THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA

Case No. IT-09-92-PT

IN THE TRIAL CHAMBER

Before: Judge Alphons Orie, Presiding
Judge Bakone Justice Moloto
Judge Christoph Flügge

Registrar: Mr. John Hocking

Date Filed: 16 April 2012

THE PROSECUTOR

v.

RATKO MLADIĆ

PUBLIC

DEFENCE SUBMISSIONS IN RESPONSE TO PROSECUTION SUBMISSIONS ON TRIAL CHAMBER GUIDELINES

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I. INTRODUCTION

1. Ratko Mladić ("Accused"), by and through Counsel, respectfully submits the following Response to the *Prosecution Submissions on Trial Chamber Guidelines* (hereinafter "Prosecution Submissions"), filed on 2 April 2012. The Defence submits that the guidelines set forth by the Chamber are clear and have been the subject of many months of consideration/reiteration. The Prosecution Submissions are, in all actuality, a request for reconsideration nearly a half of a year after the bulk of parameters were promulgated. Despite provisions to allow variation to the guidelines where necessary, the Prosecution, instead, seeks to abolish any guidelines to assist the efficacy of trial. The Prosecution Submission is not only untimely, it is unhelpful in that it offers no substitute suggestions for the guidelines in place that were created by the Chamber to improve the efficiency of the proceedings. Furthermore, the Defence does not believe an *en banc* hearing is necessary to assist the proceedings at this time.

II. DISCUSSION

2. As shown through the Prosecution Submissions, the Chamber has given clear and precise guidelines to the parties for submission of witnesses under Rules 92*bis,* 92*ter* and 92*quater*.[1] Since announced at the 10 November 2011 Status Conference, these guidelines have been discussed and emphasized at subsequent Rule 65*ter* meetings and Status Conferences, including those held on 8 December 2011, 20 February 2012, 23 February 2012 and 29 March 2012.

3. The Defence largely agrees with the summarization of the Chamber-issued guidelines as set out in the Prosecution Submissions, with one notable exception in regard to Paragraph 3, Point (i). The Defence submits that there is nothing in the guidelines – as promulgated through the multiple status conferences and 65*ter* meetings – that encourages a 'consolidation' of statements. While Judge Orie did make a reference to a 'consolidated statement' in answer to a question on 10 November 2011,[2] it is clear from the subsequent instruction on 23 February 2012 that the statement should not present a 'consolidation' or an 'amalgamation', but should be limited to one (1) statement taking "the normal form of an ICTY witness statement".[3]

4. Overall, the Defence submits that these guidelines have been well-considered by the Chamber and the thus supports them in keeping this large case manageable. As the Prosecution recognizes, the guidelines have been created "motivated by a desire to develop a trial procedure that is efficient and effective."[4] They are exactly as they are termed – "guidelines". The Chamber has repeatedly stated that variation is allowed "in exceptional circumstances" with proper reasoning for such derivation. To date, however, the Prosecution has failed to file any Rules 92*bis*/*ter* motion that complies with the guidelines of the Chamber and has failed to provide 'exceptional circumstances' for derivation.

[1] *See, especially*, Prosecution Submissions, Annex A.
[2] *See* Status Conference, 10 November 2011, T.111.
[3] Status Conference, 23 February 2012, T.193:9-16; *see also*, Status Conference, 10 November 2011, T.108:25-109:6.
[4] Prosecution Motion, para.24.

5. Instead, the Prosecution has submitted the Prosecution Submissions, which are a request for reconsideration of the Chamber Guidelines. However, the Prosecution fails to show the existence of clear error or injustice that arises out of setting guidelines for the purposes of expeditious proceedings.[5]

"One Statement"

6. The Prosecution Submissions state that the guideline of 'one statement' per witness is "impractical".[6] While it submits that "unnecessary costs" and "unnecessary hardship on witnesses"[7] will come from the Chamber's guideline, the argument appears to be an objection to the certification processes of Rules 92*bis/ter* as these 'hardships' would be incurred by any standard use of these Rules.

7. Nothing about the guidelines call on the Prosecution to expend unnecessary resources in creating new statements for all Rules 92*bis*/*ter* witnesses; in fact, there is nothing requiring the Prosecution to utilize Rule 92 at all. However, where sought to use the Rule to expedite the proceedings, the Chamber has indicated that it should be one statement that provides the core testimony.

8. Testimony offered pursuant to Rules 92*bis*/*ter*, while saving in-court time and resources, is meant to meet a reliability standard equivalent to live testimony. As outlined by the Appeals Chamber:

> The decision to encourage the admission of written statements prepared for the purposes of such legal proceedings in lieu of oral evidence from the makers of the statements was [...] taken by the Tribunal [...] but with the realisation that any evidentiary provision specifically relating to that material required considerable emphasis upon the need to ensure its reliability. [...] Rule 92bis has introduced that emphasis.[8]

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[5] *Prosecutor v. Milutinović et al.*, IT-05-87-T, Decision on Prosecution Motion Requesting Reconsideration of Trial Chamber "Decision on Evidence Tendered Through Witness K-82" Issued 3 October 2006 and Leave to Recall Witness K-82, 13 March 2007, para.14.
[6] Prosecution Submissions, para.5.
[7] *Id.*, para.9.
[8] *Prosecutor v. Galić*, IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92*bis*(C), 7 June 2002 ("*Galić* Interlocutory"), para.30.

9. Therefore, Rule 92*bis*, as well as Rules 92*ter*/*quater*/*quinques*, are the *lex specialis* of statement evidence.[9] These rules were carefully crafted to allow broad application for admitting statement testimony, but with these basic provisions to ensure *prima facie* reliability. For Rule 92*bis*, it is the review/certification (and 3d-party witness declaration) of a statement that was previously given.[10] For Rule 92*ter*, it is an in-court affirmation of the prior statement.

10. The parties of the Tribunal must work within the set conditions of these rules if they are to be employed in lieu of *viva voce* testimony. The Prosecution has shown no basis for abolishing a guideline of 'one statement' of a witness, nor has it shown how this is non-compliant with the Rules which actually state "***a*** written statement ***or a*** transcript of evidence".[11]

11. Further, it is a necessary standard of Rules 92*bis*/*ter* that the statement must be reviewed and certified as accurate. Therefore, the Prosecution's arguments that "Registry officials would also have to travel and incur separate costs"[12] or that it is an "unnecessary inconvenience" for the witness[13] is without merit as a witness must verify the contents of the proffered testimony and either certify the statement pursuant to Rule 92*bis* or appear before the court pursuant to Rule 92*ter*. There is no provision that allows a witness to give "blanket permission for submission of their attested statements in all ICTY proceedings".[14]

12. This is not a "new heightened legal standard" that operates to "arbitrarily bar admission" of multiple statements.[15] In fact, it was a preference iterated by Judge Hunt when statement evidence became an increasing feature in the Tribunal's practice; he suggested:

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[9] *Id.*, para.31; *see also*, *Prosecutor v. Milošević*, IT-02-54-T, Decision On Prosecution Motion For The Admission Of Evidence-In-Chief Of Its Witnesses In Writing, 16 April 2003, p.2 (referring only to Rule 92*bis* as predating the Rule changes to add Rules 92*ter*/*quater*/*quinques*); *see also*, O. Kwon, *The Challenge of an International Criminal Trial as Seen from the Bench*, 5 J. Int'l Crim. Just. 360, 365-366 (2007).
[10] *See Defence Motion To Exceed The Word Limit And Response To Re-Filing Of Prosecution Motion To Admit The Evidence Of RM057 Pursuant To Rule 92bis*, 16 March 2012, paras.
[11] *See* Rule 92*bis*/*ter* (emphasis added).
[12] Prosecution Submissions, para.6.
[13] *Id.*, para.7.
[14] *Id.*, fn.11.
[15] *Id.*, para.9.

> The better course to be pursued by the prosecution would be to prepare a *new* statement by the witness to be tendered pursuant to Rule *92bis* which includes only the specific matters which the prosecution seeks to prove through that witness, and then to have the witness attest to the truth of the new statement to enable it to be tendered pursuant to Rule *92bis*."[16]

13. The Defence submits that Rules 92*bis*/*ter* may not be the most efficient use of testimony for all cases. It is up to the party to determine which mode of testimony is most efficient given the statement evidence already provided. The Chamber's guideline does not impose "unnecessary costs" or "unnecessary hardship on witnesses".[17] Where it is entirely impossible/unreasonable to submit one statement, the Chamber has noted that it will hear reasons for exceptional derivation. Therefore, it is simply a guideline that the parties should seek to comply with or, where not possible, petition the Chamber for exceptional derivation. However, there is nothing unreasonable about the Chamber's guidance of 'one statement' to be submitted per witness when employing Rule 92.

Transcripts

14. The Defence does not, in principle, disagree with the Prosecution's submissions that transcripts be allowable in place of one statement as it is facially permissible under the Rules. However, the guideline of the Chamber was created for the sake of efficiency and a concise record that does not contain long swaths of testimony that may be irrelevant to the current proceedings. Therefore, such use of a transcript can be properly limited to exceptional circumstances and, in those instances, only one transcript that best reflects the evidence the Prosecution seeks to proffer.

15. The most troubling argument of the Prosecution Submissions is its concern that witnesses will be 'uncooperative' or will not verify their evidence.[18] Specifically, "[t]he Prosecution

[16] *Prosecutor v. Milošević*, IT-02-54-T, Milosevic, *Dissenting Opinion Of Judge David Hunt On Admissibility Of Evidence In Chief In The Form Of Written Statement (Majority Decision given 30 September 2003)*, 21 October 2003, para.13: This statement is likewise applicable to Rule 92*ter* as can be seen from the text of the opinion which is referring to the possibility of cross-examination as under the former Rule 92*bis*.
[17] Prosecution Submissions, para.9.
[18] *Id.*, para.12.

reasonably anticipates that these uncooperative adverse witnesses will not agree to provide a new statement or may seek to change their prior evidence knowing it is intended for use at the trial of their former commander."[19] This seems to present two scenarios that the Prosecution anticipates 1) that the witnesses have offered untruthful testimony in prior proceedings and could seek to remedy that now; or 2) that they are concerned that their witnesses will offer untruthful testimony in the present proceedings. Under either scenario, it creates great concern to the Defence – and should to the Chamber – of the veracity of the evidence of these uncooperative parties. While the Prosecution appears to be aware of specific examples now, it submits that it will be shown "in the next few weeks" through other applications that are foreshadowed as not meeting the stated guidelines.[20] Again, as stated above, Rules 92 is not the appropriate method of testimony for all witnesses and if these individuals are, in fact, alleged subordinates (as the Prosecution refers to 'former commander'), a short *viva voce* testimony may be more appropriate. Otherwise, the Prosecution should simply explain the 'exceptional circumstances' for derivation with the specific witnesses. However, there's nothing that points to a reason to entirely abolish the set guidelines.

16. The Prosecution cites to former ICTY Judge Patrica Wald, but its pinpoint cite reference does not further that premise that "[a]s a matter of law, a chamber is entitled to place greater weight on the testimonial evidence of a witness".[21] The closest the cited article comes to that principle is her assertion (at page 551, not page 549) that: "*ICTY judges, of course, may decide how much weight to give a written statement-ordinarily, we would expect it to be less than that of a live credible witness subject to cross-examination.*"[22] It is worth noting that, in her academic article, Judge Wald gives a good outline of the

[19] *Id.*
[20] *Id.*, fn.19.
[21] Prosecution Submissions, para.11, fn.18. It should be noted that this is from an academic article that expresses her views and "not necessarily those of the Tribunal or the United Nations (UN).", *see* P. Wald, *To Establish Incredible Events by Credible Evidence: The Use of Affidavit Testimony in Yugoslavia War Crimes Tribunal Proceedings*, 42 Harvard J. Int'l L. 535 (2001) ("*Wald*").
[22] *Wald*, p.551.

development of the use of statement testimony at the Tribunal,[23] recalling that "*ICTY proceedings were originally envisioned as reliant mainly on live witness testimony*."[24]

17. The Prosecution has not shown that the Chamber's guideline preferring statement testimony over a transcript is in error. Transcripts are often lengthy and explore issues outside of the specific charges of the indictment and can include cross-examination that is incompatible with the defence sought by the specific accused of the trial in which it is proffered. As noted by former President, Judge Patrick Robinson, "[t]he determination that previous cross-examination is adequate is quite often a delicate and risky judicial exercise".[25] It is submitted, then, that these considerations can further complicate a request for admission under Rule 92 and, therefore, the Chamber's guideline that prefers statement evidence is reasonable.

18. When the Prosecution argues the use of transcripts is necessary for suspects/subordinates[26], it ignores that there is already a modus in place to seek to confront/impeach same with their prior transcript if they testify different. The introduction of a prior transcript when the prosecution has represented knowledge the witness would not testify the same would be wholly improper, and against the Rule.

Associated Exhibits

19. With regard to 'associated exhibits', the Prosecution also request reconsideration of the *guidelines* that only five (5) exhibits be requested for tender with a Rule 92*bis* application and none be made with a Rule 92*ter* application (the latter requiring that documentary evidence be taken when the witness is available in the courtroom). The Prosecution states that "[t]he Guidelines are at odds with the consolidated practice of the Tribunal, which

[23] *Id.,* pp.539-543.
[24] *Id.*, p.541.
[25] P. Robinson, *Rough Edges in the Alignment of Legal Systems in the Proceedings at the ICTY*, 3 J. Int'l Crim. Just. 1037, 1045 (2005).
[26] Para. 12

promotes the admission of exhibits associated with written statements or transcripts when they form an "inseparable and indispensable part" of the witness's testimony."[27]

20. Unfortunately, the Prosecution is incorrect in that the practice of the Tribunal is one of permission, not promotion. Whereas some chambers have allowed such practice, it was based on the specific circumstances of the case as considered by each trial bench. For example, in the cited *Đorđević* case,[28] the Prosecution case consisted of 115 witnesses with 105 appearing for at least partial *viva voce* testimony; only five (5) Prosecution witnesses provided testimony entirely in the form of Rule 92*bis* statements.[29] In total, that Chamber received 1585 Prosecution exhibits.[30] Here, the Prosecution states that it will have 'nearly 200' witnesses that it would like to call via Rule 92*bis*;[31] if allowing a guideline of five (5) documents for each, this would amount to 1000 pieces of evidence, a significant allotment of documents that would not receive the benefit of in-court explanation or cross-examination if allowed under Rule 92*bis*. Thus, in order to manage a much larger breadth of evidence, this Chamber has prudently set a guideline of five (5) exhibits for a Rule 92*bis* witnesses. This is not an unreasonable limit considering that Rule 92bis is meant to be utilized for crime-base evidence, the type of evidence that, typically, is not document-heavy.

21. The Chamber has stated a preference for documentary evidence to be tendered "in court through witnesses who can provide the proper contextualization."[32] This is squarely in line with a procedural standard set forth in other Chambers that, where possible, live testimony is preferable.[33] In any event, the Prosecution has not shown how this guideline amounts to clear error, especially when the Chamber has stated that it will take exceptional circumstances into consideration when submitted. Otherwise, it is reasonable that, where at

[27] Prosecution Submissions, para.19
[28] *Id.*, para.19, fn.22.
[29] *Prosecutor v. Đorđević*, IT-05-87/1-T, Judgement, 23 February 2011, para.2250.
[30] *Id.*, para.2255.
[31] Prosecution Submissions, para.6.
[32] Status Conference, 29 March 2012, T.236:5-11; *see also*, T.229:4-7.
[33] *Prosecutor v. Delić*, IT-04-83-PT, Decision on Prosecution Motion for Admission of Documentary Evidence Pursuant to Rule 94(B), 9 July 2007, p.5.

all possible, documents should be given through a live witness who can attest to the document's reliability and context to the present case.

Length of Examination-in-Chief of Rule 92ter Witnesses

22. In procedural matters, the Trial Chamber has the power to limit the time for presentation of a party's evidence so long as it considers the complexity of the issues and allocates a fair amount of time to present its case.[34]

23. Here, the Chamber has carefully considered practice of other Chambers and determined that thirty (30) minutes is an acceptable guideline.[35] However, it also stated that these times are "not carved in stone".[36] Specifically, the Chamber has provided an allowance to request additional time outside of the standard thirty (30) minutes:

> In the interests of a fair and expeditious trial, the Chamber will monitor the conduct of examination-in-chief, cross-examination, as well as any re-examination. And further, the parties should keep these time estimates in mind, and if already anticipating deviations from them, the parties should indicate this to the Chamber no later than two weeks before the expected start of the witness's -testimony.[37]

24. The Prosecution has noted this in its submissions, yet seeks to abolish any set estimation, which the Chamber is within its power to enforce. There is no showing that the standard of thirty (30) minutes is in clear error warranting a reconsideration.

En banc Hearing

25. The Defence submits that an *en banc* hearing is unnecessary at this time. The guidelines have been discussed in multiple 65*ter* meetings and Status Conferences and they are clear, reasonable and firmly set in place. The Chamber is seized of the Prosecution Submissions which lay forth its request for reconsideration of the guidelines; herein, the Defence has

[34] *Prosecutor v. Prlić et al.*, IT-04-74-AR73.4, Decision on Prosecution Appeal Concerning the Trial Chamber's Ruling Reducing Time for the Prosecution Case, 6 February 2007, para.14.
[35] Status Conference, 29 March 2012, T.225:15-18.
[36] *See, id.,* T.222:3-5.
[37] *Id.*, T.222:13-18.

made its response. Therefore, the arguments of the parties are sufficiently in the hands of the Chamber and an *en banc* hearing, at this point, will only unnecessarily delay the proceedings and detract from other important matters that must be resolved in the coming month if there is to be a timely start of trial.

III. RELIEF REQUESTED

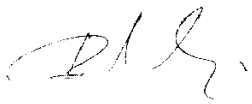
WHEREFORE, for the foregoing arguments, the Defence respectfully requests that the Chamber,

- Deny the Prosecution request for an *en banc* hearing as not materially advancing the proceedings; and,

- Dismiss the Prosecution Submissions as not meeting the standard for reconsideration of the Chamber's set guidelines and provisions for derivation thereof.

Word Count: 2995

RESPECTFULLY SUBMITTED BY:



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Lead Counsel for Ratko Mladić

Dated this 16th of April 2012
Belgrade, Republic of Serbia