



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-01-42-T
Date: 10 September 2004
Original: English

IN TRIAL CHAMBER II

Before: Judge Kevin Parker
Judge Krister Thelin
Judge Christine Van Den Wyngaert

Registrar: Mr. Hans Holthuis

Decision of: 10 September 2004

PROSECUTOR

v.

PAVLE STRUGAR

**DECISION III ON THE ADMISSIBILITY OF CERTAIN
DOCUMENTS**

The Office of the Prosecutor:

Ms. Susan Somers
Mr. Philip Weiner

Counsel for the Accused:

Mr. Goran Rodić
Mr. Vladimir Petrović

I. THE MOTION

1. This decision of Trial Chamber II is in respect of the Defence Motion of 6 August 2004¹, filed immediately following the close of the Defence case. This Motion seeks to have admitted into evidence the following documents as Defence evidence in rejoinder, pursuant to Rule 85(A)(iv):

- Annex I² is an extract from the Personal Records File of the Defence witness Petre Handžiev, drawn up by the Personnel Directorate of the General Staff of the Army of Serbia and Montenegro;
- Annex II³ is a Daily Combat Report of the 9th VPS, dated apparently 28 March 1992;⁴
- Annex III⁵ is another Daily Combat Report of the 9th VPS, dated 25 March 1992;
- Annex IV⁶ is a handwritten note by Miodrag Jokić, dated 29 November 1991 and addressed to the Command of the 2nd Operational Group, congratulating the Accused on his promotion to Colonel-General.

2. The Prosecution objected to the admission of each of these documents.⁷

II. THE LAW

3. The admissibility of evidence is principally governed by Rule 89(C) of the Rules of Procedure and Evidence which states that a Chamber “may admit any relevant evidence which it deems to have probative value.”

4. While Rule 89(C) appears to grant the Trial Chamber a “broad discretion”, the Appeals Chamber has held that it “must be interpreted so that safeguards are provided to ensure that the Trial Chamber can be satisfied that the evidence is reliable.”⁸ With this in mind, the Appeals Chamber has indicated that the reliability of a statement may be relevant to its admissibility, and not just to its weight. Indeed, “[a] piece of evidence may be so lacking in terms of the indicia of

¹ Defence Motion: Pursuant to Rule 85(A)(iv), 6 August 2004 (“Defence Motion”).

² Defence Motion: Annex I, 6 August 2004 (“Annex I”).

³ Defence Motion: Annex II, 6 August 2004 (“Annex II”).

⁴ See *infra* fn. 16.

⁵ Defence Motion: Annex III, 6 August 2004 (“Annex III”).

⁶ Defence Motion: Annex IV, 6 August 2004 (“Annex IV”).

⁷ Prosecution’s Response to “Defence Motion: Pursuant to Rule 85(A)(iv)”, 10 August 2004 (“Prosecution Response”), paras 5, 7, 12, 15.

⁸ *Prosecutor v. Dario Kordić et al*, Case No. IT-95-14/2-AR73.5, Decision on Appeal Regarding Statement of a Deceased Witness, 21 July 2000, paras 20 and 22.

reliability that it is not ‘probative’ and is therefore inadmissible”.⁹ This consideration has been commonly expressed in the case-law as a requirement, said to be implicit in Rule 89(C), that evidence must have “sufficient indicia of reliability”.¹⁰

5. The admission of defence evidence in rejoinder is provided for in Rule 85(A)(iv) of the Rules of Procedure and Evidence. This rule does not create an absolute entitlement to lead evidence in rejoinder. As held by the Trial Chamber in the *Kunarac* case¹¹, Rule 85(A)(iv) does not deal with the Defence’s entitlement to lead evidence, but merely with the order in which evidence is given “where an entitlement to lead such evidence exists”.¹² When analysing the issue from the perspective of the admission of prosecution evidence in rebuttal, the said Chamber held that it is the obligation of the Prosecution to lead its evidence in its case-in-chief, and it is only if the accused raises a new issue in the course of the Defence case that the Prosecution may lead evidence in rebuttal according to Rule 85(A)(iii). The Chamber held that the same applies for the admission of defence evidence in rejoinder under Rule 85(A)(iv). Thus, the admission of rejoinder evidence is limited to issues directly arising from rebuttal evidence and which could not have been expected to have been addressed during the Defence case.¹³

6. Also relevant to the admission of some of the documents now in contention is Rule 90(H)(ii), which provides that a cross-examining party shall put to the witness the nature of its case where it appears in contradiction of the evidence given by that witness. The admission of evidence in rejoinder may not be used to cure the failure of that party to do so.

7. The Chamber wishes to emphasise that the decision to admit a particular piece of evidence is no indication of the ultimate weight to be accorded to it.

III. DISCUSSION

8. Annex I is an extract from the Personal Records File of the Defence witness Petre Handžiev, drawn up by the Personnel Directorate of the General Staff of the Army of Serbia and Montenegro. The Defence contends that it demonstrates that, despite Miodrag Jokić’s testimony during trial in the sense that Petre Handžiev “was of poor quality and that he always had very bad results while in

⁹ *Ibid.*, para. 24.

¹⁰ See e.g. *Prosecutor v. Zejnir Delalić et al*, Case No. IT-96-21-AR 73.2, Decision on Application of Defendant Zejnir Delalić for Leave to Appeal Against the Decision of the Trial Chamber of 19 January 1998 for the Admissibility of Evidence, 4 March 1998, paras 19 and 20.

¹¹ *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vuković*, Case No. IT-96-23-T and IT-96-23/1-T, Decision on Defence Motions for Rejoinder, 31 October 2000.

¹² *Ibid.*, para. 14.

¹³ *Ibid.*, para. 14; *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-T, 2 April 2003; *Prosecutor v. Mladen Naletilić aka “Tuta” and Vinko Martinović aka “Stela”*, Case No. IT-98-34-T, 23 October 2002.

service”, his file records include comments such as “distinguishes himself” and “very good”.¹⁴ The Prosecution submits that the document is only an extract from the records, which is not of itself probative of Admiral Jokić’s credibility. The Prosecution considers that only the “primary documentary evidence could be contrasted with” Admiral Jokić’s evidence.¹⁵ The Trial Chamber is satisfied that the document deals with an issue which directly arose out of Admiral Jokić’s testimony during rebuttal and without prior notice to the Defence. The Prosecution’s concerns in truth are relevant to the weight that might ultimately be given to this evidence rather than its admissibility. The document will be admitted.

9. Annex II and Annex III are both Daily Combat Reports of the 9th VPS signed by Miodrag Jokić. Annex II is dated apparently 28 March 1992¹⁶; Annex III is dated 25 March 1992. The Defence contends that these documents contradict Admiral Jokić’s testimony about General Života Panić and the Accused visiting the positions of the 3rd Battalion of the 472nd Motorised Brigade in December 1991¹⁷, by recording the visit to have been in March 1992. With respect to Annex II, the Prosecution submits that, during cross-examination in rebuttal, the Defence failed to put the document to Admiral Jokić.¹⁸ As regards Annex III, the Prosecution contends that, in addition to the Defence not having put the document to Admiral Jokić during cross-examination, it does not on its face demonstrate that the Accused, General Panić and Admiral Jokić did *not* visit in December 1991. The Chamber agrees that the document lacks sufficient relevance as it does not deal directly with the question of a visit in December 1991 and the fact that there was a visit in March 1992 is already revealed in the evidence. The Chamber will not admit these documents.

10. Annex IV is a handwritten note by Miodrag Jokić, dated 29 November 1991 and addressed to the Command of the 2nd Operational Group, congratulating the Accused on his promotion to Colonel-General. The Defence contends that, as Admiral Jokić testified for the Prosecution against the Accused, this document challenges his credibility.¹⁹ The Prosecution submits that as the document is merely a standard congratulatory message from a subordinate officer to a superior officer, it cannot detract from Admiral Jokić’s credibility.²⁰ It would not fall under the scope of Rule 85(A)(iv) and hence it should not be admitted as evidence in rejoinder.²¹ The congratulatory note appears to be a formality between a subordinate and his superior and does not suggest any

¹⁴ Defence Motion, para. 5.

¹⁵ Prosecution Response, paras 4, 5.

¹⁶ Although the date 28 March 1991 appears in the heading of the document, the document relates events occurred in March 1992, and the date accompanying the signatures is 28 March 1992.

¹⁷ Defence Motion, paras 6, 7.

¹⁸ Prosecution Response, para. 7.

¹⁹ Defence Motion, para. 8.

²⁰ Prosecution Response, para. 14.

²¹ *Ibid.*, para. 15.

personal affection from Admiral Jokić towards the Accused. The document does not have sufficient evidentiary basis as to the fact the Defence wants to prove from it. The document will not be admitted.

IV. DISPOSITION

11. Based on the foregoing, the Chamber will admit into evidence the document presented as Annex I to the Defence Motion. The remaining documents, or parts thereof, are not admitted.

12. The Chamber requests the Registry to (a) mark as an exhibit the document presented as Annex I to the Defence Motion, (b) assign an exhibit number to this document, and to inform the Chamber and the parties of the exhibit number in writing as soon as practicable.

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

Dated this tenth day of September 2004
At The Hague
The Netherlands



Judge Kevin Parker
Presiding

[Seal of the Tribunal]