

**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-95-5/18-T
Date: 8 January 2014

IN TRIAL CHAMBER III

Before: Judge O-Gon Kwon, Presiding
Judge Howard Morrison
Judge Melville Baird
Judge Flavia Lattanzi, Reserve Judge

Registrar: Mr John Hocking

THE PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**PROSECUTION SUBMISSION ON FORM OF KARADŽIĆ'S
TESTIMONY**

The Office of the Prosecutor:

Mr Alan Tieger
Ms Hildegard Uertz-Retzlaff

The Accused:

Mr Radovan Karadžić

Standby Counsel:

Mr Richard Harvey

**THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA**

Case No. IT-95-5/18-T

THE PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

PROSECUTION SUBMISSION ON FORM OF KARADŽIĆ'S TESTIMONY

I. Introduction

1. It is up to the Trial Chamber to decide whether the Accused should testify in the standard question-and-answer format, or whether he should be permitted to testify by way of a narrative. The Accused's citation to a single United States ("US") case in support of his unilateral assertion that he will testify in narrative form¹ is misplaced. Apart from the fact that US case law is not directly applicable at the ICTY, the case he cites does not support the proposition that a *pro se* accused has a unilateral right to testify in narrative form. In fact, US cases consistently hold that it is within the discretion of the trial judge to determine whether a witness will be permitted to testify by way of a narrative.

2. The Accused's sole rationale for testifying in narrative versus question-and-answer form is time savings. However, it is far from clear that allowing the Accused to provide hours of potentially unstructured and unfocused testimony would be more efficient than having him answer clear and focused questions posed by his legal advisor. In any event, any minimal time saved by allowing the Accused to testify in narrative form would be outweighed by the fact that the standard question-and-answer format would facilitate the ability of the Prosecution to raise objections, assist the Trial Chamber in exercising control over the proceedings, and provide for clearer, more structured and more focused testimony.

¹ *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Defence Submission of Order of Witnesses for February and March 2014, 18 December 2013, ("Submission") para.3 and fn.2.

II. Discussion

3. The Accused's assertion that he "will testify in narrative form"² ignores the fact that such a decision falls within the Trial Chamber's discretion pursuant to Rule 90(F), which states:³

(F) The Trial Chamber shall exercise control over the mode and order of interrogating witnesses and presenting evidence so as to

(i) make the interrogation and presentation effective for the ascertainment of the truth; and

(ii) avoid needless consumption of time.

4. The Accused's reliance on a single US case (*United States v. Ly*) in support of his assertion that he will testify in narrative form⁴ is misconceived for two reasons. First, the Accused has ignored the Rules of this tribunal and instead appears to contend – erroneously – that whatever ability he might have under US law to elect to provide narrative testimony is automatically applicable at the ICTY.

5. Second, contrary to the Accused's suggestion, *Ly* does not support the proposition that a *pro se* defendant has the unilateral right to testify in narrative form. *Ly* stands for the proposition that a *pro se* defendant can only waive his right to testify on his own behalf at trial if he makes that waiver knowingly and intelligently.⁵ In that case, the trial court erred in failing to correct Ly's obvious misunderstanding that he could only testify on his own behalf if he had an attorney present to ask him questions.⁶ Ly thus believed that he had no right to testify as a *pro se* defendant and, therefore, elected not to testify.⁷ Because Ly elected not to testify at all, the question did not arise of what form his direct examination should take. The Court of Appeals stated that "a *pro se* criminal defendant may testify in narrative form", but this was in the context of Ly's mistaken belief that narrative testimony was not possible.⁸ The Court did not reach any conclusion on the form Ly's testimony would take if he did elect to testify.

² Submission, para.3.

³ Rules of Procedure and Evidence, IT/32/Rev.49, 22 May 2013 ("Rules"), Rule 90(F).

⁴ Submission, para.3 and fn.2.

⁵ *United States v. Ly*, 646 F.3d 1307 (11th Cir., 2011) ("Ly").

⁶ *Ly*, 646 F.3d at 1312-1313.

⁷ *Ly*, 646 F.3d at 1312-1313.

⁸ *Ly*, 646 F.3d at 1312-1313.

6. In fact, US courts have consistently held that it is up to the trial judge to decide whether a witness may testify in narrative versus question-and-answer form.⁹ This principle also applies to the testimony of self-represented parties. Thus, it is within the trial judge's discretion to require a self-represented party to provide his or her own testimony in the form of questions and answers, even where there is no attorney available to ask the questions.¹⁰

7. In this case, the Accused would not have to ask and answer his own questions as he is assisted by legal advisors who could pose the questions. Indeed, the Defence has made clear that it initially intended to proceed in this manner and only subsequently decided to propose narrative testimony in an effort to save time.¹¹

8. In this regard, the suggestion by the Defence that narrative testimony could halve the time otherwise estimated for the Accused's examination-in-chief¹² is speculative and unrealistic. Permitting the Accused to testify by way of a largely uncontrolled narrative is virtually certain to fuel the Accused's well-established

⁹ See, e.g., *United States v. Young*, 745 F.2d 733, 761 (2d Cir., 1984) (holding that “[g]enerally speaking, a trial judge has broad discretion in deciding whether or not to allow narrative testimony.” In reaching this conclusion, the Appeals Court relied in part on Federal Rule of Evidence 611(a) which, similar to Rule 90(F), states: “The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to: (1) make those procedures effective for determining the truth; (2) avoid wasting time; and (3) protect witnesses from harassment or undue embarrassment.” (Fed. R. Evid. 611(a)); *People v. Wilson*, 326 N.W.2d 576, 581 (Mich. App., 1982) (in interpreting Michigan Rule of evidence 611(a), which is identical to the Federal Rule and also similar to Rule 90(F) (see Mich. R. Evid. 611(a), quoted in *Wilson* at 580) held that, “[i]t rests within the sound discretion of the trial judge to determine whether a witness will be required to testify by question and answer or will be permitted to testify in narrative form.”); *State v. Clark*, 693 S.W.2d 137 (Mo. App. E. Dist., 1985) (holding that the form of examination, including whether it is in interrogatory or narrative form “is a matter committed to the discretion of the court.”); *State v. Wall*, 452 So.2d 222, 226 (La. App. 1. Cir., 1984) (holding that “[t]he trial court is vested with sound discretion with regard to the control of examination of a witness, ... including the issue of narrative testimony.”); *State v. Rodriguez*, 295 Wis.2d 801, 834 (Wis. App., 2006) (holding that, although questions that call for a narrative are generally improper because they do not alert court and counsel to the subject about which the witness is about to testify, whether to permit a question calling for a narrative response is within the trial court's discretion).

¹⁰ See, e.g., *State v. Joyner*, 69 Wash.App. 356, 363-365 (Wash. App. Div. 1, 1993) (holding that the trial judge's denial of a *pro se* accused's request to testify in narrative form and his requirement that the Accused testify in question-and-answer format (a) did not violate the accused's constitutional right to testify in his own defence; and (b) was not an abuse of the trial judge's discretion); *Piترangelo v. Wilmer Cutler Pickering Hale & Dorr, LLP*, 68 A.3d 697, 717 (D.C., 2013) (holding that *pro se* litigants do not have an automatic right to testify in narrative form and, by requiring Piترangelo to testify in a question-and-answer format, the trial judge acted well within her discretion in determining that orderly procedure required the other party be given an opportunity to object); *Hutter N. Trust v. Door Cy. Chamber of Commerce*, 467 F.2d 1075, 1078 (7th Cir. 1972) (holding that the trial judge's denial of a *pro se* plaintiff's request to testify in narrative form, requiring instead that he ask and answer his own questions, was “well within the proper exercise of the judge's discretion”).

¹¹ *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, T.45188 (16 December 2013).

¹² *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, T.45188 (16 December 2013).

propensities to elicit irrelevant evidence,¹³ mischaracterize the trial record,¹⁴ and otherwise waste courtroom time.¹⁵ In contrast, the standard question-and-answer form

¹³ Examples from the trial record of *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T include: T.28791-28794 and T.28798 (3 September 2012) (the Chamber noting the volume of irrelevant, marginally relevant and unduly repetitive material reflected in the Accused's witness list and providing the Accused an opportunity to revise his witness list in light of these observations); T.30893-30898 (4 December 2012) (the Chamber noting the Accused's failure to address its concerns regarding the volume of irrelevant and marginally relevant material reflected in his witness list and ordering the Accused to further revise his witness list accordingly); T.30240 (14 November 2012) (noting that "a large portion" of a defence witness's statement covered matters "irrelevant to this case"); T.30517-T.30520 (28 November 2012) (oral decision excluding the evidence of one defence witness entirely and another in part due to its irrelevance); T.30687-30688 (30 November 2012) (oral decision partially excluding the evidence of a defence witness due to its irrelevance); T.30899 (4 December 2012) (oral decision partially excluding the evidence of a defence witness due to its irrelevance); T.31558-31559 (17 December 2012) (oral decision partially excluding the evidence of a defence witness due to its irrelevance); T.32652-32653 (24 January 2013) oral decision partially excluding the evidence of a defence witness due to its irrelevance); T.33304-33305 (6 February 2013) (oral decision partially excluding the evidence of a defence witness due to its limited relevance and very low probative value); T.33543-33544 (13 February 2013) (oral decision partially excluding the evidence of a defence expert witness due to its irrelevance); T.34230-34231 (26 February 2013) (oral decision partially excluding the evidence of a defence witness due to its irrelevance); T.35121 (11 March 2013) (oral decision partially excluding the evidence of a defence witness due to its irrelevance); T.42628-42629 (30 October 2013) (oral decision partially excluding the evidence of a defence witness due to its irrelevance); T.34183 (21 February 2013) (oral decision excluding a video tendered by the Accused due to its irrelevance); T.36775 (8 April 2013) (oral decision excluding proposed associated exhibits of a defence witness due in part to their irrelevance).

¹⁴ Examples from the trial record of *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T include: T.2729-2730 (26 May 2010) (the Accused misrepresenting the witness's evidence on a document shown to him); T.17593 (22 August 2011) (the Accused mischaracterizing the witness's evidence); T.24012-24013 (1 February 2012) the Accused misrepresenting the record by claiming that a particular witness who had survived a mass execution had survived the breakthrough); T.40991 (8 July 2013) (the Accused asking a misleading question which suggested that Manjača camp was in operation for the entire duration of the war); T.41770 (23 July 2013) (the Accused misrepresenting the record by stating that there were no executions before July 14 1995); T.43721 (18 November 2013) (the Accused mischaracterizing in his re-direct examination what had been put to the witness in cross-examination); T.43723 (18 November 2013) (the Accused mischaracterizing in his re-direct examination what had been put to the witness in cross-examination); T.45283-45284 (17 December 2013) (the Accused mischaracterizing in his re-direct examination what had been put to the witness in cross-examination); T.45298 (17 December 2013) (the Accused mischaracterizing in his re-direct examination what had been put to the witness in cross-examination).

¹⁵ Examples from the trial record of *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T include: T.2570 (20 May 2010) (the Chamber noting that the Accused was wasting time reading out large portions of a document on which the witness could not comment); T.3534 (9 June 2010) (the Chamber noting that the Accused had wasted his time during the first few days of Mr Donia's cross-examination by focusing on marginal issues, asking open-ended questions and making comments); T.6197 (6 September 2010) (the Chamber noting the Accused was wasting his time with questions regarding the identity of persons whom certain streets were named after); T.8733 (1 November 2010) (the Chamber noting the Accused was wasting his time putting documents to a witness who did not know anything about them); T.8974 (4 November 2010) (the Chamber noting the Accused was wasting time asking questions that required expertise that the witness had already made clear he did not possess); T.9160-9161 (5 November 2010) (the Chamber noting the Accused's persistent practice of wasting time in his cross-examinations); T.9221 (29 November 2011) (the Chamber noting the Accused was wasting time by persisting with questions on a topic after the witness made clear he could not comment on it); T.17021 (20 July 2011) (the Chamber noting the Accused was wasting time asking an expert witness questions falling outside the scope of his expertise); T.19701 (30 September 2011) (the Chamber noting the Accused was wasting time by persisting with questions on a topic after the witness made clear he could not comment on it); T.12610 (1 March 2011) (the Chamber noting that the Accused was wasting time trading insults with the witness); T.32402 (22 January 2013) the Chamber agreeing that the Accused was wasting time asking his witness questions on military matters about which the witness

of testimony is not only inherently clearer and more structured, it also signals in advance each anticipated area of testimony. As such, question-and-answer testimony will create a clearer and more comprehensible record of the Accused's testimony, and facilitate the ability of the Prosecution and the Chamber to intervene to ensure the Accused's testimony remains focused on relevant issues and to correct any mischaracterizations of the trial record. This will in turn further both prongs of Rule 90(F), i.e., making the presentation of evidence effective for the ascertainment of the truth and avoiding needless consumption of time.

III. Conclusion

9. For reasons set out above, the Chamber should not permit the Accused to testify in narrative form.

Word Count: 2382



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had already stated he had no knowledge); T.34191 (21 February 2013) (the Chamber noting that the Accused was wasting time showing the witness an irrelevant video); T.38950 (29 May 2013) the Chamber noting that the Accused was wasting time on matters falling outside the scope of his witness's expertise).