



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 No. IT-95-5/18-AR73.10

Date: 29 January 2013

Original: English

IN THE APPEALS CHAMBER

Before:

**Judge Theodor Meron, Presiding
Judge Patrick Robinson
Judge Liu Daqun
Judge Khalida Rachid Khan
Judge Bakhtiyar Tuzmukhamedov**

Registrar:

Mr. John Hocking

Decision of:

29 January 2013

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON APPEAL FROM DECISION ON DURATION OF
DEFENCE CASE**

The Office of the Prosecutor:

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused:

Mr. Radovan Karadžić

Standby Counsel:

Mr. Richard Harvey

1. The Appeals 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 (“Appeals Chamber” and “Tribunal”, respectively) is seised of the “Appeal from Decision on Duration of Defence Case” filed by Radovan Karadžić (“Karadžić”) on 12 October 2012 (“Appeal”). The Office of the Prosecutor (“Prosecution”) filed a response on 22 October 2012.¹ Karadžić filed a reply on 25 October 2012.² On 29 October 2012, the Prosecution submitted both a request to file a sur-reply³ and the proposed sur-reply.⁴

I. BACKGROUND

2. Karadžić’s trial commenced on 26 October 2009.⁵ Trial Chamber III of the Tribunal (“Trial Chamber”) granted the Prosecution 300 hours for its case,⁶ of which 299 hours and 27 minutes were ultimately used.⁷ Before and during the Prosecution’s case, the Trial Chamber took judicial notice of more than 2,300 adjudicated facts (“Adjudicated Facts”) out of more than 3,000 adjudicated facts put forward by the Prosecution.⁸

3. On 14 June 2010, the Trial Chamber denied two motions filed by Karadžić requesting reconsideration of certain aspects of the Judicial Notice Decisions.⁹ On 4 May 2012, the Trial Chamber granted in part three motions filed by Karadžić requesting reconsideration of certain aspects of the Judicial Notice Decisions, and withdrew judicial notice of seventeen Adjudicated Facts.¹⁰

¹ Prosecution Response to Appeal from Decision on Duration of Defence Case, 22 October 2012 (public with confidential Appendix A) (“Response”).

² Reply Brief: Appeal from Decision on Duration of Defence Case, 25 October 2012 (“Reply”).

³ Prosecution Request for Sur-Reply and Proposed Sur-Reply in Appeal from Decision on Duration of Defence Case, 29 October 2012 (“Sur-Reply”), para. 1 (“Request to File a Sur-Reply”).

⁴ Sur-Reply, paras 2-5.

⁵ T. 26 October 2009 p. 502. *See also Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Scheduling Order for the Commencement of Trial, 14 October 2009, p. 3.

⁶ T. 6 October 2009 p. 467.

⁷ *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Time Allocated to the Accused for the Presentation of his Case, 19 September 2012 (“Impugned Decision”), para. 7.

⁸ *See Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Decision on First Prosecution Motion for Judicial Notice of Adjudicated Facts, 5 June 2009 (“First Judicial Notice Decision”), para. 39; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Decision on Third Prosecution Motion for Judicial Notice of Adjudicated Facts, 9 July 2009 (“Third Judicial Notice Decision”), para. 63; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Decision on Second Prosecution Motion for Judicial Notice of Adjudicated Facts, 9 October 2009, para. 54; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Fourth Prosecution Motion for Judicial Notice of Adjudicated Facts, 14 June 2010, para. 98; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Fifth Prosecution Motion for Judicial Notice of Adjudicated Facts, 14 June 2010, para. 56 (collectively, “Judicial Notice Decisions”).

⁹ *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Accused’s Motions for Reconsideration of Decisions on Judicial Notice of Adjudicated Facts, 14 June 2010 (“First Reconsideration Decision”), para. 24.

¹⁰ *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Three Accused’s Motions for Reconsideration of Decisions on Judicial Notice of Adjudicated Facts, 4 May 2012 (“Second Reconsideration Decision”), para. 18.

4. On 27 August 2012, Karadžić filed a submission pursuant to Rule 65*ter* of the Rules of Procedure and Evidence of the Tribunal (“Rules”), which included a list of witnesses and exhibits that he planned to introduce during his defence case.¹¹ In the First Submission, Karadžić requested, *inter alia*, 600 hours for the presentation of his defence, based on an estimate of 300 hours to present his case and 300 hours to rebut the Adjudicated Facts.¹²

5. On 3 September 2012, the Trial Chamber held a status conference to review the progress in preparing Karadžić’s defence case (“Status Conference”).¹³ At the Status Conference, the Trial Chamber observed that Karadžić’s First Submission proposed evidence irrelevant to Karadžić’s case, and further included “a lot of unnecessary repetition” of evidence and witness testimony.¹⁴ In response to a request by the Trial Chamber,¹⁵ Karadžić filed a revised submission pursuant to Rule 65*ter* of the Rules on 11 September 2012, in which he removed ten witnesses from his proposed list of witnesses, and added fourteen new prospective witnesses.¹⁶

6. On 19 September 2012, the Trial Chamber issued the Impugned Decision, which allocated Karadžić 300 hours for his defence case.¹⁷ On 5 October 2012, the Trial Chamber granted Karadžić’s application for certification to appeal the Impugned Decision.¹⁸

II. STANDARD OF REVIEW

7. Trial chambers exercise their discretion in relation to trial management decisions, to which the Appeals Chamber accords deference.¹⁹ The Appeals Chamber will only overturn a trial chamber’s discretionary decision where it is found to be: (i) based on an incorrect interpretation of governing law; (ii) based on a patently incorrect conclusion of fact; or (iii) so unfair or unreasonable as to constitute an abuse of the trial chamber’s discretion.²⁰ The Appeals Chamber

¹¹ *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Defence Submission Pursuant to Rule 65 *ter* and Related Motions, 27 August 2012 (public with confidential annexes) (“First Submission”), paras 1-2, 5, 7. *See also* First Submission, Annexes A, B (confidential).

¹² First Submission, para. 3.

¹³ *See* T. 3 September 2012 p. 28777.

¹⁴ T. 3 September 2012 p. 28793. *See also* T. 3 September 2012 pp. 28791-28792.

¹⁵ T. 3 September 2012 p. 28798.

¹⁶ *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Defence Supplemental Submission Pursuant to Rule 65 *ter*, 11 September 2012 (public with confidential annexes) (“Revised Submission”), para. 3; Appeal, para. 5 n. 4. *See also* Revised Submission, Annex C (confidential).

¹⁷ Impugned Decision, para. 14.

¹⁸ *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Application for Certification to Appeal Decision on Time for Defence Case, 5 October 2012, p. 3.

¹⁹ *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR73.7, Decision on Defendants['] Appeal Against “*Décision portant attribution du temps à la défense pour la présentation des moyens à décharge*”, 1 July 2008 (“Prlić *et al.* Decision”), para. 15.

²⁰ Prlić *et al.* Decision, para. 15; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-AR73.5, Decision on Radovan Karadžić’s Appeal of the Decision on Commencement of Trial, 13 October 2009, para. 6.

will also consider whether the trial chamber has given weight to extraneous or irrelevant considerations or has failed to give weight or sufficient weight to relevant considerations.²¹

III. APPLICABLE LAW

8. Article 20(1) of the Statute of the Tribunal (“Statute”) states in relevant part that trial chambers “shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the [Rules], with full respect for the rights of the accused”. Article 21 of the Statute sets forth the general fair trial rights of a person tried by the Tribunal, including, *inter alia*, the right to adequate time and facilities for the preparation of his defence,²² the right to be tried without undue delay,²³ and the right to examine witnesses under the same conditions as those granted to the Prosecution.²⁴

9. Pursuant to Rule 73ter(E) of the Rules, the trial chamber shall, after considering defence submissions, “determine the time available to the defence for presenting evidence.” In making this determination, the trial chamber has a responsibility to ensure “that the trial is completed within a reasonable time”.²⁵ The Appeals Chamber has held that “the time granted to an accused under Rule 73ter of the Rules must be reasonably proportional to the time allocated to the Prosecution, and objectively adequate to permit the Accused to set forth his case in a manner consistent with his rights under Article 21 of the Statute.”²⁶

10. In allocating time for the duration of parties’ cases at trial, a trial chamber must justify its decision, but it need not “specifically itemise and justify” all of the reasons for its decision.²⁷

IV. DISCUSSION

A. Submissions

11. Karadžić requests that the Appeals Chamber reverse the Impugned Decision and direct the Trial Chamber to recalculate the amount of time allocated for his defence.²⁸ He submits that the 300 hours granted for the presentation of his case is insufficient to allow him “to make a full and

²¹ *Prlić et al.* Decision, para. 15.

²² Statute, Article 21(4)(b).

²³ Statute, Article 21(4)(c).

²⁴ Statute, Article 21(4)(e).

²⁵ *Prlić et al.* Decision, para. 16.

²⁶ *Prlić et al.* Decision, para. 16. See also *Prosecutor v. Naser Orić*, Case No. IT-03-68-AR73.2, Interlocutory Decision on Length of Defence Case, 20 July 2005 (“*Orić* Decision”), paras 7-8.

²⁷ Cf. *Prlić et al.* Decision, para. 48 (internal quotation omitted).

²⁸ Appeal, para. 46.

fair defence to the case against him.”²⁹ Karadžić contends, *inter alia*, that, having taken judicial notice of a large number of Adjudicated Facts, and imposed time constraints which prevented him from fully cross-examining relevant Prosecution witnesses,³⁰ the Trial Chamber erred by not providing him adequate time to refute these facts during the defence phase of his case.³¹ He submits that this error is demonstrated by the Trial Chamber’s failure to provide a specific explanation of how much time it allocated specifically for the rebuttal of the Adjudicated Facts.³² Karadžić further submits that the Trial Chamber misunderstood the nature and scope of the Adjudicated Facts³³ and thus underestimated the courtroom time needed to rebut them.³⁴ He also asserts that the Judicial Notice Decisions suggested that he would be granted extra time specifically for this rebuttal.³⁵

12. Karadžić submits that the Trial Chamber committed a number of additional errors in the Impugned Decision. Specifically, Karadžić emphasises the need for more than “a single witness” to support each aspect of his case, and contends that the Trial Chamber erred by failing to take into account that repetition of testimony and evidence is necessary to corroborate his arguments.³⁶ Karadžić also asserts that the Trial Chamber applied a “double standard” against him, by permitting the Prosecution to present a broad case against him, and then limiting the time for Karadžić’s case on the ground that evidence he proposed adducing was too broad to be relevant.³⁷ He further asserts that the Trial Chamber erred by failing to consider that his “defence requires a frontal attack on the [P]rosecution’s case”, rather than a strategy of “poking specifically targeted holes in the [P]rosecution’s case”.³⁸ He contends that this strategy requires a large number of courtroom hours and that, based on this strategy, evidence that the Trial Chamber considered irrelevant was, in fact, germane to his case.³⁹ Karadžić also maintains that the Trial Chamber took into account irrelevant information when it noted that cross-examination of Prosecution witnesses took two and a half times as long as direct examination.⁴⁰ He submits that the Prosecution’s extensive introduction of written witness testimony pursuant to Rule 92*ter* of the Rules renders such a comparison with Karadžić’s oral cross-examination time “fallacious”.⁴¹

²⁹ Appeal, para. 46.

³⁰ Reply, paras 10, 21. Karadžić also contends that the Prosecution does not face the same time constraints in the context of his case (*see* Reply, para. 11).

³¹ Appeal, paras 12, 19-35; Reply, para. 22.

³² Reply, para. 4.

³³ Appeal, para. 29; Reply, para. 5. *See also* Appeal, paras 30-33.

³⁴ *See* Appeal, paras 22, 25-28, 34-35.

³⁵ Appeal, para. 22.

³⁶ Appeal, para. 40. *See also* Appeal, para. 41; Reply, para. 17.

³⁷ Reply, para. 21. *See also* Appeal, paras 32-33; Reply, paras 12, 18-20.

³⁸ Appeal, para. 44. *See also* Appeal, paras 42-43, 45.

³⁹ *See* Reply, paras 12, 18-21.

⁴⁰ Appeal, para. 36, *citing* Impugned Decision, para. 9. *See also* Appeal, paras 37-39; Reply, paras 14-16.

⁴¹ Appeal, para. 36. *See also* Appeal, paras 37-39; Reply, paras 14-16.

13. The Prosecution responds that the Trial Chamber properly considered the nature and scope of the Adjudicated Facts in the Impugned Decision⁴² and notes that the Trial Chamber expressly considered the large number of Adjudicated Facts in allocating time for Karadžić's defence.⁴³ The Prosecution rejects Karadžić's assertion that he needs extensive time to rebut each of the Adjudicated Facts, contending, *inter alia*, that the Adjudicated Facts substantially overlap with other evidence presented during the Prosecution's case, and that Karadžić has had time during cross-examination to challenge many of these facts.⁴⁴

14. The Prosecution also rejects Karadžić's remaining challenges to the Impugned Decision as unfounded. The Prosecution maintains that the Trial Chamber determined that Karadžić's proposed First Submission included large amounts of irrelevant material,⁴⁵ and submits that the Trial Chamber did not exclude Karadžić from presenting repetitive evidence on relevant matters.⁴⁶ The Prosecution asserts that, in any event, the Trial Chamber was entitled to consider and limit the repetition of witness testimony, including of relevant witnesses.⁴⁷ The Prosecution also contends that the absence of express reference to the nature of Karadžić's defence in the Impugned Decision does not imply that the Trial Chamber failed to consider this issue, and it further submits that Karadžić's conduct at trial belies his assertion that he intends to challenge every aspect of the Prosecution's case.⁴⁸ Finally, the Prosecution maintains that the Trial Chamber did not err in its consideration of the time Karadžić spent cross-examining Prosecution witnesses, observing that Karadžić used substantial amounts of his cross-examination time to elicit positive evidence for his defence, pursuant to Rule 90(H) of the Rules.⁴⁹

B. Analysis

15. As an initial matter, the Appeals Chamber notes that the Prosecution filed its Request to File a Sur-Reply⁵⁰ together with the proposed Sur-Reply.⁵¹ The Appeals Chamber observes that neither the Rules nor the Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings Before the International Tribunal⁵² provide that a party may file a sur-reply. However, leave to file a sur-reply may be granted "where the reply raises a new issue to which the respondent

⁴² Response, para. 3. *See also* Response, paras 4-22.

⁴³ Response, para. 4.

⁴⁴ Response, paras 3, 7, 9-12.

⁴⁵ Response, para. 25.

⁴⁶ Response, para. 26.

⁴⁷ Response, para. 27.

⁴⁸ Response, paras 28-31.

⁴⁹ Response, para. 24.

⁵⁰ Sur-Reply, para. 1.

⁵¹ Sur-Reply, paras 2-5.

⁵² IT/155 Rev. 4, 4 April 2012, para. 11.

has not already had the opportunity to respond”.⁵³ The Prosecution seeks leave to file the Sur-Reply on the basis that the Reply raises a new contention: that time constraints imposed by the Trial Chamber were responsible for Karadžić’s failure to challenge certain testimony by Prosecution witnesses related to the Adjudicated Facts, and that the Prosecution was not subject to such limitations in the defence case.⁵⁴ The Appeals Chamber observes that the Reply indeed raises new issues.⁵⁵ In these circumstances, the Appeals Chamber will consider the Sur-Reply, and its contentions that: (i) the Trial Chamber only limited Karadžić’s cross-examination of Prosecution witnesses where his questioning focused on marginal issues and irrelevant matters; and (ii) the Trial Chamber stated that it would apply the same time limits to the Prosecution should its cross-examination be similarly unfocused.⁵⁶

16. Turning to the parties’ central contentions, the Appeals Chamber, Judge Robinson dissenting, is satisfied that Karadžić has not demonstrated that 300 courtroom hours is an objectively inadequate amount of time for his defence. The Appeals Chamber recalls that, while the Trial Chamber was required to allocate sufficient time for Karadžić to present his defence,⁵⁷ it also has an obligation to ensure that proceedings do not suffer undue delays.⁵⁸ The Appeals Chamber further recalls that the allocation of time for the presentation of the defence case is based on a contextual analysis of the specific factors relevant to the case.⁵⁹ Considering that the Prosecution bears the burden of proof,⁶⁰ an allocation of time reasonably proportional to that granted to the Prosecution will often result in less time being granted to the defence for the presentation of its case.⁶¹ The Appeals Chamber recalls that Karadžić and the Prosecution were each granted 300 hours to present their cases,⁶² and further recalls that Karadžić has already used more than twice as much time as the Prosecution during the presentation of the Prosecution case.⁶³ In these

⁵³ *Prosecutor v. Ljube Bošković and Johan Tarčulovski*, Case No. IT-04-82-A, Decision on Johan Tarčulovski’s Motion for Leave to Present Appellate Arguments in Order Different from that Presented in Notice of Appeal, to Amend the Notice of Appeal, and to File Sur-Reply, and on Prosecution Motion to Strike, 26 March 2009, para. 15 (internal quotation omitted).

⁵⁴ Sur-Reply, paras 1-3.

⁵⁵ See Reply, paras 10-11, 21.

⁵⁶ See Sur-Reply, paras 2-5.

⁵⁷ *Orić* Decision, para. 8.

⁵⁸ *Prlić et al.* Decision, para. 16.

⁵⁹ *Prlić et al.* Decision, para. 35.

⁶⁰ See Statute, Article 21(3); *Prosecutor v. Ante Gotovina and Mladen Markač*, Case No. IT-06-90-A, Judgement, 16 November 2012, para. 63.

⁶¹ See, e.g., *Prosecutor v. Momčilo Perišić*, Case No. IT-04-81-T, Judgement, 6 September 2011 (public with confidential Annex C), Annex A, paras 18 (allocation of 335 hours for the Prosecution’s case), 23 (allocation of 180 hours for the defence case); *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-T, Judgement, 3 March 2000 (originally filed in French; the English translation was filed on 20 April 2000), para. 53 (allocation of 75 trial days for the Prosecution’s case and 60 trial days for the defence case).

⁶² See T. 6 October 2009 p. 467 (granting 300 hours for the Prosecution’s case); Impugned Decision, para. 14 (granting Karadžić 300 hours for his defence case).

⁶³ Impugned Decision, para. 9. While Karadžić contests the relevance of this comparison, (see Appeal, paras 36-39; Reply, paras 14-16) he does not challenge the accuracy of the Trial Chamber’s calculation that his cross-examinations

circumstances, the Appeals Chamber, Judge Robinson dissenting, is not persuaded that Karadžić has demonstrated any objective unfairness in the Impugned Decision.

17. The Appeals Chamber, Judge Robinson dissenting, considers that Karadžić is also unconvincing in contending that the Impugned Decision was flawed in its assessment of: the Adjudicated Facts;⁶⁴ repetitive evidence;⁶⁵ the scope of the Prosecution's case;⁶⁶ the nature of the defence case;⁶⁷ or the examination of witnesses.⁶⁸

18. The Appeals Chamber first turns to Karadžić's contentions regarding the Adjudicated Facts. Contrary to Karadžić's suggestion, the Judicial Notice Decisions did not suggest that he would be allocated additional time to rebut the Adjudicated Facts.⁶⁹ In addition, the Appeals Chamber, Judge Robinson dissenting, considers Karadžić is unconvincing in asserting that the Impugned Decision did not sufficiently assess the time he would need to rebut the Adjudicated Facts.⁷⁰ The Appeals Chamber notes that the Trial Chamber explicitly considered the "high number of adjudicated facts"⁷¹ as one element underlying its decision granting Karadžić the same courtroom time as the Prosecution. The Trial Chamber also explicitly assessed the potential impact of the Adjudicated Facts on Karadžić's case, concluding that not every Adjudicated Fact would need to be rebutted during Karadžić's defence, as Karadžić had an opportunity to cross-examine and elicit relevant evidence from Prosecution witnesses during the presentation of the Prosecution case.⁷² While this analysis did not specify the amount of time being granted to rebut the Adjudicated Facts, the Appeals Chamber recalls that a trial chamber is "not obligated to justify its decision [on the allocation of time] with reference to each piece of evidence proposed".⁷³ Accordingly, the Appeals Chamber, Judge Robinson dissenting, is not satisfied that Karadžić has demonstrated that the Impugned Decision's analysis of the Adjudicated Facts was deficient.

19. The Appeals Chamber notes that Karadžić challenges the Impugned Decision by discussing the Trial Chamber's analyses of certain Adjudicated Facts which he contends are demonstrative of the Trial Chamber's general failure to consider the full import of the Adjudicated Facts.⁷⁴ However, the Appeals Chamber observes that the Trial Chamber was intimately aware of the scope of the

of Prosecution witnesses took two and a half times as long as the Prosecution's direct examinations (*see generally* Appeal; Reply).

⁶⁴ Appeal, paras 19-35.

⁶⁵ Appeal, paras 40-41.

⁶⁶ Reply, para. 21.

⁶⁷ Appeal, paras 42-45.

⁶⁸ Appeal, paras 36-39.

⁶⁹ *See* First Judicial Notice Decision, para. 36; Third Judicial Notice Decision, para. 61.

⁷⁰ *See* Reply, para. 4.

⁷¹ Impugned Decision, para. 10.

⁷² Impugned Decision, para. 10.

⁷³ *Prlić et al.* Decision, para. 69.

Adjudicated Facts, as demonstrated by its multiple detailed decisions considering adjudicated facts proposed by the Prosecution.⁷⁵ In addition, the Appeals Chamber notes that the Impugned Decision explicitly considered that Karadžić had the opportunity to cross-examine Prosecution witnesses on many of the topics covered by the Adjudicated Facts, further demonstrating the Trial Chamber's familiarity with this evidence.⁷⁶ In these circumstances, recalling that trial chambers enjoy broad discretion in evaluating evidence,⁷⁷ the Appeals Chamber, Judge Robinson dissenting, finds that Karadžić has not demonstrated that the Trial Chamber erred in its assessment of the import or scope of the Adjudicated Facts in its consideration of the time allocated for the defence case.

20. The Appeals Chamber is satisfied that the Trial Chamber acted within the scope of its discretion in finding that Karadžić's First and Revised Submissions proposed adducing irrelevant and unnecessarily repetitive evidence.⁷⁸ Contrary to Karadžić's assertion, the Trial Chamber did not indicate that he would need only "a single witness" to support each aspect of his defence.⁷⁹ Instead, the Trial Chamber observed more generally that Karadžić proposed introducing large amounts of "irrelevant" evidence and other evidence that was "of some relevance" but was still "far too repetitive."⁸⁰ The Trial Chamber articulated this view at both the Status Conference and in the Impugned Decision.⁸¹ The Appeals Chamber is similarly unconvinced by Karadžić's contention that the Trial Chamber's decision to limit the length of his defence, on the basis that evidence he proposed to adduce was irrelevant, demonstrated a "double standard" applied to his detriment, given the large scope of the Prosecution's case.⁸² The Appeals Chamber recalls that the Trial Chamber granted Karadžić the same courtroom time as it granted the Prosecution,⁸³ and further notes the discretion accorded to the Trial Chamber to "assess the relevance of proposed testimony prior to its presentation".⁸⁴ In these circumstances, the Appeals Chamber considers that Karadžić has not demonstrated any erroneous "double standard" by the Trial Chamber.⁸⁵

21. The Appeals Chamber notes that the Impugned Decision does not explicitly address Karadžić's contention that his particular defence strategy involves disputing "everything except the

⁷⁴ Appeal, paras 29-31, 33.

⁷⁵ These decisions totalled nearly 150 pages. See Judicial Notice Decisions; First Reconsideration Decision; Second Reconsideration Decision.

⁷⁶ Impugned Decision, para. 10.

⁷⁷ See *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-A, Judgement, 24 March 2000, para. 63 ("Trial [c]hambers are best placed to hear, assess and weigh the evidence [...] presented at trial.").

⁷⁸ Impugned Decision, para. 11.

⁷⁹ Appeal, para. 40. See also Appeal, para. 41.

⁸⁰ T. 3 September 2012 p. 28793. See also Impugned Decision, para. 11.

⁸¹ T. 3 September 2012 pp. 28791-28793; Impugned Decision, para. 11.

⁸² Reply, para. 21. See also Appeal, paras 32-33; Reply, paras 11-12, 18-20.

⁸³ See *supra*, n. 62.

⁸⁴ *Prlić et al.* Decision, para. 25.

⁸⁵ Reply, para. 21.

weather”,⁸⁶ and thus requires extensive courtroom time.⁸⁷ However the Appeals Chamber is not satisfied that this omission constituted an error on the part of the Trial Chamber. The Appeals Chamber recalls that a Trial Chamber’s decision not to explicitly refer to a specific fact or contention does not necessarily demonstrate a failure to consider that issue.⁸⁸ In addition, the Appeals Chamber notes that the Trial Chamber considered, *inter alia*, the duration and extent of Karadžić’s cross-examination of Prosecution witnesses,⁸⁹ a consideration that suggests the Trial Chamber took into account Karadžić’s defence strategy when determining the amount of time allocated for the presentation of the defence case. In these circumstances, the Appeals Chamber, Judge Robinson dissenting, is not satisfied that Karadžić has demonstrated any error on the part of the Trial Chamber.

22. The Appeals Chamber, Judge Robinson dissenting, finds no error in the Trial Chamber’s analysis of the parties’ direct and cross-examination of Prosecution witnesses. Karadžić contends that the Prosecution’s use of written testimony meant that the comparatively short duration of direct examination “bore absolutely no relation” to the breadth of testimony, or, accordingly, to the time he needed to cross-examine Prosecution witnesses.⁹⁰ He also submits that the limitations imposed by the Trial Chamber on the length of his cross-examinations further undermine the relevance of this consideration.⁹¹ However, the Appeals Chamber notes that the Trial Chamber did not merely compare the duration of direct and cross-examination during the Prosecution case, but also considered the nature and substance of Karadžić’s cross-examination,⁹² specifically observing that Karadžić elicited evidence relevant to his defence pursuant to Rule 90(H) of the Rules. The Appeals Chamber considers, Judge Robinson dissenting, that it is within a trial chamber’s discretion to determine that, in certain circumstances, the elicitation of such evidence is relevant to the time allocated to the defence for the presentation of its case. Recalling that a trial chamber’s decision on the allocation of time for the defence case is “the result of a highly contextual analysis”,⁹³ the deference accorded to such decisions,⁹⁴ and the trial chamber’s obligation to ensure that trials do not suffer undue delays,⁹⁵ the Appeals Chamber, Judge Robinson dissenting, finds that the Trial Chamber did not err, in the circumstances of this case, by considering the duration and content of Karadžić’s cross-examination in allocating 300 hours for his defence.

⁸⁶ Appeal, para. 42 (internal quotation omitted).

⁸⁷ See Appeal, paras 44-45.

⁸⁸ See *Prlić et al.* Decision, para. 48.

⁸⁹ Impugned Decision, paras 9-10.

⁹⁰ Appeal, para. 37. See also Appeal, paras 36, 38-39.

⁹¹ See Reply, para. 10.

⁹² Impugned Decision, paras 9-10.

⁹³ *Prlić et al.* Decision, para. 35.

⁹⁴ *Prlić et al.* Decision, para. 15.

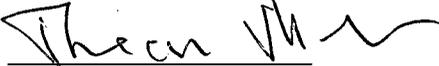
⁹⁵ *Prlić et al.* Decision, para. 16.

V. DISPOSITION

23. For the foregoing reasons, the Appeals Chamber **GRANTS** the Prosecution's Request to File a Sur-Reply, and **DENIES**, Judge Robinson dissenting, the Appeal.

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

Done this 29th day of January 2013
At The Hague,
The Netherlands.



Judge Theodor Meron
Presiding

The dissenting opinion of Judge Robinson is appended hereto.

[Seal of the Tribunal]

VI. DISSENTING OPINION OF JUDGE PATRICK ROBINSON

1. I respectfully disagree with the Majority's findings in its decision to deny Karadžić's appeal against the Trial Chamber's decision to allocate 300 hours of courtroom time to Karadžić for the presentation of his defence.¹

2. It may be that the difficulty I have with this decision relates not so much to the Impugned Decision as to the Appeals Chamber's holding cited in paragraph 9 of the Majority's decision. But in the result, as will be seen, I also have problems with the Impugned Decision. Paragraph 9 refers to the holding of the Appeals Chamber that "the time granted to an accused under Rule 73ter of the Rules must be reasonably proportional to the time allocated to the Prosecution, and objectively adequate to permit the Accused to set forth his case in a manner consistent with his rights under Article 21 of the Statute" ("the *Prlić* holding"). One can have no difficulty with the second limb of that holding since it is wholly consistent with, if not required by, Article 21(4)(e) of the Statute which gives the accused the right "to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him". This provision, which is also to be found in Article 14(3)(e) of the International Covenant on Civil and Political Rights, reflects a rule of customary international law, and is therefore in any event binding on the Tribunal. However, the first limb of the *Prlić* holding is problematic.

3. The time allocated to the Prosecution is an incorrect and, in any event, unreliable yardstick for determining the time to be allocated to the Defence. The Prosecution and the Defence have different roles in the trial; and the time allocated to the Prosecution should not be used as a substantive basis for determining the time allocated to the Defence. While the Prosecution has the burden of proving its case beyond a reasonable doubt, it is settled that the accused, under customary international law, must be afforded the facilities and time necessary to prepare and set forth his case in defence.² Moreover, in the peculiar system of the Tribunal there is another factor that operates to render the time allocated to the Prosecution an unreliable yardstick: it is that under Rules 92bis and 92ter of the Rules direct evidence is abbreviated by reason of the various procedures that substitute written evidence for oral evidence. The only criterion that should be applicable for determining the time allocated to the Defence is the one set forth in the second limb of the *Prlić* holding, although it may be that in determining the adequacy of the time to be given to the Defence one factor of which account may be taken is the scope of the Prosecution's case and the time used in presenting that case. But that time should not be elevated to the level of a factor determinative of the time to be

¹ Decision, para. 23.

allocated to the Defence. I note that the first limb of the *Prlić* holding uses the cautious concept of reasonable proportionality between the time granted to an accused and the time allocated to the Prosecution. However, that phrase in no way mitigates the unacceptability of the first limb of the *Prlić* holding since what is objectionable is the use of the time allocated to the Prosecution as a determinative factor in the allocation of time to the Defence. One result of that approach is that it almost instinctively invites recourse to the use of parity in time between the Prosecution and the Defence, if only as a first stage, in determining the time to be allocated to the Defence, when the critical issue is the requirement under customary international law and the Statute for the Defence to be afforded the facilities and time it needs to respond to the Prosecution's case; that requirement may result in the Defence being given the same time as the Prosecution or a longer time than the Prosecution or even a shorter time. The first limb of the *Prlić* holding introduces a level of artificiality that masks what ought to be a trial chamber's essential aim, namely, to ensure that the Defence is given sufficient time and facilities to present its case.

4. I note that the *Prlić* holding is itself derived from previous decisions of the Appeals Chamber in *Tadić* and *Orić*, which point to the principle of equality of arms as ensuring that neither party is put at a disadvantage when presenting its case, "certainly in terms of procedural equity".³ But nothing in that principle calls for either parity in the time allocated to the Prosecution and the Defence or the use of the time given to the Prosecution as the yardstick for determining the time to be given to the Defence. For the principle, properly understood, means that in substance the Defence must be given sufficient time and facilities to present its case. To determine the substantive needs of the Defence in terms of time one must look at the Defence case that is to be presented and not artificially take the time given to the Prosecution as a yardstick.

5. It follows therefore that I question the validity of the first limb of the *Prlić* holding. However, setting aside my criticisms of that holding, I now turn to the substantive issues raised by the appeal.

A. Adjudicated Facts

6. I respectfully disagree with the Trial Chamber's reasoning with regard to judicial notice of Adjudicated Facts. While it is perfectly correct, as the Trial Chamber asserts at paragraph 10 of its decision, "that judicial notice does not shift the ultimate burden of persuasion which remains with the Prosecution", it is clear that failure of the Defence to rebut the presumption of the accuracy of an adjudicated fact will result in the acceptance of that fact by the Trial Chamber, thereby

² As far as preparation is concerned, *see* Article 21(4)(b) of the Statute.

contributing to the discharge by the Prosecution of its ultimate burden of proving its case beyond a reasonable doubt. By confining itself to the expression of the legal truism that the ultimate burden of proof remains with the Prosecution, the Trial Chamber has undervalued the need for the Defence to rebut the adjudicated facts. Discounting the effect of the failure of Karadžić to rebut an adjudicated fact is a deficiency in the Trial Chamber's analysis, and it is one that is significant since the analysis of the legal implications of judicial notice of adjudicated facts is critically important for the decision the Trial Chamber ultimately arrived at. For this reason the Trial Chamber erred, either on the basis that it incorrectly interpreted the governing law relating to adjudicated facts or on the basis that it failed to give weight or sufficient weight to relevant considerations, *viz.*, the effect of the failure of the accused to rebut an adjudicated fact.

7. Moreover, I find problematic the Trial Chamber's assertion that "most of the topics covered by the adjudicated facts have also been discussed through Prosecution witnesses, whom the Accused has had the opportunity to cross-examine, both on the substance of their direct examination and to elicit information relevant to his case".⁴ Here the Trial Chamber is using the Karadžić's customary and statutory right to cross-examine as a basis for reducing the time allocated to the Defence case. The right of Karadžić to be afforded sufficient time and resources to present his case exists independently of his right to cross-examine a witness for the Prosecution. Implicit in the Trial Chamber's analysis is the suggestion that the substance of the Karadžić's cross-examination on matters concerning the adjudicated facts is a factor affecting the time needed for the presentation of his case. But is it the province of the Trial Chamber to tell the Defence how to present its case? Further, if, as is normally the case, the Trial Chamber does not express a view on the effectiveness of the cross-examination, why should the Defence not be allowed to fully litigate the relevant issue in presenting its case?

B. Cross-Examination

8. Much has been made of the fact that Karadžić's cross-examination of Prosecution witnesses was two and half times as long as direct examination. As an initial matter, I am bound to comment that in many jurisdictions based on the common law adversarial system it is not unusual for cross-examination to last longer than direct examination, and in many cases in those jurisdictions one would treat as unremarkable cross-examination that is two and half times longer than direct examination.

³ *Prosecutor v. Naser Orić*, Case No. IT-03-68-AR73.2, Interlocutory Decision on Length of Defence Case, 20 July 2005, para. 7; *Prosecutor v. Duško Tadić*, Case No. IT-94-1-A, Judgement, 15 July 1999, paras 48, 50, 52.

⁴ Impugned Decision, para. 10.

9. The Trial Chamber points to the length of the cross-examination as a factor that it has considered with regard to the time granted to Karadžić, and added that sometimes Karadžić went beyond the topics raised on direct examination.⁵ An immediate question is why is this being raised to the detriment of the Defence? Karadžić maintains that the Trial Chamber took into account irrelevant information in pointing to the length of his cross-examination and that the use by the Prosecution of written testimony renders the comparison with his oral cross-examination “fallacious”.⁶ I have already commented on this, pointing to the unreliability of the time used in direct examination as a basis for the time to be given to the Defence.⁷ But the principal objection must be to the Trial Chamber’s reliance on this factor as a relevant consideration in determining the time to be given to the Defence. In principle what is done by way of cross-examination or information gathered in that process should not be used as a basis for effectively reducing the time to be allocated to the Defence to present its case. To do so would be unfair to the Defence, since it would have had no assurance from the trial chamber as to the effectiveness of its cross-examination. Notwithstanding the outcome of cross-examination, the Defence will have its narrative to tell and must be afforded the fullest opportunity to do so. What is called for is an enquiry into the case to be presented by the Defence and an allocation of time to ensure that the accused is able to respond to the Prosecution’s case. In making that allocation it should not be determinative that the accused spent a longer time in cross-examination than the Prosecution did in direct examination. I therefore find that the Trial Chamber erred by taking into account an irrelevant consideration, *viz.*, the length of the cross-examination.

10. Certainly, the fact that Karadžić used Rule 90(H) of the Rules when the witness was “able to give evidence relevant to the case for the cross-examining party” should not be invoked as a factor affecting the time to be given to the Defence.⁸ When the Defence has elicited evidence from a Prosecution witness relevant its case, that is not the end of the matter; depending on the nature of the relevant evidence the Defence may still wish to address it through its own witnesses. Rule 90(H) evidence may be helpful or inimical to the Defence or it may be neutral. Understandably, then, the Defence may wish to lead evidence to corroborate or contradict the Rule 90(H) evidence. Rule 90(H) should not be treated as a time-saving device that obviates the need for the Defence to adduce evidence on the relevant issue in the presentation of its case. Moreover, I am bound to say that I find this part of the Trial Chamber’s decision difficult to understand: it has not explained how or why the Rule 90(H) evidence should be used as a factor in determining the time to be allocated to the Defence for the presentation of its case. All the Trial Chamber has said is that Karadžić was able

⁵ Impugned Decision, para. 9.

⁶ See Decision, para. 12.

⁷ See *supra* para. 3.

⁸ See Impugned Decision, para. 9. See also Decision, para. 22.

to elicit evidence relevant to his case. Significantly, there is no identification of the circumstances in which that evidence is relevant to the Defence case and why it should impact on the presentation of that case. Certainly, nothing in Rule 90(H) itself, or any reasonable interpretation of it, yields the result that it has any necessary impact on the allocation of time for the Defence case. I therefore find that the Trial Chamber has fallen into error in taking account of an irrelevant consideration by treating the Defence's use of Rule 90(H) as a factor effectively reducing the time to be given to the Defence for the presentation of its case.

11. In sum, I would allow the appeal and remit the matter to the Trial Chamber for a recalculation of the time to be allotted to Karadžić for the presentation of his defence.

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



Judge Patrick Robinson

Done this 29th day of January 2013,
At The Hague,
The Netherlands.

[Seal of the Tribunal]