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-04-74-AR73.7
Date: 1 July 2008
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IN THE APPEALS CHAMBER

Before: **Judge Fausto Pocar, Presiding**
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Andrésia Vaz
Judge Theodor Meron

Registrar: **Mr. Hans Holthuis**

Decision of: **1 July 2008**

PROSECUTOR
v.
JADRANKO PRLIĆ
BRUNO STOJIĆ
SLOBODAN PRALJAK
MILIVOJ PETKOVIĆ
VALENTIN ĆORIĆ
and BERISLAV PUŠIĆ

PUBLIC

DECISION ON DEFENDANTS APPEAL AGAINST "*DÉCISION PORTANT ATTRIBUTION DU TEMPS À LA DÉFENSE POUR LA PRÉSENTATION DES MOYENS À DÉCHARGE*"

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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 seized of four separate interlocutory appeals filed by the Defence for Milivoj Petković ("Petković Defence"), the Defence for Slobodan Praljak ("Praljak Defence"), the Defence for Bruno Stojić ("Stojić Defence")[1] and the Defence for Valentin Ćorić ("Ćorić Defence")[2] against the "*Décision portant attribution du temps à la Défense pour la présentation des moyens à décharge*", rendered by Trial Chamber III ("Trial Chamber") on 25 April 2008.[3]

I. BACKGROUND

2. In the present case, the Trial Chamber initially granted to the Prosecution a total of 400 hours to present its case-in-chief.[4] The number of hours was then reduced by the Trial Chamber to 293.[5] Subsequently, the Trial Chamber decided to grant the Prosecution 23 additional hours, thus setting the total time allocated to the Prosecution at 316 hours.[6] At the close of the Prosecution case, the time actually used by the Prosecution amounted to 297 hours.[7]

3. The foreseeable duration of the Defence case was first discussed by the Trial Chamber during the meeting held on 17 March 2008 in accordance with Rule 65*ter* (G) of the Rules of Procedure and Evidence of the Tribunal ("Rules"),[8] when the Defence teams were requested to inform the Trial Chamber of their estimates with regard to time required for the presentation of their respective cases.[9]

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[1] Respectively, Petković Defence Appeal Against the Trial Chamber's 25 April 2008 *Décision portant attribution du temps à la Défense pour la présentation des moyens à décharge*, 2 May 2008 ("Petković Appeal"); Slobodan Praljak Appeal of the *Décision portant attribution du temps à la Défense pour la présentation des moyens à décharge*", *Public with Confidential Annex*, 2 May 2008 ("Praljak Appeal"); Bruno Stojić Appeal from '*Décision portant attribution du temps à la Défense pour la présentation des moyens à décharge*' Issued 25 April 2008, 2 May 2008 ("Stojić Appeal"); Joinder of the Accused Ćorić in Petković Defence Appeal Against the Trial Chamber's 25 April 2008 *Décision portant attribution du temps à la Défense pour la présentation des moyens à décharge*, 6 May 2008 ("Ćorić Appeal"); (collectively "Appeals").

[2] Collectively, "the Appellants".

[3] *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, *Décision portant attribution du temps à la Défense pour la présentation des moyens à décharge*, 25 April 2008 ("Impugned Decision").

[4] *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, *Version révisée de la Décision portant adoption de lignes directrices relatives à la conduite du procès*, 24 May 2006.

[5] *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, *Décision portant adoption de nouvelles mesures visant à achever le procès dans un délai raisonnable*, 13 November 2006; see also *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, *Décision faisant suite à la Décision de la Chambre d'appel du 6 février 2007 relative à l'appel interjeté contre la réduction de la durée de la présentation des moyens à charge*, 2 March 2007.

[6] *Décision allouant du temps supplémentaire pour achever la présentation de moyens à charge*, 22 August 2007.

[7] Impugned Decision, para. 9. The Appeals Chamber notes that the Prosecution indicates to have used 296 hours and 25 minutes; see Prosecution Consolidated Opposition to the Defence Appeals Concerning the Trial Chamber's Ruling Dated 25 April Reducing Time for the Accused Case, 16 May 2008 ("Response"), para. 18. The Appeals Chamber considers that the difference between the two figures is not significant and will refer hereby to the figure indicated in the Impugned Decision.

[8] Hereinafter "65*ter* Conference".

[9] *Prosecutor v. Prlic et al.*, Case No. IT-04-74-T, 21 April 2008, T. 27239-27248 (partly confidential).

4. On 31 March 2008, all Defence teams filed their submissions pursuant to Rule 65*ter* (G) of the Rules indicating to the Trial Chamber the number of hours they planned to use for the presentation of their respective defence cases-in-chief. The Defence for Jadranko Prlić ("Prlić Defence") requested 128 hours; the Stojić Defence requested 68 hours; the Praljak Defence requested 110 hours; the Petković Defence requested 91 hours; the Ćorić Defence requested 81 hours; the Defence for Berislav Pušić ("Pušić Defence") requested 22 hours and 30 minutes.[10]

5. On 9 April 2008, the Trial Chamber ordered the parties to provide additional information regarding their 65*ter* Lists, in particular asking for clarification of the time requested by the Defence teams for the examination of witnesses common to more than one of the Accused.[11] On 14 April 2008, the six Defence teams provided the requested clarifications.[12] Following the Praljak Defence's Supplemental Submission, the total time requested by the Praljak Defence for the presentation of its case rose to 112 hours and 15 minutes.[13] Following the Petković Defence's Supplemental Submission, the total time requested by the Petković Defence for the presentation of its case decreased to 89 hours.[14] The time requested by the Ćorić Defence and the Stojić Defence remained as originally indicated at the 65*ter* meeting.

6. On 18 April 2008, the Trial Chamber informed the parties that it was considering a total allocation of 301 hours and 30 minutes for the presentation of the defence case, to be distributed as

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[10] *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, Jadranko Prlić's Rule 65*ter* Witness List, *Confidential*, 31 March 2008; *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, Bruno Stojić's 65*ter* Submission, *Confidential*, 31 March 2008 ("Stojić Defence 65*ter* List"); *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, Slobodan Praljak's Submission Pursuant to Rule 65*ter*, *Public with Confidential Annexes*, 31 March 2008 ("Praljak Defence 65*ter* List"); *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, Petković Defense Submission Pursuant to Rule 65*ter*, *Public with Confidential Annexes*, 31 March 2008 ("Petković Defence 65*ter* List"); *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, Valentin Ćorić's Submission Under Rule 65*ter*, *Confidential*, 31 March 2008 ("Ćorić Defence 65*ter* List"); *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, Berislav Pušić's Submission of Lists Pursuant to Rule 65 *ter* (G), *Confidential*, 31 March 2008; (cumulatively, "65*ter* Lists"). The Appeals Chamber notes the discrepancy between the amount of time estimated by the Praljak Defence for its case-in-chief in its Rule 65 *ter* List (107 hours and 55 minutes) and the amount calculated in the Impugned Decision (110 hours). Considering the explanation provided by the Trial Chamber in the Impugned Decision (at fn. 48) and considering that the Praljak Defence's request of time was subsequently modified, the Appeals Chamber does not deem it necessary to further address this issue.

[11] *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, *Ordonnance portant complément d'information des Listes 65 ter*, 9 April 2008.

[12] *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, Jadranko Prlić's Notice Pursuant to the Trial Chamber's Order of 9 April 2008 Concerning Supplemental Information on 65*ter* Lists, Confidential, 14 April 2008; *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, Notice of Bruno Stojić Providing Time Estimates for Common Defence Witnesses Pursuant to *Ordonnance portant complément d'information des Listes 65 ter* dated 9 April 2008, Confidential, 14 April 2008 (Stojić Defence Supplemental Submission"); *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, Slobodan Praljak's Submission Pursuant to the Trial Chamber's Order of 9 April 2008 Regarding Witnesses Expected to be Called by Multiple Accused, Confidential, 14 April 2008 ("Praljak Supplemental Submission"); see also *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, *Corrigendum* to Slobodan Praljak's Submission Pursuant to Trial Chamber's Order of 9 April 2008 Regarding witnesses Expected to Be Called by Multiple Accused, Confidential, 16 April 2008 ("Praljak *Corrigendum* to Supplemental Submission"); *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, Petković Defence Notice Pursuant to Trial Chamber's *Ordonnance portant complément d'information des Listes 65 ter* of 9 April 2008, Confidential, 14 April 2008 ("Petković Supplemental Submission"); *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, Valentin Ćorić's Submission Pursuant to *Ordonnance portant complément d'information des Listes 65 ter*, Confidential, 14 April 2008 ("Ćorić Supplemental Submission"); *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, Notice on Behalf of Berislav Pušić Pursuant to the Trial Chamber's *Ordonnance portant complément d'information des Listes 65 ter*, confidential, 14 April 2008; (collectively, "Supplemental Submissions").

[13] Praljak Defence Supplemental submission; see also, Impugned Decision, para. 30.

[14] Petković Defence Supplemental Submission; see also, Impugned Decision, para. 34.

follows: Prlić Defence: 80 hours; Stojić Defence: 54 hours; Praljak Defence: 50 hours; Petković Defence: 50 hours; Ćorić Defence: 45 hours; Pušić Defence: 22 hours and 30 minutes.[15] During the 73*ter* Conference of 21 April 2008, the parties were invited to make submissions on the Trial Chamber's tentative estimation of time.[16]

7. On 25 April 2008, the Trial Chamber issued the Impugned Decision, allocating a total of 336 hours and 30 minutes to the Defence, to be distributed as follows: Prlić Defence: 95 hours; Stojić Defence: 59 hours; Praljak Defence: 55 hours; Petković Defence: 55 hours; Ćorić Defence: 50 hours; Pušić Defence: 22 hours and 30 minutes. The Trial Chamber certified in advance, pursuant to Rule 73 of the Rules, permission for all of the parties to appeal the Impugned Decision.[17]

8. On 2 May 2008, the Petković Appeal, the Stojić Appeal and the Praljak Appeal were filed. The Ćorić Appeal was filed on 6 May 2008, four days after the deadline for submitting an interlocutory appeal under Rule 73(C) of the Rules. The Ćorić Defence has offered no justification for the delay and did not apply for an extension of time. Nonetheless, noting that the Ćorić Appeal seeks only to join the Petković Appeal and does not raise any additional ground- of appeal, the Appeals Chamber will accept the late filing pursuant to its discretionary powers under Rule 127(A)(ii) of the Rules.

9. On 8 May 2008, the Prosecution requested leave to file a single consolidated response,[18] which was granted by the Appeals Chamber on 9 May 2008.[19] The Prosecution Response was filed on 16 May 2008.

10. On 22 May 2008, the Praljak Defence requested leave to file its reply to the Prosecution Response and submitted its Reply.[20] The Appeals Chamber hereby grants the requested leave. On the same day, the Praljak Defence submitted its Notice Regarding Translation,[21] requesting that the Appeals Chamber, in deciding on the Praljak Appeal, take in consideration a decision issued by the Trial Chamber on 16 May 2008 pertaining to the restriction of translation facilities.[22]

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[15] *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, *Décision portant complément à l'ordre du jour de la Conférence préalable à la présentation des moyens à décharge du 21 avril 2008*, 18 April 2008.
[16] *Prosecutor v. Prlic et al.*, Case No. IT-04-74-T, T. 21 April 2008, 27373-2745.
[17] Impugned Decision, para. 46.
[18] Motion to File Consolidated Response to Appellants' Appeals Filed on 2 May 2008 and 6 May 2008, 8 May 2008.
[19] Decision on "Prosecution's Motion to File Consolidated Response to Appellants' Appeals Filed on 2 May 2008 and 6 May 2008", 9 May 2008.
[20] Slobodan Praljak's Request for Leave to Reply to the Prosecution's Response and Praljak's Reply to the Prosecution's Response, 22 May 2008 ("Praljak Reply").
[21] Slobodan Praljak's Notice Regarding Translation, 22 May 2008, p.1.
[22] Slobodan Praljak's Notice Regarding Translation, p. 1, referring to *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, *Ordonnance portant sur la demande de Slobodan Praljak relative à la traduction de documents*, 16 May 2008.

11. On 22 May 2008 the Petković Defence filed its Reply.[23] The Stojić Defence and the Ćorić Defence did not file a reply.

II. SUBMISSION OF THE PARTIES

12. As detailed below, all Appellants submit that the Trial Chamber committed discernible errors in the Impugned Decision because: (i) it gave weight to extraneous or irrelevant considerations; (ii) it violated the Accused's right to a fair trial pursuant to Article 21 of the Statute and Rule 82(a) of the Rules, in that the time allocated to the Appellants to present their respective Defence cases (a) is not reasonably proportional to the time allowed to the Prosecution to present its case; (b) does not provide the accused with an objectively adequate opportunity to present their respective cases.

13. In particular, the Praljak Defence requests that the Appeals Chamber set aside the Impugned Decision and direct the Trial Chamber to allocate at least 97 hours for the presentation of its case.[24] The Petković Defence requests that the Appeals Chamber set aside the Impugned Decision and direct the Trial Chamber to allocate 89 hours for the presentation of its case.[25] The Ćorić Defence purports to join the Petković Appeal and submits that, given the similarity between the facts which would support the Ćorić Appeal and the Petković Appeal, the Appeals Chamber would be in a position to rule on the Ćorić Appeal "without explanation of specific facts" by the Ćorić Defence.[26] The Stojić Defence requests that the Appeals Chamber vacate the Impugned Decision and order the Trial Chamber to grant to the Stojić Defence 68 hours of direct examination.[27]

14. In its Response, the Prosecution submits that the Trial Chamber did not err in its assessment of the time to be allocated for the presentation of the Defence cases and that the Impugned Decision represents a reasonable exercise of the Trial Chamber's discretion in case management.[28] The Prosecution also submits that the Appellants have failed to individually demonstrate why the time allotted to each of them would not be reasonably proportionate to the time granted for the presentation of the Prosecution's case, or would prevent the Appellants from

[23] Milivoj Petković Defence Reply to Prosecution Consolidated Opposition to the Defence Appeals Concerning the Trial Chamber's Ruling Dated 25 April 2008 Reducing Time for the Defence Case, 22 May 2008 ("Petković Reply").
[24] Praljak Appeal, para. 67.
[25] Petković Appeal, para. 38.
[26] Ćorić Appeal, p. 1.
[27] Stojić Appeal, para. 20
[28] Response, paras 3, 20-34 and 58.

having an adequate opportunity to present their cases.[29] It requests that the Appeals Chamber affirm the Impugned Decision.[30]

III. STANDARD OF REVIEW

15. It is well established in the jurisprudence of the International Tribunal that Trial Chambers exercise discretion in relation to trial management.[31] The Trial Chamber's decision in this case to allocate time to the Appellants for the presentation of their evidence was a discretionary decision to which the Appeals Chamber accords deference. Such deference is based on the recognition by the Appeals Chamber of "the Trial Chamber's organic familiarity with the day-to-day conduct of the parties and practical demands of the case".[32] The Appeals Chamber's examination is therefore limited to establishing whether the Trial Chamber has abused its discretionary power by committing a discernible error.[33] The Appeals Chamber will only overturn a Trial Chamber's exercise of its discretion where it is found to be "(1) based on an incorrect interpretation of governing law; (2) based on a patently incorrect conclusion of fact; or (3) so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion".[34] The Appeals Chamber 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 in reaching its decision.[35]

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[29] Response, paras 35-40, 41-45, 46-51, 52-56.
[30] Response, para. 59.
[31] *Prosecutor v. Prlić et al.*, Case No. IT-04-74-AR73.2, Decision on Joint Defence Interlocutory Appeal Against the Trial Chamber's Oral Decision of 8 May 2006 Relating to Cross-Examination By Defence and on Association of Defence Counsel's Request for Leave to File an *Amicus Curiae* Brief, 4 July 2006 ("*Prlić* Decision on Cross-Examination"), p. 3; *Prosecutor v. Tolimir et al.*, Case No. IT-04-80-AR73.1, Decision on Radivoje Miletić's Interlocutory Appeal Against the Trial Chamber's Decision on Joinder of Accused, 27 January 2006 ("Decision on Radivoje Miletić's Interlocutory Appeal") para. 4; *Prosecutor v. Milošević*, Case No. IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence Counsel, 1 November 2004 ("*Milošević* Decision on the Assignment of Defence Counsel") para. 9; *Prosecutor v. Milošević*, Case No. IT-02-54-AR73, Reasons for Refusal of Leave to Appeal from Decision to Impose Time Limit, 16 May 2002 ("*Milošević* Decision to Impose Time Limit"), at para. 14: "The prosecution concedes, correctly, that the decision by the Trial Chamber to impose a time limit within which the prosecution was to present its case was a discretionary one".
[32] Decision on Radivoje Miletić's Interlocutory Appeal, para. 4; *Milošević* Decision on Defense Counsel, para. 9.
[33] *Prlić* Decision on Cross-Examination, p. 3 *citing Prosecutor v. Milošević*, Case Nos. IT-99-37-AR73, IT-01-50-AR73, and IT-01-51-AR73, Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder, 18 April 2002, para. 4: "Where an appeal is brought from a discretionary decision of a Trial Chamber, the issue in that appeal is not whether the decision was correct, in the sense that the Appeals Chamber agrees with that decision, but rather whether the Trial Chamber has correctly exercised its discretion in reaching that decision", *see also* paras 5-6; *see* also *Milošević* Decision on the Assignment of Defence Counsel, para. 10; Decision on Radivoje Miletić's Interlocutory Appeal, para. 6 *citing Prosecutor v. Stanišić*, Case No. IT-04-79-AR65.1, Decision on Prosecution's Interlocutory Appeal of Mićo Stanišić's Provisional Release, 17 October 2005 ("*Stanišić* Provisional Release Decision"), para. 6.
[34] See e.g., *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-AR65.2, Decision on Interlocutory Appeal of Denial of Provisional Release During the Winter Recess, 14 December 2006 ("*Milutinović* Decision"), para. 3; *Prosecutor v. Popović et al.*, Case No. IT-05-88-AR65.2, Decision on Defence's Interlocutory Appeal of Trial Chamber's Decision Denying Ljubomir Borovčanin Provisional Release, 30 June 2006 ("*Borovčanin* Decision of 30 June 2006"), para. 5.
[35] See e.g., *Prosecutor v. Popović et al.*, Case Nos. IT-05-88-AR65.4, IT-05-88-AR65.5, and IT-05-88-AR65, Decision on Consolidated Appeal Against Decision on Borovčanin's Motion for a Custodial Visit and Decisions on Gvero's and Miletić Motions for Provisional Release During the Break in the Proceedings, 15 May 2008, para. 4.

IV. DISCUSSION

16. All Appellants submit that the rights of the accused to a fair trial enshrined in Article 21 of the Statute should not be sacrificed to ensure the expeditiousness of proceedings.[36] The Appeals Chamber recalls that, pursuant to Rules 73*bis* and 73*ter* of the Rules, the Trial Chamber is required to establish the number of witnesses each party may call and the amount of time allotted to each party. Specifically, Rule 73*ter*(E) of the Rules provides that, after having heard the defence and having reviewed the Rule 65*ter* submissions of each accused, the Trial Chamber shall determine the time available to the defence for presenting evidence. In exercising the discretionary power to allocate time, a Trial Chamber has the responsibility to ensure that "the proceedings do not suffer undue delays and that the trial is completed within a reasonable time, which is recognized as a fundamental right of due process under international human rights law."[37] Recognizing that excessive limitations of time may also compromise the due process rights of the accused, the Appeals Chamber has previously held that the considerations of judicial economy should never impinge on the rights of the parties to a fair trial.[38] In particular, the time granted to an accused under Rule 73*ter* 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.[39]

17. In evaluating whether the Appellants demonstrated that the Trial Chamber committed any discernible error in adopting the Impugned Decision, the Appeals Chamber will first address the arguments, relevant to all Appeals, concerning the method adopted by the Trial Chamber in reaching its determination. The Appeals Chamber will then consider the Appellants' arguments as to whether the time allowed to a single Accused is reasonably proportional to the time allotted to the Prosecution and is objectively adequate to permit the Accused to fairly set forth their cases.

A. The method adopted by the Trial Chamber

18. The Petković Defence submits that the Trial Chamber's assessment of the time allocated for the six Defence cases is based on an arithmetic division of the time used for the Prosecution case between the six Accused[40] and that a "pure arithmetic calculation"[41] constitutes a "spurious

[36] Praljak Appeal, paras 55-61; Praljak Reply, para. 32; Petković Appeal, paras 25-36; Petkovic Reply, para. 4; Stojić Appeal, paras 10-11.
[37] *Prosecutor v. Prlić et al.*, Case No. IT-04-74-AR73.2, Decision on Prosecution Appeal Concerning the Trial Chamber's Ruling Reducing Time for the Prosecution Case, 6 February 2007 ("*Prlić* Initial Decision on Prosecution Time"), para. 23.
[38] *Prosecutor v. Orić*, Case No. IT-03-68-AR73.2, Interlocutory decision on Length of Defence Case ("*Orić* Decision"), para 8; *Prlić* Initial Decision on Prosecution Time, para. 23; *Prlić* Decision on Cross Examination, p. 4.
[39] *Orić* Decision, paras 8-9.
[40] Petković Appeal, para. 10.

application of the equality of arms" principle.[42] The Petković Defence further submits that the equality of arms principle requires that each Accused be given a fair opportunity to present all relevant evidence which is realistically capable of furthering his case.[43] It concludes that it is "inherently unlikely" that, in a case with six accused, the proper application of the equality of arms principle will produce a close arithmetic correspondence between the time allowed for the Prosecution case and the total time allocated for the six Defence cases.[44] The Prosecution responds that time allotments were not the result of simple division, but instead were devised by a detailed analysis of the Defence cases.[45]

19. The Appeals Chamber considers that a "purely arithmetical calculation" for the allocation of time to the Defence may constitute an abuse of the Trial Chamber's discretion. As noted in the *Orić* Decision, "a principle of basic proportionality, rather than a strict principle of mathematical equality, generally governs the relationship between the time and witnesses allocated to the two sides".[46] However, the Appeals Chamber is not satisfied that the Impugned Decision was based on such an arithmetic division of time.

20. In the Impugned Decision, the Trial Chamber explicitly noted the distinction between the "principle of proportionality" and "a strictly mathematical principle" for allocating time,[47] emphasizing that its conclusions in assessing the length of Defence cases were "the result of a thorough examination of each 65 *ter* List submitted by the Defence and a strictly mathematical calculation of time allocation".[48] The Trial Chamber further explained that it reached its determination after having considered, *inter alia*, the possibility of a better use of Rule *92bis, 92ter* and 92*quater* procedures; the repetitiveness of certain testimony; the excessive time allocated for certain testimony; and the fact that the Defence purported to call to testify some witnesses about acts and facts beyond the scope of the Indictment or only very loosely related to it.[49] The Trial Chamber also took account of the observations formulated by the parties during the 65*ter* (G) meeting held on 17 March 2008, the 73*ter* Conference, and in the Supplemental Submissions of 14 April 2008.[50] Based on all these factors, the Trial Chamber reached an assessment as to the time to be allocated to each Defence case, an assessment that varied in relation to each Accused.[51]

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[41] Petković Appeal, para. 12.
[42] Petković Appeal, paras 10-11.
[43] Petković Appeal, para.11.
[44] Petković Appeal, paras 10-12; Petković Reply, paras 3, 13-14, 19.
[45] Response, paras 29 and 49.
[46] *Orić* Decision, para. 7.
[47] Impugned Decision, para. 11.
[48] Impugned Decision, para. 12.
[49] Impugned Decision, para. 16.
[50] Impugend Decision, para. 13.
[51] Impugned Decision, paras 18-24, 25-28, 29-33, 34-37, 39-41 and 42-43.

21. The Appeals Chamber finds that the method adopted by the Trial Chamber in determining the amount of time necessary to ensure that each Accused was granted sufficient time to present his case was a reasonable exercise of the Trial Chamber's discretion to determine allocation of time pursuant to Rule 73*ter*.[52] For the reasons detailed below, the Appeals Chamber further finds that the Trial Chamber did not commit a discernible error when, in the exercise of its discretion in relation to trial management, it allocated the time for Defence cases taking into consideration the factors recalled above.

22. First, both the Petković Defence and the Stojić Defence criticize the Impugned Decision's emphasis on the availability of Rules 92*bis*, 92*ter*, and 92*quater* of the Rules as alternatives to *viva voce* witnesses, on the grounds that the use of written testimony is permissive rather than mandatory.[53] They submit that the Trial Chamber did not provide sufficient reasons to show that it was reasonable for some Defence witnesses to provide their testimony in writing rather than *viva voce*,[54] and that the Defence "must not be forced to use or even punished, by reduction of time for its case, for not using this mechanism".[55]

23. The Appeals Chamber notes that Rule 92*bis* to 92*quater* are aimed at ensuring the efficient presentation of evidence at trial and may be relied upon in lieu of *viva voce* evidence where it does not impact upon the fairness of the proceedings. In assessing the amount of time reasonably required for each Accused to present his case, the Trial Chamber was entitled to assume that the parties would present their cases as efficiently as possible and take advantage of the options available to them to reduce the time for presenting evidence, especially if repetitive or peripheral. In light of the Trial Chamber's familiarity with the case to be presented by the Defence, it was reasonable for the Trial Chamber to consider that the Defence could make use of Rules 92*bis* and 92*ter* of the Rules in relation to some of the witnesses each intended to call.

24. Second, the Stojić and the Praljak Defence argue that the determination by the Trial Chamber of redundancy or repetitiveness of the evidence proposed by the Defence should be made during the presentation of Defence cases rather than before.[56] In particular, they submit that any determination of redundancy should be made in the course of the witness examination, during which the Trial Chamber is able to monitor the testimony and restrict counsel from continuing to present testimony that is repetitive of that heard previously.[57]

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[52] *Orić* Decision, paras 8-9.
[53] Petković Appeal, para. 15; Stojić Appeal, para. 13.
[54] Petković Appeal, para. 15; Stojić Appeal, paras 12-13.
[55] Petković Appeal, para. 15.
[56] Praljak Appeal, paras 62-64; Stojić Appeal, para. 14.
[57] Praljak Appeal, para. 62, Stojić Appeal, para. 14.

25. The Appeals Chamber finds that the Trial Chamber's decision to assess the relevance of proposed testimony prior to its presentation in evidence falls within the discretion accorded to the Trial Chamber in its management of the trial. There is no prohibition against a Trial Chamber's considering that some of the evidence sought to be presented will be repetitive when assessing, in application of Rule 73*ter*(E) and on the basis of the 65*ter* List presented by an accused, the time necessary for the fair presentation of the Defence case. The Appeals Chamber considers that this method is not only reasonable, but also presents the advantage of certainty, enabling the Defence to organize its strategy on the basis of the time allocated to it. The Appeals Chamber further notes that the Trial Chamber clarified in the Impugned Decision that it would adopt a flexible approach and, should the Defence establish that additional time was necessary, it would grant additional time.[58] Consequently, the Appeals Chamber finds no error in the approach adopted by the Trial Chamber.

26. Third, the Stojić Defence submits that the Trial Chamber was unreasonable in basing a reduction of time for the Defence case on the fact that some of the proposed witnesses are common to more Accused, since common witnesses could testify on different circumstances particular to an individual Accused.[59] It adds that, pursuant to Rule 82(A) of the Rules, the number of hours that an accused requests for the examination of a witness who is important to his individual defence should not be compromised by the independent decision of a second accused to examine the same witness.[60]

27. The Appeals Chamber finds that it was not unreasonable for the Trial Chamber to consider, in evaluating the time to be allocated for a witness examination, whether the witness was included in the 65*ter* Lists of more than one Accused. The fact that a witness is common to more than one Accused certainly permits saving both the time necessary for certain procedural matters, such as the identification of the witness, and for acquiring substantive information, for example the general background of the witness. Further, in a case where the co-Accused are charged with the same crimes, it is not unreasonable to make the initial assumption that a witness called to testify by more than one Defence team could present, *inter alia*, evidence on subjects relevant to all of the defence cases concerned. As to the specific determinations of the Trial Chamber on the repetitive nature of the evidence that several Defence teams seek to obtain by common witnesses, the Appeals Chamber defers to the Trial Chamber's discretion according to the standard of review recalled above. The specific concerns submitted by each of the Appellants on the Trial Chamber's evaluation of the repetitiveness of common witnesses will be addressed in the discussion which follows.

[58] Impugned Decision, para. 45.
[59] Stojić Appeal, paras 15-17.
[60] Stojić Appeal, paras 15-17.

B. The Praljak Appeal

28. The Praljak Defence submits that the Trial Chamber committed an abuse of discretion by allowing only 55 hours to present its Defence case.[61] The Praljak Defence requests that the Appeals Chamber set aside the Impugned Decision and direct the Trial Chamber to allocate at least 97 hours for the presentation of the Praljak Defence case to allow the Accused Praljak "a period of time which is both reasonably proportional to the Prosecution's case and which will allow a fair opportunity to present his case".[62]

1. Scope of the appeal

29. On a preliminary basis, the Appeals Chamber notes that the Praljak Defence raises a number of issues that go beyond the scope of the certification granted by the Trial Chamber in the Impugned Decision.

30. First, the Praljak Defence submits that the disproportional difference between the time allocated to the Prosecution and the Praljak Defence is magnified by disparities in the time allowed to the parties for cross-examination.[63] The Appeals Chamber notes that the Impugned Decision only deals with the allocation of time for the presentation of the Defence case-in-chief and that the certification granted by the Trial Chamber is limited to the content of the Impugned Decision. Indeed, the allocation of time for cross-examination was specifically considered by the Trial Chamber in a different decision.[64] The Appeals Chamber finds that the above issue is not properly before it and accordingly declines to consider it.

31. Additionally, the Praljak Defence's separate submission in the Notice Regarding Translation expresses concerns regarding the restriction of translation facilities as imposed by the Trial Chamber in its Decision of 16 May 2008.[65] The Appeals Chamber notes that the matter of translation facilities is not addressed in the Impugned Decision and falls therefore outside the scope of the Trial Chamber's certification. Consequently, the Appeals Chamber will not consider that issue here.

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[61] Praljak Appeal, para. 7.
[62] Praljak Appeal, para. 67.
[63] Praljak Appeal, paras 30 -31. The Praljak Defence recalls in this respect that, while it was granted one-sixth of the time of the Prosecution case-in-chief to cross-examine Prosecution witnesses, the Prosecution is allowed the same amount of time as the Defence case-in-chief to cross-examine the Praljak Defence's witnesses. It further notes that the Trial Chamber has not granted the Praljak Defence equal time to the Prosecution to cross-examine witnesses called by the co-Accused, since the Praljak Defence is entitled to use only one-tenth of the time granted to the Prosecution; Praljak Appeal, paras 30 -31, referring to *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, *Décision portant adoption de lignes directrices pour la présentation des elements de prevue à décharge,* 24 April 2008 ("Decision on Guidelines"), paras 13-17.
[64] Decision on Guidelines, paras 13-17.
[65] Slobodan Praljak's Notice Regarding Translation, 23 May 2008, para. 1, whereby the Praljak Defence requests that the Appeals Chamber take into consideration the arguments submitted by the Praljak Defence in a motion directed to

2. Reasonable proportionality with the time allowed for the Prosecution case

32. The Praljak Defence submits that the Impugned Decision violates the standard of reasonable proportionality elaborated in the *Orić* Decision.[66] The Praljak Defence first insists that the *Orić* Decision provides "substantive guidelines on proportionality" and contends that a strict comparison of the facts of the two cases reveals that the Impugned Decision fails to meet these guidelines.[67] In the *Orić* Decision, the Appeals Chamber overturned the Trial Chamber's decision to allocate to the Defence 27% of the time allowed to the Prosecution by holding that "the disparity in this instance is so great that no specific prejudice need be shown".[68] The Praljak Defence indicates that the Impugned Decision allowed it only 17.4% of the time granted to the Prosecution, that is, proportionally less time than the amount held to be in violation of reasonable proportionality in the *Orić* Decision.[69] The Praljak Defence submits that the Trial Chamber unreasonably did so despite the greater complexity of the present case, which presents a broader temporal and geographical scope than the *Orić* case, as well as a longer indictment, a higher number of counts, and additional alleged forms of liability.[70]

33. The Prosecution responds to Praljak's factual comparison to the *Orić* Decision by arguing that *Orić* involved only a single accused rather than multiple accused and that the comparison is therefore inappropriate.[71] In particular, the Prosecution argues that the average amount of time allotted to each Accused (56 hours) is significantly more than the average time used by the Prosecution per Accused, which the Prosecution identifies as approximately 42.5 hours.[72] The Appeals Chamber notes that this calculation of the time used by the Prosecution per Accused is obtained by "dividing the Prosecution time by seven", on the basis that "at least a substantial part of the Prosecution's case had to address common elements and aspects of the case (representing at least a "unit" equal to each of the six accused)".[73]

34. The Appeals Chamber declines to accept the Prosecution's argument that the proportionality standard should necessarily consider the "common elements" as a separate "unit" in the calculation of time and allocate each Accused one-seventh of the time allotted for the

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the Trial Chamber (Slobodan Praljak's Request for Reconsideration or in Alternative for Certification to Appeal the Trial Chamber's 16 May 2008 Decision on the Translation of Evidence, 22 May 2008).

[66] Praljak Appeal, paras 17-33.

[67] Praljak Appeal, paras 20-21.

[68] Praljak Appeal, para. 22.

[69] Praljak Appeal, paras 20-22.

[70] Praljak Appeal, paras 22-27.

[71] Response, para. 25.

[72] Response, paras 25-26. In order to calculate the average time used by the Prosecution per Accused, it divided the total number of hours of the Prosecution case by seven, after considering that the time necessary to address the elements common to all the Accused amounted to about one-seventh of the total.

[73] Response, para. 25.

Prosecution case.[74] This argument belies the fact that, pursuant to Rule 82(A) of the Rules, each Accused should be allowed time to respond to the common elements of the Prosecution case as they relate to his particular case.

35. However, the Appeals Chamber emphasizes that the determination of the time to be granted to the Defence to present its case is the result of a highly contextual analysis. As a consequence, factors such as the presence of multiple accused make any strict numerical comparison to previous cases inapposite. In a case with multiple accused, the Prosecution is to divide the time allowed for the presentation of its case in order to prove the guilt of each individual accused for each of the crimes charged. Consequently, each individual accused is unlikely to challenge every piece of evidence presented by the Prosecution. Accordingly, the Appeals Chamber finds that the *Orić* Decision does not provide substantive guidelines for assessing what kind of disparity between the time allocated to the Prosecution and the time allocated to each accused would be too great in a case such as the instant one.[75]

36. The Praljak Defence argues that a case involving multiple Accused should not have the effect of legitimizing a disproportionate reduction of the defence case for the single Accused, as "the presence of other accused is at least as much of a burden as a benefit".[76] The Praljak Defence argues, in particular, that in any multi-accused case there is a possibility that the co-accused function as "*de facto* additional prosecutors", presenting inculpatory evidence for the other co-accused.[77] The Appeals Chamber notes that the eventuality that co-accused present evidence against other accused in the same trial, is counterbalanced by the guarantee, for each accused, to cross-examine witnesses presented by other co-accused and by the fact that each accused may request additional time in due course should good reasons exist.[78]

37. The Praljak Defence further submits that the issue of proportionality must be evaluated in light of the "extremely broad" nature of the indictment, which presents 26 counts and "multiple overlapping theories of liability".[79]

38. The Prosecution submits that, even taking into account the complexity of the case, the time allotted to the Accused is reasonably proportional to the time allotted to the Prosecution.[80] It argues that the Trial Chamber took into consideration the complexity of the case and, through a detailed analysis of the list of witnesses of each Accused, weighed whether the witness testimony was

[74] Response, para. 25.
[75] Praljak Appeal, paras 20-27.
[76] Praljak Appeal, paras 28-29.
[77] Praljak Appeal, paras 28-29.
[78] See Rule 73*ter* of the Rules. See also Impugned Decision, para. 45.
[79] Praljak Appeal, para. 32.

outside the frame of the indictment, unrelated to the indicted charges or repetitive.[81] It submits that the depth of the Trial Chamber's analysis met the standard established by previous Appeals Chamber's decisions rendered on analogous matters.[82] The Prosecution also recalls the greater evidentiary burden on the Prosecution to prove all elements of all counts beyond a reasonable doubt, while the Defence instead is only to cast doubt on specific aspects of the Prosecution case.[83]

39. The Appeals Chamber recalls that, as stated in the *Orić* Decision, when discussing the proportionality between the time allowed to the Prosecution and to the Defence, an accused is not "necessarily entitled to precisely the same amount of time or the same number of witnesses as the Prosecution," which has the burden of proving every element of the crimes charged beyond a reasonable doubt.[84] In a case with multiple accused, the issue of proportionality is affected not only by the burden of proof upon the Prosecution, but also by the circumstance that not all of the evidence presented by the Prosecution is directed to prove the responsibility of one individual Accused. The Appeals Chamber defers to the Trial Chamber's knowledge of the Prosecution case and to its assessment of the proportion between the time allocated to an individual accused and the time used by the Prosecution to address the responsibility of that Accused, unless the determination adopted by the Trial Chamber shows unreasonable disproportion. In this instance, the Appeals Chamber is not satisfied that the Trial Chamber's assessment was unreasonably disproportionate. The Prosecution was granted 316 hours to present its case against the six Accused and used in total 297 hours. The Trial Chamber finds that the allocation to the Praljak Defence of 55 hours was within the reasonable exercise of the Trial Chamber's discretion.

3. Adequate opportunity to present the case

40. The Praljak Defence submits that the Impugned Decision fails to provide the Accused with a "fair opportunity to present an accused's case" as required by the *Orić* Decision.[85] In particular, the Praljak Defence argues that the Impugned Decision deprives it of this opportunity both "*de facto* through its radical reduction of time" and by specifically prompting the Praljak Defence to eliminate broad categories of relevant evidence.[86]

41. The Praljak Defence challenges the four specific grounds upon which the Impugned Decision justified the reduction of time, arguing in detail that all of the proposed evidence is

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[80] Response, paras 20-24.
[81] Response, para. 29.
[82] Response, paras 31-34.
[83] Response, para. 27.
[84] *Orić* Decision, para. 7.
[85] Praljak Appeal, para. 34.
[86] Praljak Appeal, para. 34.

"directly related to the allegations in the Indictment".[87] First, the Praljak Defence argues that the Rule 93 witnesses identified in its 65*ter* List as to demonstrate a consistent pattern of conduct by the Accused Praljak would not be excessive. Instead, the Praljak Defence argues that only the "carefully planned combination of witnesses" it intends to call would adequately address all counts of the Indictment, particularly the charge of persecution and questions regarding *mens rea*.[88] Second, the Praljak Defence disagrees with the Impugned Decision's determination that the proposed evidence of humanitarian aid to Muslims, cooperation between Croats and Muslims, and Serbian aggression would have "little or no relation to the case" or would be redundant.[89] Instead, the Praljak Defence argues that these topics are "central" to establishing the Accused Praljak's role in the alleged joint criminal enterprise and rebutting the allegation regarding the existence of an international armed conflict.[90] Third, the Praljak Defence argues that the potential reduction in time does not justify the limitation of its Rule 92*ter* witnesses, emphasizing that the Praljak Defence deliberately used this mechanism at the direction of the Trial Chamber to minimize the need for *viva voce* testimony.[91] Finally, the Prajlak Defence argues that the Impugned Decision erred in finding that the evidence offered by common witnesses would be repetitive, indicating instead that these witnesses would be testifying about "separate issues not addressed by the other Accused".[92]

42. Additionally, the Prajlak Defence argues that even fully excluding the four categories of evidence identified in the Impugned Decision would not justify reducing the Defence case by the required 56 hours and 30 minutes.[93] In particular, the Praljak Defence estimates that "even if *every* witness at issue *disappeared entirely*" from the Praljak Defence case, including all Rule 93 witnesses (6 hours and 40 minutes), all duplicative viva *voce* witnesses (20 hours and 30 minutes), all Rule 92*ter* witnesses (17 hours and 20 minutes), and all common witnesses (5 hours and 35 minutes), this would result in a reduction of time of only 50 hours and 5 minutes.[94] The Praljak Defence recalls that the trial Chamber instead reduced the time allocated to the Praljak defence by 67 hours and 25 minutes.[95] The Praljak Defence argues that this disparity is particularly pronounced given that the Trial Chamber did not require that these categories be eliminated entirely, but only suggested that they could be reduced to save time.[96]

43. The Prosecution responds that the Praljak Defence failed to demonstrate why the categories of evidence outlined above would be necessary. The Prosecution also identifies 12

[87] Praljak Appeal, para. 36.
[88] Praljak Appeal, paras 37-38.
[89] Praljak Appeal, para. 35.
[90] Praljak Appeal, paras 39-42.
[91] Praljak Appeal, para. 43.
[92] Praljak Appeal, para. 45.
[93] Praljak Appeal, paras 52-53.
[94] Praljak Appeal, paras 46-51.
[95] Praljak Appeal, para. 52.
[96] Praljak Appeal, paras 46, 52-53.

additional subjects or categories of evidence that it contends account for numerous hours of testimony and which it claims are "very far from the core of the case".[97] As a result, the Prosecution argues that the Impugned Decision appropriately found that the Praljak Defence could reduce its case to 55 hours by reducing testimony related to subjects that would be outside the scope of the indictment, would have little or no relevance to the case, or would be entirely repetitive.[98]

44. In its Reply, the Praljak Defence preliminarily submits that the 12 subjects of "peripheral" evidence identified by the Prosecution were addressed for the first time by the Prosecution in its Response.[99] It consequently argues that there is no evidence that the Trial Chamber shares the Prosecution's position that these subjects may be considered "peripheral".[100] It further contends that the evidence the Prosecution identifies as only "peripherally" relevant is actually relevant to rebut evidence offered by the Prosecution case and necessary to the Defence case.[101] The Praljak Defence also contends that "even if *every* witness objected to in the Response is *eliminated entirely*", the Praljak Defence would only reduce its time by an estimated 22 hours and 10 minutes.[102] The Praljak Defence further argues that even if this evidence would only be "peripherally" relevant, the Praljak Defence should at least be allowed time and opportunity to submit this evidence in abbreviated form.[103]

45. Addressing first the reasonableness of the reduction of time, the Appeals Chamber notes that the full elimination of the enumerated categories of evidence referred to in the Impugned Decision as the basis for the reduction in time would not fully account for the imposed reduction in time.[104] If the reduction of time had been based solely on these categories of evidence, the Praljak Defence's argument would be persuasive.

46. However, the Praljak Defence mischaracterises the Impugned Decision's justification of the reduction in time as relating solely to the enumerated topics. The Impugned Decision simply indicates that "[f]or example, a number of witnesses are to appear to testify on the humanitarian aid delivered to the Muslims; on cooperation between the Croats and Muslims in 1991 and 1992 and Serb aggression...".[105] The Appeals Chamber notes that both the phrase "for example" and the ellipsis at the end of the sentence appear to indicate that these topics are an incomplete list of those that the Trial Chamber believed to be repetitive or only peripherally relevant. Accordingly, the

[97] Response, para. 44.
[98] Response, paras 43-45.
[99] Praljak Reply, para. 3.
[100] Praljak Reply, para. 3, fn. 3.
[101] Praljak Reply, paras 8-10.
[102] Praljak Reply, para. 4.
[103] Praljak Reply, para. 5.
[104] See, in particular, the Confidential Annex attached to the Praljak Defence Appeal, the Praljak Defence 65*ter* List, and the Praljak Defence Supplemental Submission.
[105] Impugned Decision, para. 31.

Appeals Chamber interprets this category of evidence to be broader than the set of witnesses identified by the Praljak Defence. As a result, the amount of time covered by the *viva voce* witnesses testifying on peripheral or repetitive topics identified by the Trial Chamber is presumably greater than the estimated maximum of 50 hours and 5 minutes.[106] The Appeals Chamber notes that the Praljak Defence also focuses primarily on the peripheral subjects and ignores the Impugned Decision's argument that the Praljak Defence could also reduce repetitive testimony related to relevant topics.[107]

47. The Praljak Defence argument is also misguided in insisting that the Trial Chamber has prompted it to eliminate broad categories of relevant evidence. The Impugned Decision does not suggest the wholesale elimination of evidence as to these "peripheral" topics, but rather aims at limiting the amount of time used to present them in the interests of efficiency and expeditiousness. The Trial Chamber simply finds that an "excessive number of witnesses" have been put on the Praljak 65*ter* List and that the estimated length of testimony "could be easily reduced".[108]

48. The Appeals Chamber has previously found that although the Trial Chamber must justify its reduction in time by indicating the documents and the competing interests it considered, it does not need to specifically "itemise and justify" all of the bases for this reduction.[109] Additionally, the Appeals Chamber has previously noted that:

> "[w]hile a Trial Chamber has an obligation to provide reasons for its decision, it is not required to articulate the reasoning in detail. The fact that the Trial Chamber did not mention a particular fact in its written order does not by itself establish that the Chamber has not taken that circumstance into its consideration."[110]

Accordingly, the Appeals Chamber defers to the discretion of the Trial Chamber in assessing the relevance and repetitiveness of the evidence outlined in the 65*ter* submissions even if the Impugned Decision only references a few examples of these topics.

C. The Petković Appeal

49. The Trial Chamber, in the Impugned Decision, justified its allocation of 55 hours for the presentation of the Petković Defence's case based on its findings that (1) "the testimony of a number of witnesses is repetitive and, consequently, that the time requested for them is often excessive", (2) the Petković Defence "takes no recourse to Rules 92 *bis* to *quater*", and (3) the

[106] Praljak Appeal, para. 31.
[107] Impugned Decision, para. 31.
[108] Impugned Decision, paras 31, 33.
[109] *Prlić* Decision After Remand on Prosecution Time, para. 25.
[110] *Milošević* Decision on Presentation of Defence Case, para. 7.

Petković Defence failed to reduce the time requested for certain witnesses after finding that they were also on the 65*ter* lists of other Accused.[111]

50. The Petković Defence submits that the Trial Chamber did not provide adequate reasons justifying its assessment that 55 hours is a sufficient time for the presentation of the Petković Defence's case.[112] It requests that the Appeals Chamber set aside the Impugned Decision and direct the Trial Chamber to allocate 89 hours for the presentation of the Petković Defence case "subject to such adjustments as may be just in accordance with the Trial Chamber's ordinary discretion in the light of future changed circumstances".[113]

51. The Petković Defence concedes that the Trial Chamber is entitled to impose limits preventing the introduction of evidence which is irrelevant, or repetitive, or which "would take grossly disproportionate time and other resources when it is very unlikely that it will have any bearing at all on the outcome of the case".[114] However, it submits that the Trial Chamber is not entitled to prevent an Accused from adducing evidence which "may turn out to further the case of the party adducing that evidence", which it claims has been done by the Trial Chamber in the Impugned Decision.[115]

52. The Petković Defence first emphasizes the "extraordinary complexity" of the Indictment and submits that it needs at a minimum 89 hours for the examination of 22 witnesses and the introduction of nearly 800 exhibits, in order to address all crimes alleged in the Indictment, which charges the Accused under all possible forms of liability envisaged in Statute.[116] It argues, in particular, that the Petković Defence is to challenge the evidence provided by the Prosecution through more than 140 witnesses and more than 4,500 exhibits,[117] that there are no agreed facts between the Defence and the Prosecution, and that the Trial Chamber judicially noticed more than 200 facts adjudicated in other proceedings.[118] It further notes that the Trial Chamber, in its Decision on Guidelines,[119] required that Defence exhibits should be presented through *viva voce* witnesses unless certain requirements are satisfied.[120] The Prosecution responds that the Petković Defence does not account for the fact that, while the Prosecution is to prove every element of every crime

[111] Impugned Decision, para. 35.
[112] Petković Appeal, para. 14(c).
[113] Petković Appeal, para. 38.
[114] Petković Appeal, para. 13.
[115] Petković Appeal, para. 13, Petković Reply, para. 12.
[116] Petković Appeal, paras 4-9 and 14; Petković Reply, para. 15.
[117] Petković Appeal, para. 14(c).
[118] Petković Reply, para. 15.
[119] Decision on Guidelines, para. 35.
[120] Petković Appeal, para 14(b).

beyond reasonable doubt, the Defence may defeat a guilty verdict on any charge by raising doubt on merely one element of the alleged crimes.[121]

53. The Petković Defence also submits that the Trial Chamber unreasonably assumed that the testimony of certain witnesses would be redundant on the basis of the Petković 65*ter* list. It argues that, although some witness may be called to testify on similar *topics,* they will give evidence on different *facts* pertaining to those topics "from different point of view, in different context and for different purpose, depending on their positions during relevant time [...]".[122] The Petković Defence submits that it planned the presentation so to eliminate any potential redundancy in the testimony to be provided by witnesses, and that it could have demonstrated to the Trial Chamber the inexistence of cumulative evidence if required to do so.[123] It further argues that all topics identified by the Trial Chamber as subjects of cumulative evidence "are in fact key points of the Petković Defence and consequentially require appropriate elaboration".[124] The Petković Defence finally submits that the Trial Chamber erred in assuming that the Petković Defence, in its Supplemental Submission, reduced the time requested for the examination of a witness common to other accused from 3 hours to one hour.[125] It argues that, based on this error, the Trial Chamber erroneously assumed that a corresponding adjustment could have been made in relation to other common witnesses.[126]

54. The Prosecution responds that the Petković Defence did not explain why the witnesses identified by the Trial Chamber would not be repetitive and why procedures for admission of written evidence are inadequate to articulate witnesses testimony.[127]

55. As to the standard of reasonable proportionality between the time allowed to the Petković Defence to present its case and the time allowed to the Prosecution, the Appeals Chamber considers that the Praljak Defence and the Petković Defence have been granted the same amount of time for presenting their cases[128] and that the two Accused are charged with the same crimes under the same forms of liability.[129] Considering the similarities between the two cases, and considering that the Petković defence does not provide additional arguments addressing the issue of proportionality, the Appeals Chamber is satisfied that the reasons already given in relation to its assessment of the Praljak Appeal also apply to the Petković Defence.

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[121] Response, para. 48, citing *Orić* Decision, para. 7.
[122] Petković Appeal, paras 18-23.
[123] Petković Appeal, para. 24.
[124] Petković Appeal, paras 16-23.
[125] Petković Appeal, para. 24.
[126] Petković Appeal, para. 24.
[127] Response, para. 51.
[128] Impugned Decision, paras 33, 37.
[129] *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, Amended Indictment, 16 November 2005.

56. The Appeals Chamber further rejects the Petković Defence argument that the Impugned Decision failed to adequately consider and justify its decision to reduce the time requested by the Petković Defence's case.[130] As previously held by the Appeals Chamber, a Trial Chamber is required to justify its decision allocating the time for a party to present its case by indicating "what documents and information it had taken into account and the factors it considered in assessing" the appropriate time.[131] The Appeals Chamber re-iterates that a Trial Chamber is not, however, required to itemise and justify the time reduction in respect of each piece of evidence proposed by a party.[132] The Appeals Chamber has already established above that the Trial Chamber adequately identified the documents and the factors it considered in allocating time and found that they were not unreasonable in principle.[133] Accordingly, the burden on appeal is on the Petković Defence to show that "relevant factors have gone unconsidered or irrelevant factors have been accorded undue weight"[134] or that the determination was "so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion".[135]

57. The Appeals Chamber first notes that the Impugned Decision does identify several specific topics about which multiple witnesses would be testifying as examples of repetitive testimony:

> For example, the Chamber notes that eight witnesses are to testify on the ABiH attack against Konjić; that seven witnesses are to refer to the multi-ethnic organisation of the HVO and the betrayal of the Muslims; that three witnesses are to talk about the non-participation of Milivoj Petković in Operation "South" and that six witnesses are to present facts on the willingness of the HVO to find negotiated solutions with the ABiH.[136]

The Appeals Chamber finds that this level of specificity is not unreasonable and that the Trial Chamber does not need to provide a more detailed analysis.

58. Further, the Appeals Chamber finds no merit in the Petković Defence's argument that the Trial Chamber inferred that it would be possible to reduce the time estimated for witnesses common to other accused, based on a misinterpretation of the Petkovic's Defence Supplemental Submission. The Appeals Chamber considers irrelevant that the reduction of two hours for the examination of a common witness was addressed by the Praljak Defence during the 73*ter* Conference of 21 April 2008 rather than in the Praljak Defence's Supplemental Submission. It further considers that the Trial Chamber committed no error in noting that the Praljak Defence reduced by two hours the estimated time for the examination of a witness common to other accused. It finally considers that the Trial Chamber's conclusion that time could be saved in the examination of witnesses common

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[130] Petković Appeal, para. 14(c).
[131] *Prlić* Decision After Remand on Prosecution Time, para. 25.
[132] *Prlić* Decision After Remand on Prosecution Time, para. 25.
[133] *Supra*, paras 21-29.
[134] *Prlić* Decision After Remand on Prosecution Time, para. 30.
[135] Decision on Radivoje Miletić's Interlocutory Appeal, para. 6 *citing Stanišić* Provisional Release Decision, para. 6, fn. 10.

to other accused was not based on the Praljak Defence reduction of the estimated time for one of the common witnesses, but rather was based on the presence of six other witnesses common to more accused.

59. Finally, the Appeals Chamber does not accept the argument that the Trial Chamber could not make an evaluation of the existence of redundant evidence based on the "relatively short summaries" provided by the Petković Defence in its 65*ter* list.[137] First, the Appeals Chamber notes that Rule 73*ter* of the Rules expressly provides that a Trial Chamber is to determine the duration of a party's case based on its review of the 65*ter* Lists and the representations of the party. Second, the Appeals Chamber considers that one of the purposes of the submission of the *65ter* list, is for a party to show the relevance of the evidence it proposes to present. Third, although the Petković Defence insists that the witnesses would be called to "give relevant evidence on different *facts* in relation to those (same) topics" and insists that they could have demonstrated this in further proceedings,[138] the Appeals Chamber notes that the Petković Defence has already been granted several occasions to clarify its position.[139] Fourth, the Appeals Chamber considers that the Trial Chamber reached its determination on the issue of repetitive evidence by reference to its familiarity with the factual and legal issues in this case and its knowledge of the existing evidence on the record. The Appeals Chamber therefore, defers to the judgement of the Trial Chamber in assessing that some of this evidence would be repetitive. The Appeals Chamber further recalls that, in the Impugned Decision, the Trial Chamber stated that it would be willing to further review its determination during the course of the trial and verify whether an extension of time for the Defence cases would be appropriate.[140]

60. For the aforementioned reasons, the Appeals Chamber finds that the Petković Defence failed to show that the Trial Chamber committed any discernable error in allocating 55 hours for the presentation of the Petković Defence's case.

D. The Ćorić Appeal

61. In its Appeal, the Ćorić Defence declares its intention to join the Petković Appeal. It submits that, considering the similarity between the facts which would support the Ćorić Appeal and the facts addressed in the Petković Appeal, the Appeals Chamber would be in a position to rule on the Ćorić Appeal "without explanation of specific facts" by the Ćorić Defence.[141]

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[136] Impugned Decision, para. 35.
[137] Petković Appeal, para. 17.
[138] Petković Appeal, paras 18, 21.
[139] *Supra*, paras 2-5.
[140] Impugned Decision, para. 45.

62. The Prosecution responds that the Trial Chamber did not unreasonably limit the time allocated to the Ćorić Defence from 81 hours to 50 hours because the Ćorić Defence provided no explanation in its 65(G) *ter* summaries or on appeal as to why the witnesses identified by the Trial Chamber were not repetitive and made no effort to use Rule 92 *bis* to *quater* testimony to reduce time.[142]

63. As outlined above, the Appeals Chamber has dismissed the arguments made by the Petković Defence in support of its appeal. Accordingly, the Appeals Chamber finds that the Ćorić Defence failed to demonstrate that the Trial Chamber committed any discernable error in allocating 55 hours to the Ćorić Defence for the presentation of its case.

E. The Stojić Appeal

64. The Stojić Defence submits that the Trial Chamber committed an abuse of discretion by allowing only 59 hours to present its Defence case. It requests that the Appeals Chamber vacate the Impugned Decision and order the Trial Chamber to grant to the Stojić Defence his original request of 68 hours of direct examination, "which is both reasonably proportional to the Prosecution case and which allows Mr. Stojić a fair opportunity to present its case". [143]

65. The Stojić Defence recalls that the number of hours initially granted to the Prosecution was more than the number of hours actually used for the Prosecution case.[144] It submits that each Accused should be granted at least one-sixth of the time the Prosecution was given at the start of the proceedings, since "the Prosecution was not limited in use of time" and "the Stojić Defence should be given similar consideration".[145] The Prosecution notes that Stojić concedes that a fair resolution of the matter would grant each Accused one-sixth of the time allotted to the Prosecution, and submits that Stojić erroneously assumed that the calculation should be based on the 400 hours that the Prosecution was given at the beginning of the case.[146]

66. The Appeals Chamber does not accept the Stojić Defence argument that proportionality should be based on the original allotment of 400 hours that was granted to the Prosecution. First, the Appeals Chamber notes that the Defence is to challenge the evidence actually presented by the Prosecution, and not the evidence that the Prosecution could have adduced if it would have used all of the time initially granted. Second, while the Appeals Chamber might be amenable to this

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[141] Ćorić Appeal, p. 1.
[142] Response, paras 52-54.
[143] Stojić Appeal, para. 20.
[144] Stojić Appeal, para. 18.
[145] Stojić Appeal, para. 18.
[146] Prosecution Response, para. 40.

argument if the reduction in the length of the Prosecution case had been purely voluntary, it notes that the reduction of the time allotted to the Prosecution was instead imposed by a judicial decision.[147] As a result, the Stojić Defence's contention that the Prosecution was "not limited in its use of time" is misleading.[148] The Appeals Chamber further notes that in earlier decisions in this case it explicitly considered the future proportionality of the Defence cases in assessing the reasonableness of the allocation of time for the Prosecution case:

> [T]he modalities and allocation of time for presentation of the Accused's case is yet to be determined by the Trial Chamber. When the proceedings reach that stage, the Appeals Chamber recalls that under the jurisprudence of the International Tribunal, the Trial Chamber will be bound to apply the longstanding principle of equality of arms to ensure that a basic proportionality will govern the relationship between the time and number of witnesses allocated to all sides. [149]

Accordingly, the Appeals Chamber finds that the Trial Chamber's allocation of time based on the 316 hours actually allowed to the Prosecution rather than the 400 hours initially allotted is not unreasonable.[150]

67. Second, the Stojić Defence submits that the Trial Chamber reduced the number of hours due to the alleged redundant nature of some of the proposed evidence failing to provide a witness-by-witness justification of such a reduction.[151] The Stojić Defence argues that "the evidence the 24 *viva voce* witnesses will present at trial will not be repetitive or redundant of evidence of events given in the Prosecution's case", but will rather be necessary to rebut evidence introduced by the Prosecutor.[152]

68. The Prosecution responds that the Stojić Defence only submits "unsupported assertions," since it provides no specific examples of why the testimony of common or repetitive witnesses would be relevant and not redundant.[153]

69. The Appeal Chamber reiterates that in setting the amount of time to be allocated to the Defence for the presentation of its case, the Trial Chamber is not obligated to justify its decision with reference to each piece of evidence proposed by the Defence. The Appeals Chamber finds that the Stojić Defence failed to show that the Trial Chamber committed any discernable error in assessing the time for the Stojić Defence to present its case.

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[147] *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, *Décision portant adoption de nouvelles mesures visant à achever le procès dans un délai raisonnable*, 13 November 2006.
[148] Stojić Appeal, para. 18.
[149] *Prlić* Decision After Remand on Prosecution Time, para. 38.
[150] Impugned Decision, para. 8.
[151] Stojić Appeal, para. 12.
[152] Stojić Appeal, para. 13.
[153] Response, paras 38-39.

V. DISPOSITION

70. On the basis of the foregoing, the Appeals Chamber,

DISMISSES the Praljak Appeal;

DISMISSES the Petković Appeal;

DISMISSES the Ćorić Appeal;

DISMISSES the Stojić Appeal; and

AFFIRMS the Impugned Decision.

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

Done this 1st day of July 2008,
At The Hague,
The Netherlands.

Judge Fausto Pocar
Presiding Judge

[Seal of the International Tribunal]