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

Date: 19 September 2012

Original: English

IN THE TRIAL CHAMBER

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

Registrar: **Mr. John Hocking**

Decision of: **19 September 2012**

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

DECISION ON TIME ALLOCATED TO THE ACCUSED FOR THE PRESENTATION OF HIS CASE

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused

Mr. Radovan Karadžić

Standby Counsel

Mr. Richard Harvey

THIS 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") is seised of the Accused's request in the "Defence Submission Pursuant to Rule 65 *ter* and Related Motions" filed on 27 August 2012 ("First Submission"), in relation to the time sought to present his case, and hereby issues its decision thereon.

I. Background and Submissions

1. On 26 April 2012, the Chamber issued a "Scheduling Order on Close of the Prosecution Case, Rule 98 *bis* Submissions, and Start of the Defence case", in which it, *inter alia*, ordered the Accused to file, no later than 27 August 2012, a list of witnesses pursuant to Rule 65 *ter* of the Rules of Procedure and Evidence of the Tribunal ("Rules"), as well as the total time estimated for the presentation of the defence case. Accordingly, the Accused filed the First Submission, requesting 600 hours for the presentation of his case, namely the amount of time allocated to the Office of the Prosecutor ("Prosecution")—300 hours—plus an additional 300 hours "to rebut the 2300 adjudicated facts for which judicial notice has been taken" ("Request").[1] In confidential Annex A to the First Submission, the Accused submitted a list of 579 prospective witnesses he intends to call during his defence case.

2. On 3 September 2012, the Chamber held a status conference to review the progress made for the preparations of the defence case ("Status Conference"). In relation to the Request, the Chamber raised concerns as to the relevance and the repetitive character of a certain number of prospected witnesses, providing specific examples of such witnesses,[2] and noting that this guidance would allow the Accused to reduce the number of hours he deemed necessary to present his case. The Chamber thus gave the opportunity to the Accused to file a revised witness list no later than 14 September 2012 taking into consideration the aforementioned comments.[3]

3. During the Status Conference, the Prosecution submitted that the Accused had not offered any basis for the Request, which the Prosecution coined as "unfounded and unreasonable", and had not even attempted to consider the difference in the burden of proof on the Prosecution and the Accused. The Prosecution also argued that during cross-examination of Prosecution witnesses, the Accused already spent time on eliciting matters related to his case rather than on the specific cross-

[1] First Submission, para. 3.
[2] T. 28791–28793 (3 September 2012).
[3] T. 28793, 28798 (3 September 2012).

examination of those witnesses. More specifically in relation to the Accused's need to rebut 2,300 adjudicated facts, the Prosecution averred that the Accused did not attempt to identify which of those are actually necessary for him to address.[4]

4. On 11 September 2012, the Accused filed a "Defence Supplemental Submission Pursuant to Rule 65 *ter*" ("Second Submission") wherein he submits that he has dropped ten prospective witnesses but added 14 witnesses related to sentencing. The Accused did not vary the Request.

II. Applicable Law

5. While Article 20(1) of the Tribunal's Statute ("Statute") entrusts the Chamber with ensuring that the trial is fair and expeditious, Article 21(4)(d) of the Statute provides that the accused shall be entitled "to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him".

6. Rule 73 *ter*(F) of the Rules provides that "[a]fter having heard the defence, the Trial Chamber shall determine the time available to the defence for presenting evidence".

III. Discussion

7. The Chamber first recalls that the Prosecution was ordered to present the totality of its evidence in 300 hours,[5] and that it ultimately presented its case in 299 hours and 27 minutes.[6]

8. The Appeals Chamber has held that an accused is not "necessarily entitled to precisely the same amount of time or the same number of witnesses as the Prosecution" and that the time allotted to the Defence should be reasonably proportional to the Prosecution's allocation and sufficient to permit a fair opportunity for the accused to present his case, in a manner which is consistent with the accused's rights.[7] The Appeals Chamber also held that an accused is not "free to present unnecessarily repetitive or irrelevant evidence".[8]

9. In considering the amount of time to grant to the Accused to present his case, the Chamber has had regard to the following factors. First, the Accused has used during cross-examination of Prosecution witnesses two and half times the amount of hours used by the Prosecution on direct

[4] T. 28799–28800 (3 September 2012).
[5] T. 467 (6 October 2009). The 300 hours were to include both direct examination and re-examination.
[6] Chamber's Report on Use of Time in the Trial, 21 June 2012 ("Time Report").
[7] *Prosecutor v. Naser Orić*, Case No. IT-03-68-AR73.2, Interlocutory Decision on Length of Defence Case, 20 July 2005 ("*Orić* Decision"), paras. 6, 8–9.
[8] *Orić* Decision, para. 6.

and re-direct examination,[9] sometimes going beyond the topics raised on direct examination, and making use of Rule 90 (H) when the witness was "able to give evidence relevant to the case for the cross-examining party".[10]

10. Second, in relation to adjudicated facts, the Chamber recalls that the Prosecution always bears the burden of establishing the guilt of the Accused beyond a reasonable doubt.[11] While the taking of judicial notice creates a rebuttal presumption for the accuracy of the said adjudicated fact, which therefore does not have to be proven at trial,[12] judicial notice does not shift the ultimate burden of persuasion which remains with the Prosecution.[13] Furthermore, while the Chamber considers that some of the time allocated to the Accused should reflect the high number of adjudicated facts in this case, it is not of the view that each single adjudicated fact needs to be addressed during the defence case.[14] Moreover, most of the topics covered by the adjudicated facts in evidence 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.

11. Finally, the Chamber reiterates the concerns expressed at the Status Conference in relation to the relevance and repetitive nature of the expected testimony of a large proportion of witnesses currently on the Accused's Rule 65 *ter* witness list as set forth in the Second Submission. The Chamber was, and still is, of the view that had the Accused given careful consideration to the Chamber's guidance, he would have been able to substantially reduce the amount of time he deems necessary to present his case.

12. The Chamber therefore considers that it is appropriate, in light of all the factors outlined above, to grant the Accused 300 hours to present his case. This figure shall include the Accused's direct examination, as well as any re-examination of his witnesses.

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[9] Time Report. During the Prosecution's case, the Chamber granted the Accused a set time for cross-examination in light of, *inter alia*, the Accused's own time estimate, the Prosecution's estimate of time for direct examination, the scope of the witness's anticipated testimony, the type of witness, and the volume of written evidence proffered, including the length of the transcript of previous testimony where relevant and the number of associated exhibits. *See* T. 3904 (21 October 2010).

[10] *See* for instance T. 15158 (22 June 2011).

[11] Rule 87(A) of the Rules.

[12] Decision on Second Prosecution for Judicial Notice of Adjudicated Facts, 9 October 2009, para. 15, referring to *Prosecutor v. Milošević*, Case No. IT-2-54-AR73.5, Decision on the Prosecution's Interlocutory Appeal against the Trial Chamber's 10 April 2003 Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, 28 October 2003, p. 4.

[13] *Prosecutor v. Karemera et al*., Case No. ICTR-98-44-AR73(C), Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice, 16 June 2006, para. 42.

[14] The Chamber notes that a large proportion of the adjudicated facts which judicial notice was taken relate to background matters as well as to the political and military structure in Bosnia and Herzegovina, *see* for instance Adjudicated Facts 1–5, 402–408, 415–417, 419–422, 2093–2094, 2125–2144.

13. The Chamber further notes that at this time it will not impose time limits on the Prosecution for its cross-examination of Accused's witnesses. As it did for the Accused during the Prosecution's case,[15] the Chamber will closely monitor the time used on cross-examination and will impose time restrictions if those become necessary.

IV. Disposition

14. Accordingly, the Chamber, pursuant to Articles 20 and 21 of the Statute and Rule 73 *ter*(F) of the Rules, hereby **GRANTS** the Request in part, **ORDERS** that the Accused shall present the totality of his evidence in 300 hours, and **DENIES** the remainder of the Request.

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

Judge O-Gon Kwon
Presiding

Dated this nineteenth day of September 2012
At The Hague
The Netherlands

[Seal of the Tribunal]

[15] T. 3903–3905 (21 June 2010).