IN THE TRIAL CHAMBER

Before: Judge Adolphus G. Karibi-Whyte, Presiding

Judge Elizabeth Odio Benito

Judge Saad Saood Jan

Registrar: Mrs. Dorothee de Sampayo Garrido-Nijgh

Decision of: 19 January 1998

PROSECUTOR

v.

ZEJNIL DELALIC
ZDRAVKO MUCIC also known as "PAVO"
HAZIM DELIC
ESAD LANDZO also known as "ZENGA"

DECISION ON THE PROSECUTION'S ORAL REQUESTS FOR THE ADMISSION OF EXHIBIT 155 INTO EVIDENCE AND FOR AN ORDER TO COMPEL THE ACCUSED, ZDRAVKO MUCIC, TO PROVIDE A HANDWRITING SAMPLE

The Office of the Prosecutor:

Mr. Grant Niemann

Ms. Teresa McHenry

Mr. Guiliano Turone

Counsel for the Accused:

Ms. Edina Residovic, Mr. Ekrem Galijatovic, Mr. Eugene O'Sullivan, for Zejnil Delalic

Mr. Zeljko Olujic, Mr. Michael Greaves for Zdravko Mucic

Mr. Salih Karabdic, Mr. Thomas Moran, for Hazim Delic

Mr. John Ackerman, Ms. Cynthia McMurrey, for Esad Landzo

I. INTRODUCTION AND PROCEDURAL BACKGROUND

1. On 8 July 1997, this 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 ("International Tribunal") directed both the Office of the Prosecutor ("Prosecution") and the Defence for the accused, Zdravko Mucic ("Mucic" or "the accused"), (jointly referred to hereinafter as "the parties") to submit written briefs in respect of two requests by the Prosecution. The events up to the direction of the Trial Chamber are the following.

2. During the trial proceedings on 8 July 1997, Ms. Teresa McHenry for the Prosecution led a Prosecution witness designated by the pseudonym "P" ("witness "P"") through examination-in-chief. During the course of this examination, witness "P" testified that an unidentified lady had delivered a letter (hereinafter referred to by its identification number, "Exhibit 155" or as "the letter"), allegedly written by the accused to him about a month prior to the time of his testimony.

3. At this point, Ms. McHenry made the first request on behalf of the Prosecution. She sought the admission in evidence of Exhibit 155. Defence Counsel for Mucic, Mr. Michael Greaves, promptly raised objection to the admissibility of Exhibit 155 on the ground that no proper evidence had been led in support of the allegation that it had been written by his client. Mr. Greaves, further, stated that Mucic was neither admitting nor denying that Exhibit 155 was written and sent to witness "P" by him.

4. In response, Ms. McHenry submitted that Exhibit 155 should be admitted in evidence. She contended that the letter was written by Mucic because the writer had signed it as "Pavo", the nickname by which he is very well known and identified. Further, she stated that the letter contained references to several pieces of information of a non-public nature, peculiarly within the knowledge of both witness "P" and Mucic, including the latter’s current address in detention and information regarding his role in the Celebici camp.

5. In addition, the Prosecution made reference to a further document, a newspaper article referred to in Exhibit 155. The Prosecution requested that, in the event that Exhibit 155 be admitted into evidence, this article also be admitted as Exhibit 156.

6. Thereafter, Ms. McHenry made the Prosecution's second request. She submitted that in the event that the Trial Chamber considered that these inferences were insufficient to link the accused to the letter for purposes of admissibility, the Trial Chamber, in the exercise of its powers under Sub-rule 39(iv) and Rule 54 of the International Tribunal's Rules of Procedure and Evidence ("Rules"), should direct Mucic to provide a sample of his handwriting for analysis and identification. In the event of his non-compliance with such an Order, Ms. McHenry submitted that the Trial Chamber should draw the necessary adverse inferences.

7. Considering the importance of the Prosecution's two requests, the Trial Chamber held deliberations, after which it pronounced that it would defer making any final determination on them until such a time that the parties submitted written briefs for further argument. It was pursuant to this pronouncement that the Trial Chamber made the direction referred to in paragraph 1 above.

8. On 16 July 1997, the Prosecution filed its "Brief Concerning the Standard for Admission of Evidence at Trial and the Production of Handwriting Samples" (Official Record at Registry Page ("RP") D 4010 - D 4021). In response, the Defence for the accused ("Defence") filed its "Reply to the Prosecution's Oral Motion of 8th. July 1997" (RP D 4055 - D 4112) on 29 July 1997. The briefs address, in considerable detail, the applicable law regarding the admissibility of evidence and, specifically, the letter as well as the exercise of the powers of the Trial Chamber under Sub-rule 39(iv) and Rule 54 to compel an accused person to provide a sample of his handwriting for analysis in a trial before it.

9. On 11 September 1997, the parties argued their positions orally before the Trial Chamber. During the trial proceedings on 6 November 1997, the Trial Chamber issued an oral decision admitting Exhibit 155 in evidence. However, it denied the Prosecution's second request to issue an Order compelling the accused to provide a sample of his handwriting. On the same date, it deferred rendering a written decision until a later date.

THE TRIAL CHAMBER, HAVING CONSIDERED the written submissions and oral arguments of the parties,

HEREBY ISSUES ITS WRITTEN DECISION.

II. DISCUSSION

A. Applicable Provisions

10. It is important and relevant to the ensuing discussion to set out the main provisions of the Statute of the International Tribunal ("Statute") and the Rules relied upon for the determination of the issues before this Trial Chamber. Those provisions are the following.

Article 15

Rules of procedure and evidence

The judges of the International Tribunal shall adopt rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters.

Article 20

Commencement and conduct of trial proceedings

1. The Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

2. A person against whom an indictment has been confirmed shall, pursuant to an order or an arrest warrant of the International Tribunal, be taken into custody, immediately informed of the charges against him and transferred to the International Tribunal.

3. The Trial Chamber shall read the indictment, satisfy itself that the rights of the accused are respected, confirm that the accused understands the indictment, and instruct the accused to enter a plea. The Trial Chamber shall then set the date for trial.

4. The hearings shall be public unless the Trial Chamber decides to close the proceedings in accordance with its rules

of procedure and evidence.

Article 21

Rights of the accused

. . . .

3. The accused shall be presumed innocent until proved guilty according to the provisions of the present Statute.

4. In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:

. . . .

(g) not to be compelled to testify against himself or to confess guilt.

Rule 39

Conduct of Investigations

In the conduct of an investigation, the Prosecutor may:

. . . .

(iv) request such orders as may be necessary from a Trial Chamber or a Judge.

Rule 41

Retention of Information

The Prosecutor shall be responsible for the retention, storage and security of information and physical evidence obtained in the course of his investigations.

Rule 54

General Rule

At the request of either party or proprio motu, a Judge or a Trial Chamber may issue such orders, summonses,

subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial.

Rule 63

Questioning of Accused

. . . .

(B) The questioning, including any waiver of the right to counsel, shall be audio-recorded or video-recorded in accordance with the procedure provided for in Rule 43. The Prosecutor shall at the beginning of the questioning caution the accused in accordance with Rule 42(A)(iii).

Rule 87

Deliberations

(A) When both parties have completed their presentation of the case, the Presiding Judge shall declare the hearing closed, and the Trial Chamber shall deliberate in private. A finding of guilt may be reached only when a majority of the Trial Chamber is satisfied that guilt has been proved beyond reasonable doubt.

The Trial Chamber shall vote separately on each charge contained in the indictment. If two or more accused are tried together under Rule 48, separate findings shall be made as to each accused.

Rule 89

General Provisions

(A) The rules of evidence set forth in this Section shall govern the proceedings before the Chambers. The Chambers shall not be bound by national rules of evidence.

(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.

(C) A Chamber may admit any relevant evidence which it deems to have probative value.

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

(E) A Chamber may request verification of the authenticity of evidence obtained out of court.

Rule 95

Evidence Obtained by Means Contrary to Internationally

Protected Human Rights

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.

B. Pleadings

1. The Prosecution

11. The Prosecution presented its arguments, both orally and in writing, by addressing, first the admissibility of Exhibit 155, and secondly, the power of the Trial Chamber to compel Mucic to provide a sample of his handwriting.

(i) The Admissibility of Exhibit 155

12. In support of its contention that Exhibit 155 ought to be admitted in evidence, the Prosecution argues that in accordance with Sub-rule 89(C), the letter is relevant and has probative value. The letter thus possesses both of the essential ingredients of admissibility of evidence. Further, the Prosecution asserts that the letter exhibits more than sufficient indicia of reliability, thus satisfying the test established by a majority of Trial Chamber II (Judges McDonald, presiding and Vohrah) in the case of *Prosecutor v. Dusko Tadic* that evidence which is both relevant and probative, must also enjoy some component of reliability (Decision on Defence Motion on Hearsay, IT-94-1-T, T.Ch. II, 5 August

1996), ("Hearsay Decision").

13. The Prosecution notes that according to Sub-rule 89(A), the Trial Chamber is not bound by rules of evidence employed in national legal systems. However, in its written brief, it surveys a number of national systems. In this survey, the Prosecution makes reference both to civil law[1] and common law jurisdictions[2] and concludes that national legal systems differ greatly as to the standards for admissibility of evidence during criminal trials. The Prosecution declares that courts in civil law countries apply an extremely broad standard. For instance, in Italy[3] documentary evidence is admitted with little consideration for relevance or probative value because, as in the Netherlands[4], relevancy and probative value are considered in respect of the weight to be given to a piece of evidence, rather than with regard to admissibility. Reliability is given greater premium. In Portugal, Germany, Finland, and the former Socialist Federal Republic of Yugoslavia, every piece of evidence is admissible unless it is precluded on the ground that it was obtained by torture or coercion, and in Belgium, courts allow facts in criminal cases to be proved by all possible means. For common law systems, the Prosecution states that evidence is admitted in accordance with standards which, though liberal, are higher than in civil law systems. These standards vary from a preponderance of evidence, that is where the material offered in evidence is more likely than not to be reliable and authentic, in the United States of America, to relevance and reliability in New Zealand[5], and relevance alone in Canada and Australia. The Prosecution concedes, however that in England and Wales, a highly restrictive standard of beyond reasonable doubt is applied to authenticate documents before admission into evidence[6]. In conclusion, it avers that in order to create an efficient and fair method of prosecuting matters before the Trial Chamber, it is necessary to adopt a unique amalgam of the differing common and civil law standards for the admissibility of evidence.

14. The Prosecution submits that the proper course for the Trial Chamber to follow is to satisfy itself that the party proposing that evidence be admitted has proven that the article of evidence is consistent with what that party claims it to be before admitting it into evidence. To determine this, the Prosecutor urges the Trial Chamber to apply a standard of "some component of reliability" as prescribed in the Hearsay Decision, a liberal standard which is consistent with Sub-rules 89(B) and (C). In evaluating reliability, the Trial Chamber should

examine the circumstances out of which the evidence arose as well as its context in order to draw all reasonable inferences.

15. The Prosecution contends that the letter is relevant because it is material to several important issues relating to the innocence or guilt of Mucic. It also has probative value for the admissions it contains such as a statement that the accused was in charge of the Celebici camp[7] at the beginning of August 1992 and information about his activities there early in the month of June of the same year. The letter also contains a number of facts which the Prosecution alleges are peculiarly within the knowledge of Mucic. These include the dates when sick and injured persons were transferred to the Celebici camp from the "Third of March School", references to specific documents relating to the transfer of prisoners, the decision of the most appropriate location for an infirmary within the Celebici camp, the approximate date when Witness "P" was released, the dates of release of other prisoners, the existence of several release documents signed by Mucic, and the current address of the accused. All these facts combined with the fact that letter was hand-delivered to Witness "P" at his place of employment, and signed "Pavo", a name by which Mucic is well known in the Prosecution's view, provide the requisite indicia of reliability and authenticity of the letter.

16. Relating the contents of the letter to the test of "some component of reliability", the Prosecution avers that the contents show that the letter is what the Prosecution claims it to be, namely, a letter written by Mucic, while in detention, to Witness "P". Accordingly, Exhibit 155 more than satisfies the "component of reliability" threshold standard of admissibility prescribed in the Hearsay Decision. The Prosecution, therefore, urges the Trial Chamber to admit the letter into evidence.

(ii) The Order for the Production of a Handwriting Sample

17. The Prosecution seeks pursuant to Sub-rule 39(iv) and Rule 54 an Order from the Trial Chamber to direct Mucic to produce a sample of his handwriting to be used solely for identification purposes and for analysis. It submits that such a handwriting sample will, on analysis, conclusively establish the authorship of the letter.

18. The Prosecutor contends that an Order of the Trial Chamber for a handwriting sample will not violate the accused's rights under the Statute. The Prosecution states that because it does not seek a statement wherein Mucic will admit guilt or through which knowledge of specific circumstances may be inferred, the sample cannot be

regarded as self-incriminating. Thus its request for an Order fully complies with international legal standards and domestic jurisprudence.

19. With regard to international standards, the Prosecution traces the origin of the right of the accused "not to be compelled to testify against himself or to confess guilt" set forth in Article 21, sub-paragraph 4(g) of the Statute, to the provisions of Article 14, sub-paragraph 3(g), of the International Covenant on Civil and Political Rights ("ICCPR"); Article 8, sub-paragraph 2(g) of the American Convention on Human Rights ("ACHR") and, implicitly, to Article 6 of the European Convention of Human Rights ("ECHR"). Conceding that these instruments clearly protect an accused person from being compelled to confess guilt, the Prosecution maintains that its request for a handwriting sample, which it describes as innocuous, and the content of which is irrelevant to the substantive issues in these proceedings, is not such a statement which results in guilt, and does not therefore violate any of these instruments or Article 21 sub-paragraph 4(g). In the Prosecution's view, a handwriting sample is simply equivocal information which may or may not substantiate other evidence and it therefore possesses no confessional value.

20. The Prosecution also concludes from a further survey of both common and civil law jurisdictions[8] that national courts do not consider that the right of an accused against self-incrimination is violated, when they compel the production of evidence for the determination of disputed identification rather than evidence of substantive or testimonial value. It contends that it is not an infringement of the privilege against self-incrimination to compel the accused to produce a handwriting sample which demonstrates only the physical characteristics of his handwriting rather than the contents of what is written. In countries where an order to compel a handwriting sample without statutory authorisation would constitute a violation of a constitutional right, a general review mechanism is adopted to balance the necessity of the sample to the Prosecutor's case against the possible impact producing such a sample would have on an accused person. In the instant case, the handwriting sample is required only to establish evidence of the accused's authorship of the letter in issue, not his guilt or innocence of the charges against him. Accordingly, an Order compelling Mucic to produce a handwriting sample in no way speaks to the ultimate issue before the Court. During oral arguments, the Prosecution averred that the position is the same even if the handwriting sample is finally used in evidence.

21. The Prosecution urges the Trial Chamber to draw adverse inferences as to the authorship of the letter in the event of a refusal to comply with an Order of the Trial Chamber to give the handwriting sample. It cites the European Court of Human Rights case of *Murray v U.K.*[9] in which it was held that an accused's right to silence is not absolute in support of its position that where triers of fact are experienced Judges, no violation of rights arises when courts draw common sense adverse inferences from an accused person's silence during police interrogation and/or trial.

2. The Defence

(i) The Admissibility of Exhibit 155

22. The Defence urges the Trial Chamber to adhere to the Rules of the Tribunal which it describes as a distillation of all the experiences of the various judicial systems of the world. It contends that Rule 89 contains all the law relating to evidence. However, Mr. Greaves cited and relied heavily on the Hearsay Decision which he submitted should not to be confined to and regarded as merely expository of the law relating to Hearsay as the title implies. In his submission, the findings in the Hearsay Decision hold true for evidence generally. Based on the Hearsay Decision, the Defence submits that before the International Tribunal, the admissibility of evidence in a trial entails a four-stage process. There is first the consideration of reliability which Counsel submits is a golden thread running through all the stages. Secondly, the evidence must be relevant. There is the third consideration, that it must have probative value and the fourth, that it should in any event not be capable of being excluded. These, according to the Defence, are the essential requirements of admissibility. After evidence has been admitted then a consideration of its weight is appropriate. Mr. Greaves submitted that, as the Hearsay Decision requires, implicit in the rules of admissibility is the requirement of reliability as an indispensable component.

23. The Defence refers to the Prosecution's submission that the contents of Exhibit 155 sufficiently link Mucic with it because of those matters exclusively within the knowledge of both Witness "P" and himself. It urges the Trial Chamber to reject the argument and submits that on the contrary the pieces of information are within the knowledge of a large number of persons. It is, therefore, dangerous to rely on such factors as showing reliably that the letter was written by the accused. In these circumstances, the Defence prays the Trial Chamber not to admit the letter in evidence.

(ii) The Order for the Production of a Handwriting Sample

24. The Defence opposes the request of the Prosecution for an Order for Mucic to provide a sample of his handwriting against his will. It maintains that if the Trial Chamber makes such an Order, in the absence of an enabling provision of the Statute or Rules, it will be violating the right of the accused under Article 21, sub-paragraph 4(g) of the Statute. An Order against Mucic to provide a handwriting sample to enable the determination of the authorship of the letter would have the effect of compelling him to contribute to the process of incriminating himself, which will be a violation of his protection against self-incrimination, an essential element of a fair trial.

25. The Defence argues that an Order accompanied by the threat of an adverse inference on account of non-compliance, would be subversive of the burden of proof which is on the Prosecution. It is clearly not for the accused to prove that a document is not his document any more than he has to prove any fact in issue. Drawing an adverse inference for non-compliance would, in the opinion of the Defence, support a presumption of guilty motive for such a non-compliance, thereby shifting the burden on the Defence to rebut such a presumption.

26. The Defence further submits that because the letter was provided to the Prosecution by the Victims and Witnesses Unit, who received it from Witness "P", admitting it would be against public policy because it would undermine the impartiality of that Unit.

C. Findings

27. Since there are two clear issues before the Trial Chamber, namely, (i) whether Exhibit 155 is admissible in evidence; and (2) whether the Trial Chamber can issue an Order under the provisions of Sub-rule 39(iv) and Rule 54 for a handwriting sample, the Trial Chamber will proceed to address them separately.

(i) The Admissibility of Exhibit 155

28. Before the Trial Chamber, admissibility of evidence is governed primarily by the provisions of Rules 89 and 95 and Sub-rule 96(iv). The general evidentiary provision, Rule 89, provides a framework within which the other rules of evidence set out in Section 3 of the Rules operate. The rules of evidence seem adequate. Sub-rule 89(D) and Rules 95 and 96 deal with the exclusion of evidence, Sub-rule 89(E) relates to the authentication of evidence obtained out of Court and, there is a residuary provision in the form of Sub-rule 89(B) which

permits a Trial Chamber to apply such rules of evidence as are consistent with the Statute and general principles of law in cases not provided for by the Rules.

29. The Trial Chamber will focus on Sub-rule 89(C) because it is specifically relevant to this discussion. As Sub-rule 89(C) is clear and unambiguous, the Trial Chamber will adopt a construction which relies on the plain, fair literal meaning of its words since such a construction will not be inconsistent with the Statute or lead to manifest injustice. In the view of the Trial Chamber, the plain words of the provision of Sub-rule 89(C) require for the admissibility of evidence the essential elements of relevancy and probative value. A literal construction of its provision shows that the word "relevant" and the phrase "probative value" are dominant. What then is relevant evidence and what kind of evidence may be regarded as being of probative value? In common law systems, evidence that is of probative value is regarded as "evidence that tends to prove an issue"[10]. Stephen gives some substance to the word ’relevant’ in the following manner:

> Any two facts to which it is applied are so related to each other that according to the common course of events one either taken by itself or in connection with other facts proves or renders probable the past, present, or future existence or non-existence of the other.
>
> Digest of the Law of Evidence ((12th ed.) Art. 1), quoted in Cross & Tapper on Evidence (8th ed. at p. 56.)

The Supreme Court of Canada in *R v Cloutier* (2 S.C.R. 709, 731) quoting Sir Rupert Cross[11], stated the following in respect of relevant facts:

> For one fact to be relevant to another, there must be a connection or nexus between the two which makes it possible to infer the existence of one from the other. One fact is not relevant to another if it does not have real probative value with respect to the latter.

Thus, it seems that there is implicit in "relevancy" an element of "probative value". What is obvious is that these concepts, "relevance" and "probative value", beg of an easy and clear definition. In his Separate Opinion to the Hearsay Decision, Judge Stephen entirely agrees with the assessment that the probative value of a piece of evidence will not always be easy to determine as it is "a quality of

necessarily very variable content and much will depend upon the context and the character of the evidence in question"[12]. Sir Rupert Cross[13] was probably thinking along the same lines when he stated that "relevancy is a concept arrived at intuitively from experience and its applicability can be tested deductively by the construction of a syllogism".

30. At common law, the general rule is that all evidence which is sufficiently relevant to an issue before the Court is admissible and all that is irrelevant or insufficiently relevant is inadmissible and should be excluded[14]. The Nigerian Evidence Act[15] simplifies the concept of relevance by succinctly providing that one fact is said to be relevant to another when the one is connected with the other in any of the ways referred to in its provisions relating to the relevancy of facts. A review of civil law jurisdictions discloses that there is very little disparity in the standards required for the admissibility of evidence. The requirements of relevance of the evidence to the matter in issue, and the probative value of such evidence are indicia for admissibility. Emphasis or reliance on these indicia may vary. For instance in Dutch and Italian Courts, relevancy and probative value are considered together with the weight of the evidence, and not admissibility. In Portugal all evidence is admissible except if excluded on the ground that it was obtained by means of torture. Germany and Finland admit all relevant evidence once probative value is established. The basic principle, as in the common law, is that all relevant evidence which has probative value is admissible if such evidence is not affected by any exclusionary virus.

31. During oral arguments the parties cited and relied upon the Hearsay Decision but drew different conclusions from it. The Prosecution contended that some component of reliability was necessary to support the probative value of the evidence for evidence to be admissible under Sub-rule 89(C). The Defence maintained that before documentary evidence could be admitted, the Prosecution must prove beyond a reasonable doubt, that the document is reliable, which, in the instant case, implies that the author of the letter must be proved to be the accused. Both parties read the element of reliability as one of the indicia of admissibility in Sub-rule 89(C).

32. The Trial Chamber is aware that the Hearsay Decision considers the reliability of evidence to be an implicit requirement of admissibility[16]. Further, the Trial Chamber accepts and agrees with the reasoning that reliability is an inherent and implicit component of

each element of admissibility. It is clear that for evidence to be relevant, and to have a nexus between it and the subject matter, such evidence must be reliable. The same is true for evidence which is said to have probative value. Accordingly reliability is the invisible golden thread which runs through all the components of admissibility. Yet, it is a cardinal rule of construction of legislation, that where the words of a provision are clear and unambiguous, the task of interpretation does not arise. So it is with Sub-rule 89(C). Thus, it is neither necessary nor desirable to add to the provisions of Sub-rule 89(C) a condition of admissibility which is not expressly prescribed by that provision.

33. There is evidence that Witness P personally received the letter and handed it over to the Prosecution. The Prosecution argues that Mucic is the author of the letter, yet this remains to be demonstrated to the Trial Chamber. The Prosecution has not shown that Mucic usually signs his letters as "Pavo" and Mucic has remained silent, asserting a right under the provisions of the Article 21 sub-paragraphs 3 and 4(g) and Rule 63. The contents of the letter that relate to him, such as his current address, are not facts peculiarly known only to Mucic and Witness P, but are matters of public knowledge. The Trial Chamber is, therefore, not convinced that these factors inexorably link Mucic to the letter. All that can be stated with any certainty at this stage is, thus, that sufficient indicia of reliability have been established of the letter as a document received by Witness P from an unknown third person.

34. The letter contains references to Mucic and his role at the Celebici camp and has, on its own, sufficient relevance and probative value for admissibility. However, the assertion made by the Prosecution that the contents of the letter tend to prove certain elements of the Indictment by virtue of it being written by Mucic, remains in issue. This is a factor which is fundamental to the future consideration by the Trial Chamber of the weight to be attached to the item.

35. The Prosecution has also, conditional upon the admission of Exhibit 155, sought the admission of Exhibit 156. This item is closely associated with Exhibit 155 and has not been objected to by itself. Being relevant and of probative value it is therefore admitted.

36. Finally, the Defence raises a public policy issue relating to the role of the Victims and Witnesses Unit pursuant to which, in any event, it claims the letter should not be admitted in evidence. This argument, which was made with considerable passion by the Defence, appears to

the Trial Chamber to be misconceived. The Unit is statutorily recognised, as the Registrar is vested with powers under Rule 34 to establish it. The Unit is common to the parties in the discharge of its functions of ameliorating the problems of all witnesses. It is a neutral Unit in the service of the administration of justice.

37. A witness who receives what he considers to be a threat letter and who passes such a letter to the Unit, does so in the ordinary course of association with the Unit and its duties towards such a witness. It is only natural and legitimate for the Unit, whose primary function is the protection of victims and witnesses, to inform the relevant Trial Chamber or the Prosecution. This is by no means a biased or partial discharge of its statutory functions in favour of the Prosecution. The Trial Chamber is satisfied that no right of the accused is necessarily violated and no public policy issue is involved by the conduct such that the Trial Chamber will be required to reject the letter because it was received through the Unit.

(ii) The Order for the Production of a Handwriting Sample

38. The Prosecution considers the handwriting sample of the accused to be crucial for the evaluation of Exhibit 155. The Prosecution is of the view that the handwriting sample goes only to identification whereas the Defence argues that an Order in the terms sought would force the accused to incriminate himself. The Defence, further, takes the position that without an enabling statutory provision, the Trial Chamber is without jurisdiction to make such an Order. In the Prosecution's view, the provisions of Sub-rule 39(iv) and Rule 54 provide authority for the Trial Chamber to Order the production of the handwriting sample. An examination of the scope of these provisions is pertinent. Rule 54 provides that "[a]t the request of either party or *proprio motu*, a Judge or a Trial Chamber may issue such order, summons, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial." Sub-rule 39(iv) states that "[I]n the conduct of an investigation, the Prosecutor may request such orders as may be necessary from a Trial Chamber or a Judge". It seems clear from the provisions of these Rules, that the Prosecution is required to show that the order it requests is necessary for the conduct of an investigation or, under Rule 54, for the preparation or conduct of the trial. The Trial Chamber is satisfied that the present request is neither for the purposes of an investigation nor for the preparation of the trial which has commenced. There is no doubt, however, that it could be for the conduct of the trial. Thus, the Prosecution must satisfy the Trial

Chamber that the Order is necessary for the conduct of the trial.

39. The purpose of the request is to direct Mucic to provide a sample of his handwriting. This, the Prosecution claims, is required to enable it through analysis to prove the authorship of Exhibit 155. Relying essentially on certain United States of America decisions and jurisprudence derived therefrom[17], the Prosecution argues that an Order for production of evidence of disputed identification rather than evidence of substantive or testimonial value does not violate the rights of the accused.

40. It is relevant to refer to the statutory provisions and rules which protect the rights of an accused person before the International Tribunal. Article 20 enjoins the Trial Chamber to ensure that the accused has a fair and expeditious trial, and that the proceedings are conducted in accordance with the Rules with full respect for the rights of the accused. Article 21 sub-paragraph 3 provides the accused with the presumption of innocence until proved guilty according to the provisions of the present Statute. Under Article 21 sub-paragraph 4(g), the accused is guaranteed the protection "not to be compelled to testify against himself or to confess guilt". Under Sub-rules 42(A) and (B), and Rule 63, the right to silence is guaranteed.

41. Article 14 sub-paragraph 3(g) of the ICCPR is *in pari materia* with Article 21 sub-paragraph 4(g). There is a similar provision in the ACHR, Article 8 sub-paragraph 2(g). The essence of these provisions is to protect an accused person from being compelled to testify against his own interest or to confess guilt. This is also the essence of Article 20 sub-paragraph 1. The exercise of the power of the Trial Chamber under Rule 54 must be consistent with the rights of the accused guaranteed under the Statute. This is because the powers of the Trial Chamber under Rule 54 were granted pursuant to the rule making powers vested in the Judges in Article 15 of the Statute. Thus, the exercise of such powers cannot be inconsistent with the provisions of the Statute. It is a well settled canon for the construction of statutes, which requires no citation of decided cases, that where delegated legislation is inconsistent with its enabling statutory provision, it is void entirely or *pro tanto*. Accordingly the validity of the exercise of power of the Trial Chamber under Rule 54 depends upon the construction given to the facts of this case.

42. The Prosecution submits that the request for the handwriting sample is not a contravention of the rights of Mucic. It contends that it seeks the sample because of its value as identification material for

investigative purposes. The handwriting sample does not seek a statement involving an admission of guilt or which leads to inferences of specific circumstances. It is not self-incriminating and the Order cannot constitute a violation of the rights of the accused and is in full compliance with the Statute, international conventions and domestic jurisprudence.

43. The Defence contention is diametrically opposed; the Order on the admission of the Prosecution has as its motive and effect the compulsion of the Defendant to contribute to the process of incriminating himself by providing the evidence with which the authorship of Exhibit 155 will be determined, and the determination of counts in the indictment. This, it was submitted, offends against Articles 20 and 21, and Sub-rules 42(A)(iii), 63(B) and 89(B) were also relied upon. The Decision of the European Court of Human Rights in *Funke v France*[18] was cited and relied upon. Finally it was urged, that the power cannot be exercised in the absence of express enabling legislation.

44. In its consideration of the opposing arguments, the Trial Chamber will discuss the decisions relied upon by the parties in construing the rights protected by Article 21 sub-paragraphs 3 and 4(g).

45. It is significant that though absent express words in the ECHR, the provisions of Article 6 sub-paragraph 1, which protect the right to fair hearing, have been extended to include the right to protection from self-incrimination. The consideration is that it is an inherent element of any fair trial. The Decision in *Funke v France* was relied upon by the Defence. In that case, the Defendant was ordered to and, on refusal, convicted for failing to provide customs officers with the statements of his overseas bank accounts which might have led to proof of a case of fraud against him. In other words, the evidence sought from him would have formed the material against him.

46. In *Murray v U.K.,* a case relied upon by the Prosecution, the same Court decided that the right to protection from self-incrimination is not absolute; and that a national court was entitled to draw adverse inference from the silence of an accused person, where all the evidence points towards his guilt. In that case, a court in Northern Ireland, acting pursuant to Articles 4 and 6 of the Prevention of Terrorism (Temporary Provisions) Act 1989, drew adverse inferences from the failure of an accused person to give evidence. It is clear that the power to make adverse inferences exercised by the United Kingdom court in *Murray* and subsequently approved by the European

Court of Human Rights is absent in the Statute. Rather, the omission of the right to silence in Article 21 sub-paragraph 4(g) of the Statute has been complemented in Sub-rule 42(A)(iii) and Rule 63. *Murray* cannot, therefore, be a reliable authority for the facts of this case. Besides, the International Tribunal is not bound by national rules of evidence.

47. The Trial Chamber is not satisfied that a handwriting sample *per se* can be regarded as forming material proof against an accused. We hold that where the material factor absent in the incriminating elements is the handwriting sample of the accused, the Trial Chamber cannot compel the accused to supply the missing element. To do so will be to infringe the provisions of Article 21 sub-paragraph 4(g) which protects the accused from self-incrimination. It is different where the accused voluntarily complies on demand without coercion.

48. It has been argued that in the instant case the Order for a handwriting sample bears no relevance to the case before the Trial Chamber. The Trial Chamber rejects this contention. The reason for requiring the handwriting sample is admittedly to ascertain conclusively the authorship of Exhibit 155. If authenticated, the letter will act as a sufficient admission of its contents in respect of certain counts in the indictment against the author. The obvious implication is that the accused would have been compelled by an Order of the Trial Chamber to assist the Prosecution in its investigation, and probably provide the evidence to incriminate himself. The fact that the handwriting sample *per se* is neutral evidence is not the issue. If the handwriting sample taken together with other evidence will constitute material evidence to prove the charge against the accused, then the Order of the Trial Chamber would have compelled the production of self-incriminating evidence.

49. There is no duty in law or morals for the accused to fill a vacuum created by the investigative procedural gap of the Prosecution. Self-preservation is the first principle of life. It is an elementary principle of proof, that he who alleges must prove the subject matter of his allegation. Since the Prosecution alleges the authorship of Exhibit 155, it has to discharge the burden of proof unaided by the Defence. In *Miranda v Arizona*[19], the Supreme Court of the United States of America referring to the nature of the privilege from self-incrimination stated the following:

> [Its] constitutional foundation . . . is the respect a government - state or federal - must accord to the dignity

> and integrity of its citizens. To maintain a "fair state - individual balance", to require the government "to shoulder the entire load" to respect the inviolability of the human personality, our accusatory system of criminal justice demands that the government seeking to punish an individual, produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth.

(Citations omitted.)

50. The Trial Chamber agrees with this opinion and holds that the Statute and Rules demand no less than that. The Trial Chamber refers to the silence of Mucic in the face of the allegation that Exhibit 155 was written by him and sent to Witness "P". We consider this attitude a legitimate exercise of his right implicit in Article 21 sub-paragraph 4(g) and express in Rule 63. The precise meaning of the right to silence is that an accused person can stay mute without reacting to the allegation. This is generally a legitimate reaction to the preceding warning of the right to silence. It is also in response and reaction to the exercise of the right to protection from self-incrimination.

51. The Trial Chamber will now consider the validity of the distinction between testimonial evidence protected and the non-testimonial or physical evidence which is not protected as expressed in some decisions from the United States of America relied upon by the Prosecution. The Prosecution avers that the handwriting sample in this case is in the category of non-testimonial evidence which is not protected. It is necessary to observe that in essence, the provision of the Fifth Amendment to the United States Constitution is not dissimilar to Article 21 sub-paragraph 4(g) of the Statute. Though differently worded, they protect the same rights.

52. In *Gilbert v California*[20], a Decision involving a determination of the protection against self-incrimination in the Fifth Amendment to the United States Constitution, the Supreme Court held that:

> One’s voice and handwriting are, of course means of communication. It by no means follows, however, that every compulsion of an accused to use his voice or write compels a communication within the cover of privilege. A mere handwriting exemplar, in contrast to what is written, like the voice or body itself, is an identifying physical characteristic outside its protection. . . . No claim is made that the content

of the exemplars was a testimonial or communicative matter.

(Citations omitted.)

This Decision was founded on the construction of the word "witness" in the Fifth Amendment. The Fifth Amendment provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself . . . . " The Supreme Court construed the phrase "to be a witness" as to testify. Accordingly, there can be protection for self-incrimination only in so far as the evidence compelled is testimonial in nature. On that reasoning, evidence of handwriting samples, breath, blood and finger print samples which are nothing but physical evidence are not protected.

53. The qualification of the right to protection from self-incrimination which followed an interpretation of the Fifth Amendment of the United States Constitution has its origin in the opinion of Justice Holmes in the case of *Holt v United States*[21]. In that case he said that "[t]he prohibition of compelling a man in a criminal court to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material"[22]. On the facts of the case, the dictum can only be regarded as *obiter*.

54. Justice Holmes' dictum in *Holt v United States*, was promoted to constitutional status when it was adopted and made the central reason for the decision in *Schmerber v U.S*[23] where the taking of a blood sample over the objection of the accused was held not to be a violation of the Fifth Amendment. It was held that the resulting blood test evidence "was neither the [individual's] testimony nor evidence relating to some communicative act . . . ."[24] The Supreme Court appeared to have accepted that since *Holt*, the "Fifth Amendment privilege" extended only to "testimony" or "communications" but not to "real or physical evidence"[25].

55. This distinction was followed in *U.S. v Wade*[26], and in *Gilbert v U.S.*[27]. In *Wade*, the Supreme Court indicated that "compelling Wade to speak within hearing distance of the witnesses even to utter words purportedly uttered by the robber was no different from compelling Schmerber to provide a blood sample or Holt to wear the blouse". In *Gilbert*, the Court held that "a mere handwriting exemplar, in contrast to the content of what is written, like the voice or body itself, is an

identifying physical characteristic outside [the privilege's] protection."

56. Before the assault on the right to Fifth Amendment protection from self-incrimination, in *Holt*, a majority of the Courts which had to address the issue were of the opinion that the right was not divisible. Thus the right not to give evidence, to be a witness or to testify, encompassed the right to refuse to relate passively or actively with the prosecution. Hence, in *State v Sirmay*[28] it was held that it was an error to compel an accused person to submit to the comparison of footprint and in *Blackwell v State*[29] it was held to be an error to compel the defendant to exhibit his leg. The principle underlying the interpretation in these decisions was that a right against self-incrimination prohibited the State from compelling a criminal defendant to "testify", "to be a witness", "to give evidence" or "to furnish evidence against himself." The unqualified meaning is that an accused cannot be compelled to do or say anything that may tend to incriminate him, and his refusal to do so cannot be proved as a circumstance against him.

57. The genesis of this construction of the right to protection from self-incrimination is *Holt* and the opinion of Justice Holmes. The interpretation has not been unanimous as there are powerful dissenting voices, both judicial and academic. The Trial Chamber is concerned with the construction of Articles 20, 21 sub-paragraphs 3 and 4(g) of the Statute and Sub-rule 42(A)(iii) and Rules 54 and 63 of the Rules. The scope of the right of the accused can only be gathered from the construction of the relevant provisions.

58. In construing the provisions of Article 21 sub-paragraph 4(g), it is better to rely on the words of the provision if clear and unambiguous. The words "to testify against himself" are clear and unambiguous, and require no modification or qualification. Nowhere is the privilege from self-incrimination qualified, or restricted to testimonial evidence. To read such a limitation as is suggested by the Prosecution is to read into the plain words, a condition not contemplated by the law maker. Such a construction will subvert the intention of the protection by introducing a qualification inconsistent with the true basis of the protection. The Trial Chamber cannot deprive the accused of his guaranteed right through construction of the words of the provision given without express limitation. The true basis of the protection against self-incrimination, is to protect the innocent by insulating him from the effects of coercion from law enforcement authorities. Another objective is the protection of society by conviction of the guilty. Furthermore, the right encourages witnesses to volunteer to testify

who might be deterred from doing so out of fear of self-incrimination. On the whole the right seeks to protect the innocent and guilty alike.

59. The international community, due to the operation of international and regional conventions protecting fair trial rights, has come a very long way from the unabashed and egregious violation of the dignity and personality of the individual in judicial proceedings. It is the sacred and solemn duty of every judicial institution to respect and give benevolent construction to the provisions guaranteeing such rights instead of giving such a construction as to whittle down their effects.

60. The Trial Chamber, in accordance with its Statute, is enjoined to ensure that the accused has a fair trial and that the proceedings are conducted in accordance with the Rules and with full respect for his/her rights. The Trial Chamber is satisfied that the construction of the words of Article 21 sub-paragraph 4(g) adopted herein accords with the words and spirit of the provision and is consistent with the protection of the rights of the accused as provided. The Trial Chamber cannot in the circumstance exercise any jurisdiction to make the Order sought. Mucic, cannot be ordered to provide a handwriting sample. This would involve him testifying against himself.

61. Having decided against the exercise of the power to issue an Order pursuant to Rule 54, it is obvious that the issue of the drawing of adverse inferences for refusal to comply does not arise.

III. DISPOSITION

For the foregoing reasons, **THE TRIAL CHAMBER**, being seized of the requests of the Prosecution,

Having considered each of the rules and statutory provisions hereinbefore cited,

PURSUANT TO RULE 54,

HEREBY:

1. **ADMITS** Exhibits 155 and 156 into evidence;

2. **DENIES** the request of the Prosecution to issue an Order to compel Zdravko Mucic to provide a sample of his handwriting.

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

_____

Adolphus
Godwin
Karibi-
Whyte

Presiding
Judge

Dated this nineteenth day of January 1998

At The Hague,

The Netherlands.

[Seal
of
the
Tribunal]

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1. Italy, The Netherlands, Portugal, Germany, Finland, the former Socialist Federal Republic of Yugoslavia and Belgium.

2. The United States of America, Australia, New Zealand, Canada, South Africa, England and Wales.

3. Article 234 of the *New Code of Criminal Procedure of Italy.*

4. Dutch Code of Criminal Procedure Art. 338 and 339.

5. The Prosecution cites the case of R v Bain (1996) 1 NZLR.129.

6. The Prosecution cites R v. Minors, R v. Harper (1989) 2 All ER 208.

7. Several counts of the indictment charge Mucic with command responsibility for violations of the provisions of the Statute which allegedly occurred in Celebici camp.

8. The Prosecution referred the Trial Chamber to Article 75, Rules of Enforcement of the *codice di procedura penale*, New Italian Penal Code of Criminal Procedure; Section 186, The Code of Criminal Procedure of the Russian Federation 1997; and the United

States of America Supreme Court's opinion in *Schmerber v. California*, 384 U.S. 757, 764 (1966).

9. Judgement of Feb. 8, 1996 No. 41/1994/488/570.

10. Henry C. Black, Black's Law Dictionary 1203 (6th ed. 1991).

11. Cross on Evidence (4th ed. 1974) p. 16.

12. See Separate Opinion of Judge Stephen at p. 3, 2nd paragraph.

13. Cross on Evidence (4th ed.) 1974, at p. 24.

14. Hollington v Hewthorn & Co Ltd (1943) K.B. 587 at 594.

15. The Laws of the Federation of Nigeria 1990, cap. 63, Section 3.

16. See para. 15.

17. See for example the case of Schmerber v California 384 U.S. 757, 764 (1966) which the Prosecution cited and relied upon.

18. European Court of Human Rights, Series A No. 256A para. 44.

19. 384 U.S. 436, 460 (1966).

20. 388 U.S. 263 (1967).

21. 218 U.S., 245 (1910).

22. At pps. 252-253.

23. 384 U.S. 757 (1966).

24. See p. 769.

25. See p. 764.

26. 388 U.S. 261.

27. 388 U.S. 266-7.

28. 40 Utah 525.

29. 67 Ga. 76 (1881).