



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-97-24-PT

Date: 25 February 2002

Original: ENGLISH

IN THE TRIAL CHAMBER

Before: Judge Wolfgang Schomburg, Pre-Trial Judge
Registrar: Mr. Hans Holthuis
Order of: 25 February 2002

PROSECUTOR

v.

MILOMIR STAKIĆ

**PROVISIONAL ORDER ON THE STANDARDS GOVERNING
THE ADMISSION OF EVIDENCE AND IDENTIFICATION**

The Office of the Prosecutor:

Ms. Joanna Korner
Ms. Susan Somers
Mr. Nicolas Koumjian

Counsel for the Accused:

Mr. Branko Lukić
Mr. John Ostojić

I, Wolfgang Schomburg, Judge 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 ("International Tribunal"),

HAVING BEEN DESIGNATED pre-trial Judge in the present matter by the "Order Appointing a Pre-Trial Judge" issued by Trial Chamber II of the International Tribunal on 28 November 2001;

NOTING the Order issued by Trial Chamber II in *The Prosecutor v. Brđanin & Talić*, Case. No. IT-99-36-T, Order on the Standards Governing the Admission of Evidence, 15 February 2002, ("Order") which set-out the guidelines governing the admission of evidence in that case;

CONSIDERING that the guidelines set-forth in the Order are reflective of the jurisprudence of the International Tribunal and in conformity with the Rules of Procedure and Evidence, notably Rule 89;

HEREBY ADOPT the guidelines set-forth in the Order, with the following adjustments, as (provisional) rules, as stated in the Annex; and

INVITE the parties to submit their comments on the (provisional) rules provided in the Annex by 15 March 2002.

ADDITIONALLY, and apart from these rules on admissibility, I intend to order the following and shall invite the parties to respond with their observations by 15 March 2002:

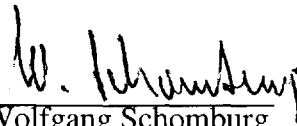
1. Preliminary remarks: The probative value of a courtroom identification is rather limited. This potential loss of evidence has to be avoided. The parties, therefore, shall in principle provide for a formal identification parade. The following rules should be applied in this case:

Identification

- a. In case a victim or a witness shall be called upon to determine whether a person (accused or third person) can be identified, before the examination, a formal line-up must be conducted, at the request of a party or *ex officio*.

- b. The confrontation shall include at least four other persons of the same gender, similar age and similar appearance, selected, if necessary, by the Registrar.
- c. Nothing in the above procedure shall indicate which of these persons is the one to be identified.
- d. For the purposes of a line-up, the Trial Chamber shall appoint a Presiding Officer. The party at whose initiative the line up is to be conducted shall give reasonable notice to the other party, who shall have the right to attend the procedure. The line up may be held either at or away from the seat of the Tribunal.
- e. The Presiding Officer shall ensure that the identification is conducted in accordance with the Rules. A video-tape of the identification procedure must be taken on the record. The Presiding Officer shall transmit the record to the Trial Chamber.

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


Wolfgang Schomburg
Pre-Trial Judge

Dated this twenty-fifth day of February 2002
At The Hague,
The Netherlands

(Seal of the Tribunal)

Annex

The following guidelines will govern the admissibility of evidence in this case:

1. 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 as the rule.
2. The fact that this Trial Chamber may – more or less provisionally – 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.
3. 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. As it was said before: "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"¹.
4. When 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.
5. 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. Similarly, the parties should keep in mind the fact that an unsigned and unstamped document does not, *a priori*, render it void of authenticity. Authenticity and proof of authorship will assume the greatest importance in the Trial Chamber's assessment of the weight to be attached to individual pieces in the framework of the free evaluation of evidence.

¹ *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.
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6. Hearsay evidence is admissible. Out of court statements, which a Trial Chamber considers probative, are admissible under Rule 89(C). As it was 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.²

7. 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.
8. Rule 95 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 by oppressive conduct, cannot pass the test under Rule 95. If there is a *prima facie* indicia that there was such an oppressive conduct, the burden on the prosecuting party 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

² *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.

protects the integrity of the proceedings by the non-admissibility of evidence obtained by methods which cast substantial doubts on that reliability”.³

9. Reliability. In respect to 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.
10. Last but not least this Trial Chamber emphasizes 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 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. 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 Rules, ought not to be admitted in evidence. It should be always kept in mind that the parties 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.

³ *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.