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Milošević dovodi u pitanje stručnost i objektivnost sudskog veštaka

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Substantial parts of the Prosecution's remaining case in chief against Slobodan Milosevic may be presented in the form of written statements, according to a recent ruling of the Tribunal's Appeals Chamber. Depending on how the decision is applied, it may constitute a major change in the way the Tribunal does business, bringing it closer to the continental or civil law system. In the past, the Tribunal's procedure, an amalgam of civil and common law, has leaned more towards common law.

The Appeals Chamber's ruling permits trial chambers to admit a witness's written statement in lieu of oral testimony, as long as the witness is present in court, attests that the statement reflects his or her declaration and what he or she would say if examined, and is available for cross examination and questioning by the judges. The only limitations on this liberal admission of written statements is that the trial chamber must decide whether to apply it on a case by case basis and must determine that such admission is 'in the interests of justice.' While the Appeals Chamber did not make a definitive ruling about what constitutes 'the interests of justice,' it suggested that some relevant factors militating against admission of written statements might include the loss of a court's ability to assess the witness's credibility (including demeanor) during oral examination in chief, and curtailing the public nature of the trial. In the Milosevic case, a case of significant public interest, the latter concern seems paramount.

The Accused himself objected vehemently to the new procedure. Claiming that it amounted to an 'abolition of examination in chief,' he argued that it violated an elemental right for evidence to be presented in public and in the Accused's presence.

Lead Prosecutor Geoffrey Nice admitted his intention to apply to the Court for the evidence of all future witnesses to be submitted in written form. With only 44 trial days left to present the Prosecution case, Mr. Nice maintains he will not be able to present the evidence of all necessary witnesses if he is not allowed to substitute written statements more liberally.

To date, the Trial Chamber has limited written statements to those qualifying under Rule 92bis, generally direct evidence of the crime base from victims or others' involved or background and historical evidence. Even so, the Chamber has required the majority of these so-called 92bis witnesses to appear in court for cross examination by the Accused, particularly if their testimony concerns the acts or conduct of the Accused, involvement of the Yugoslav Army (JNA/VJ) or Serbian police, or touches on a central issue in the case. Milosevic's cross examination of 92bis witnesses has considerably extended the length of the Prosecution's case, while, to the same degree, the Prosecutor's available time for producing evidence has been reduced. Mr. Nice's frustration with this state of affairs has led him to suggest alternative (and more expeditious) ways to get his case before the judges within the time limits the Chamber has set.

Were the Trial Chamber to accede to the Prosecution's request to present the remainder of its case in writing, it would all but eliminate the public nature of the trial. Obviously, the Prosecutor's priority is proving his case. The judges, however, have to consider broader interests, including the Accused's right to a public trial and the public's right to a transparent judicial system.

The Appeals Chamber ruling, however, may be more revolutionary in theory than in application. Milan Milanovic, an official in the Serb Krajina, was the first witness for whom the application was made. A majority of the Trial Chamber (Judge Robinson dissenting) allowed Mr. Milanovic's written statement to be admitted into evidence. At the same time, the Prosecution was required to lead him in testifying orally where his evidence touched on the acts or conduct of the Accused or a central issue in the case. That turned out to be fairly substantial. The new ruling as applied here is not much different from what the Trial Chamber has allowed under Rule 92bis in the past. Nevertheless, it resulted in a lack of clarity in the testimony, since references to the written statement often required a fuller explanation to be fully understood.

As the Court struggles to apply the Appeals Chamber ruling to each of the remaining prosecution witnesses, the degree to which it is a departure from current practice should become more apparent. The Trial Chamber's first application of the ruling encourages one to hope the door marked 'public access' will remain open.
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