IN THE APPEALS CHAMBER

Before: Judge Richard May, Presiding

Judge Wang Tieya

Judge David Hunt

Judge Mohamed Bennouna

Judge Patrick Robinson

Registrar: Mrs. Dorothee de Sampayo Garrido-Nijgh

Decision of: 16 February 1999

PROSECUTOR

v.

ZLATKO ALEKSOVSKI

DECISION ON PROSECUTOR'S APPEAL ON ADMISSIBILITY OF EVIDENCE

The Office of the Prosecutor:

Mr. Grant Niemann
Mr. Anura Meddegoda

Counsel for the Accused:

Mr. Goran Mikulicic
Mr. Srdan Joka

This Appeals Chamber ("Appeals 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 ("International Tribunal"),

BEING seized of the Prosecution's Application for Leave to Appeal: (1) the Trial Chamber's Decision to Admit further Defence evidence; and (2) the Trial Chamber's Decision to deny the Prosecutor's Motion to Admit further evidence in Reply, filed on 6 November 1998 ("Appeal"),

PURSUANT TO the Statute and the Rules of Procedure and Evidence of the International Tribunal ("Statute" and "Rules"),

HEREBY RENDERS its Decision in respect of the present Appeal, as follows.

I. BACKGROUND

(A) Introduction

1. The Respondent in this Appeal is Mr. Zlatko Aleksovski. He is the accused on trial before Trial Chamber I, on three charges arising out of events which are alleged to have occurred in the Lasva Valley area. Two charges arise under Article 2 of the Statute and one arises under Article 3.
2. The Respondent was originally indicted with five others, including General Tihomir Blaskic. At the request of the counsel for the Respondent, which was not opposed by the Office of the Prosecutor ("Prosecution"), his trial was severed from that of General Blaskic by a Decision of Trial Chamber I on 25 September 1997.

(B) Chronology of the Trial

3. On 6 January 1998, the Respondent's trial began. On 27 March, the Prosecution closed its case. On 27 August, the Defence closed its case. On 22 September, the Prosecution called evidence in rebuttal. On 19 and 20 October, the Defence called evidence in rejoinder.
4. Meanwhile, on 10 September, Admiral Davor Domazet gave expert evidence for the Defence in the *Blaskic* trial. This evidence sought to explain the causes, course and conduct of the armed conflict in the Lasva Valley with which both the *Blaskic* and the *Aleksovski* trials are concerned.

(C) History of Events Leading to Appeal

5. On 29 September, the Respondent applied to Trial Chamber I for leave to present as evidence in his trial the transcript and video-recording of the evidence given by Admiral Domazet in the *Blaskic* trial. The application was made under Rule 89(B) (as best favouring a fair determination of the matter); Rule 89(C) (which permits the Trial Chamber to admit any relevant evidence which it deems to have probative value); and Rule 94(B) (which permits the Trial Chamber to take judicial notice of adjudicated facts or documentary evidence from other proceedings of the Tribunal).[1]
6. On 6 October, the Prosecution objected to the application on the grounds that it was untimely, failed to have regard to the rule that witnesses shall in principle be heard directly by the Chambers (Rule 90(A)) and ignored the right of the Prosecution to cross-examine the witness as provided for in Rule 85(B).[2] The Prosecution also submitted that Rule 94(B) was not applicable since it only applies to 'adjudicated facts', which means facts proved as a consequence of a judicial decision.
7. On 22 October the Trial Chamber issued a written decision ("First Decision") ordering that the testimony of Admiral Domazet including the video recording of it and exhibits be admitted into evidence under Rule 89(C). The Trial Chamber, in giving reasons, stated that:

    a. the evidence of Admiral Domazet in relation to the issue as to whether the armed conflict in the area in question was of an international nature and was of indisputable probative value, although the weight to be afforded to it was yet to be considered; [3]
    b. the situation was exceptional: Admiral Domazet was not immediately available due to the nature of his duties, the trial had reached its final phase and the accused Aleksovski had been in custody since 29 April 1997; and
    c. the Prosecution had already had the opportunity to cross-examine the Admiral in the *Blaskic* trial and could not, at this late stage, invoke its right to cross-examine him without threatening the balance between the parties and the application of the principle of equality of arms.

8. Meanwhile, on 19 October, the Prosecution, under Rules 89(B)

and (C), sought leave to tender in rebuttal to the evidence of Admiral Domazet the transcript of the evidence of a confidential witness who had testified in the *Blaskic* trial. The Defence objected. On 3 November 1998 the Trial Chamber rejected the Prosecution motion ("Second Decision") on the following grounds:

a. it was the responsibility of the Prosecution to call the confidential witness to testify as to the nature of the armed conflict in its case in chief;
b. the confidential witness, whose identity was protected, had testified in closed session in the *Blaskic* trial; and the Trial Chamber did not have power to alter or to amend any protective measures ordered by another Trial Chamber; and
c. even if the problem of confidentiality were to be resolved, to admit the evidence of the confidential witness would amount to depriving the accused Aleksovski of his right to cross-examine the witness, thus affecting the balance between the parties and the principle of equality of arms; and such an infringement upon the fundamental right of the accused to a fair and expeditious trial would be intolerable.

II. THE APPEAL

(A) Application for Leave to Appeal

9. On 6 November, the Prosecution ("Appellant") filed its Application for Leave to Appeal the First and Second Decisions of the Trial Chamber, on the following grounds:
   a. in relation to the First Decision, the Appellant submitted that the Trial Chamber erred in:
      i. failing to require the Respondent to establish why it failed to call Admiral Domazet during its case; applying an incorrect test in deciding whether the Respondent acted diligently; and failing to require the Respondent to establish adequately that the witness was unavailable to give evidence; and
      ii. incorrectly ruling that the Prosecution cross-examination in the *Blaskic* trial satisfied the right to

cross-examine in the *Aleksovski* trial.

b. In relation to the Second Decision, the Appellant submitted that the Trial Chamber erred in:
   i. inconsistently applying its reasoning concerning cross-examination since the Defence in *Blaskic* had the opportunity to cross-examine and there was a common interest between the Defence in *Blaskic* and *Aleksovski*;
   ii. destroying the equilibrium of the trial in preventing the Appellant from rebutting the surprise evidence called by the Respondent; and
   iii. holding that confidentiality and protective measures prevent the evidence in rebuttal being given.

10. On 23 November, the Respondent responded submitting that:

(a) in relation to the First Decision, the Appeal was filed out-of-time since Rule 73(C) of the Rules provides for seven days to make such an application for leave;[4] and

(b)in relation to the Second Decision, (i) the Rules forbid the admission of closed session testimony from another case, and (ii) as the witness had given evidence on 16 March 1998, the Prosecution had had time to seek leave to have the evidence admitted in the present case.

11. On 26 November, the Appellant replied (in relation to the issue of timeliness) that the two Decisions were related as part of the same logical process, were intrinsically linked and the Appellant had thus waited until after the Trial Chamber's Second Decision before applying for leave to appeal: accordingly, the time limits should be extended under Rule 127(A) to allow for the First Decision to be appealed in conjunction with the Second Decision.[5]

(B.) Granting of Leave

12. On 18 December 1998, a Bench of the Appeals Chamber granted the application for leave to appeal, finding that the application was not timely with respect to the Trial Chamber's First Decision, however recognising the filing of the application as validly done under Rule 127(B); and considering that since the issues were closely related they ought to be determined together and that the appeal raised fundamental issues of equality of arms and the

right to a fair trial for both prosecution and defence.

13. It may be noted that this Decision disposed of the issue of timeliness in the present Appeal. However, it related to the unusual circumstances of this Appeal and cannot be taken as encouragement to those who seek, in future, to appeal out of time. The opportunity should also not be lost for the Appeals Chamber to state quite unequivocally that the initial reason for not appealing within time given by the Appellant – that it had treated the date when the English translation became available as that from which the seven day period ran – was wrong. The period of seven days within which Rule 73(C) provides for the filing of an application for leave to appeal runs from (but does not include) the day upon which the written decision is filed, whichever of the two working languages of the Tribunal in which the written decision is given.[6] If there is some difficulty for the party wishing to challenge the decision in filing the application for leave to appeal within that period of seven days because (for example) the decision is written in a language with which he or she is unfamiliar, then that party should move under Rule 127(A) ("Variation of Time-limits") to have the Trial Chamber either enlarge the time prescribed by Rule 73 or recognise any act done after that time as having been validly done.

III. ANALYSIS AND FINDINGS

(A) The First Decision

14. The evidence of Admiral Domazet, which was admitted under the Trial Chamber's First Decision, consisted of the transcript of his evidence in *Blaskic*, together with a video-recording of the evidence and accompanying exhibits. As such, this evidence was hearsay, i.e., the statement of a person made otherwise than in the proceedings in which it is being tendered, but nevertheless being tendered in those proceedings in order to establish the truth of what that person says. The fact that what Admiral Domazet said was "testimony" for the purposes of the *Blaskic* trial does not make such a statement "testimony" for the purposes of the *Aleksovski* trial.

15. 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). This was established in 1996 by the Decision of Trial

Chamber II in *Prosecutor v. Tadic*[7] and followed by Trial Chamber I in *Prosecutor v. Blaskic*.[8] Neither Decision was the subject of appeal and it is not now submitted that they were wrongly decided. Accordingly, 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,[9] 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;[10] 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.[11] 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.[12] 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.[13]

16. Accordingly the Trial Chamber was correct in holding that the evidence of Admiral Domazet was potentially admissible under Rule 89(C), subject to its exercise of discretion under that Sub-rule.

17. The first ground on which the Appellant seeks to attack the First Decision is based on the applicability of Rule 90(A). The Appellant argues that if the evidence was not admissible under this rule it was not admissible at all.[14] Rule 90(A) provides that witnesses shall in principle be heard directly by Chambers although exceptions are provided for in the case of a witness being heard by means of deposition or via video-conference link. (It may also be noted in this connection that affidavit evidence is now admissible under Rule 94*ter*.) However, the heading of Rule 90 is 'Testimony of Witnesses' (meaning oral statements by witnesses on oath or affirmation),[15] and the purpose of the Rule is to govern the receipt of such testimony in court. Thus the other sub-rules deal with such matters as the solemn declaration, the presence of witnesses in court, the interrogation of witnesses and the privilege against self-incrimination. Nothing in Rule 90(A) fetters

the discretion of a Trial Chamber to admit evidence under Rule 89(C) and nothing in Rule 90 suggests that statements made otherwise than in the subject proceedings – but which were in fact made in the course of giving evidence in other proceedings - may only be received under Rule 90(A). Therefore, while it was open to the Trial Chamber, in the instant case, to order the witness to give evidence before it (in which case Rule 90(A) would have applied), it was equally open to the Trial Chamber in the circumstances to exercise its discretion under Rule 89(C) and admit the evidence. Thus the Decision was well within the exercise of the Trial Chamber's discretion and should not be disturbed on appeal unless that discretion has been shown to have miscarried.

18. In attacking the Trial Chamber's exercise of discretion, the Appellant first submits that the Trial Chamber erred in not requiring the Respondent to establish why he failed to call the evidence of Admiral Domazet during his case. Secondly, the Appellant submits that, in any event, the test should not be whether the Respondent knew at the time his case was closed of the actual evidence which the Admiral could give but rather whether the Respondent knew of the existence of the witness and of his potential testimony. It has not been shown that the assertion of those representing this accused, that they did not know of the evidence before the defence case was closed, was ever disputed or that there was any request made by the Prosecution to the Trial Chamber to examine it. The Appeals Chamber does not accept this argument as demonstrating an error by the Trial Chamber in the exercise of its discretion. Nor does the Appeals Chamber accept the second argument, which places too great a burden upon any party seeking to reopen his or her case. The Appeals Chamber, however, points out that there is a firm obligation placed upon those representing an accused person to make proper enquiries as to what evidence is available in that person's defence. In the circumstances of this case, the evidence led by the accused person in the *Blaskic* trial was very obviously a primary source of such enquiry by those representing Zlatko Aleksovski.

19. The Appellant next submits that the Trial Chamber erred in failing to require the Respondent adequately to establish that the witness was unavailable to give evidence. In support of this contention, the Appellant refers to the sometimes elaborate rules in national jurisdictions covering the circumstances when courts are entitled to hold that witnesses are unavailable to give evidence.[16] However, there is no reason to import such rules into

the practice of the Tribunal, which is not bound by national rules of evidence.[17] The purpose of the Rules is to promote a fair and expeditious trial,[18] and Trial Chambers must have the flexibility to achieve this goal. Again, it has not been shown that this was ever made an issue before the Trial Chamber. In these circumstances, the Trial Chamber was entitled to take account of the stage of the trial, the length of time the accused had been in custody and its finding that the witness was not immediately available in exercising its discretion to admit the evidence. In the absence of any issue being raised by the Appellant, the Trial Chamber was not required to make further enquiries of the Respondent.

20. Finally, the Appellant argues that the Trial Chamber was in error in ruling that the opportunity to cross-examine Admiral Domazet in the *Blaskic* trial satisfied its need to cross-examine him also in the *Aleksovski* trial. It is common ground that the alleged events out of which both men were charged took place in the same area, the Lasva Valley area, and that the two proceedings (which arose out of the same indictment) had much in common in both their legal and factual aspects. No attempt has been made to demonstrate any particular line of cross-examination which would have been both relevant and significant to the *Aleksovski* trial but which would not also have been both relevant and significant to the *Blaskic* trial. The Appellant also argued that the cross-examination of Admiral Domazet in the *Blaskic* trial had been wrongly curtailed on issues of credit, but no such complaint was made to the Trial Chamber in *Aleksovski*, and it should not be permitted to be made for the first time on appeal. The Appeals Chamber does not accept these arguments as demonstrating an error by the Trial Chamber in the exercise of its discretion to admit evidence, under Rule 89(C), on a hearsay basis.
21. It follows that no criticism can be made of the Trial Chamber in the exercise of its discretion and the appeal against the First Decision fails.

(B) The Second Decision

22. The transcript of evidence of the confidential witness (which was the subject of the Second Decision) falls into the same category as that of Admiral Domazet, i.e., hearsay evidence admissible under Rule 89(C). The Appellant submits that the Trial Chamber's Decision to exclude this evidence was contrary to the principle of equality of arms and of a fair trial enunciated in Articles 20 and 21 of the Statute.

23. Article 21 of the Statute provides that "all persons shall be equal before the International Tribunal". This Article has been interpreted in many Decisions of the Tribunal as having been based upon the well-known international law principle of "equality of arms". There has, however, been some difference of opinion expressed as to whether the principle relates only to the position of the accused – that is, that it provides merely that the accused is to be afforded the same rights as the Prosecution – or whether it relates to equality between both parties. Thus in *Tadic*,[19] Judge Vohrah said that the application of the principle in criminal trials should be inclined in favour of the Defence acquiring parity with the Prosecution in the presentation of the Defence case to preclude any injustice against the accused. On the other hand, the Trial Chamber in *Delalic*[20] disagreed and said that procedural equality means what it says, equality between Prosecution and Defence, and to suggest otherwise is tantamount to a procedural inequality in favour of the Defence and against the Prosecution.
24. The principle has been discussed in a number of judgements of the European Court of Human Rights.[21] In these cases, the concept of a fair trial is described in terms of its application to both parties. In *Ekbatani v. Sweden*,[22] the court held that although the parties had not been allowed to appear in person each had been able to present its case in writing and the principle of equality of arms was thus observed. In *Barberà v. Spain*[23] the court emphasised that the provisions of article 6(1) entail equal treatment of the Prosecution and Defence; and in *Brandsetter v. Austria*[24] the court said that both parties must be given equal opportunity in relation to the evidence tendered by the other. In *Dombo Beheer BV v. The Netherlands*[25] the court described the requirement of equality of arms as providing a "fair balance" between the parties and as implying that each party must be afforded a reasonable opportunity to present his case – including his evidence – under conditions that do not place him at a substantial disadvantage *vis-à-vis* his opponent.
25. This application of the concept of a fair trial in favour of both parties is understandable because the Prosecution acts on behalf of and in the interests of the community, including the interests of the victims of the offence charged (in cases before the Tribunal the Prosecutor acts on behalf of the international community). This principle of equality does not affect the fundamental protections given by the general law or Statute to the accused,[26]

and the trial proceeds against the background of those fundamental protections. Seen in this way, it is difficult to see how a trial could ever be considered to be fair where the accused is favoured at the expense of the Prosecution beyond a strict compliance with those fundamental protections.

26. The Trial Chamber's Second Decision to exclude the evidence of the confidential witness tendered in reply to the evidence of Admiral Domazet must be examined against this background. The first reason given by the Chamber for its Decision, that the evidence should have been called during the Prosecution case, cannot be sustained. The Prosecution did not know that the Defence were intending to tender the evidence of Admiral Domazet until the Defence sought leave to do so. The substance of the Admiral's evidence was not put to the Prosecution witnesses, so no occasion arose in which this evidence should have been led in advance. The second reason given by the Chamber, that the protective order made by another Trial Chamber could not be altered, can also not be sustained. There was nothing to prevent the Prosecution from applying to the Chamber trying the *Blaskic* case for a waiver or amendment of the protective measures in relation to the witness to enable the witness's evidence to be disclosed in the *Aleksovski* trial. This is the practice in the Tribunal, and could have been followed in the instant case. Once the evidence is disclosed, it can be admitted in the present proceedings subject to suitable protective measures. In these circumstances, it was unfair to the Prosecution to deny it the advantage granted to the Defence and to prevent it calling evidence in rebuttal of the defence evidence.

27. However, the Trial Chamber also relied on the fact that to admit the transcript of evidence of the confidential witness would be to deprive the accused of his right to cross-examine the witness. In fact, as the Prosecution has pointed out, the witness was extensively cross-examined in the *Blaskic* trial, and there is a common interest between the Defence in the two cases. Nonetheless, the fact remains that, if the evidence is admitted upon a hearsay basis, this accused will be denied the opportunity of cross-examining the witness. However, this is the case with the admission of any hearsay evidence: the opposing party loses the opportunity to cross-examine the witness. The disadvantage is tempered in this case by the cross-examination in *Blaskic,* and, in any event, any residual disadvantage to the accused is outweighed by the disadvantage which would be occasioned to the Prosecution by the exclusion of the evidence in the circumstances of this case.[27] Just as Rule 89(D) does not deny the

admissibility of the transcript and video-recording of the hearsay statements made by Admiral Domazet in favour of the accused, so it does not deny the admissibility of the transcript of the hearsay statements made by the confidential witness in favour of the Prosecution, given the need for equality between the parties.

28. Therefore, the Appeals Chamber finds that the Trial Chamber fell into error in exercising its discretion to exclude the evidence. As a result, the appeal against the Second Decision is allowed. No challenge has been made to the relevance of this evidence. However, the Trial Chamber has yet to determine whether the evidence has probative value under Rule 89(C). Accordingly, steps must be taken to obtain amendment of the protective measures ordered for the witness in *Blaskic* to enable the Trial Chamber to review the evidence in order to determine its probative value. Then, unless the Trial Chamber considers it has no probative value, the evidence should be admitted, subject to further suitable protective measures in relation to the evidence once admitted.

IV. DISPOSITION

For the foregoing reasons the APPEALS CHAMBER,

HEREBY REAFFIRMS the Order of 4 February 1999 of the Appeals Chamber regarding the Prosecution's Application for Leave to Appeal filed on 6 November 1998;

AND DECIDES, by a majority of four to one, Judge Patrick Robinson dissenting, that the Appeal is refused in respect of the First Decision of the *Aleksovski* Trial Chamber admitting further Defence evidence, and that the Appeal is allowed with regard to the Second Decision to the extent that the Trial Chamber considers that the evidence in rebuttal has probative value under Rule 89 (C);

AND FURTHER ORDERS, by a majority of four to one, Judge Patrick Robinson dissenting, that the matter be remitted to the *Aleksovski* Trial Chamber for review with regard to the evidence in rebuttal, and that the *Aleksovski* Trial Chamber;

1. instruct the Prosecution to seek from the Trial Chamber in the case of *Prosecutor* v. *Tihomir Blaskic* (Case No. IT-95-14-T) a waiver or amendment of the protective measures

ordered by that Trial Chamber to enable the evidence in rebuttal to be disclosed as necessary in the *Aleksovski* proceedings; and

2. order appropriate protective measures for the purposes of its review of the evidence in rebuttal and of the admission, in part or in entirety, of this evidence in the present trial, if the evidence is to be admitted.

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

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Richard May

Presiding Judge

Judge Patrick Robinson attaches his dissenting opinion to this Decision.

Dated this sixteenth day of February 1999

At The Hague,

The Netherlands.

[Seal of the Tribunal]

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1. Rule 89(B): In cases not otherwise provided for 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. Rule 89(C): A Chamber may admit any relevant evidence which it deems to have probative value. Rule 94(B): At the request of a party or *proprio motu*, a Trial Chamber, after hearing the parties, may decide to take judicial notice of adjudicated facts or documentary evidence from other proceedings o the Tribunal relating to matters at issue in the current proceedings.

2. Rule 85(B): Examination-in-chief, cross-examination and re-examination shall be allowed in each case. It shall be for the party calling a witness to examine such witness in chief, but a Judge may at any stage put any question to the witness. Rule 90(A): Witnesses shall, in principle, be heard directly by the Chambers unless a Chamber has ordered that the witness be heard by means of a deposition as provided for in Rule 71

or where, in exceptional circumstances and in the interests of justice, a Chamber has authorized the receipt of testimony via video-conference link.

3. The qualification that the weight to be afforded to the evidence suggests that the finding that the evidence was of indisputable probative value was intended to mean no more than that it was of indisputable relevance.

4. Rule 73(C): Applications for leave to appeal shall be filed within seven days of the filing of the impugned decision. Where such decision is rendered orally, the application shall be filed within seven days of the oral decision, unless
(i) the party challenging the decision was not present or represented when the decision was pronounced, in which case the time-limit shall run from the date on which the challenging party is notified of the oral decision; or (ii) the Trial Chamber has indicated that a written decision will follow, in which case the time-limit shall run from filing of the written decision.

5. Rule 127(A): Save as provided by Sub-rule (B), a Trial Chamber may, on good cause being shown by motion,
(i) enlarge or reduce any time prescribed by or under these Rules; (ii) recognise as validly done any act done after the expiration of a time so prescribed on such terms, if any, as is thought just and whether or not that time has already expired. Rule 127(B): In relation to any step falling to be taken in connection with an appeal or application for leave to appeal, the Appeals Chamber or a bench of three Judges of that chamber may exercise the like power as is conferred by Sub-rule (A) and in like manner and subject to the same conditions as are therein set out.

6. Rule 3(F) provides otherwise where the computation of time runs from the filing by a party of a document written in other than one of the two working languages of the Tribunal.

7. Case No. IT-94-1-T, Decision on the Defence Motion on Hearsay, 5 Aug. 1996.

8. Case No. IT-95-14-T, Decision on Standing Objection of the Defence to the Admission of Hearsay with no Inquiry as to its Reliability, 26 Jan. 1998.

9. *Prosecutor v. Tadic*, Case No. IT-94-1-T, 5 Aug. 1996, at paras. 15-19; *Prosecutor v. Blaškic*, Case No. IT-95-14-T, 21 Jan. 1998, at para. 10.

10. *Prosecutor v. Tadic*, Case No. IT-94-1-T, 5 Aug. 1996, at paras. 15-19.

11. *Prosecutor v. Tadic*, Case No. IT-94-1-T, 5 Aug. 1996 at p. 3 of Judge Stephen’s concurring opinion.

12. *Prosecutor v. Blaškic*, Case No. IT-95-14-T, 21 Jan. 1998, at para. 12.

13. *Prosecutor v. Tadic*, Case No. IT-94-1-T, 5 Aug. 1996 at pp. 2-3 of Judge Stephen’s concurring opinion.

14. In the original motion to admit the evidence reliance was placed on Rule 94(B) as a ground of admissibility. However, the Trial Chamber placed no reliance on this sub-rule in its Decision and were correct not to do so since the evidence consisted in neither

‘adjudicated facts’ nor ‘documentary evidence from other proceedings’ which are the subject of the sub-rule.

15. ‘1. Evidence, proof … given in court, an oral or written statement under oath or affirmation’ New Shorter Oxford English Dictionary (1993).

16. Prosecution Brief, 8 Jan. 1999, para. 24 *et seq*.

17. Rule 89(A) expressly provides that the Trial Chambers are not so bound.

18. Art. 20(1) of the Tribunal’s Statute.

19. Case No. IT-96-1-T, Separate Opinion of Judge Vohrah on Prosecution Motion for Production of Defence Witness Statement, 27 Nov. 1996, p. 7.

20. Case No. IT-96-21-T, Decision on the Prosecution’s Motion for an Order Requiring Advance Disclosure of Witnesses by the Defence, 4 Feb. 1998, para. 49.

21. These cases were concerned with Art. 6(1) of the European Convention on Human Rights which provides: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law …".

22. (1988) 10 EHRR 510 at para. 30.

23. (1988) 11 EHRR 360 at para. 18.

24. (1991) 15 EHRR 213 at para. 67.

25. (1993) 18 EHRR 213 at para. 33. This was a civil case but the court was considering whether the requirement of equality of arms recognised in criminal cases should apply to civil cases also.

26. i.e., It is for the Prosecution to prove the guilt of the accused beyond reasonable doubt; and the accused cannot be compelled to testify or to incriminate himself (Art. 21).

27. Rule 89(D): A Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.