evidentiary provisions. Sub-rule (B) provides that

In 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.

The same rule permits the Chamber to admit any relevant evidence with probative value and exclude any if the probative value is substantially outweighed by the need to ensure a fair trial. 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. 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.

13. These considerations have resulted in the generally uniform tendency of the various Trial Chambers of this Tribunal towards admitting evidence in the first place, leaving its weight to be assessed when all the evidence is being considered by the Trial Chamber in reaching its judgement. The Appeals Chamber has approved this approach in more than one instance. This will, therefore, in principle, be the practice that this Trial Chamber will adopt throughout these proceedings.

14. Another conspicuous practice that has been followed by the Trial Chambers of this Tribunal, and 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. The main reason for this is that these rules were developed in the context of a system of trial by jury. In a jury trial there is the absolute need to keep away from the lay jurors prejudicial material of little or no probative value that may be difficult for them to remove from their mind. Proceedings before this Tribunal are instead conducted by professional judges. This

¹⁰ *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.

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 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.¹¹

15. The following guidelines will govern the admissibility of evidence throughout the duration of the trial in this case:

16. The first guideline is that the parties should always bear in mind the basic distinction that exists between the legal admissibility of documentary evidence and the weight that documentary evidence is given in the courtroom.

17. The second guideline is that the fact that this Trial Chamber may, at some point in the course of the proceedings, rule against the admissibility of some 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, has persuasive value and hence justifies the admission of the evidence in question.

18. The third guideline is that 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”.¹² This Trial Chamber agrees that “the 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”.¹³ This does not mean that a document will not be considered at all when a party seeks to have the document admitted. As this Trial Chamber sees it and as stated by the Appeals Chamber in the *Čelebići* case in its “Appeal Decision on Admissibility of Evidence”, at the stage of admission of evidence, “the implicit requirement of reliability means no more

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, para. 20.

¹² *Ibid.*

¹³ *Ibid.*

than that there must be sufficient indicia of reliability to make out a prima facie case for the admission of that document”.¹⁴ This is substantially different from what counsel for the defence of each accused contends – although Counsel for Brđanin cites the same authority. Their submissions would not only entail a thorough, if not conclusive, examination of reliability, but also an examination of the absolute authenticity of the document tendered for admission. This is not in conformity with the case law of this Tribunal.

19. The fourth guideline is that when, as has already happened in this case, objections are raised on grounds of authenticity, this Trial Chamber will follow the practice this Tribunal has previously adopted, namely, to admit documents and video recordings and then decide what weight to give them in the context of the trial record as a whole.

20. Similarly, the fifth guideline is that the parties should remember there is “no blanket prohibition on the admission of documents simply on the grounds that their purported author has not been called to testify”.¹⁵ Similarly, the parties should keep in mind the fact that an unsigned and unstamped document does not, *a priori*, render it void of authenticity. In fact, as rightly pointed out by the prosecution, the absence of a signature or an official seal may sometimes, in itself, be indicative of the pursuit of a criminal joint enterprise or possibly a method intentionally devised to avoid having the paternity of that document directly established. As already stated, 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.

21. The sixth guideline relates to hearsay evidence. Undoubtedly, this issue will arise from time to time especially when either of the parties seeks to present statements of persons who have died in the meantime and other similar items of evidence. This Trial Chamber hereby reiterates the position of the Appeals Chamber in the *Aleksovski* case that “it is well settled in the practice of the Tribunal that hearsay evidence is admissible. Thus relevant out of court statements, which a Trial Chamber considers probative, are admissible under Rule 89(C)”.¹⁶ This was previously established by the Trial Chamber in *Tadić*¹⁷ and followed by

¹⁴ *Prosecutor v. Zejnil Delalić et. al*, Case No. IT-96-21-T, Decision on Application of Defendant Zejnil Delalić for Leave to Appeal against the Decision on the Trial Chamber of 19 January 1998 for the Admissibility of Evidence, 4 March 1998, para. 20.

¹⁵ *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.

¹⁶ *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.

the Trial Chamber in *Blaškić*.¹⁸ Accordingly, 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.¹⁹

22. The seventh guideline is that the so-called "best evidence rule" will be applied in the determination of matters before this Trial Chamber. This essentially means that the Trial Chamber will rely on the best evidence available in the circumstances of the case and parties are directed to regulate the production of their evidence along these lines. 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. The Trial Chamber will exercise its discretion in the spirit that lies at the basis of the Statute and the Rules.

23. With the eighth guideline, the Trial Chamber draws the attention of the parties to Rule 95, which provides for the exclusion of improperly obtained evidence. It declares that no evidence shall be admissible if obtained by methods that 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 are obtained from suspects by oppressive conduct, cannot pass the test under Rule 95. The burden is on the prosecution to prove beyond a reasonable doubt that the statement was voluntary and not obtained by oppressive conduct. As stated by the *Čelebići* Trial Chamber in its "Decision on Exclusion of Evidence", "it is extremely difficult for a statement taken in violation of Rule 42 to fall within Rule 95, which

¹⁷ *Prosecutor v. Dusko Tadić*, Case No. IT-94-1-T, Decision on Motion on Hearsay, 5 August 1996.

¹⁸ *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.

¹⁹ *Supra* note 16

protects the integrity of the proceedings by the non-admissibility of evidence obtained by methods which cast substantial doubts on that reliability”.²⁰

24. The ninth guideline that this Trial Chamber wishes to draw the attention of the parties to relates to the notion of reliability. In matters of hearsay evidence 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 so because if the hearsay evidence offered is unreliable, then it cannot be either relevant or of probative value. Therefore such evidence will be inadmissible in terms of Sub-Rule 89 (C). However, in respect to other documentary evidence, the Trial Chamber does not agree that the determination of the issue of reliability, when it arises, should be seen as a separate, first step in assessing a piece of evidence offered for admission. Therefore, the notion of establishing indicia of reliability ought not to be confused with having admissibility predicated on proof of reliability as suggested by counsel for the defence in the present case. That would be tantamount to finding a way around the well-established case law of this Tribunal, which this Trial Chamber is not prepared to do.

25. Last but not least this Trial Chamber emphasizes what it considers to be an overriding 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 delicate task of striking a balance in seeking to protect also the rights of victims and witnesses. As a trial is an often complex journey in search for the truth, 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. Naturally, 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 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

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.

²¹ *Prosecutor v. Dario Kordić & Mario Čerkez*, Case No. IT-95-14/2-T, Decision on Appeal Regarding Statement of a Deceased Witness, A. Ch., 21 July 2000.

Rules, ought not to be admitted in evidence. In other words, the submission of the prosecution, that “for a document to be admitted into evidence, the prosecution must establish relevance and probative value” is very much in consonance with what the Rules in effect require from either party when seeking to introduce a document into evidence. The prosecution is also right in submitting that it need not establish authenticity or authorship or even the source of a document for such admission. However, it should be always kept in mind that the prosecution may be called upon by the Trial Chamber to provide a minimum of proof that would be sufficient to constitute a *prima facie* indicia of reliability if the document so warrants.

26. As a final remark, this Trial Chamber notes that it is undoubtedly true that this case involves an unusually large number of documents. However, that does not mean, as counsel for Bradnin suggests, that proof of the reliability of each document will be required as a precondition for the admission of these documents. As elaborated above, save where this Trial Chamber deems it fit to intervene *ex officio*, the practice will be in favour of admissibility due regard being had to the relevance and probative value of the document on the basis explained above.

IV. DISPOSITION

For the foregoing reasons

TRIAL CHAMBER II HEREBY:

Orders that the admission of evidence introduced by either party in this case will be governed by the principles set out in this decision.

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

Dated this 15th day of February 2002,
At The Hague,
The Netherlands



Carmel Agius

Presiding Judge

[Seal of the Tribunal]