

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: 2 September 1997

THE PROSECUTOR

v.

**ZEJNIL DELALIC
ZDRAVKO MUCIC a/k/a "PAVO"
HAZIM DELIC
ESAD LANDZO a/k/a "ZENGA"**

**DECISION ON ZDRAVKO MUCIC'S MOTION FOR THE
EXCLUSION OF EVIDENCE**

The Office of the Prosecutor:

Mr. Grant Niemann

Ms. Teresa McHenry

Mr. Giuliano 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

I. PROCEDURAL AND FACTUAL BACKGROUND

On 8 May 1997, the defence for the accused, Zdravko Mucic ("Defence") presented two related applications pursuant to Rule 73 of the Rules of Procedure and Evidence ("Rules") for determination by 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"). The first application is for leave to file an out-of-time-application to exclude the transcripts of certain pre-trial interviews held between Zdravko Mucic and officials of the Austrian Police Force on 18 March 1996 and with officials of the Prosecution on 19, 20 and 21 March 1996 ("Statements") from evidence (Official Record at Registry Page ("RP") D 3956 - D 3958). The second application is the substantive application to exclude the Statements ("Application") and it is the one which is the subject matter of this Decision (RP D 3587 - D 3595).

On the same date, the Trial Chamber heard oral arguments from both the Defence and the Office of the Prosecutor ("Prosecution") on the first application. It ruled in favour of the Defence, thereby granting the Defence leave to present the Application. However, the Trial Chamber deferred hearing oral arguments on the Application until after the examination of the witnesses through whom the Prosecution will seek to tender the Statements into evidence. Shortly thereafter, the Prosecution filed an undated response to the Application ("Response") (RP D 3766 - D3790).

The Trial Chamber heard the examination of the Prosecution witnesses relating to the Statements and on 12 June 1997, heard oral arguments on the Application from both the Prosecution and the Defence. Thereafter, the Trial Chamber delivered an oral ruling granting the Application in part and denying it in part. It reserved its written decision to a later date.

THE TRIAL CHAMBER HEREBY ISSUES ITS WRITTEN DECISION.

II. DISCUSSION

A. Applicable Provisions

1. The following provisions of the Statute of the International Tribunal and the Rules are relevant to the determination of the Motion.

Article 18

Investigation and preparation of indictment

1. The Prosecutor shall initiate investigations ex-officio or on the basis of information obtained from any source, particularly from Governments, United Nations organs, intergovernmental and non-governmental organizations. The Prosecutor shall assess the information received or obtained and decide whether there is sufficient basis to proceed.

2. The Prosecutor shall have the power to question suspects, victims and witnesses, to collect evidence and to conduct on-site investigations. In carrying out these tasks, the Prosecutor may, as appropriate, seek the assistance of the State authorities concerned.

3. If questioned, the suspect shall be entitled to be assisted by counsel of his own choice, including the right to have legal assistance assigned to him without payment by him in any such case if he does not have sufficient means to pay for it, as well as to necessary translation into and from a language he speaks and understands.

4. Upon a determination that a prima facie case exists, the Prosecutor shall prepare an indictment containing a concise statement of the facts and the crime or crimes with which the accused is charged under the Statute. The indictment shall be transmitted to a judge of the Trial Chamber.

Article 19

Review of the indictment

1. The judge of the Trial Chamber to whom the indictment has been transmitted shall review it. If

satisfied that a prima facie case has been established by the Prosecutor, he shall confirm the indictment. If not so satisfied, the indictment shall be dismissed.

2. Upon confirmation of an indictment, the judge may, at the request of the Prosecutor, issue such orders and warrants for the arrest, detention, surrender or transfer of persons, and any other orders as may be required for the conduct of the trial.

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

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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:

(a) to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) to be tried without undue delay;

(d) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) to have the free assistance of an interpreter if he cannot understand or speak the language used in the International Tribunal;

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

Rule 5

Non-compliance with Rules

Any objection by a party to an act of another party on the ground of non-compliance with the Rules or Regulations shall be raised at the earliest opportunity; it shall be upheld, and the act declared null, only if the act was inconsistent with the fundamental principles of fairness and has occasioned a miscarriage of justice.

Rule 42

Rights of Suspects during Investigation

(A) A suspect who is to be questioned by the Prosecutor shall have the following rights, of which he shall be informed by the Prosecutor prior to questioning, in a language he speaks and understands:

(i) the right to be assisted by counsel of his choice or to have legal assistance assigned to him without payment if he does not have sufficient means to pay for it;

(ii) the right to have the free assistance of an interpreter if he cannot understand or speak the language to be used for questioning; and

(iii) the right to remain silent, and to be cautioned that any statement he makes shall be recorded and may be used in evidence.

(B) Questioning of a suspect shall not proceed without the presence of counsel unless the suspect has voluntarily waived his right to counsel. In case of waiver, if the suspect subsequently expresses a desire to have counsel, questioning shall thereupon cease, and shall only resume when the suspect has obtained or has been assigned counsel.

Rule 63

Questioning of Accused

(A) Questioning by the Prosecutor of an accused,

including after the initial appearance, shall not proceed without the presence of counsel unless the accused has voluntarily and expressly agreed to proceed without counsel present. If the accused subsequently expresses a desire to have counsel, questioning shall thereupon cease, and shall only resume when the accused's counsel is present.

(B)

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.

2. Also of relevance to this Application is Article 6(3) of the European Convention on Human Rights.

Article 6

. . . .

3. Everyone charged with a criminal offence has the following minimum rights:

c. to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

. . . .

B. General Considerations

3. Before the Prosecution sought to tender the Statements into evidence, Defence Counsel objected to their admissibility on various grounds and submitted that the Statements should be excluded. The grounds relied upon are briefly stated as follows:

A. Zdravko Mucic ("the Accused") was not at the interview of 18 March 1996 at 19.30 hours on the face of the evidence offered or advised of his right to Counsel or any of his rights as a suspect before questioning.

B. Analysis of the rights accorded to the Accused by the Austrian Police were unfair to him and violated his rights.

C. The differences in the rights accorded to the suspect by the Austrian Police and those of the Prosecution were confusing to him.

D. The Prosecution was aware of the cultural differences and therefore owed the Accused a duty to explain his rights more clearly rather than merely reading the rights to him.

E. The activities of the Prosecution were oppressive to the Accused.

4. In the Response, the Prosecution denied the allegations made in their entirety. It was submitted that the ground of *prima facie* oppressive conduct on which the waiver to bring the Motion is founded is unfair both to the Prosecution and to other accused persons. The Prosecution argued as follows:

It would be unfair to other accused who, because their allegations were not so serious have (quite properly) not been permitted leave to challenge the admissibility of their statements. That an accused would be able to bring up all issues merely because he raises one serious issue would be an encouragement for all accused in this case and future cases to raise unfounded and serious allegations.

(Response at para. 23)

5. The Prosecution's answer to the challenge of the waiver of the Accused of his right to Counsel is that the waiver was voluntary and that he maintained this position throughout the interview with the Prosecution. The Prosecution denied the accusation of oppression of the Accused and submitted that no promises were made or threats held out to the Accused to waive the right. The possible "confusing distinction" between the Austrian approach and the Prosecution approach cannot be regarded as oppression and cannot now be raised. The representatives of the Prosecution did everything to ensure that the Accused understood the rights he is entitled to, and was afforded all the rights he is entitled to under the Rules. The Prosecution replied in detail to the accusation that the Austrian procedure was in violation of the human rights of the Accused.

6. On 12 June 1997, when Counsel for the Prosecution sought to tender the statements of the Accused, Defence Counsel objected to the admissibility of the statements relying on all the grounds raised in the Application and elaborating on them in the oral address. Concisely stated the objections were based essentially on the violation of the human rights of the suspect, founded on the violation of Rules 42 and 43.

C. Arguments

I. The Defence

7. Mr. Greaves, for the Defence, regarded the interviews on 18 March

1996 by the Austrian Police and those conducted on 19, 20 and 21 March 1996 by the Investigators of the Prosecution in Vienna as one. Counsel submitted that the two interviews cannot be separated and placed in separate compartments; each isolated and standing and relying on its own procedure for its validity or legality. The interviews must be seen simply as a continuing part of an entire process which took place over a period of about four days. Counsel's reasons why the statements are inadmissible is because they offend against Rule 95.

8. Criticising the Austrian interview, Counsel submitted that the Accused was denied right to Counsel, to remain silent, and was induced to make a confession. It was submitted that the interview which lasted 4 3/4 hours in total and conducted by five different officers was oppressive of the Accused.

Rights of the Accused

Right to Counsel

9. Counsel referred to paragraph 4 of the sheet for arrested persons served on the Accused, the English translation of which states that "[i]f you want your legal Counsel to come and see you as soon as possible, make it known. You may not have legal counsel present when you are questioned for a criminal offence." Counsel submitted that under the Austrian procedure, an accused person is allowed to speak to his lawyer only after being questioned and if it has been determined that the accused person would be transferred to the Court prison and that there is sufficient time remaining until then. It was submitted that consultation with a lawyer in the Austrian procedure is subject to there being no risk of prejudice to the course of justice.

10. Contrasting these with the right to counsel under Rule 42 which confers an unfettered right to counsel to give advice during the course of an interview, with the conditional Austrian rights to counsel only after questioning, and if it has been determined that the Accused would be transferred to the Court prison subject to the availability of time. It was submitted that such consultation with a lawyer will be considered only if there is no risk of prejudicing the course of justice.

11. The Austrian rules, it was submitted, offend against Rule 42. Any system which allows the Accused to see his lawyer only with the approval of the Police smacks of a Police State.

Right to Silence

12. According to the Austrian Rules, the exercise of the right to remain silent, is an effective removal of the exercise of the right to defend oneself. This, it is submitted, is against the spirit of the Rules. The Accused is encouraged to speak because the statements may also help to clear up a mistake. The Accused need not speak about the case. The exercise of the right to remain silent deprives the suspect of the possibility to give an account of things from his own perspective and help to clear up a mistake.

Confession

13. The nature of the advice of the Austrian Police is such that the Accused was told that if he confessed or contributed to the elucidation of the truth through the statement he makes, this would be taken into account as grounds for mitigation, if convicted. Counsel submitted that this is an inducement to confess. He referred to Section 76 of the United Kingdom Police and Criminal Evidence Act 1984 which deals with Confessions. After referring to Section 76(2) of that Act, Counsel pointed out that the mischief aimed at by that legislation is to prevent people in authority (police officers, customs officers) making persons confess by improper means.

14. It was submitted that to admit the interview with the Austrian Police into evidence would offend against Rules 89(D) and 95 of the Rules of Procedure and Evidence.

Oppressive Questioning

15. The second part of the objection to the admission of the Statement made to the Austrian Police is that the interview was neither audio-taped nor video-taped in compliance with Rule 43, and was conducted with a man who on the evidence of Mr. Moerbauer must have been desperately tired. Counsel referred to the evidence of Mr. Moerbauer that he, as one of the interviewers, was very tired at the end. Counsel therefore inferred that a man interviewed for a period of over four and three quarter hours, by a total of some five different officers being in and out of the room must have been desperately tired. It was accordingly submitted that to have an interview of that duration is in itself oppressive.

Right to Counsel and Waiver: Cross-Cultural Element

16. In its submission on the waiver of the Accused's right to Counsel, the Defence contended that the cross-cultural aspect of the procedure should be taken into account. Counsel referred to the fact that the

Accused is a citizen of the former Yugoslavia who has lived in Austria for some time and who is thus, probably somewhat familiar with Austrian procedure. However, during this period of four days, he was subjected to two quite different cultures, involving different civil rights and obligations opposed to each other.

17. The bone of contention here is the question of why the Accused had suddenly to change his mind and waive his right to Counsel, he had earlier insisted on exercising. Mr. Greaves traced the change of mind to a conversation with Mr. Regis Abribat, the leader of the Prosecution investigating team which took place in the space of one or two minutes on 18 March 1996. He doubted whether it was possible to communicate with the Accused by interpreting the Rules to the Accused within one or two minutes, as claimed by Mr. Abribat. Counsel described the claim as ludicrous.

18. After criticising the procedure adopted by the investigators during the questioning of the suspect, Mr. Greaves came to his own conclusions and submitted that Mr. Abribat did know that the Accused did not want a lawyer because he had had a conversation with him about the matter in the twenty minute period after the hearing before Judge Seda and before the interview began. That was why it did not occur to him to ask the Accused whether he wanted a lawyer. Counsel regards this as a crucial piece of evidence and urged the Trial Chamber to reject the evidence of the Prosecution on what happened in those twenty minutes before the beginning of the interview.

19. It was submitted that Mr. Abribat should have informed himself properly and fully of what was being said by the learned Judge and to make sure he was properly aware of what was being said to the suspect and to make sure he was properly aware as to whether the Accused wanted a lawyer before he interviewed him.

20. Finally it was submitted that the Prosecution has not proved beyond reasonable doubt that the interview with the Austrian Police was free and fair, and if that is right the only proper course is to exclude the evidence because it is in breach of Rules 89(D) and 95.

II. The Prosecution

21. In its reply to the submission of the Defence, the Prosecution like the Defence, adopted the arguments in its written Response. The Prosecution disagreed with the Defence submission that the burden of proof on the Prosecution in the instant case is proof beyond reasonable doubt. Counsel relied on the rules of the Tribunal and

certain Decisions in the case of The Prosecutor v Dusko Tadic (IT-94-1-T) for this submission. It was submitted that even if that were the standard required, the Prosecutor has met the standard.

22. On the admissibility of the interview, Counsel denied that Rule 42 is the test for the regularity of interviews taken by non-Tribunals, that is persons other than the Office of the Prosecutor, and it is not the appropriate standard for evaluating statements taken from other systems. Rule 95 is the appropriate standard. Counsel submitted that national standards differ and that is why Rule 95 is adopted. It was submitted that there may be evidence, including statements of an Accused, which do not meet the requirements of Rule 42 and yet may be fundamentally fair.

23. Since in many cases before the International Tribunal, people are arrested in places where different systems of law operate. It was submitted that what is required before the International Tribunal is fundamental fairness in accordance with Rule 95. However Rules 42 and 43 apply to all interviews conducted by the Prosecution.

24. On the Austrian interview, Counsel submitted that there is nothing offensive about anything which happened therein. The Accused was advised that he could consult a lawyer, including before deciding whether or not to give an interview. Austrian law provides and the Accused was advised that he had the right to consult with an Attorney and he chose not to do so. Under the law of Austria, and the Accused was informed of this, there is no right to Counsel during questioning. This is the position in many countries including European countries. It is in accordance with fundamental human rights and the European convention of human rights.

25. The right to silence as explained by the Austrian instruction did not constitute a breach of the right of the Accused.

26. The Prosecution submitted that the warning on the question of confession is absolutely fair to the Accused. All the warning amounts to is that if the Accused told the truth, on conviction of the offence, it might constitute a mitigating factor toward sentence. The advice is not improper nor an inducement to make the Accused to confess.

Oppressive Questioning

27. The Prosecution concedes that the evidence supports the submission that the Accused was tired by the end of the interview. It however denied that that meant there was anything improper in

continuing the interview. The Accused was free to stop the interview when he wanted. The issue was whether the Accused was able to make rational decisions or unable to think. There is no evidence that this was the case. A review of his statement discloses that he was in full control of his faculties at all times. If the Trial Chamber finds the Accused was tired, this fact goes to the weight rather than to the admissibility of the statement.

Office of the Prosecutor Interview

28. This interview is separate from the Austrian Police Interview. The two interviews were treated separately and the Accused understood this. The Austrian Police were not present at the Prosecution interview. Similarly, the Prosecution interviewers were not present during the Austrian Police interviews. The proceedings were different. They were different persons, at different places, at different times. The procedure for each was clearly explained to the Accused.

29. The Accused was told on six different occasions, all tape recorded, of his rights under the Rules. The Prosecution believes the evidence is clear that he did understand that the two proceedings were different. The Prosecution submits that the Accused was not confused because there were two different interviews. He clearly understood what was told to him of his rights.

Alleged Wrongdoings of Mr. Aribat

30. On 18 March 1996, Mr. Aribat, the leader of the Prosecution team of investigators, met for a few minutes with the Accused to introduce the Accused and to give him an overview of the Rules on the interviews and to see if he wanted to give an interview. This was a reasonable thing to do in the circumstances.

31. Mr. Gschwendt, who was present at the interview, gave evidence that nothing improper or any kind of oppression occurred. The two witnesses have explained convincingly what happened. There is absolutely no evidence in support of the allegation. The allegation is made over a year later and is irrelevant.

32. Mr. Aribat and Mr. d'Hooge testified that during the twenty minutes the Accused was taken away by the guards for a rest and that they set up equipment in another room in the Accused's absence. When the Accused returned about twenty minutes later, he was asked if he agreed that the interview be recorded. He agreed. It is clear that the Accused was fairly treated and was accorded his rights. Counsel

pointed out that during the three days of the interview, the periods were punctuated at least six times by questions to the Accused if he wanted to continue without an attorney, and he was told he did not have to continue if he did not wish to. On each occasion, the Accused indicated his wish to continue. The Accused had every opportunity to ask for clarification in respect of areas confusing to him.

33. It was submitted that the Accused was confused about his desire for an attorney and that he really wanted one but that this was dispelled when he, after private discussion with him, discharged Dr. Manfred Anedter, an attorney assigned to him to assist him during the interrogation. The Accused might well have wanted and did request for a lawyer in respect of the extradition proceedings. He did not want one for the Prosecution interview as the evidence disclosed. It was submitted that under Rules 42 and 89 this Court shall admit relevant evidence unless it is substantially outweighed by the need to have a fair trial and under Rule 95 it is very clear that this Prosecution interview must be admitted into evidence.

C. Findings

Introduction

34. The Trial Chamber is guided in the application of its rules of evidence by the provisions of Rules 89-98 of the Rules of Procedure and Evidence. Particularly relevant in this regard are the provisions of Rules 89 and 95. Whereas Sub-rule 89(A) expressly states the Rules of evidence governing proceedings before the Trial Chambers, and that the Chambers shall not be bound by national rules of evidence, implicit in Sub-rule 89(B) is the application of national rules of evidence by the Trial Chamber. This is because Sub-rule 89(B) permits the application of any 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.

35. The general rule is that any evidence which is relevant to the subject matter before the Trial Chamber and has probative value may be admitted - Sub-rule 89(C). However, where the probative value of such evidence is substantially outweighed by the need to ensure a fair trial, it ought to be excluded - Sub-rule 89(D). Also to be excluded by Rule 95, is evidence obtained by means contrary to internationally protected human rights.

36. By Article 18(3) of the Statute, the suspect shall have rights to counsel of his own choice, including provision of free legal assistance

if he has no means to pay. A suspect is also entitled to translation into and from a language he speaks and understands. This right has been elaborated in Rule 42 and establishes a procedural pre-condition to be observed and satisfied during the questioning of the suspect.

37. It is important to bear in mind the provisions of Rule 5 which are set out in the Applicable Provisions Section of this Decision.

Analysis

38. Arguments of Counsel in the Application seeking to exclude the Statements taken while the Accused was still a suspect, may be considered under the general heading of the Violation of the Rights of the suspect, under Article 18 of the Statute and Rule 42.

39. The Trial Chamber considers it convenient to decide the fundamental issue raised by the Defence but disputed by the Prosecution, that there is but one single interview covering the period of the Austrian Police and Prosecution. It was argued that the interviews cannot be separated into compartments as if they stand isolated each on its own. On its part, the Prosecution argues that there are two interviews, each separate from the other, and was so understood by the Accused. It was pointed out that neither of the interviews was conducted jointly by the parties. The Austrian Police were not present at the interview by the Prosecution, similarly absent were members of the Prosecution at the interview by the Austrian Police. The proceedings were different and the persons were different, held at different times and at different places.

40. It is clear on the evidence before the Trial Chamber that there were two interviews of the suspect. The one conducted by members of the Austrian Police on 18 March, and the other from 19-21 March conducted by the Office of the Prosecution. There is evidence that the Austrian Police conducted their investigation and gave the caution and rights of the suspect under Austrian law. The interview with the Prosecution was conducted in accordance with the Rules. There is no doubt, as pointed out by Counsel for the Prosecution, that different teams conducted each interview. We therefore accept the submission by the Prosecution that there were two interviews. The contiguity of time and the environment around which they took place should not obscure the fact that there were two independent and separate interviews of the suspect. The interview by the Prosecution cannot be regarded as a continuation of the interview of the Austrian Police. The interview of the Austrian Police was directed towards the extradition of the Accused. That of the Prosecution towards establishing

substantive offences within the jurisdiction of the International Tribunal. The purposes are distinct and different.

41. The Trial Chamber now adverts to the required burden of proof in respect of the admissibility of evidence sought to be excluded on the grounds of the voluntariness or not of the Statements or its legality or illegality on which issue has been joined. The Rules insist that all evidence which are reliable and have probative value are admissible. For evidence to be reliable it must be related to the subject matter of the dispute and be obtained under circumstances which should cast no doubt on its nature and character, and the fact that no rules of the fundamental rights have been breached. This can be done if the evidence is obtained in accordance with Rule 95, by methods which are not antithetical to and would not seriously damage, the integrity of the proceedings. There is no doubt statements obtained from suspects which are not voluntary, or which seem to be voluntary but are obtained by oppressive conduct, cannot pass the test under Rule 95.

42. The burden of proof of voluntariness or absence of oppressive conduct in obtaining a statement is on the Prosecution. Since these are essential elements of proof fundamental to the admissibility of a statement, the Trial Chamber is of the opinion that the nature of the issue demands for admissibility the most exacting standard consistent with the allegation. Thus, the Prosecution claiming voluntariness on the part of the Accused/suspect, or absence of oppressive conduct, is required to prove it convincingly and beyond reasonable doubt. We agree with the Defence that this is the required standard.

43. The Prosecution has challenged the submission of the Defence that Rule 42 contains the test for the admissibility of evidence taken before persons other than investigators of the Prosecution and that it is not the appropriate standard for evaluating statements from other systems. The appropriate standard is to be found in Rule 95. The Trial Chamber is not satisfied that this is a correct analysis of the provisions, and does not accept the Prosecution's position. Rule 42 embodies the essential provisions of the right to a fair hearing as enshrined in Article 14(3) of the International Covenant on Civil and Political Rights and Article 6(3)(c) of the European Convention on Human Rights. These are the internationally accepted basic and fundamental rights accorded to the individual to enable the enjoyment of a right to a fair hearing during trial. It seems to us extremely difficult for a statement taken in violation of Rule 42 to fall within Rule 95 which protects the integrity of the proceedings by the non-admissibility of evidence obtained by methods which cast substantial

doubts on its reliability.

44. The Trial Chamber is of the opinion that the surest way to protect the integrity of the proceedings is to read both Rules 42 and 95 together. We read Rule 95 as a summary of the provisions in the Rules, which enable the exclusion of evidence antithetical to and damaging, and thereby protecting the integrity of the proceedings. We regard it as a residual exclusionary provision.

45. The Application will be considered separately in accordance with these two interviews. The Trial Chamber shall take first the Austrian interview.

The Austrian Police Interview

46. Arguing the motion, Mr. Greaves, learned Counsel for the Defence, criticised the rights accorded to an accused person under Austrian law. It was argued that the rights of the Accused, such as silence under Rule 42, were violated. In addition, there was inducement for him to confess. Counsel for the Prosecution argued that there was nothing offensive in the Austrian provisions challenged. The Accused was advised that he could consult a lawyer, but the Accused voluntarily waived the right. The Austrian law does not provide for a right to counsel during questioning which is not strange and not in violation of fundamental human rights or the European Convention on human rights.

47. Whilst the Trial Chamber accepts the submission of the Prosecutor that any relevant evidence which falls within the parameters of fundamental fairness will be admissible and admitted by the Trial Chamber because such evidence will pass the test of Rule 95, the litmus test of the right of the suspect is clearly laid down in Article 18 of the Statute as elaborated in Rule 42. However, non-compliance with these provisions will render the act null under Rule 5.

48. The Trial Chamber is governed by its Rules. Accordingly any evidence to be admissible in proceedings before it must satisfy the law as provided in the Statute and Rules. The Tribunal is established for the trial of criminal offences of the most serious kind. Hence nothing less than the most exacting standard of proof is required. It is universally accepted that the burden of proof lies on the Prosecution. The standard of proof on the Prosecution is proof beyond reasonable doubt.

49. The Trial Chamber is not bound by national rules of evidence -

Sub-rule 89(A). However, where the interest of justice demands and the matter before it can be better determined by the application of national rules of evidence, the Trial Chamber may apply such rules. To determine the admissibility of the Austrian rules governing the rights of the suspect, they must be considered within the context of Rules 42 and 95.

50. The Austrian procedure rules do not recognise the right of the suspect to counsel during questioning. The provisions of paragraph 4 actually precludes such right. It states "if you want your legal Counsel to come and see you as soon as possible, make it known. You may not have legal Counsel present when you are questioned for a criminal offence". This is in direct contradiction to the provisions of Article 18 of the Statute and Rule 42 of the Rules of Procedure and Evidence which provide for Counsel prior to questioning. Indeed the European Court of Human Rights ("Court") decided in *Imbrioscia v. Switzerland* (1993) 17 EHRR 441 that Article 6(3)(C), which is equivalent to Article 18 of the Statute, applies to pre-trial proceedings. In this case, during the stage of the proceedings before it, the European Commission of Human Rights stated that

Article 6(3)(C) gives the Accused the right to assistance and support by a lawyer throughout the proceedings. To curtail this right during investigation proceedings may influence the material position of the defence at the trial and therefore also the outcome of the proceedings.

(See the Court's opinion at para. 60)

51. The Commission by majority cited and relied upon *Artico v Italy* (1980) 3 EHRR 1. It went on to state that "in the absence of an express provision it cannot be maintained that the rights guaranteed by Article 6(3)(C) of the European Convention are not susceptible to any restrictions" (see the Court's opinion at para. 61) what is important is that, in the proceedings taken as a whole, an accused person effectively had the benefit of "legal assistance" as required by Article 6(3)(C) of the Convention. However, in *Campbell and Fell v. UK* (1984) 7 EHRR 163 the Commission held that the failure by the United Kingdom Prison Board of Visitors to afford legal advice and assistance to the accused/applicant, Mr. Campbell, before, or legal representation at the Board's proceedings at the hearing before the Court was a failure to comply with the requirements of Article 6(3)(C). Even if it is conceded that the Austrian provision restricting the right to counsel is within Article 6(3)(C) as interpreted, there is no doubt it is

inconsistent with the unfettered right to counsel in Article 18(3) and Sub-rule 42(A)(i).

52. It is also important to state that the other conditions in the Austrian provision, namely, the right to speak to a lawyer only after being questioned, and if it has been determined that the Accused would be transferred to the Court prison, and that there is sufficient time remaining, to be decided by some other authority or person, are fetters to the exercise of the right to counsel absent in Article 18 and Rule 42. The Trial Chamber is satisfied that the Austrian rights of the suspect are so fundamentally different from the rights under the International Tribunal's Statute and Rules as to render the statement made under it inadmissible.

53. Under the Austrian Rules, the suspect is encouraged to speak rather than remain silent. It is said that exercising the right to remain silent deprives the Accused of the possibility of giving account of the incident and helps to clear up mistakes. Defence submitted that it was in contradiction of the right of the Accused. The Trial Chamber agrees with the Prosecution that no right of the Accused was being violated in putting to him the benefit of an alternative to silence. It is a choice open to the Accused which he is not bound to accept.

54. The nature of the advice on confession, though undesirable and would seem to the Trial Chamber a suggestion to the Accused to make a confession, it does not amount to such conduct as would qualify for inducement. This is because telling a suspect that a confession would on conviction assist in mitigation of punishment is not so strong as to induce a confession. No threats of danger to the suspect, nor promise of favour has been held out to the Accused except to the extent that a possible conviction, if the suspect did not confess, may be inferred.

55. The question is whether the interview is one which can pass the test of Article 18 and Rule 42. The allegation of the Defence of inducement to confess did not go beyond reading the rules of the Austrian Police procedure to the suspect. This being the only offensive conduct, the Trial Chamber is not satisfied that this by itself was sufficient. This is because though the rules relating to silence and confession are contradictory to the relevant rules in Rule 42, they do not fall below fundamental fairness and such as to render admission antithetical to or to seriously damage the integrity of the proceedings. However violation of Sub-rules 42A(i) and 42(B) by themselves would be sufficient by virtue of Rule 5 to render the statements before the Austrian Police null and inadmissible in proceedings before us and to

be excluded.

56. The Trial Chamber will now consider the admissibility of the interview before the investigators of the Office of the Prosecution.

Interview by the Prosecution Investigators

57. Analysis of the arguments urged for and against the exclusion of the interview with the investigators of the Prosecution discloses that the Defence relied on the following.

- a. Imperfect understanding by the suspect of the meaning and scope of his rights as read to him because of the differences in the cultures of the different legal systems.
- b. Defence also vigorously challenged the exercise by the Accused of his waiver of the right to counsel during the questioning, by raising a missing link in the evidence.
- c. Finally, the Defence relied on what it described as the oppressive nature of the questioning which, it was submitted, was sufficient to exclude the statement.

58. The Defence relied on the cultural background of the suspect for the contention that he was unable to appreciate the scope and meaning of his right to counsel when the right was read to him. It was argued that the investigators had a duty to explain to the suspect what was involved in the right and its waiver. The investigators who merely read the right to him were in violation of Rule 42. The suspect was very much a part of former Yugoslavia, unfamiliar with the background of Rule 42. He had some familiarity with the Austrian culture where he has lived for several years. But within four days the suspect was subjected to two different systems opposed to each other in terms of the kinds of rights they provide. The Trial Chamber does not accept the argument that the investigators had a duty to explain the provisions of Rule 42. We are satisfied that the duty is only to interpret to the suspect the rules in a language he or she understands.

59. The Trial Chamber finds the cultural argument difficult to accept as a basis for considering the interpretation of the application of the human rights provisions. The suspect had the facility of interpretation of the rights involved in a language which he understands. Hence, whether he was familiar with some other systems will not concern the new rights interpreted to him. If we were to accept the cultural argument, it would be tantamount to every person interpreting the

rights read to him subject to his personal or contemporary cultural environment. The provision should be objectively construed.

60. Rule 42 is an adaptation *mutatis mutandi* of Article 6(3) of the European Convention on Human Rights and Article 14(3) of the International Covenant on Civil and Political Rights ("ICCPR"). These are supranational conventions based on the most elementary and fundamental provisions for the protection of individual human rights. The former Yugoslavia was a party to the ICCPR. It will, therefore, be anomalous to rely on cultural differences for their interpretation.

61. The argument of the Defence about a cumulative application of the two rights as confusing lacks substantial merit. The differences in the Austrian provisions and Rule 42 are so clear in terms of their application as to render exercise of choice quite easy. Whereas the Austrian provision denied a right of Counsel during questioning Rule 42 provided one before questioning. The Austrian provision gives reason why the suspect should not keep silent but should talk to the Prosecution. Rule 42 merely tells you that you are not obliged to talk. The Austrian provision encourages confession in anticipation of a lesser sentence on a possible conviction. Rule 42 does not speak of confession, unless volunteered by the suspect. In this circumstance, there is nothing in our view to confuse the suspect.

62. The challenge by the Defence of the waiver of the right to counsel is based on speculation of what might have transpired between Mr. Abribat and the Accused in an unrecorded part of the interview. Defence Counsel has not suggested exactly what was said, but infers that the exercise of the right to counsel must have been discussed at the meeting. This is inferred from the expression "in accordance with our previous conversation" on the first day of questioning. The Prosecution denies that they entered into any such discussion. Mr. Abribat, who is alleged to have held the unrecorded discussion, has denied such discussion. His evidence was that he merely asked the suspect through an interpreter whether the Accused would agree to the recording of the interview by both audio and video. The Trial Chamber does not accept that he could do this within the one or two minutes claimed by him. But this does not raise the inference suggested by the Defence. The interview was started at 15:30 hours. There is evidence from the recording that several times during the interview, the suspect was asked whether he was prepared to carry on without counsel, and on each occasion he unequivocally answered in the affirmative. Even when counsel, Dr. Manfred Anedtser, assigned to him appeared to assist him, the Accused indicated he did not need his

assistance, and he left.

63. There is no doubt the Accused understood that he had a right to counsel during the interview. It was obvious also that he was aware of his right to waive the exercise of the right to Counsel. It appears to us obvious that the suspect voluntarily waived the exercise of the right to counsel. The Defence has not established to the satisfaction of the Trial Chamber that the discussion on the unrecorded portion of the interview was responsible for the exercise by the suspect of his right to waive the exercise of his right to counsel. It would be dangerous to act on the several ingenious speculations of Defence Counsel as to what could have transpired.

64. The Trial Chamber now adverts to the contention that the interview be rejected on the ground that it was oppressive of the suspect. The evidence relied upon in support of the argument is that the interview was conducted for more than four and three-quarter hours, by a total of about five interrogators inter-changing. Counsel for the Defence referred to the evidence of Mr. Moerbauer, one of the interrogators, who admitted being very tired at the end of the exercise.

65. The question of "oppressive conduct" is the most recent addition to English law of evidence of grounds enabling the exclusion of statements on the grounds that it might be unreliable. The traditional reason for exclusion is based on involuntary confession.

66. Similar to an involuntary confession, statements induced by coercion, force or fraud, or oppressive conduct which saps the concentration and has sapped the free will of the suspect through various acts and weakens resistance rendering it impossible for the suspect to think, clearly may constitute such conduct oppressive and the statement resulting from its exercise unreliable. This, however, is a question of fact. Whether or not conduct is oppressive in each case will depend upon many factors, the categories of which cannot be exhausted.

67. Some of the factors to be considered may be the characteristics of the person making the statement, the duration of the questioning and the manner of the exercise of the questioning. The facilities provided such as refreshments or rests between periods of questioning are material considerations. What may be regarded as oppressive with respect to a child, old man or invalid or someone inexperienced in the ways of the administration of justice may not be oppressive with a mature person, familiar with the police or judicial process. The effect

is, therefore, relative.

68. In *R v. Prager* (1972) 56 Cr. App. R. 151, the English Court of Appeal adopted and applied the definition proffered by Lord MacDermott, which states:

Oppressive questioning is questioning which by its nature, duration or other attendant circumstances (including the fact of custody) excites hopes (such as hope of release) or fears, or so affects the mind of the subject that his will crumbles and he speaks when otherwise he would have stayed silent.

69. The Trial Chamber accepts the submission of the Prosecution that even if the Accused was tired at the end of the interview, that was no evidence of oppressive questioning, to deprive him of the ability to make rational decisions. There is evidence that, notwithstanding the inordinate duration of the interview, there was nothing oppressive. The Accused was given refreshments during the exercise and he had opportunity to rest at intervals. There was no evidence that the duration of the interview excited in him hopes of release or any fears which made his will crumble thereby prompting statements he otherwise would not have made. From all the evidence, it seems clear that the Accused was in complete control and was master of the situation.

70. The Trial Chamber is satisfied that considering his mental and physical fitness, age, experience and his comportment and surrounding circumstances, there was no evidence that the interview was oppressive of the Accused.

III. DISPOSITION

For the foregoing reasons, the **TRIAL CHAMBER**, being seised of the Motions filed by the Defence,

PURSUANT TO RULE 73,

HEREBY:

1. **EXCLUDES** the statements made on 18 March 1996 by the Accused to officers of the Austrian Police Force in Vienna from evidence.
2. **ADMITS** the statements made on 19, 20 and 21 March 1996 by the Accused to Prosecution investigators in Vienna into evidence.

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

Adolphus
Godwin
Karibi-
Whyte

Presiding
Judge

Dated this second day of September 1997

At The Hague,

The Netherlands.

[Seal
of
the
Tribunal]