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19 MAY 2006

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UNITED
NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991

Case No. IT-95-11-T

Date: 19 May 2006

Original: English

IN TRIAL CHAMBER I

Before: **Judge Bakone Justice Moloto, Presiding**
Judge Janet Nosworthy
Judge Frank Höpfel

Registrar: **Mr. Hans Holthuis**

Decision of: **19 May 2006**

PROSECUTOR

v.

MILAN MARTIĆ

REVISED VERSION OF THE DECISION ADOPTING GUIDELINES ON THE STANDARDS GOVERNING THE PRESENTATION OF EVIDENCE AND THE CONDUCT OF COUNSEL IN COURT

The Office of the Prosecutor:

Mr. Alex Whiting
Ms. Anna Richterova
Mr. Colin Black
Ms. Nisha Valabhji

Counsel for the Accused:

Mr. Predrag Milovančević
Mr. Nikola Perović

TRIAL CHAMBER I ("Trial Chamber") of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 ("Tribunal");

NOTING the Trial Chamber's Decision Adopting Guidelines on the Standards Governing the Presentation of Evidence and the Conduct of Counsel in Court ("Decision") with Annex A ("Guidelines"), filed on 13 April 2006;

NOTING that the date on the cover page and in the footer of the Decision and Guidelines was erroneously written as 13 April 2004;

CONSIDERING the necessity to clarify the Guidelines insofar as they refer to the use of lengthy documents in court;

PURSUANT TO Rule 54 of the Rules of Procedure and Evidence,

ADOPTS this revised version of the Guidelines, which shall govern the presentation of evidence and the conduct of counsel in court in the present case.

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

Judge Bakone Justice Moloto
Presiding

Dated this nineteenth day of May 2006
At The Hague
The Netherlands

[Seal of the Tribunal]

ANNEX A

GUIDELINES ON THE STANDARDS GOVERNING PRESENTATION OF EVIDENCE AND CONDUCT OF COUNSEL IN COURT

(a) Long, complicated or compound questions

1. The parties are requested to bear in mind that long, complicated or compound questions risk confusing witnesses and making the trial record unclear and unnecessarily lengthy. Therefore, in the interest of effective presentation of evidence, the parties are advised to put one question at a time to the witnesses.

(b) Admission into evidence of a prior statement of a testifying witness

2. In accordance with the principle of orality, which is expressed in Rule 89 (F),[1] prior statements of a witness should not be tendered into evidence where relevant portions thereof have been read out and entered on the record or where the witness has otherwise commented on the statement in his or her live testimony.[2]

(c) Referring to prior testimony or statements of a witness

3. The parties are requested to avoid interpreting or paraphrasing what a witness has previously either testified or stated.[3] The Trial Chamber considers that such interpreting or paraphrasing increases the risk of mischaracterising the prior testimony or statement and unnecessarily lengthens the trial record.

4. Instead, the parties are encouraged to quote from the transcript or statement. However, the parties are requested to restrict such quoting to situations when it is *strictly necessary* for the understanding of the question to be put. In such cases, the quote shall be restricted to the part of the transcript that is directly relevant to the question. Furthermore, when referring to a prior testimony

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1 *Prosecutor v. Sefer Halilović*, Case No. IT-01-48-AR73.2, Decision on Interlocutory Appeal Concerning Admission of Record of Interview of the Accused from the Bar Table, 19 Aug 2005, paras 16-17. *See also Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30/1-A, Judgement, 28 Feb 2005, paras 122-126; *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-AR73, Decision on Prosecutor's Appeal on Admissibility of Evidence, Dissenting Opinion of Judge Patrick Robinson, 16 Feb 1999, para. 10; *Prosecutor v. Zoran Kupreškić et al.*, Case No. IT-95-16, Decision on Appeal by Dragan Papić Against Ruling to Proceed by Deposition, 15 Jul 1999, para. 18.

2 *Prosecutor v. Miroslav Kvočka et al.*, 04 Jul 2000, T. 3490.

3 This concerns both what the testifying witness has testified at prior hearings, or stated, and what other witnesses, whose testimony has concluded, have testified or stated.

or statement, the parties are asked to provide exact page references to the transcript or statement in question.

(d) Refreshing the memory of a witness using a prior statement

5. Prior statements of the testifying witness, whether in evidence or not, may be used to refresh a witness's memory both during examination-in-chief and during cross-examination.[4] The Trial Chamber recalls the Appeals Chamber's finding that also unadmitted portions of a statement made pursuant to Rule 92 *bis* may be used to refresh the memory of a witness during examination-in-chief[5] and during cross-examination.[6]

6. The Trial Chamber may consider the means and circumstances by which the memory was refreshed when assessing the reliability and credibility of the witness's testimony.[7]

(e) Scope of the cross-examination

7. The Trial Chamber recalls Rule 90 (H)(i) of the Rules of Procedure and Evidence, which requires the parties to restrict cross-examination to:

> the subject-matter of the evidence-in-chief and matters affecting the credibility of the witness and, where the witness is able to give evidence relevant to the case for the cross-examining party, to the subject-matter of that case.

8. In this respect, the parties are reminded that, when dealing in cross-examination with questions relating to the historical, political and military context of the case, they are requested to state the purpose and relevance of questions to the allegations raised in the Indictment against the Accused.[8] Furthermore, it is recalled that this Tribunal does not recognise *tu quoque* as a valid defence, and has accepted, but only to a very limited extent, evidence relating to crimes allegedly committed by other parties to the conflict.[9] As a consequence, the Trial Chamber may disallow

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4 *Prosecutor v. Enver Hadžihasanović and Amir Kubura*, Case No. IT-01-47-AR73.2, Decision on Interlocutory Appeal Relating to the Refreshment of the Memory of a Witness, 02 Apr 2004, p. 2, referring to *Prosecutor v. Blagoje Simić et al.*, Case Nos IT-95-9-AR73.6 & IT-95-9-AR73.7, Decision on Prosecution Interlocutory Appeals on the Use of Statements not Admitted into Evidence Pursuant to Rule 92*bis* as a Basis to Challenge Credibility and to Refresh Memory, 23 May 2003, paras 18-20.

5 *Ibid.*

6 *Prosecutor v. Blagoje Simić et al.*, Case No. IT-95-9 & IT-95-9-AR73.7, Decision on Prosecution Interlocutory Appeals on the Use of Statements not Admitted into Evidence Pursuant to Rule 92*bis* as a Basis to Challenge Credibility and to Refresh Memory, 23 May 2003, paras 18, 20.

7 *Ibid.*

8 *Prosecution v. Zoran Kupreškić et al.*, Case No. IT-95-16, Decision on Evidence of the Good Character of the Accused and the Defence of *Tu Quoque*, 17 Feb 1999; *Prosecutor v. Enver Hadžihasanović et al.*, Case No. IT-01-47, Decision on Defence Motion for Clarification on the Oral Decision of 17 December 2003 Regarding the Scope of Cross-examination Pursuant to Rule 90 (H) of the Rules, 28 Jan 2004, p. 3.

9 *Prosecution v. Zoran Kupreškić et al.*, Case No. IT-95-16, Decision on Evidence of the Good Character of the Accused and the Defence of *Tu Quoque*, 17 Feb 1999, pp 3-5; *Prosecutor v. Enver Hadžihasanović et al.*, Case No.

questions which are irrelevant either because they are beyond the Indictment's temporal scope or are unrelated to the specific facts of the violations alleged in the Indictment.

9. The Trial Chamber acknowledges that Rule 90 (H)(i) does not limit the matters that may be raised during a cross-examination which is directed solely at the credibility of the witness. However, cross-examination must still be conducted within some reasonable limits.[10] The Trial Chamber may therefore disallow improper or unfair questions, including those which constitute an unwarranted attack on the witness.[11]

10. The Trial Chamber recalls that Rule 90 (H)(ii) requires the cross-examining party to put to a witness, who is able to give evidence relevant to the case for that party, the nature of its case that is in contradiction to the witness's evidence. The Trial Chamber, in accordance with the practice of the Tribunal, notes that Rule 90 (H)(ii) allows for certain flexibility depending on the various circumstances at trial and interprets the rule to mean that the cross-examining party is required to put the *substance* of the contradictory evidence and not every detail that the party does not accept.[12]

(f) Length of the cross-examination

11. In the interest of ensuring fair and expeditious conduct of the trial proceedings, the parties are requested to adhere to the principle that the time for cross-examination of a witness should not exceed the time allotted for the examination-in-chief of that witness, unless there are particular circumstances requiring that the cross-examination be extended.[13] Such circumstances include

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IT-01-47, Decision on Defence Motion for Clarification on the Oral Decision of 17 December 2003 Regarding the Scope of Cross-examination Pursuant to Rule 90 (H) of the Rules, 28 Jan 2004, p. 4; and *Prosecutor v. Kupreškić et al.*, Trial Judgement, paras 515-520; *Prosecutor v. Kordić and Čerkez* Trial Judgement, para. 520.

[10] *Prosecution v. Momčilo Krajišnik*, Case No. IT-00-39-T, Decision on Cross-Examination of Milorad Davidović, 15 Dec 2005.

[11] *Ibid.* In that case the Trial Chamber, by recalling its duty to protect witnesses set out in Article 22 of the Statute, retained the discretion to disallow a question or sustain an objection against a question in cross-examination where, in the Trial Chamber's view, it constituted an unwarranted attack on a witness. An example of such an attack was the allegation by the cross-examining party that a witness had engaged in serious criminal conduct, without showing reasonable grounds to do so at the time the allegation was made. A similar solution is found in the practice of the ICTR, *see Prosecutor v. Bagosora*, Case No. ICTR-96-7, Oral Decision on Cross Examination, 9 May 2005, T. 27-28, where the judges agreed with the holding set forth in the common law textbook, *Archbold,* whereby "questions which affect the credibility of a witness by attacking his character that are not otherwise relevant to the actual inquiry ought not to be asked unless the cross-examiner has reasonable grounds for thinking that the imputation conveyed by the question is well founded or true."

[12] *Prosecutor v. Radoslav Brđanin and Momir Talić*, Case No. IT-99-36-T, Decision on "Motion to Declare Rule 90 (H)(ii) Void to the Extent it is in Violation of Article 21 of the Statute of the International Tribunal" by the Accused Radoslav Brđanin and on "Rule 90(H)(ii) Submissions" by the Accused Momir Talić, 22 Mar 2002. *See also Prosecution v. Naser Orić*, Case No. IT-03-68-T, Decision on Partly Confidential Defence Motion Regarding the Consequences of a Party Failing to Put its Case to Witnesses Pursuant to Rule 90 (H)(ii),17 Jan 2006.

[13] *Prosecutor v. Mladen Naletilić and Vinko Martinović*, Case No. IT-98-34, 10 Jun 2002, T. 12248 (closed session); *Prosecutor v. Goran Jelisić*, Case No. IT-95-10, 07 Sep 1999, T. 1063. In the *Krajišnik* case, the Trial Chamber requested the parties to limit the time devoted to the cross examination to 60 per cent of the time employed in the examination in chief. *See, e.g., Prosecution v. Momčilo Krajišnik*, Case No. IT-00-39-T, 23 Apr 2004, T. 2652.

situations where there has been a particularly brief examination-in-chief, where the witness is an expert witness, or where fairness to the Accused so requires.

(g) Confronting a witness with testimony of a previous witness

12. The cross-examining party may confront a witness with the testimony of another witness in order to impeach or challenge the credibility of that witness or the testifying witness. The cross-examining party shall put to the testifying witness the evidence of the previous witness *without* identifying from whom the information has come.[14]

13. The parties are reminded that while they may ask the witness whether or not he agrees or disagrees with the evidence of the previous testimony, the parties should not ask witnesses to comment on the credibility of other witnesses.[15]

(h) 92 *bis* witnesses appearing for cross-examination

14. Where a witness whose previous testimony or statement has been admitted into evidence pursuant to Rule 92 *bis*, has been called solely for the purposes of cross-examination, the calling party should not introduce new evidence through examination-in-chief. The cross-examination of such witnesses shall be carried out in accordance with Rule 90 (H)(i) and (ii) with the limitation that questions relating to the "subject matter of the evidence-in-chief":[16]

However, the Trial Chamber interpreted the "60 per cent practice" with a certain degree of flexibility. *See* in this regard, *ibid.*, 27 May 2004, T. 3068-3069. In particular, under the 89 (F) procedure which drastically reduces the examination-in-chief the Trial Chamber has admitted derogation from the "60 per cent practice", *ibid.*, 03 Sep 2004, T. 5421. In *Milošević,* after the prosecution case, an order was issued on the use of time in the defence case. In that order, the judges stated that 60 percent of the time allocated to the Accused to present his case in chief would be allocated to the Prosecution for cross-examination during the Defence case, *Prosecution v. Slobodan Milošević*, Case No. IT-02-54, Third Order on the Use of Time in the Defence Case and Decision on Prosecution's Further Submissions on the Recording and Use of Time During the Defence Case, 19 May 2005.

[14] *Prosecutor v. Blagoje Simić et al.*, Case No. IT-95-9 & IT-95-9-AR73.7, 13 Mar 2003, T. 16636; *ibid.*, 29 Apr 2003, T. 18809-10; *Prosecutor v. Radoslav Brđanin and Momir Talić*, Case No. IT-99-36-T, 14 Oct 2002, T. 10654:

> JUDGE AGIUS: [...] it's not right that you present the witness with information leading him to understand that another witness also coming from the political arena gives a completely different story to his with regard to some details at least.

Miroslav Kvočka et al., Case No. IT-98-30/1, 28 Aug 2000, T. 4220-21. *Prosecution v. Momčilo Krajišnik*, Case No. IT-00-39-T, 05 Dec 2005, T. 19215.

[15] *Prosecutor v. Blagoje Simić et al.*, Case No. IT-95-9, 04 Jun 2002, T. 8820-8821; *Prosecutor v. Miroslav Kvočka et al., ibid*; *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2, 24 Nov 1999, T. 10336-7; *Prosecutor v. Radoslav Brđanin and Momir Talić*, Case No. IT-99-36-T, 14 Oct 2002, T. 10651.

[16] That is, the Rule 92 *bis* statement or transcript.

1. shall be restricted to the matters for which the Trial Chamber has decided to allow the witness to be called for cross-examination;[17] and

2. shall not include questions relating to the summary of the witness's 92 *bis* statement or transcript, which the calling party reads out at the start of the testimony, unless related to item 1, above.

(i) Use of large documents in court

15. The Trial Chamber considers that it is not an efficient use of in-court time to read out large passages of a document which is subsequently tendered for admission into evidence. This is particularly so where the party does not ask concise and specific questions on the information contained in the document but merely requests the witness to verify what is written on the page in front of the witness. In this respect, counsel are reminded of the possibility of tendering such evidence from the bar table.[18] Where the parties wish to present passages of a long document to a witness, they are urged to provide the relevant parts of the document to the witness and give the witness time to study it either in court or, preferably, during a break, and then ask concise questions on the substance of the relevant parts of the document. Smaller portions of a document may be read out by counsel in court.

16. Barring exceptional circumstances with the leave of the Trial Chamber, the parties may not tender into evidence lengthy documents, such as books, where only portions thereof are relevant to the evidence of the witness through whom the document is tendered. Rather, when seeking the admission into evidence of such documents, be it during examination-in-chief, cross-examination or re-examination, each party is requested to specify which portions of the document it seeks to have admitted. Each tendering party is also requested to submit electronic versions of the portions of the document sought to be admitted.

(j) Use of hardcopies of documents

17. Parties are reminded that as this trial uses E-Court, the principle is that all documents shall be handled through the E-Court system. Hardcopies of a document may be used by a party only where the party has been unable, due to unforeseen circumstances, to put a document into the E-

[17] *See, e.g., Prosecutor v. Milan Martić,* Case No. IT-95-11-T, Decision on Prosecution's Motion For the Admission of Written Evidence Pursuant to Rule 92 *bis* of the Rules, 16 Jan 2006.

[18] Rule 89 (C) provides "a Chamber may admit any relevant evidence which it deems to have probative value"; *Prosecutor v. Sefer Halilović,* Case No. IT-01-48-AR73.2, Decision on Interlocutory Appeal Concerning Admission of Record of Interview of the Accused from The Bar Table, 19 Aug 2005, para. 14.

Court system. Parties are also reminded that when use of hardcopies of a document is permitted, sufficient copies should be provided to the witness, the opposite party, the Bench, the Registrar and the interpreters. Finally, the parties are reminded to make use of the drawing functionality of E-Court when asking a witness to make a drawing or annotate a document.