

IT-00-39-T
D13070-D13062
07 April 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 the
Former Yugoslavia since 1991**

Case: IT-00-39-T

Date: 7 April 2006

Original: English

IN TRIAL CHAMBER I

Before: Judge Alphons Orie, presiding
Judge Joaquín Martín Canivell
Judge Claude Hanoteau

Registrar: Mr Hans Holthuis

Order of: 7 April 2006

PROSECUTOR

v.

MOMČILO KRAJIŠNIK

**PROCEDURE ON CALLING AND EXAMINING
CHAMBER WITNESSES**

Office of the Prosecutor

Mr Mark Harmon
Mr Alan Tieger

Counsel for the Defence

Mr Nicholas Stewart, QC
Mr David Josse

THE TRIAL CHAMBER,

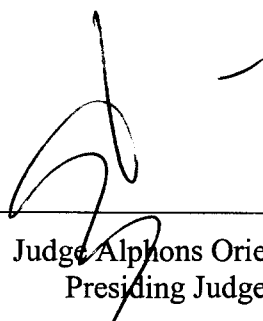
NOTING its announcement to the parties on 30 March 2006 that “As matters stand at this moment, this Chamber will decide at the close of the Defence case, whether to hear evidence from the additional witnesses we have in mind. Due to the logistical steps required in order to bring witnesses to the Tribunal, the Chamber will, however, start making arrangements already now for their possible testimony. Once the Chamber has finalized the procedure for the hearing of evidence from potential witnesses, we will identify these witnesses along with the procedure to enable the parties to conduct their own preparations. The Chamber will hear the parties’ observations on the proposed procedure at the appropriate time”;¹

CONSIDERING that the Chamber has since drafted the aforementioned procedure and has annexed it to this order;

PURSUANT to Rule 98 of the Tribunal’s Rules of Procedure and Evidence,

INVITES the parties to comment orally on the proposed procedure at the hearing scheduled for Tuesday 11 April 2006.

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



Judge Alphons Orie
Presiding Judge

Dated this 7th day of April 2006
At The Hague
The Netherlands

[Seal of the Tribunal]

¹ T. 22233-4.

ANNEX

Procedure on calling and examining Chamber witnesses

1. A final decision by the Chamber on whether to call persons to testify as Chamber witnesses will be made at the close of the defence case. Until that time, preparatory steps in respect of potential Chamber witnesses will be undertaken by the Chamber, assisted by the Registry and the parties, in accordance with the procedure set out below. This procedure is not meant to be applicable in all circumstances in the same way. For example, it may not be necessary to undertake step 11 of the procedure (the preliminary interview) with witnesses of relatively minor importance. Moreover, as indicated below, the procedure will have to be substantially modified in cases where the prospective witness is in legal custody.
2. The parties or their agents are not to have any contact with the prospective Chamber witnesses (“witnesses”) from the time that their names are announced to the parties.
3. The Chamber is to locate the witnesses and arrange for them to be informed that they are being considered as Chamber witnesses in the case. To this end:
 - (a) The parties may be requested to supply the Chamber with any information they may have about the whereabouts, health, and legal status of the witnesses.
 - (b) The Chamber may issue a request for state cooperation, pursuant to Article 29 of the Tribunal’s Statute, in relation to each of the witnesses. The state may be requested to locate the witness, inform the witness that he or she may be contacted by a legal officer of the Tribunal for the purpose of giving evidence in the case, collect the witness’s contact information, and report back to the Chamber with the contact information.
4. Once the witness information has been received from states or other sources, a legal officer of the Chamber is to conduct a telephone conference with the witness at a suitably equipped facility at the Tribunal:
 - (a) The telephone conference, which is to be held in , is to be conducted by a legal officer of the Chamber in the presence of a Court Officer (who will minute the procedure and provide other support consistent with the Registry’s neutral role) and a CLSS language assistant (to translate between the legal officer and the witness).
 - (b) The telephone conference is to be audio-recorded, but not transcribed.

- (c) The first objective of the telephone conference is to determine the prospective witness's availability and initial reaction to giving evidence at the Tribunal.
- (d) Should the witness refuse to speak to the legal officer before obtaining legal advice, the legal officer will offer to reschedule the telephone conference to give the witness an opportunity to obtain legal advice. The legal officer is to inform the witness that, should he or she refuse to cooperate further, the Chamber may decide to subpoena the witness to testify before the Chamber.
- (e) The second objective is to complete the VWS's Witness Information Sheet. This is to be done by the legal officer in consultation with the witness.
- (f) The witness will be informed that he or she may be brought to The Hague at the Tribunal's expense in order to give a statement to the legal officer of his or her prospective testimony (step 11, "preliminary interview"). Should the witness express concern about prosecution or arrest, the legal officer may inform the witness about guarantees which may be provided by the Tribunal to prevent detention or prosecution of the witness during travel to The Hague (e.g. safe conducts), as well as Rule 90 protection against self-incrimination when testifying before the Chamber.
5. Should the witness refuse to cooperate in the course of step 4, or refuse to cooperate after having received independent legal advice, the Chamber may decide to subpoena the witness to testify before the Chamber. In such a case there will be no preliminary interview, and the remainder of this procedure shall be modified accordingly.
6. As mentioned at step 4, for each witness, the Chamber is to complete a Witness Information Sheet for the VWS. The Chamber is to specify the date of the preliminary interview and (should the Chamber decide to call the witness) the expected date of testimony. The VWS shall implement standard procedures for bringing witnesses to The Hague.
7. If the Prosecution has conducted interviews with a prospective Chamber witness, the Chamber may order the production of the record of the interviews to the extent that the materials are not covered by Rule 70 of the Tribunal's Rules of Procedure and Evidence.
8. The Chamber is to prepare a list of topics for each witness, with specific questions under each topic, and assemble and organize under the topics the documentary material to be presented to the witness. The parties have no role in these preparations.

9. On the basis of the work described in step 8, the Chamber is to prepare a list of questions for the preliminary interview with the witness. CLSS is to translate these questions into the witness's language in advance of the interview.
10. The witness is to be brought to The Hague by the VWS for the preliminary interview. When contacting the witness, the VWS is to deliver to the prospective witness, on behalf of the Chamber, a letter from the legal officer addressed to the witness to which are attached the questions referred to in step 9 and any exhibits relevant to understanding the questions. The letter will request the witness to bring to The Hague for the preliminary interview any documents (e.g. diary entries, copies of correspondence, official documents) which may be relevant to answering the attached questions. The usual VWS support for testifying witnesses will be provided to the witness during the period of his or her preliminary interview. This includes alerting the legal officer to any issues raised by the witness which may affect the capacity of the witness to participate in the preliminary interview, e.g. health issues, security threats to the witness or to his or her family.
11. The preliminary interview, to be held at a suitably equipped facility at the Tribunal:
 - (a) The preliminary interview is to be conducted by a legal officer of the Chamber in the presence of a Court Officer (who will minute the procedure and provide other support consistent with the Registry's neutral role), a CLSS interpreter, and a CLSS court reporter. No other persons shall be present at the preliminary interview, unless the Chamber has given permission for the prospective witness's lawyer to be present.
 - (b) The preliminary interview is to be audio-recorded (both BCS and English channels).
 - (c) Practical arrangements and other needs of the witness (e.g. protective measures) shall be discussed between the legal officer and the witness in the course of the preliminary interview. (At the appropriate time, the parties will be invited to make submissions on any protective measures proposed by the Chamber for its witnesses.)
 - (d) Should the witness express concerns about self-incrimination during the preliminary interview, the legal officer is to suspend the interview, seek the Chamber's advice, and convey the Chamber's written response to the witness.
 - (e) The questions referred to at step 9 are to be put to the witness by the legal officer through the interpreter, and the translation of the witness's answers is to be recorded by the court reporter.

(f) Documents that the Chamber is considering to use with the witness in the course of his or her testimony may be shown by the legal officer to the witness in the course of the preliminary interview. If any of the documents is an exhibit under seal, the legal officer is to instruct the witness not to disclose its contents.

(g) The legal officer is to compile the witness's translated answers to the questions into a statement, which a CLSS language assistant, in the presence of the legal officer and the Court Officer, will read back to the witness. The legal officer shall incorporate any corrections made by the witness, and the witness and the legal officer shall sign the English version of the statement and initial each of its pages. The witness is to receive a copy of the signed statement.

(h) Standard guidelines for interviewing witnesses and taking statements are to be followed. These are summarized at the end of this procedure.

12. In the case of a witness who is in legal custody and cannot have his or her preliminary interview in The Hague, steps 10 and 11 are to be modified so as to achieve as far as possible the same outcomes. The main modification is likely to be that the Chamber will send a legal officer to conduct the preliminary interview at the place where the witness is being held. An interpreter and an audio-typist, who is to rely on an audio-recording of the interview, are to accompany the legal officer, or hired locally. (See also paragraph 7 of the guidelines at the end of this procedure.)

13. After the conclusion of the preliminary interview, the Chamber may issue the witness with a formal summons (or, if need be, a subpoena) to appear to testify.

14. The witness's statement, and any other material provided by the witness, is to be translated into BCS or English (as required) by CLSS. The Chamber is to provide the parties with the English version of the statement immediately after it is prepared, as a rule no less than seven working days prior to the date on which the testimony of the witness is scheduled (or provisionally scheduled). The VWS is to forward to a BCS-speaking witness a copy of the translation of the witness's statement into BCS. The parties are also to receive this translation.

15. Upon further instructions from the Chamber, the VWS is to bring the witness to The Hague for testimony. Chamber witnesses will not normally be proofed by Chamber staff prior to giving testimony. Chamber staff are not to have any contact with the witness during the course of the witness's testimony. The usual VWS support will be provided to the witness.

16. Testimony of the witness:

- (a) The witness will be asked whether he or she adopts the statement given at the preliminary interview and whether he or she would like to add something to it. The statement is to be entered into evidence pursuant to Rule 89(F).²
- (b) A summary of the statement, prepared by the Chamber, will be read out by the Presiding Judge for the purposes of informing the public about the contents of the statement. The witness will be asked whether the summary is correct.
- (c) The witness will be examined by the judges in relation to the subject-matter of the statement, and in relation to other matters raised by answers elicited by the Chamber. The constraints on questioning a witness which are placed upon the party calling the witness shall not apply to the judges. Exhibits will be presented to the witness and admitted in the usual manner, with an opportunity given to the parties to object.
- (d) The witness will be cross-examined by the parties, first by the Prosecution and then by the Defence. The scope of the parties' cross-examination will be limited to the subject-matter of the witness's statement, his or her answers to the judges' questions, and to questions going to the credibility of the witness.
- (e) The witness will be re-examined by the judges.
- (f) Further cross-examination by the parties will be allowed.

17. The time-limits and notice requirements set or implied by this procedure may be modified by the Chamber in exceptional circumstances.

² The Chamber recalls that, according to its guidance to the parties on the procedure for Rule 89(F) examinations (T. 9606 and following), "evidence concerning significant acts and conduct of the accused, evidence relating to issues critical and pivotal to the Prosecution's case, and evidence concerning persons or events significantly proximate to the accused should be presented orally by the witness in examination-in-chief. ... If his or her evidence meets one of these three criteria, that portion of the evidence must be elicited orally. Other evidence which does not have these characteristics may be admitted in written form by way of the 89(F) procedure." The Chamber adopted this cautious approach both to ensure fair play on the part of the Prosecution and to have the benefit of hearing important evidence directly from the witness. These considerations do not apply in the same way to Chamber witnesses. The Chamber refers to the discretion articulated in the Appeals Chamber's decision of 30 September 2003 (*Prosecutor v. Slobodan Milošević*, Decision on Interlocutory Appeal on the Admissibility of Evidence-in-Chief in the Form of Written Statements), where the Appeals Chamber said (paras 16-19): "Where the witness is present before the Court and orally attests to the accuracy of the statement, the evidence entered into the record cannot be considered to be exclusively written within the meaning of Rule 92 bis. The testimony of the witness constitutes a mixture of oral and written evidence. The appearance of the witness in court to attest to a written statement, is a crucial factor which renders Rule 92 bis inapplicable. ... In effect, the fact that a written statement has been prepared for the purposes of legal proceedings does not by itself suffice to make it admissible only under Rule 92 bis unless the statement is also intended to be in lieu of oral evidence. ... the Appeals Chamber is satisfied that the appearance of the witness in court to orally attest to the accuracy of the tendered statement is an important safeguard in itself because the witness is certifying the accuracy of the statement before the court and is available to answer questions from the bench." For the purpose of Chamber witnesses, this more flexible approach to written statements shall be adopted.

Guidelines for interviewing witnesses and taking statements (step 11):

1. The witness is to be brought to the Tribunal conference facility by a VWS officer, who will accompany the witness during any breaks in the preliminary interview, and who will lead the witness away when the interview is finished.
2. The witness will be informed that the Chamber's legal officer is conducting the interview for the purpose of producing a statement of the witness's expected testimony signed by the witness, and that the signed statement will be given to the Prosecution and to the Defence, and may be entered into evidence in the course of the proceedings.
3. The witness will be informed that he or she may be called to testify before the Tribunal, and, if so, that his or her identity will be made public, unless protective measures are sought and granted, but that in any case the identity of the witness will be disclosed to the Prosecution and the Defence.
4. The legal officer may seek to clarify a question which the witness does not appear to understand, and may ask the witness for more information where the answer is inadequate (e.g. too brief) or unclear.
5. The legal officer may additionally inform the witness about the purpose of the trial and its procedure. This may include the role of the persons present in the courtroom. The legal officer may explain the form in which questions are likely to be asked by the judges and the parties, and the form in which they are expected to be answered.
6. During any breaks in the interview, those participating in the interview are not to discuss any matter that goes to the substance of the interview.
7. In those cases where the preliminary interview is not being conducted at the Tribunal, in conditions of simultaneous interpretation, the legal officer will arrange for the interpreter to translate one sentence at a time. The witness is to be asked to speak only when the interpreter has finished the translation. The interpreter shall be reminded that the interpretation must be verbatim. If the witness asks for clarification, the interpreter is to convey the request to the legal officer. The interpreter is not to provide the clarification himself or herself. An audio-recording is to be made, and an audio-typist employed to produce the English transcript.
8. As to the format of the statement, the paragraphs of the statement are to be numbered, the last page of the statement is to be signed and dated by both the witness and the legal officer. Each page of the statement is to be initialled by the witness and by the legal officer.

The cover page of the statement shall record the date, time, and place of the interview, the persons present, the language spoken by the witness, and any other relevant information. The Court Officer may assist in this process.

9. Any documentary evidence produced by the witness to the legal officer is to be fully described in the body of the statement. Copies of this material, and English translations where needed, shall be provided to the parties together with the signed statement, as mentioned in step 14 of the procedure.