UNITED
NATIONS

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-04-81-T
Date: 29 October 2008
Original: English

IN TRIAL CHAMBER I

Before: **Judge Bakone Justice Moloto, Presiding Judge**
Judge Pedro David
Judge Michèle Picard

Registrar: **Mr. Hans Holthuis**

Order of: **29 October 2008**

PROSECUTOR

v.

MOMČILO PERIŠIĆ

PUBLIC

ORDER FOR GUIDELINES ON THE ADMISSION AND PRESENTATION OF EVIDENCE AND CONDUCT OF COUNSEL IN COURT

The Office of the Prosecutor

Mr. Mark Harmon
Mr. Daniel Saxon

Counsel for the Accused

Mr. Novak Lukić
Mr. Gregor Guy-Smith

TRIAL CHAMBER I ("Trial Chamber") 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 ("Tribunal");

NOTING that at the Status Conference on 2 September 2008, Judge Moloto, then pre-trial Judge, informed the Parties that guidelines covering the presentation and admission of evidence and the conduct of counsel in court will be adopted in the present case ("Guidelines");[1]

NOTING that on 24 September 2008, the Trial Chamber requested the Parties to provide it with any comments by way of e-mail;

NOTING that such comments were received from both Parties, and the Trial Chamber has taken them into account where appropriate;

CONSIDERING that the Guidelines attached in the Annex to the present Decision will promote fair and expeditious trial proceedings;

CONSIDERING that the attached Guidelines are in conformity with the Statute and the Rules of the Tribunal, notably Rules 89 and 90 of the Rules of Procedure and Evidence ("Rules"), and that the Guidelines are reflective of the jurisprudence of the Tribunal;

PURSUANT TO Article 20(1) of the Statute of the Tribunal and Rules 54, 89 and 90 of the Rules

HEREBY adopts the Guidelines, attached as an Annex to this Decision, which shall govern the admission and presentation of evidence and the conduct of counsel in court in this case.

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

Judge Bakone Justice Moloto
Presiding Judge

Dated this twenty-ninth day of October 2008
At The Hague
The Netherlands

[Seal of the Tribunal]

[1] Pre-Trial Conference, 2 September 008, T. 288.

ANNEX

A. Standards Governing Presentation of Evidence and Conduct of Counsel in Court

(a) Order of Calling Witnesses

1. Each Party shall provide the other Party and the Trial Chamber with a list indicating the order of witnesses due to testify and the scheduled date of their appearance at trial. The Trial Chamber requires the Parties to inform it of the calling order of witnesses at the end of every week for the coming two weeks. Furthermore, the Parties shall inform the Trial Chamber five working days in advance of any changes to the calling order. Moreover, the Parties shall provide a list of documents which they intend to use for the examination-in-chief of each witness at least two working days before the start of the testimony. In the case of any witness in respect of whom 100 or more documents are intended to be used, the list of such documents is to be provided at least five working days before the start of the testimony.

(b) Long, Complicated or Compound Questions

2. The Parties are requested to bear in mind that long, complicated or compound questions risk confusing witnesses and making the trial record unclear and unnecessarily lengthy. Therefore, in the interest of effective presentation of evidence, the Parties are advised to put one question at a time to the witnesses.

(c) Admission into Evidence of a Prior Statement of a Testifying Witness

3. In accordance with the principle of orality, which is expressed in Rule 89 (F),[2] prior statements of a witness should not be tendered into evidence where relevant portions thereof have been read out and entered on the record or where the witness has otherwise commented on the statement in his or her live testimony.[3]

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[2] *Prosecutor v. Sefer Halilović*, Case No. IT-01-48-AR73.2, Decision on Interlocutory Appeal Concerning Admission of Record of Interview of the Accused from the Bar Table, 19 August 2005, paras 16-17. *See also Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30/1-A, Judgement, 28 February 2005, paras 122-126; *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-AR73, Decision on Prosecutor's Appeal on Admissibility of Evidence, Dissenting Opinion of Judge Patrick Robinson, 16 February 1999, para. 10; *Prosecutor v. Zoran Kupreškić et al.*, Case No. IT-95-16, Decision on Appeal by Dragan Papić Against Ruling to Proceed by Deposition, 15 July 1999, para. 18.

[3] *Prosecutor v. Miroslav Kvočka et al.*, 4 July 2000, T. 3490. *See also Prosecutor v. Milan Martić*, Case No. IT-91-11, Revised Version of the Decision Adopting Guidelines on the Standards Governing the Presentation of Evidence and the Conduct of Counsel in Court, 19 May 2006.

(d) Referring to Prior Testimony or Statements of a Witness

4. The Parties are requested to avoid interpreting or paraphrasing what a witness has previously either stated or testified.[4] The Trial Chamber considers that such practice increases the risk of mischaracterising the prior statement or testimony and unnecessarily lengthens the trial record.

5. The Parties are instead encouraged to quote from the statement or transcript. However, the Parties are requested to restrict such quoting to situations when it is *strictly necessary* for the understanding of the question asked. In such cases, the quote shall be restricted to the part of the transcript that is directly relevant to the question. Furthermore, when referring to a prior statement or testimony, the Parties are asked to provide exact page and line references to the statement or transcript in question.

(e) Refreshing the Memory of a Witness Using a Prior Statement

6. Prior statements of the testifying witness, whether in evidence or not, may be used to refresh a witness's memory both during examination-in-chief and during cross-examination.[5] The Trial Chamber recalls the Appeals Chamber's finding that also non-admitted portions of a statement made pursuant to Rule 92 *bis* may be used to refresh the memory of a witness during examination-in-chief[6] and during cross-examination.[7]

7. The Trial Chamber may consider the means and circumstances by which this process was conducted when assessing the reliability and credibility of the witness's testimony.[8]

(f) Scope of Cross-examination

8. The Trial Chamber recalls Rule 90 (H)(i) of the Rules of Procedure and Evidence, which requires the parties to restrict cross-examination to:

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[4] This concerns both what the testifying witness has stated, or testified at prior hearings, and what other witnesses, whose testimony has concluded, have stated or testified.

[5] *Prosecutor v. Enver Hadžihasanović and Amir Kubura*, Case No. IT-01-47-AR73.2, Decision on Interlocutory Appeal Relating to the Refreshment of the Memory of a Witness, 2 April 2004, p. 2, referring to *Prosecutor v. Blagoje Simić et al.*, Case Nos IT-95-9-AR73.6 & IT-95-9-AR73.7, Decision on Prosecution Interlocutory Appeals on the Use of Statements not Admitted into Evidence Pursuant to Rule 92*bis* as a Basis to Challenge Credibility and to Refresh Memory, 23 May 2003, paras 18-20. *See also Prosecutor v. Milan Martić*, Case No. IT-91-11, Revised Version of the Decision Adopting Guidelines on the Standards Governing the Presentation of Evidence and the Conduct of Counsel in Court, 19 May 2006.

[6] *Ibid.*

Prosecutor v. Blagoje Simić et al., Case No. IT-95-9 & IT-95-9-AR73.7, Decision on Prosecution Interlocutory Appeals on the Use of Statements not Admitted into Evidence Pursuant to Rule 92*bis* as a Basis to Challenge Credibility and to Refresh Memory, 23 May 2003, paras 18, 20.

[8] *Ibid.*

> the subject-matter of the evidence-in-chief and matters affecting the credibility of the witness and, where the witness is able to give evidence relevant to the case for the cross-examining party, to the subject-matter of that case.

9. In this respect, the Parties are reminded that, when dealing in cross-examination with questions relating to the historical, political and military context of the case, they are requested to state the purpose and relevance of questions to the allegations raised in the Indictment against the Accused.[9] Furthermore, it is recalled that this Tribunal does not recognise *tu quoque* as a valid defence and has accepted, but only to a very limited extent, evidence relating to crimes allegedly committed by other parties to the conflict.[10] As a consequence, the Trial Chamber may disallow questions which are irrelevant either because they are beyond the Indictment's temporal scope or are unrelated to the specific facts of the violations alleged in the Indictment.[11]

10. The Trial Chamber acknowledges that Rule 90 (H)(i) does not limit the matters that may be raised during cross-examination which is directed solely at the credibility of the witness. However, cross-examination must still be conducted within some reasonable limits.[12] The Trial Chamber may therefore disallow improper, repetitive, irrelevant or unfair questions, including those which constitute an unwarranted attack on the witness or which fall outside the above parameters.[13]

11. The Trial Chamber notes that the cross-examining party may confront a witness with the testimony[14] of another witness who has previously appeared in the present case in order to impeach or challenge the credibility of that witness or the testifying witness. The cross-examining party shall put to the testifying witness the evidence of the previous witness without identifying from whom

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[9] *Prosecution v. Zoran Kupreškić et al.*, Case No. IT-95-16, Decision on Evidence of the Good Character of the Accused and the Defence of *Tu Quoque*, 17 February 1999; *Prosecutor v. Enver Hadžihasanović et al.*, Case No. IT-01-47, Decision on Defence Motion for Clarification on the Oral Decision of 17 December 2003 Regarding the Scope of Cross-examination Pursuant to Rule 90 (H) of the Rules, 28 January 2004, p. 3.

[10] *Prosecution v. Zoran Kupreškić et al.*, Case No. IT-95-16, Decision on Evidence of the Good Character of the Accused and the Defence of *Tu Quoque*, 17 February 1999, pp 3-5; *Prosecutor v. Enver Hadžihasanović et al.*, Case No. IT-01-47, Decision on Defence Motion for Clarification on the Oral Decision of 17 December 2003 Regarding the Scope of Cross-examination Pursuant to Rule 90 (H) of the Rules, 28 January 2004, p. 4; and *Prosecutor v. Kupreškić et al.*, Trial Judgement, paras 515-520; *Prosecutor v. Kordić and Čerkez* Trial Judgement, para. 520.

[11] The Trial Chamber recalls in this regard that, for example, certain adjudicated or agreed facts may fall outside of the temporal scope of the Indictment.

[12] *Prosecution v. Momčilo Krajišnik*, Case No. IT-00-39-T, Decision on Cross-Examination of Milorad Davidović, 15 December 2005.

[13] *Ibid.* In that case the Trial Chamber, by recalling its duty to protect witnesses set out in Article 22 of the Statute, retained the discretion to disallow a question or sustain an objection against a question in cross-examination where, in the Trial Chamber's view, it constituted an unwarranted attack on a witness. An example of such an attack was the allegation by the cross-examining party that a witness had engaged in serious criminal conduct, without showing reasonable grounds to do so at the time the allegation was made. A similar solution is found in the practice of the ICTR, *see Prosecutor v. Bagosora*, Case No. ICTR-96-7, Oral Decision on Cross Examination, 9 May 2005, T. 27-28.

[14] The Trial Chamber considers this to include statements pursuant to Rule 92 *bis*, Rule 92 *ter* or Rule 92 *quater* which have been admitted in evidence.

the information has come.[15] Where the testimony has been given by a person who has previously appeared as a protected witness or where the prior testimony has been led in private or closed session, the presentation of that testimony to the testifying witness must be done in private or closed session. Moreover, the Trial Chamber reminds the Parties that while they may ask the witness whether or not he agrees or disagrees with the evidence of the previous witness, the Parties should not ask witnesses to comment on the credibility of other witnesses.[16]

12. The Parties may confront a witness in court with the statement of another witness or transcript of prior testimony from another case before this Tribunal (hereinafter "transcript") only where that person will come to testify in the present case. The presenting party must identify to the Trial Chamber and the other party the name of the statement maker or prior witness, the date of the statement or transcript and the page references of the portion(s) of the statement or transcript which will be read out in court or referred to. However, this information shall not be disclosed to the witness in court. Where the witness statement or transcript has been made by a person who has previously appeared as a protected witness or where the prior testimony has been led in private or closed session, the presentation of that statement or transcript to the testifying witness must be done in private or closed session. Finally, the statement shall not ordinarily be admitted into evidence.

13. Where a witness is confronted in court with the statement or transcript of another witness who is scheduled to come to testify in the present case, and where that witness ultimately does not testify, the Trial Chamber shall disregard the part of the testimony where the witness was confronted with the statement or transcript of the witness who ultimately did not testify.

14. The Trial Chamber notes that Rule 90 (H)(ii) requires the cross-examining party to put to a witness, who is able to give evidence relevant to the case for that party, the nature of its case that is in contradiction to the witness's evidence. The Trial Chamber, in accordance with the practice of the Tribunal, observes that Rule 90 (H)(ii) allows for certain flexibility depending on the various

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[15] *Prosecutor v. Blagoje Simić et al.*, Case No. IT-95-9 & IT-95-9-AR73.7, 13 March 2003, T. 16636; *ibid.*, 29 April 2003, T. 18809-10; *Prosecutor v. Radoslav Brđanin and Momir Talić*, Case No. IT-99-36-T, 14 October 2002, T. 10654:

> JUDGE AGIUS: [...] it's not right that you present the witness with information leading him to understand that another witness also coming from the political arena gives a completely different story to his with regard to some details at least.

Miroslav Kvočka et al., Case No. IT-98-30/1, 28 August 2000, T. 4220-21. *Prosecution v. Momčilo Krajišnik*, Case No. IT-00-39-T, 5 December 2005, T. 19215.

[16] *Prosecutor v. Blagoje Simić et al.*, Case No. IT-95-9, 4 June 2002, T. 8820-8821; *Prosecutor v. Miroslav Kvočka et al., ibid*; *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2, 24 November 1999, T. 10336-7; *Prosecutor v. Radoslav Brđanin and Momir Talić*, Case No. IT-99-36-T, 14 October 2002, T. 10651.

circumstances at trial and interprets the rule to mean that the cross-examining party is required to put the *substance* of the contradictory evidence and not every detail that the party does not accept.[17]

(g) Length of Examination

15. A system for monitoring the use of time shall be established by the Registry, who will be responsible for recording time used. Such a system shall record time used: (a) by the Prosecution for its examination-in-chief; (b) by the Defence for cross-examination; (c) by the Prosecution for re-examination; (d) by the Judges for putting questions to the witnesses; and (e) for all other matters, including procedural matters. Regular reports on the use of time shall be compiled by the Registry every two weeks for use by the Trial Chamber and the parties. Significant time spent dealing with objections will not be counted against the party then examining the witness.[18] Where there are time savings (*i.e.*, where examination (whether direct or cross-) takes less time than estimated), these may be apportioned by the examining party to other witnesses.

16. The examination-in-chief of a witness will be limited to the time indicated by each Party, under the control of the Trial Chamber.

17. In the interest of ensuring fair and expeditious conduct of the trial proceedings, the Parties are requested to adhere to the principle that the time for cross-examination of a witness should not exceed the time allotted for the examination-in-chief of that witness, unless there are particular circumstances requiring that the cross-examination be extended.[19] Such circumstances include situations where there has been a particularly brief examination-in-chief, where the witness is an expert witness, or where fairness to the accused so requires.

18. Re-examination of a witness shall be limited to matters raised in cross-examination.

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[17] *Prosecutor v. Radoslav Brđanin and Momir Talić*, Case No. IT-99-36-T, Decision on "Motion to Declare Rule 90 (H)(ii) Void to the Extent it is in Violation of Article 21 of the Statute of the International Tribunal" by the Accused Radoslav Brđanin and on "Rule 90(H)(ii) Submissions" by the Accused Momir Talić, 22 March 2002. *See also Prosecution v. Naser Orić*, Case No. IT-03-68-T, Decision on Partly Confidential Defence Motion Regarding the Consequences of a Party Failing to Put its Case to Witnesses Pursuant to Rule 90 (H)(ii),17 January 2006.

[18] The Trial Chamber will decide on the merits of such an application on a case-by-case basis.

[19] *Prosecutor v. Mladen Naletilić and Vinko Martinović*, Case No. IT-98-34, 10 June 2002, T. 12248 (closed session); *Prosecutor v. Goran Jelisić*, Case No. IT-95-10, 7 September 1999, T. 1063. In the *Krajišnik* case, the Trial Chamber requested the parties to limit the time devoted to the cross examination to 60 per cent of the time employed in the examination in chief. *See e.g.*, *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-T, 23 April 2004, T. 2652. However, the Trial Chamber interpreted the "60 per cent practice" with a certain degree of flexibility. *See* in this regard, *ibid.*, 27 May 2004, T. 3068-3069. In particular, under the 89 (F) procedure which drastically reduces the examination-in-chief the Trial Chamber has admitted derogation from the "60 per cent practice", *ibid.*, 3 September 2004, T. 5421. In *Milošević*, after the prosecution case, an order was issued on the use of time in the defence case. In that order, the judges stated that 60 percent of the time allocated to the Accused to present his case in chief would be allocated to the Prosecution for cross-examination during the Defence case, *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54, Third Order on the Use of Time in the Defence Case and Decision on Prosecution's Further Submissions on the Recording and Use of Time During the Defence Case, 19 May 2005.

(h) 92 *bis* Witnesses Appearing for Cross-examination

19. Where a witness whose previous testimony or statement has been admitted into evidence pursuant to Rule 92 *bis* has been called solely for the purposes of cross-examination, the *calling party* should not introduce new evidence through examination-in-chief without leave of the court. Furthermore, the cross-examination of such witnesses shall be carried out in accordance with Rule 90(H)(i) and (ii) with the limitation that questions relating to the "subject matter of the evidence-in-chief":

1. shall be restricted to the matters for which the Trial Chamber has decided to allow the witness to be called for cross-examination;[20] and

2. shall not include questions relating to the summary of the witness's 92 *bis* statement or transcript, which the calling party reads out at the start of the testimony, unless related to item 1 above.

(i) 92 *ter* Witnesses

20. Rather than filing a motion for each witness who a party intends to call pursuant to Rule 92 *ter*, that party should provide the other with all relevant materials for each witness three weeks in advance of the testimony of the witness. "All relevant materials" in this context means a notice identifying:

- the passages from prior statements and/or passages from prior testimony of the witness that are relied upon, and listing the exhibits (or any other material) referred to in those passages;

- where a prior statement is not to be relied upon in its entirety, a redacted version showing the passages that are relied upon;

- where the prior testimony of a witness is not to be relied upon in its entirety, a redacted transcript or transcripts showing the passages that are relied upon.

The other party should raise any objection 12 days prior to the witness being heard or the Rule 92 *ter* statement being admitted by the Trial Chamber.[21] Nine days prior to the witness being heard or the Rule 92 *ter* statement being admitted by the Trial Chamber, the party calling the witness is to release the relevant materials into E-court, together with the exhibits (or any other material) listed in the notice. A list of any remaining documents intended to be used with a witness is to be

[20] *See e.g., Prosecutor v. Milan Martić*, Case No. IT-95-11-T, Decision on Prosecution's Motion for the Admission of Written Evidence Pursuant to Rule 92 *bis* of the Rules, 16 January 2006.

provided five days prior to the witness being heard or the Rule 92 *ter* statement being admitted by the Trial Chamber.

21. The party calling a witness under Rule 92 *ter* may be permitted by the Trial Chamber to read out a short summary of the witness's Rule 92 *ter* statement and/or conduct a limited direct examination of the witness where such examination is focused on clarifying or highlighting particular aspects of the statement. In addition, the calling party will be permitted to show documents to the Rule 92 *ter* witness and such documents may be tendered into evidence.

(j) Tendering Evidence from the Bar Table

22. In accordance with Rule 89(C), the Trial Chamber allows for the possibility of tendering exhibits from the bar table.

23. In order to facilitate the admission process, the Chamber requests a joint submission of the parties whenever a set of documents is tendered without being presented to a witness.[22] The tendering party should file a table containing a short description of each exhibit, as well as its relevance and probative value if not immediately obvious from the description. In case of bulky exhibits with particularly relevant portions, a reference to those portions is needed. In the joint submission as well as in the said table of exhibits, the other party may also provide any comments and/or objections with regard to each tendered exhibit.

(k) Use of Large Documents in Court

24. The Trial Chamber considers that it is not an efficient use of in-court time to read out large passages of a document which is subsequently tendered for admission into evidence. This is particularly so where the party does not ask concise and specific questions on the information contained in the document but merely requests the witness to read the document into the record. In this respect, counsel are reminded of the possibility of tendering such evidence from the bar table.[23] Where the Parties wish to present passages of a long document to a witness, they are urged to provide the relevant parts of the document to the witness and give the witness time to study it either in court or, preferably, during a break, and then ask concise questions on the substance of the relevant parts of the document. Smaller portions of a document may be read out by counsel in court.

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[21] Status Conference, 2 September 2008, T. 288-290.

[22] This practice has been adopted by the Trial Chamber in *Gotovina et al.*, Case No. IT-06-90-T.

[23] Rule 89 (C); *Prosecutor v. Sefer Halilović*, Case No. IT-01-48-AR73.2, Decision on Interlocutory Appeal Concerning Admission of Record of Interview of the Accused from The Bar Table, 19 August 2005, para. 14. *See also Prosecutor v. Milan Martić*, Case No. IT-91-11, Revised Version of the Decision Adopting Guidelines on the Standards Governing the Presentation of Evidence and the Conduct of Counsel in Court, 19 May 2006.

25. Barring exceptional circumstances with the leave of the Trial Chamber, the Parties may not tender into evidence lengthy documents, such as books, where only portions thereof are relevant to the evidence of the witness through whom the document is tendered. Rather, when seeking the admission into evidence of such documents, be it during examination-in-chief, cross-examination or re-examination, each Party is requested to specify which portions of the document it seeks to have admitted. Each tendering Party is also requested to submit electronic versions of the portions of the document sought to be admitted.

(l) Use of Hardcopies of Documents

26. Parties are reminded that as this trial uses E-Court, the principle is that all documents shall be handled through the E-Court system. Hardcopies of a document may be used by a party only where the party has been unable, due to unforeseen circumstances, to put a document into the E-Court system, or where the use of E-Court does not allow for the effective presentation of the material. Parties are also reminded that when the use of hardcopies of a document is permitted, sufficient copies should be provided to the witness, the opposite party, the Bench, the Registrar and the interpreters. Finally, the Parties are reminded to make use of the drawing functionality of E-Court when asking a witness to make a drawing or annotate a document.

(m) Tendering of Exhibits Through Witnesses

27. Where one of the Parties seeks the admission of a document through a witness it must demonstrate to the Trial Chamber the relation between the witness and the document. The Trial Chamber may not allow the admission, through that particular witness, of documents which lack such relation.

(n) General Terms of Behaviour

28. The Parties are encouraged to contact the Trial Chamber Legal Officer to resolve issues that can be addressed informally.

29. The Parties should endeavour to take all steps to preserve the public character of the proceedings. In particular, the Parties should seek only those specific protective measures, such as face or voice distortion, which they deem strictly necessary for the protection of the witnesses. It should be noted that closed session will only be ordered on an exceptional basis, after a party has presented the Trial Chamber with sufficient information warranting the taking of such a measure.

B. The Admission of Evidence

30. The Trial Chamber will begin any analysis on the admissibility of evidence by recalling Rule 89(C) of the Rules, which provides that "[a] Chamber may admit any relevant evidence which it deems to have probative value", and Rule 89(D) of the Rules, which provides that "[a] Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial."

31. 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, therefore, be in favour of admissibility.

32. The admission of a document into evidence does not, in itself, signify that the information contained therein will necessarily be deemed to be an accurate portrayal of the facts.[24] 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 has previously been stated, "[t]he 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".[25]

33. The fact that this Trial Chamber may rule on the admissibility of a particular document or other piece of evidence will not prevent that ruling from being reversed. Therefore, a decision to admit or not admit a piece of evidence may be quashed at a later stage if good cause is shown for doing so, for example, where further evidence emerges which is relevant, establishes that the material has or does not have probative value and thus justifies the admission or exclusion of the evidence in question.[26]

34. There is no general prohibition on the admission of documents simply on the grounds that their purported author has not been called to testify. Similarly, the fact that a document is unsigned or unstamped does not, *a priori,* render it void of authenticity.[27]

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[24] *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.
[25] *Ibid.*
[26] *Prosecutor v. Milan Martić*, Case No. IT-95-11-T, Decision Adopting Guidelines on the Standards Governing the Admission of Evidence, 19 January 2006, Annex A, para. 4.
[27] *Ibid.*, para. 5.

35. When objections are raised on grounds of authenticity or reliability, this Trial Chamber will follow the practice of this Tribunal, namely, to admit documents and/or video recordings and then decide on the weight to be given to them within the context of the trial record as a whole.[28] As provided for in Rule 89(E) of the Rules, the tendering party may be requested to provide the Trial Chamber with verification of the authenticity of evidence obtained out of court. Additionally, when an objection is made on the ground of reliability, the tendering party may be required to produce sufficient indicia of reliability to make a *prima facie* case for the admission of the piece of evidence in question.[29] On the request of a party or *proprio motu*, the Trial Chamber may order the party tendering copies of evidence to present the original or the best legible, audible or visible copy available.

36. The "best evidence rule" will be applied in the determination of matters before this Trial Chamber. This means that the Trial Chamber will rely on the best evidence available in the circumstances of the case, and parties are directed to keep this rule in mind when submitting evidence to the Trial Chamber. What is considered the best evidence will depend on the particular circumstances attached to each document, the complexity of the case and the preceding investigations.

37. Hearsay evidence is admissible. Out of court statements, which a Trial Chamber considers relevant and probative, are admissible under Rule 89(C).[30] 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

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[28] *See 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; *Prosecutor v. Dario Kordić and Mario Čerkez*, Decision on Appeal Regarding Statement of a Deceased Witness, Case No. IT-95-14/2-AR73.5, 21 July 2000; *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.

[29] *See Prosecutor v. Zejnil Delalić et. al*, Case No. IT-96-21-AR 73.2, Decision on the Application of Defendant Zejnil Delalić for Leave to Appeal against the Decision of the Trial Chamber of 19 January 1998 for the Admissibility of Evidence, 4 March 1998, para. 20: "The implicit requirement that a piece of evidence be *prima facie* credible – that it have sufficient indicia of reliability – is a factor in the assessment of its relevance and probative value. To require absolute proof of a document's authenticity before it could be admitted would be to require a far more stringent test than the standard envisioned by Sub-rule 89(C)."

[30] Since "evidence is admissible only if it is relevant and it is relevant only if has probative value", the reliability of hearsay evidence is a necessary prerequisite of its probative value under Rule 89(C), *Prosecutor v. Galić*, Case No. IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92*bis*(C), 7 June 2002, para. 35. *See also Prosecutor v. Milutinović at. al.*, Case No. IT-05-87-T, Order on Procedure and Evidence, 11 July 2006, para. 4.

> 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.[31]

38. Rule 95 of the Rules provides for the exclusion of improperly obtained evidence. It declares that 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. Accordingly, the Trial Chamber makes it clear at the very outset that statements which are not voluntary, but rather are obtained by means including oppressive conduct, cannot be admitted. If there are *prima facie* indicia that there was such oppressive conduct, the burden is on the party seeking to have the evidence admitted to prove that the statement was voluntary and not obtained by oppressive conduct.

39. The Trial Chamber considers circumstantial evidence as being evidence of circumstances surrounding an event or an offence from which a fact at issue may be reasonably inferred.[32] The Trial Chamber recognises that circumstantial evidence may be necessary in order to establish an alleged fact, particularly in criminal trials such as those before this Tribunal, where there is often no eye-witness or conclusive documents relating to a particular alleged fact. The Trial Chamber does not consider circumstantial evidence to be of less value than direct evidence.[33] The Trial Chamber further considers that while individual items of evidence by themselves may be insufficient to establish a fact, when taken together, they may be revealing and decisive. In evaluating circumstantial evidence, this Trial Chamber takes particular notice of the Trial Chamber in *Krnojelac*, which stated that "[a] circumstantial case consists of evidence of a number of different circumstances which, taken in combination, point to the existence of a particular fact upon which the guilt of the accused person depends because they would usually exist in combination only because a particular fact did exist."[34] The Appeals Chamber further added that "[t]he standard is only satisfied if the inference drawn was the only reasonable one that could be drawn from the evidence presented."[35]

40. The Trial Chamber emphasises 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

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[31] *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-T, Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 February 1999, para. 15.

[32] Richard May and Stephen Powell, Criminal Evidence, 5th Edition, Sweet & Maxwell Ltd., London, 2004.

[33] The Appeals Chamber noted that "[t]here is nothing to prevent a conviction being based upon such evidence. Circumstantial evidence can often be sufficient to satisfy a fact finder beyond reasonable doubt." *Kupreškić* Appeal Judgement, para. 303.

[34] *Krnojelac* Trial Judgement, para. 67.

[35] *Stakić* Appeal Judgement, para. 219. *See also Krnojelac* Trial Judgement, para. 67.

the obligation to strike a balance in seeking to protect the rights of victims and witnesses. As a trial is often a complex journey in search for the truth in relation to the alleged individual criminal responsibility of the Accused, bearing in mind that "the truth" can never be fully satisfied, 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 only 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.[36]

41. Finally, pursuant to Rule 98 of the Rules, the Trial Chamber may be obliged *proprio motu* to summon witnesses and order their attendance in order to address any outstanding questions regarding the individual criminal responsibility of the Accused emanating from the presentation of evidence by the parties.

[36] *Prosecutor v. Milan Martić*, Case No. IT-95-11-T, Decision Adopting Guidelines on the Standards Governing the Admission of Evidence, 19 January 2006, Annex A, para. 11.