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19 August 2011

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UNITED
NATIONS

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-08-91-T
Date: 19 August 2011
Original: English

IN TRIAL CHAMBER II

Before: **Judge Burton Hall, Presiding**
Judge Guy Delvoie
Judge Frederik Harhoff

Registrar: **Mr. John Hocking**

Order of: **19 August 2011**

PROSECUTOR

v.

MIĆO STANIŠIĆ AND STOJAN ŽUPLJANIN

PUBLIC

ORDER FURTHER AMENDING GUIDELINES ON THE ADMISSION AND PRESENTATION OF EVIDENCE

The Office of the Prosecutor

Ms. Joanna Korner
Mr. Thomas Hannis

Counsel for the Accused

Mr. Slobodan Zečević and Mr. Slobodan Cvijetić for Mićo Stanišić
Mr. Dragan Krgović and Mr. Aleksandar Aleksić for Stojan Župljanin

TRIAL CHAMBER II ("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");

RECALLING the "Decision granting in part Prosecution's motion for admission of documents shown to witness MS001, Andrija Bjelošević", rendered on 8 July 2011 ("Decision"), whereby the Trial Chamber set out the law applicable to "material that was not included in the Prosecution Rule 65 *ter* list and not admitted during the Prosecution's case-in-chief but that is tendered by the Prosecution when cross-examining Defence witnesses";[1]

RECALLING the "Order on revised guidelines on admission and presentation of evidence", issued on 2 October 2009 ("Guidelines");

CONSIDERING that paragraphs 46 to 51 of the Decision expand the guidance contained in the Guidelines, thus rendering necessary an amendment thereof;

PURSUANT TO Article 20 and 21 of the Statute and Rule 54 of the Rules;

ADOPTS Guideline 15.A. in the terms indicated in the Second Amended Guidelines attached in Annex A.

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

Judge Burton Hall
Presiding

Dated this ninteenth day of August 2011
At The Hague
The Netherlands

[Seal of the Tribunal]

[1] Decision, paras 46-51.

ANNEX A

SECOND AMENDED GUIDELINES OF 19 AUGUST 2011 ON THE ADMISSION AND PRESENTATION OF EVIDENCE

1. In the admission of evidence, the Trial Chamber will be guided by the best evidence rule. Each party shall produce their evidence by following this rule as far as practicable.

2. Pursuant to Rule 89(C), the Trial Chamber will not admit evidence which it considers to be without relevance and probative value. It is for the tendering party to demonstrate the relevance and probative value of the evidence.

3. It is for a party to demonstrate the connection of an exhibit with the substance of the testimony of the witness through whom the party seeks to tender the exhibit.

4. There is no rule which prohibits the admission into evidence of documents merely because their alleged source was not called to testify. Likewise, the fact that a document has neither a signature nor a stamp is not in itself a reason to find that the document is not authentic.

5. According to the practice of the Tribunal, circumstantial evidence including hearsay evidence is admissible. However, the probative value of such evidence will in general be less than the direct evidence of a witness.[2]

6. Material on a party's exhibit list may be requested to be admitted into evidence by that party. In the event that a party seeks to admit into evidence material that is not on its exhibit list, the party must, prior to requesting admission into evidence, seek the leave of the Trial Chamber by way of a written motion to add the material in question to the exhibit list.

7. It is the duty of each party to present its evidence in a specific and concentrated manner. Except in exceptional circumstances, parties may not request the admission into evidence of very long documents, such as books, diaries or reports, when only certain passages thereof are relevant to the testimony of the witness through whom the document is presented. The parties are requested to seek the admission into evidence of any large collections of documents through bar table motions.

8. This trial will use e-court and the parties are reminded that, as a result, 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. When use of hardcopies of a document is permitted, the tendering party is responsible to produce copies to the witness, the opposite party, the Trial Chamber, the Registrar and the interpreters.

9. Prior to the calling of its first witness, the Prosecution shall release all documents on its Rule 65 *ter* exhibit list in the e-court system.

10. By 4 p.m. every Thursday, the party whose case is being presented shall provide the Trial Chamber, the Registrar and the other parties with an electronic list of the witnesses it intends to call the following week indicating the order of their testimony and the time estimated for the examination-in-chief. It is the duty of the calling party to notify the Trial Chamber, the Registrar and the other parties as soon as possible of any changes to the order of witnesses.

11. The calling party shall provide the Trial Chamber, the Registry and the other parties with an electronic list of the documents or material it intends to use during the examination-in-chief no later than 72 hours prior to the testimony of the relevant witness when the total number of pages exceeds 100, and in all other cases 48 hours in advance of the testimony.

12. The calling party shall submit the final list of documents or material to be used during examination-in-chief no later than 4 p.m. on the working day prior to the testimony of a witness.

13. Proofing notes shall be distributed to the Trial Chamber, the Registrar and the other parties as soon as possible after the conclusion of the proofing session.

14. Upon the witness making the solemn declaration pursuant to Rule 90, the cross-examining parties shall provide electronically to the Trial Chamber, the Registrar and the other parties a list of the documents and other material that they may use in cross-examination.

15. If any party wishes to use material which has not been timely noticed pursuant to these guidelines, it may only do so with the leave of the Trial Chamber.

15.A. If the Prosecution seeks the admission into evidence of documents which were not included in the Prosecution's Rule 65 ter list, but which the Prosecution used or wishes to use in the cross-examinination of Defence witnesses ("Fresh Evidence"), it has to specifically justify its request by explaining why the document was not tendered during its case-in-chief, as well as the reasons for seeking the admission of the document through that particular defence witness. The Trial Chamber

[2] *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-AR73, Decision on Prosecutor's appeal on admissibility of evidence, 16 February 1999, para. 15.

may exercise its discretion, in the interests of justice, to either admit or exclude such documents under Rules 89(C) and 89(D) of the Rules and, if admitted, it will also specify how the prejudice caused to the Defence, if any, is to be redressed. The Trial Chamber must strike the appropriate balance between the right of the accused to a fair trial and the Prosecution's duty to prove its case beyond a reasonable doubt. Finally, unless otherwise specified, the Trial Chamber need not, at the time of admission of the Fresh Evidence, make a determination of whether that evidence will be considered solely for credibility purposes or also for the truth of its content.

16. The parties are to organise their presentation of evidence in a way that avoids repetition of evidence that is already on the record. The Trial Chamber may prohibit inappropriate, repetitive or irrelevant questions, including those constituting an unjustified attack on a witness.

17. The parties are to avoid lengthy, complicated or combined questions which may confuse the witnesses. The parties are to avoid paraphrasing previous testimony or statements of witnesses, but shall quote the directly relevant passage and indicate the exact page numbers and relevant lines. The parties are requested to restrict such quoting to situations when it is strictly necessary for the understanding of the question to be put.

18. A prior statement of a witness may be used to refresh the witness' recollection regardless of whether the statement has been admitted into evidence.[3] The Trial Chamber may consider the means and circumstances by which the memory was refreshed when assessing the reliability and credibility of the witness' testimony.

19. The Trial Chamber will supervise and regulate the length of the examination-in-chief of a witness taking into consideration the time indicated by the relevant party. In the interest of a fair and expeditious trial and unless specifically stated herein, the Trial Chamber will allow the cross-examining parties the same amount of time in total for cross-examination of a *viva voce* witness as that allotted for examination-in-chief. A party may be allotted more time upon the showing of good cause for its request.

20. Pursuant to Rule 90(H)(ii), the cross-examining party is required 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. In accordance with the practice of the Tribunal, the Trial Chamber

[3] *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; *Prosecutor v. Blagoje Simić et al.*, Case No. 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.

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.[4]

21. 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.[5]

22. A cross-examining party may put to a witness the evidence obtained from a previous witness provided that the identity of that witness is not given. Parties are reminded not to ask witnesses to comment on the credibility of other witnesses.

23. Any re-examination of a witness is to be strictly limited to the questions raised during the cross-examination.

24. A witness called to testify under Rule 92 *ter* must attest at the hearing that his written statement or the transcript of his prior testimony accurately reflects the witness's declaration and what the witness would say if examined.

25. Unless ordered by the Trial Chamber in a particular case upon a showing of good cause by the calling party, the party may not examine a witness heard under Rule 92 *ter* with a view to introducing evidence beyond the scope of the statements and transcripts admitted to which the witness is being called to testify.

26. The calling party, unless otherwise indicated by the Trial Chamber upon a request of the calling party, will have 20 minutes for the examination-in-chief of a witness heard pursuant to Rule 92 *ter* and one hour for examination-in-chief of a witness heard pursuant to Rule 94 *bis*.

27. The Trial Chamber will allot time for a party's cross-examination of witnesses heard pursuant to Rule 92 *ter* after taking into consideration an indication from the parties of how much time each party will require. Such indication shall be submitted by way of electronic communication as soon as possible after a witness is admitted pursuant to Rule 92 *ter*.

28. The Trial Chamber will allot time for a party's cross-examination of witnesses heard pursuant to Rule 94 *bis* after taking into consideration an indication from the parties of how much time each party will require. Such indication shall be included with the notice filed pursuant to

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[4] *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, para. 14.

[5] *Prosecutor v. Zoran Kupreškić et al.*, Case No. IT-95-16-T, Decision on evidence of the good character of the accused and the defence of *tu quoque*, 17 February 1999, p. 5.

Rule 94 *bis*(B). Where a party has already filed a notice pursuant to Rule 94 *bis*(B), the indication shall be submitted by way of electronic communication within two weeks from the filing of the Revised Guidelines.

29. Once evidence has been admitted pursuant to Rule 92 *bis*, Rule 92 *ter*, Rule 92 *quater*, or Rule 94, each document which has been admitted will be assigned an exhibit number by the Registrar.

30. In the event that a party seeks to have protective measures implemented for a witness, the party shall, three weeks prior to the testimony of the witness and save by leave of the Trial Chamber, apply by way of a written motion for protective measures.

31. A party seeking to have proceedings conducted by way of video-conference link pursuant to Rule 81 *bis* shall, five weeks prior to the scheduled date of the proceedings and save by leave of the Trial Chamber, apply to the Trial Chamber by way of a written motion for such proceedings.