



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-AR73.4
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IN THE APPEALS CHAMBER

Before: Judge Fausto Pocar, Presiding
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Andréia Vaz
Judge Wolfgang Schomburg

Registrar: Mr. Hans Holthuis

Decision: 11 May 2007

PROSECUTOR

v.

**Jadranko PRLIĆ
Bruno STOJIĆ
Slobodan PRALJAK
Milivoj PETKOVIĆ
Valentin ĆORIĆ
Berislav PUŠIĆ**

**DECISION ON PROSECUTION APPEAL FOLLOWING TRIAL
CHAMBER'S DECISION ON REMAND AND FURTHER
CERTIFICATION**

The Office of the Prosecutor:

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Mr. Daryl Mundis
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Ms. Senka Nožica and Mr. Peter Murphy for Bruno Stojić
Mr. Božidar Kovačić and Ms. Nika Pinter for Slobodan Praljak
Ms. Vesna Alaburić and Mr. Nicholas Stewart for Milivoj Petković
Ms. Dijana Tomašegović-Tomić and Mr. Dražen Plavec for Valentin Ćorić
Mr. Fahrudin Ibrišimović and Mr. Roger Sahota for Berislav Pušić

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 “International Tribunal”, respectively), is seized of the “Prosecution Appeal Brief Following Decision on Remand and Trial Chamber’s Further Certification” filed on 29 March 2007 (“Interlocutory Appeal Following Remand”) and remains seized of the “Prosecution Appeal Concerning the Trial Chamber’s Ruling Dated 13 November 2006 Reducing Time for the Prosecution Case” filed on 30 November 2006 (“Interlocutory Appeal”).

I. BACKGROUND

2. On 13 November 2006, Trial Chamber III rendered its “Decision on Adoption of New Measures to Bring the Trial to an End Within a Reasonable Time” (“Impugned Decision”),¹ in which it decided, *inter alia*, to reduce the number of hours allocated to the Prosecution for the presentation of its evidence in the *Prlić et al.* trial by 107 hours.² The Trial Chamber decided, pursuant to Articles 20 and 21 of the Statute of the International Tribunal (“Statute”) and Rules 54 and 90(F) of the Rules of Procedure and Evidence of the International Tribunal (“Rules”), to amend its previous “Revised Version of the Decision Adopting Guidelines on Conduct of Trial Proceedings” of 28 April 2006 (“Decision Adopting Guidelines”),³ by reducing the Prosecution’s remaining 297 hours (out of a total 400 allotted hours) to 190 hours, beginning on 13 November 2006.⁴

3. On 23 November 2006, the Trial Chamber granted the Prosecution’s application, pursuant to Rule 73(C) of the Rules, for certification to appeal the Impugned Decision⁵ and on 30 November 2006, the Prosecution filed its Interlocutory Appeal.

4. On 11 December 2006, Defence Counsel for Jadranko Prlić, Slobodan Praljak and Berislav Pušić filed a Joint Response (“*Prlić et al.* Joint Response”),⁶ supporting the Prosecution’s Interlocutory Appeal against the reduction of remaining time for the presentation of its case.⁷ The *Prlić et al.* Joint Response, however, takes issue with the Prosecution’s assessment of its own efficiency and cooperation with the Trial Chamber; rejects the suggestions it makes for speeding up

¹ *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, Decision on Adoption of New Measures to Bring the Trial to an End Within a Reasonable Time, 13 November 2006.

² Impugned Decision, paras. 19-20.

³ *Prosecutor v. Prlić et al.*, Case No. IT-04-74-PT, Revised Version of the Decision Adopting Guidelines on Conduct of Trial Proceedings, 28 April 2006.

⁴ Impugned Decision, para. 20, p. 10.

⁵ T. 10678-10681, 23 November 2006.

⁶ Joint Defence Response of Jadranko Prlić, Slobodan Praljak and Berislav Pušić to Prosecution Appeal Concerning the Trial Chamber’s Ruling Dated 13 November 2006 Reducing Time for the Prosecution Case, 11 December 2006.

the trial; and joins the Trial Chamber in calling on the Prosecution to examine the possibility of reducing the scope of the Indictment or its evidence.⁸

5. On 11 December 2006, Defence Counsel for Milivoj Petković filed the “Response of the Defence for Milivoj Petković to Prosecution Appeal Against the Trial Chamber’s Ruling Dated 13 November 2006 Reducing Time for the Prosecution Case” (“*Petković* Response”), supporting the Prosecution’s Interlocutory Appeal against the Impugned Decision’s reduction of remaining time for the presentation of its case.⁹ The *Petković* Response also supports the Trial Chamber’s suggestions for improved efficiency by the Prosecution and its urging of the Prosecution to examine the possibility of reducing the scope of the Indictment.¹⁰

6. On 13 December 2006, Defence Counsel for Bruno Stojić and Valentin Ćorić filed a “Joinder of the Accused Stojić and Ćorić in Joint Defence Response of Jadranko Prlić, Slobodan Praljak and Berislav Pušić to Prosecution Appeal Concerning the Trial Chamber’s Ruling Dated 13 November 2006 Reducing Time for the Prosecution Case,” joining and adopting the *Prlić et al.* Joint Response.

7. On 14 December 2006, the “Prosecution Reply to Defence Responses to Prosecution Appeal of the Trial Chamber Ruling Dated 13 November 2006 Reducing Time for the Prosecution Case” (“Prosecution Reply”) was filed.

8. On 6 February 2007, the Appeals Chamber rendered its “Decision on Prosecution Appeal Concerning The Trial Chamber’s Ruling Reducing Time For The Prosecution Case” (“Appeals Chamber’s Decision”), in which it remanded the Impugned Decision to the Trial Chamber for its renewed assessment and consideration of whether the reduction of time would allow the Prosecution a fair opportunity to present its case in light of the complexity and number of issues that remain.¹¹ The Appeals Chamber recalled that a Trial Chamber must provide reasoning in support of its findings on the relevant substantive considerations and concluded that, in the absence of having made the above-noted assessment, the reasoning in the Impugned Decision was insufficient to support the reduction of the Prosecution’s time by 107 hours.¹²

9. On 9 February 2007, the Prosecution filed the “Prosecution Submission Concerning Decision on Prosecution Appeal on Reduction of Time” before the Trial Chamber (“Prosecution

⁷ *Prlić et al.* Joint Response, paras. 2, 21. *See also*, paras. 3-7.

⁸ *Ibid.*, paras. 2, 21. *See also* paras. 8-20.

⁹ *Petković* Response, para. 5.

¹⁰ *Ibid.*, para. 4.

¹¹ Appeals Chamber’s Decision, para. 24.

¹² *Ibid.*, para. 16.

Submission Following Remand”)¹³ and on 15 February 2007, Defence Counsel for Jadranko Prlić, Bruno Stojić, Slobodan Praljak, Milivoj Petković, Valentin Ćorić and Berislav Pušić filed the “Joint Defence Response to Prosecution Submission Concerning Decision on Prosecution Appeal on Reduction of Time” (“Joint Defence Response Following Remand”).¹⁴

10. On 1 March 2007, the Trial Chamber rendered its “Decision Following the Appeals Chamber Decision of 6 February 2007 Concerning Appeal Against Reducing Time for the Prosecution Case” (“Impugned Decision on Remand”),¹⁵ in which it decided to maintain the Impugned Decision.¹⁶ The Trial Chamber stated that it had reassessed the reduction of time allotted to the Prosecution in light of, *inter alia*, all the documents submitted by the parties, new information collected since the Impugned Decision to date, and the observations put forward by the parties on 9 and 15 February 2007, and concluded “that the time limit imposed on the Prosecution allows it to complete the presentation of its case in full conformity with the rules of procedural fairness, which is also in conformity with the requirements of the [Appeals Chamber’s Decision].”¹⁷

11. On 7 March 2007, the Prosecution filed the “Prosecution Request for Certification of Appeal Concerning the Trial Chamber’s Decision on Remand Dated 1 March 2007” (“Prosecution Request for Certification”),¹⁸ in which it noted that it sought certification as a precautionary measure “to the extent that any further certification is required” while maintaining its position that the Interlocutory Appeal remained pending before the Appeals Chamber.¹⁹ Response briefs supporting the Prosecution Request for Certification were filed by the Accused.²⁰

12. On 8 March 2007, the Prosecution filed a “Notice of Decision on Remand” before the Appeals Chamber (“Prosecution Notice of Decision on Remand”),²¹ noting that it “maintains and

¹³ *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, Prosecution Submission Concerning Decision On Prosecution Appeal on Reduction Of Time, 9 February 2007.

¹⁴ *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, Joint Defence Response to Prosecution Submission Concerning Decision on Prosecution Appeal on Reduction of Time, 15 February 2007.

¹⁵ *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, Decision Following the Appeals Chamber Decision of 6 February 2007 Concerning Appeal Against Reducing Time for the Prosecution Case, 1 March 2007.

¹⁶ Impugned Decision on Remand, p. 4.

¹⁷ *Ibid.*

¹⁸ *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, Prosecution Request for Certification of Appeal Concerning the Trial Chamber’s Decision on Remand Dated 1 March 2007, 7 March 2007.

¹⁹ Prosecution Request for Certification, para. 1, fn. 1.

²⁰ Response of Bruno Stojić to Prosecution Request for Certification of Appeal Concerning the Trial Chamber’s Decision on Remand Dated 1 March 2007 of 12 March 2007; Joint Defence Response of Jadranko Prlić, Slobodan Praljak and Berislav Pušić to Prosecution Request for Certification of Appeal Concerning the Trial Chamber’s Decision on Remand Dated 1 March 2007 of 12 March 2007; Joinder of the Accused Valentin Ćorić in the Response of Bruno Stojić to Prosecution Request for Certification of Appeal Concerning the Trial Chamber’s Decision on Remand Dated 1 March 2007 of 14 March 2007; and Petković Defence Response to Prosecution Request for Certification to Appeal Against the Trial Chamber Decision on Remand Dated 1 March 2007 of 19 March 2007.

²¹ Notice of Decision on Remand, 8 March 2007.

persists” each ground raised in its Interlocutory Appeal.²² The Prosecution further argues that the Impugned Decision on Remand fails to provide a substantive or objective assessment of whether the reduction of time would indeed allow the Prosecution a fair opportunity to present its case in light of the complexity and number of issues that remain.²³

13. On 19 March 2007, Defence Counsel for Milivoj Petković filed the “Petković Defence Response to Prosecution Notice of Decision on Remand” supporting the Prosecution Notice of Decision on Remand.²⁴

14. On 22 March 2007, the Trial Chamber rendered its written “Decision on the Request for Certification of Appeal Concerning the Trial Chamber’s Decision of 1 March 2006” (“Certification Decision”),²⁵ in which it considered, by majority, that the Interlocutory Appeal was still pending before the Appeals Chamber and consequently denied the Prosecution Request for Certification as inadmissible for lack of jurisdiction. Nonetheless, the Trial Chamber, again by majority, considered it appropriate in the alternative to grant the Prosecution certification to appeal against the Impugned Decision on Remand for reasons of judicial economy in the event the Appeals Chamber no longer considers itself seized of the Interlocutory Appeal.²⁶

15. On 29 March 2007, the Prosecution submitted its Interlocutory Appeal Following Remand in which it reiterates each of the grounds it had previously raised in its Interlocutory Appeal while additionally arguing, *inter alia*, that the Impugned Decision Following Remand does not comply with the Appeals Chamber’s Decision in that it “contains no significant new information and no substantive or sufficient analysis as to how the 293 hours ordered by the Trial Chamber is objectively adequate to permit the Prosecution to set forth its case in a manner consistent with its rights.”²⁷

16. On 10 April 2007, Defence Counsel for Milivoj Petković filed the “Petković Defence Response to Prosecution Appeal Brief Following Decision on Remand and Trial Chamber’s Further Certification” (Petković Defence Response Following Remand”). No other response briefs were filed by or on behalf of the Accused. No reply was filed by the Prosecution.

II. STANDARD OF REVIEW

²² *Ibid.*, para. 5.

²³ *Ibid.*, para. 11.

²⁴ Petković Defence Response to Prosecution Notice of Decision on Remand, 19 March 2007.

²⁵ *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, Decision on the Request for Certification of Appeal Concerning the Trial Chamber’s Decision of 1 March 2006, 22 March 2007.

17. It is well established in the jurisprudence of the International Tribunal that Trial Chambers exercise discretion in relation to trial management.²⁸ The Trial Chamber’s decision in this case to reduce the time allocated to the Prosecution for the presentation of its 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.”²⁹ The Appeals Chamber’s examination is therefore limited to establishing whether the Trial Chamber has abused its discretionary power by committing a discernible error.³⁰ 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.”³¹

III. DISCUSSION

(A) Certification

18. As a preliminary matter, the Appeals Chamber considers it important to clarify that, in spite of the Trial Chamber’s Certification Decision, certification was not required in this case. The Appeals Chamber remained seized of the issues raised by the Prosecution in its Interlocutory Appeal having remanded the Impugned Decision for the purpose of obtaining the Trial Chamber’s

²⁶ Certification Decision, pp. 4-5.

²⁷ Interlocutory Appeal Following Remand, para. 15.

²⁸ *Prosecutor v. Jadranko 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. Zdravko 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. Slobodan 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. Slobodan 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.”

²⁹ Decision on Radivoje Miletić’s Interlocutory Appeal, para. 4; *Milošević* Decision on Defense Counsel, para. 9.

³⁰ *Prlić* Decision on Cross-Examination, p. 3 citing *Prosecutor v. Slobodan 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. Mićo 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.

³¹ Decision on Radivoje Miletić’s Interlocutory Appeal, para. 6 citing *Stanišić* Provisional Release Decision, para. 6 & n. 10. The Appeals Chamber will also consider whether the Trial Chamber “has given weight to extraneous or irrelevant considerations or that it has failed to give weight or sufficient weight to relevant considerations” *Ibid.*

renewed assessment and further substantiation of the reasoning underpinning its decision to reduce the Prosecution's remaining allocated time for the presentation of its case.³²

19. Thus, regardless of the Certification Decision, the Appeals Chamber considers itself seized of the original Interlocutory Appeal as well as of the Interlocutory Appeal Following Remand in which the Prosecution takes further issue with the sufficiency of the reasoning provided by the Trial Chamber in the Impugned Decision on Remand in support of maintaining the Impugned Decision. On this basis, the Appeals Chamber will also consider the Petković Defence Response Following Remand. The Prosecution Notice of Decision on Remand and the Petković Defence Response to Prosecution Notice of Decision on Remand are also duly noted.

(B) Impugned Decision on Remand

20. Before revisiting the arguments raised in the Interlocutory Appeal, the Appeals Chamber considers it useful to address the Prosecution's challenge to the compliance of the Impugned Decision on Remand with the Appeals Chamber's direction to the Trial Chamber that it specifically consider whether the reduction of 107 hours from the 400 hours originally allocated to the Prosecution would allow it a fair opportunity to present its case in light of the complexity and number of issues that remain.³³ The Prosecution contends that the Impugned Decision on Remand fails to comply with the Appeals Chamber's Decision, because it "contains no significant new information and no substantive or sufficient analysis as to how the 293 hours ordered by the Trial Chamber is 'objectively adequate'" to allow it to fairly set forth its case.³⁴ It adds that "the Trial Chamber's mere recitation that it 'has duly taken into account the complexity and number of questions remaining to be dealt with in the case' is no substitution for actually setting out on the face of its ruling the analysis required by the Appeals Chamber."³⁵

21. The Prosecution submits that the Impugned Decision on Remand does nothing more than (a) acknowledge the very limited actual available court time enjoyed by the Prosecution to date; (b) recognise that within this limited amount of time, the Prosecution has worked hard to present its case as efficiently as possible; and (c) urge the Prosecution to continue working as efficiently as possible.³⁶ It then goes on to suggest the particulars of what is missing. It notes that the Trial Chamber has not set out its reasoning as to how the time granted is objectively adequate for the

³² Appeals Chamber's Decision, para. 24.

³³ *Ibid.*

³⁴ Interlocutory Appeal Following Remand, para. 15.

³⁵ *Ibid.*, para. 18.

Prosecution to fairly present and prove the following: (a) each element of each of the crimes charged in the Amended Indictment,³⁷ concerning, for example, Mostar, Stolac, Vareš and Stupni Do, and the Dretelj concentration camp;³⁸ (b) the joint criminal enterprise involving a Greater Croatia, and the various forms of joint criminal enterprise as set out in the Amended Indictment;³⁹ (c) the existence of an international armed conflict involving the Republic of Croatia in Bosnia and Herzegovina;⁴⁰ (d) the Article 7(1) responsibility of each of the six accused;⁴¹ (e) the Article 7(3) responsibility of each of the six accused;⁴² (f) the *mens rea* of each of the accused;⁴³ and (g) the widespread and systematic nature of the charged conduct.⁴⁴

22. The Prosecution continues to maintain that the total of 293 hours is not an objectively adequate amount of time in which to fairly “complete the crime base evidence, address a number of common and other elements such as international armed conflict and the widespread and systematic nature of the charged conduct” or to deal with the essential evidence concerning the joint criminal enterprise and essential linkage evidence for not just one but six different accused.⁴⁵

23. The Appeals Chamber notes that in reaching the Impugned Decision on Remand, the Trial Chamber stated that “it took due notice of the complexity and number of issues to be litigated in the case” on the basis of the following documents: the Amended Indictment; the pre-trial briefs; summaries of the facts on which Prosecution witnesses will testify and which were compiled pursuant to Rule 65*ter* of the Rules; the tables submitted by the Prosecution on 4 September 2006; the points raised by the parties at the hearing of 6 November 2006 regarding the time allocated to the Prosecution for the presentation of its evidence; the number and content of the statements of witnesses who have already testified; and the documentary evidence submitted during the trial.⁴⁶ The Trial Chamber further affirmed that it has reassessed the reduction of time in light of these documents, new information collected since the date of the Impugned Decision, the Prosecution Submission Following Remand, and the Joint Defence Response Following Remand.⁴⁷

³⁶ *Ibid.*, para. 15.

³⁷ *Prosecutor v. Prlić et al.*, Case No. IT-04-74-PT, Amended Indictment, 16 November 2005 (“Amended Indictment”).

³⁸ *Ibid.*, para. 20, referring to paras. 88-117; 154-170; 204-216; and 187-193 of the Amended Indictment.

³⁹ *Ibid.*, para. 21, referring to paras. 15-17, 18-42, 221-227 of the Amended Indictment.

⁴⁰ *Ibid.*, para. 22, referring to para. 232 of the Amended Indictment.

⁴¹ *Ibid.*, para. 23, referring to paras. 218-220 of the Amended Indictment.

⁴² *Ibid.*, para. 24, referring to para. 228 of the Amended Indictment.

⁴³ *Ibid.*, referring to paras. 219-220, 228 and 233 of the Amended Indictment.

⁴⁴ *Ibid.*, referring to para. 234 of the Amended Indictment.

⁴⁵ *Ibid.*, para. 16.

⁴⁶ Impugned Decision on Remand, p. 2.

⁴⁷ *Ibid.*, pp. 2-3.

24. The Trial Chamber also specifically pointed to the fact that a large part of the Amended Indictment has been covered by the testimony of at least 98 Prosecution witnesses including allegations concerning the municipalities of Prozor, Gornji Vakuf, Mostar, Jablanica, Stolac, Ljubuški and Čapljina, the Heliodrom camp and the prisons in Dretelj and Gabela. It further noted that the statements of several more witnesses have addressed the nature of the conflict in Bosnia and Herzegovina and the responsibility of the Accused all within about 167 hearing hours.⁴⁸ Finally, the Trial Chamber took note of the Prosecution's estimation that it would complete the presentation of its *viva voce* evidence on the crime base by the end of March 2007.⁴⁹

25. The Appeals Chamber considers that while a Trial Chamber must provide reasoning in support of its findings on the substantive considerations relevant for a decision – in this case whether the reduced timeframe objectively allows the Prosecution a fair opportunity to present its case – the Prosecution overstates the Trial Chamber's burden in this respect. It is sufficient here that the Trial Chamber indicated what documents and information it had taken into account and the factors it considered in assessing what remains to be covered against the backdrop of the Amended Indictment, while making clear in its assessment that it duly balanced the sometimes competing interests at stake in carrying out its duty to ensure the fairness and expeditiousness of the proceedings. The Trial Chamber is not, however, required to itemise and justify the time reduction in respect of each section of the Amended Indictment.⁵⁰

26. The Appeals Chamber finds that the Trial Chamber has sufficiently complied with its direction on remand such that the Appeals Chamber may now carry out a *bona fide* review of the Impugned Decision.

(C) Interlocutory Appeal

27. Turning to the merits of the Interlocutory Appeal, the Appeals Chamber notes that the Prosecution maintains that the Impugned Decision “denies and violates the fundamental right of the victims, the Prosecution and the international community to a fair trial.”⁵¹ The Prosecution specifically submits that the Impugned Decision (1) “substantially interferes with and unreasonably

⁴⁸ *Ibid.*, p. 3. See also *Brdanin* Appeal Judgement, para. 11; *Kvočka* Appeal Judgement, para.23.

⁴⁹ *Ibid.*, p. 3, referring to T.14154, 14 February 2007.

⁵⁰ *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR73.6, Decision on the Interlocutory Appeal by the *Amici Curiae* Against the Trial Chamber Order Concerning the Presentation and Preparation of the Defence Case, 20 January 2004 (“*Milošević* Appeal by the *Amici*”), para. 9 (“While a Trial Chamber has an obligation to provide reasons for its decision, it is not required to articulate the reasoning in detail.”).

⁵¹ Interlocutory Appeal, para. 3; Interlocutory Appeal Following Remand, para. 8.

limits the Prosecution's ability to fairly and effectively present its case";⁵² (2) "changes the rules for the conduct of the trial after the Prosecution has fully relied, to its detriment, on the Trial Chamber's earlier rulings";⁵³ (3) "penalises and prejudices the Prosecution without justification, for factors beyond the Prosecution's control";⁵⁴ (4) "is arbitrary and capricious, involving a too precipitous and too severe action to the prejudice of the Prosecution, without taking other available steps to provide more time and to conduct the trial proceedings more efficiently and fairly";⁵⁵ and (5) "impermissibly gives priority to a stated Completion Strategy deadline over the rights of the victims, the Prosecution and the international community."⁵⁶

(i) The Impugned Decision Substantially Interferes With and Unreasonably Limits the Prosecution's Ability to Fairly and Effectively Present its Case

28. The Appeals Chamber recognises that a substantial amount of time has been cut. It also takes note of the significant complexity and importance of this case amongst those that have and will have been prosecuted at the International Tribunal. In the words of the Prosecution, this case is the "Bosnian Croat Leadership Case" as it concerns the six most responsible senior surviving political and military Bosnian Croat leaders who are alleged to have participated and assisted in the project to establish a "Greater Croatia".⁵⁷ The Prosecution submits in this connection, that the objective adequacy of the remaining time must be considered in light of the fact that many aspects of this case have never been litigated at the International Tribunal, while others that have been touched upon have not been litigated as extensively as they must be in this case.⁵⁸

29. The Appeals Chamber recognises that the reduction in time by the Trial Chamber will undoubtedly be seen to interfere with the presentation of the Prosecution's case in that a cut will force the Prosecution to further revise and refine its trial strategy. It does not however, necessarily imply that the Prosecution will be unable to fairly and effectively present its case within the confines of the reduced time. The question before the Appeals Chamber is thus whether the Trial Chamber committed a discernable error in determining that the reduction of 107 hours would still allow the Prosecution a fair opportunity to present its case.

⁵² Interlocutory Appeal, paras. 3, 22-34.

⁵³ *Ibid.*, paras. 3, 35-37.

⁵⁴ *Ibid.*, paras. 3, 38-45.

⁵⁵ *Ibid.*, paras. 3, 46-57.

⁵⁶ *Ibid.*, paras. 3, 58-62.

⁵⁷ Interlocutory Appeal Following Remand, paras. 1-2 [emphasis in original].

⁵⁸ *Ibid.*, para. 3.

30. The Appeals Chamber has previously recalled in this case that “every court possesses the inherent power to control the proceedings *during* the course of the trial,”⁵⁹ and that it was within the discretion of the Trial Chamber to revise the time originally allocated to the Prosecution in the Decision Adopting Guidelines as a function of that power.⁶⁰ Following the remanding of the Impugned Decision and the renewed assessment carried out by the Trial Chamber, the Appeals Chamber finds the Trial Chamber acted within its discretion and defers to it in respect of the outcome of its assessment. The Appeals Chamber considers that the Trial Chamber has now clearly indicated the bases upon which it carried out its assessment, and is not persuaded that relevant factors have gone unconsidered or irrelevant factors have been accorded undue weight.⁶¹ Furthermore, the Appeals Chamber does not find the Trial Chamber’s decision to be unfair or unreasonable as to constitute an abuse of its discretion.

31. The Appeals Chamber notes the Prosecution’s contention that the Trial Chamber’s reference to the use of Rules 92*bis* and 92*ter* of the Rules as a way to allow the Prosecution to present its case as efficiently as possible does not constitute a new or changed circumstance capable of justifying the cutting of the Prosecution’s time from 400 hours to 293 hours.⁶² The Prosecution submits that in relying on these factors, the Trial Chamber is effectively “double-counting”, having used these rules in setting the original timeframe of 400 hours and now again using these same rules to justify the additional time cut.⁶³ Seeking to rely on the *Milošević* Appeal by the *Amici*, the Prosecution argues that the Trial Chamber has consequently given weight to extraneous or irrelevant considerations “which the Appeals Chamber has found to be an error in the exercise of discretion in the setting of time limits.”⁶⁴ The Appeals Chamber finds that this reference is inapposite. Noting that the Trial Chamber is the best placed authority to determine what amount of time is sufficient for the accused to prepare his defence, the Appeals Chamber in the *Milošević* Appeal by the *Amici* found that the “Trial Chamber’s decision was informed by sufficient factual information and by the appropriate legal principles, and did not take into account any impermissible factor” such as the completion target for the International Tribunal’s work.⁶⁵ In that case, the Appeals Chamber did not, as the Prosecution suggests, consider the use of Rules 92*bis* and 92*ter* to be extraneous or irrelevant

⁵⁹ Appeals Chamber’s Decision, para. 14.

⁶⁰ *Ibid.* See also, Rules 54 and 73*bis*(F) of the Rules.

⁶¹ The Prosecution’s argument that the Impugned Decision impermissibly gives priority to a stated Completion Strategy deadline over the rights of the victims, the Prosecution and the international community is noted below at paras. 42-43.

⁶² Interlocutory Appeal Following Remand, paras. 25-26.

⁶³ *Ibid.*

⁶⁴ *Ibid.*, referencing *Milošević* Appeal by the *Amici*, para. 18.

⁶⁵ *Milošević* Appeal by the *Amici*, para. 18.

considerations in determining the sufficiency of the time required for a party to prepare or present its case.⁶⁶

32. Furthermore, it appears from the face of the Impugned Decision on Remand that the Trial Chamber was in fact careful not to “double count”. The Trial Chamber’s calculation of a savings of approximately 45 hours from the use of Rule 92*ter* represents the difference between the Prosecution’s estimation of the total time needed for the examination of all the witnesses who were examined prior to 28 February 2007 and the Registrar’s calculation of the time actually spent for the examination of these witnesses in court.⁶⁷

33. Lastly, the Appeals Chamber notes that the Trial Chamber clearly indicated in the Decision Adopting Guidelines that any of the practices and guidelines contained therein were subject to being altered “as the trial progresses, in order to ensure that the proceedings are conducted in a fair and expeditious manner.”⁶⁸ Such changes were not necessarily predicated, as the Prosecution argues, on the demonstration of a new or changed circumstance.

(ii) The Impugned Decision Changes the Rules for the Conduct of the Trial After the Prosecution Has Fully Relied on the Trial Chamber’s Earlier Rulings

34. The Appeals Chamber notes that the Prosecution has argued on numerous occasions that it anticipated using all of the 400 hours originally allotted to it in the Decision Adopting Guidelines and that it has in fact structured the entire presentation of its case in reliance upon that number.⁶⁹ The Appeals Chamber recalls the Trial Chamber’s clear statement in the Decision Adopting Guidelines that the guidelines therein, including those with respect to the time available to the Prosecution for the presentation of its evidence, “remain subject to future variation by the Chamber as the trial progresses”.⁷⁰ The Prosecution was thus on notice that the 400 hours allocated were subject to possible modification later in the trial.

35. The Prosecution further takes issue with the Trial Chamber’s allowance made in the Impugned Decision for the possibility that it might modify the measures adopted therein “should

⁶⁶ Decision Adopting Guidelines, para. 9(a). The Appeals Chamber understands the Prosecution to be referring to Rule 89(F) statements rather than Rule 92*ter* statements, as this latter Rule had yet to be adopted when the Decision Adopting Guidelines was issued.

⁶⁷ Impugned Decision on Remand, p. 4, fn. 8.

⁶⁸ Decision Adopting Guidelines, para. 9(u).

⁶⁹ Interlocutory Appeal, para. 35; Interlocutory Appeal Following Remand, para. 32; T. 8413, 16 October 2006.

⁷⁰ Decision Adopting Guidelines, para. 2.

new circumstances arise”⁷¹ on the basis that it “provides the victims, the Prosecution, and the international community no assurance of a fair and reasonable trial, and no basis on which the Prosecution can plan its way forward.”⁷² The Trial Chamber’s indication that it would examine any request for an extension of time by the Prosecution at the expiry of its allocated time with the utmost care,⁷³ does little in the Prosecution’s view to assuage its concern with regard to its ability to effectively plan the presentation of its evidence in relative certainty.⁷⁴

36. The Appeals Chamber understands the Prosecution concern and desire for certainty in continuing to prepare and present its case, particularly at this stage of the proceedings. However, although the Prosecution claims that it has been disadvantaged by its reliance on the 400-hour allocation, the Appeals Chamber considers that the opportunity to apply for an extension of time at the end of its allocated time is a reasonable remedy in the circumstances should the Prosecution be able to establish that such additional time is necessary to avoid unfairness in the presentation of its case. The Prosecution’s reliance on the ruling in the *Orić* case,⁷⁵ in which the Appeals Chamber ordered the Trial Chamber to recalculate the period of time and number of witnesses allocated to the Defense case,⁷⁶ is distinguishable in that the Appeals Chamber in that case was seeking to remedy the prejudice occasioned by an erroneous ruling. Here, the Appeals Chamber considers that the Impugned Decision is not in error.

(iii) The Impugned Decision Penalises and Prejudices the Prosecution Without Justification for Factors Beyond its Control

37. The Appeals Chamber considers that the Trial Chamber does not fault the Prosecution for delaying the proceedings. Rather, it seems to suggest that the Prosecution, the Defence, and the Bench all have a part to play in ensuring that these proceedings are conducted as expeditiously as possible. In this respect, the Trial Chamber “encourages the Prosecution to present its evidence in a more efficient manner by calling only those witnesses who are absolutely necessary to its case and by presenting only such evidence that is crucial to prove that the crimes were committed and that the Accused were responsible for them.”⁷⁷ It also invites the Prosecution to make more frequent use of Rules 92*bis* and 92*ter* of the Rules, suggesting specifically that it do so in respect of the crimes

⁷¹ Impugned Decision, para. 23; Impugned Decision on Remand, p. 4.

⁷² Interlocutory Appeal Following Remand, para. 30.

⁷³ Impugned Decision on Remand, p. 4.

⁷⁴ See Interlocutory Appeal, para. 37.

⁷⁵ *Ibid.*, para. 36.

⁷⁶ *Prosecutor v. Naser Orić*, Case No. IT-03-68-AR73.2, Interlocutory Decision on Length of Defence Case, 20 July 2005 (“*Orić* Decision”), para. 10.

⁷⁷ Impugned Decision, para. 21.

alleged to have been committed in the municipalities and detention centres.⁷⁸ Lastly, the Trial Chamber “urges the Prosecution to examine the possibility of reducing the scope of the Amended Indictment or its evidence.”⁷⁹

38. While noting the Prosecution’s opposition, the Appeals Chamber does not consider that the Impugned Decision seeks to penalise or prejudice the Prosecution. In exercising its discretion to control the proceedings, the Trial Chamber is working to ensure that the trial is completed within a reasonable time. The reduction of the Prosecution’s time for examination-in-chief also resulted in a cut to the Defence’s time for cross-examination. Furthermore, the modalities and allocation of time for presentation of the Accused’s case is yet to be determined by the Trial Chamber.⁸⁰ 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 arms⁸¹ to ensure that a basic proportionality will govern the relationship between the time and number of witnesses allocated to all sides. In any case, the Prosecution has failed to demonstrate a discernible error committed by the Trial Chamber in this respect.

(iv) The Impugned Decision is Arbitrary and too Severe an Action

39. The Prosecution argues that the Impugned Decision is “arbitrary and capricious, involving a too precipitous, too severe action to the prejudice of the victims and the Prosecution, without taking other available steps to provide more time to conduct the trial proceedings more efficiently and fairly.”⁸² The Appeals Chamber notes that the Trial Chamber did indeed adopt measures in addition to the reduction of the Prosecution’s time.⁸³ Furthermore, as was noted in the Appeals Chamber’s Decision, many of the measures suggested by the Prosecution in its Interlocutory Appeal were already proposed and considered by the Trial Chamber when the Prosecution put forward its “10 Point Plan”⁸⁴ at the Status Conference which took place on 12 April 2006⁸⁵ and at the Pre-Trial

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*

⁸⁰ Impugned Decision, para. 22 reads in relevant part: “In view of the fact that the time allocated for cross-examination is proportional to the duration of the examination-in-chief, it also impinges on the Defence. The Chamber shall deal with the modalities and the time to be allocated for the presentation of the Defence case at a later date”; *see also, Prlić et al. Joint Response*, para. 7 (“The Accused have strong reason to fear that their own time for presenting the Defence case, should they be called upon to do so, will be reduced, resulting in unfairness to the Defence and the real probability of injustice.”). The *Petković* Response and the *Petković* Defence Response to Prosecution Notice of Decision on Remand additionally take issue with the impact of the Impugned Decision on the time available to the Accused for the cross-examination of the Prosecution witnesses, paras. 11-13 and 5, respectively. It should be noted that the *Petković* Defence was denied certification to appeal against the Impugned Decision.

⁸¹ *Prosecutor v. Duško Tadić*, Case No. IT-94-1-A, Judgement, 15 July 1999, para. 44 (“The principle of equality of arms between the prosecutor and accused in a criminal trial goes to the heart of the fair trial guarantee.”); *Orić* Decision, para. 7 (“At a minimum, ‘equality of arms obligates a judicial body to ensure that neither party is put at a disadvantage when presenting its case,’ certainly in terms of procedural equality.”).

⁸² Interlocutory Appeal, paras. 46 -57.

⁸³ Impugned Decision, paras. 17-19.

⁸⁴ *Ibid.*, Annex 1.

Conference on 25 April 2006.⁸⁶ In the Decision Adopting Guidelines, the Trial Chamber stated in reference to the “10 Point Plan” that “[w]hile some of the proposals put forward by the Prosecution have merit, the Chamber is unable to accept the plan in its entirety as being consistent with its duty under Article 20(1) of the Statute. Indeed, there are aspects of the plan that would be impossible for the Chamber to apply.”⁸⁷

40. The Prosecution points to a series of “available measures” to conduct the proceedings more efficiently and to gain time which, in its view, the Trial Chamber was required to adopt prior to cutting such a significant amount of its time.⁸⁸ In this case, the Appeals Chamber considers that it was within the Trial Chamber’s discretion to adopt the reduction in time in tandem with other measures. Moreover, it should be noted that the Prosecution’s submissions that fewer facts were agreed upon by the parties pursuant to Rule 65ter (F) than it would have liked;⁸⁹ that its suggested use of crime base dossiers was rejected;⁹⁰ that it finds the Trial Chamber’s practice in receiving documentary evidence to be less flexible than the standard dictated by the International Tribunal’s jurisprudence and practice;⁹¹ and that the Trial Chamber has taken decisions under Rule 92ter and Rule 92bis of the Rules with which the Prosecution has disagreed,⁹² do not *prima facie* demonstrate that alternative available measures were disregarded.

41. With regard to the Prosecution’s suggestion of sitting on Fridays, the Appeals Chamber defers to the Trial Chamber’s assessment on this matter.⁹³ The Appeals Chamber does, however, take note of the Prosecution’s arguments concerning the need to reduce wasted time as well as the fact that the time spent on procedural matters has not declined.⁹⁴ The need to make improvements in these respects has been recognised by the Trial Chamber and, as noted above, measures to address these inefficiencies are being adopted.

(v) *The Impugned Decision Gives Priority to a Stated Completion Strategy Deadline*

42. The Prosecution persists in its claim that the only articulated basis for the Trial Chamber’s ruling that it should finish its case by July 2007 is “for the singular purpose of satisfying an alleged Completion Strategy deadline”⁹⁵ regardless of due process and fair trial concerns and further

⁸⁵ T. 628-672, 12 April 2006

⁸⁶ T. 725-751; 783-789, 25 April 2006.

⁸⁷ Decision Adopting Guidelines, para. 4.

⁸⁸ *Prosecutor v. Slobodan 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, para. 17.

⁸⁹ Interlocutory Appeal, para. 50.

⁹⁰ *Ibid.*, para. 51.

⁹¹ *Ibid.*, para. 53.

⁹² *Ibid.*, para. 52.

⁹³ *Ibid.*, para. 56

⁹⁴ *Ibid.*, para. 54; Interlocutory Appeal Following Remand, paras. 28-29.

⁹⁵ Interlocutory Appeal, para. 34; Interlocutory Appeal Following Remand, paras. 34-35.

submits that the Impugned Decision violates and interferes with its independence and separate functions, in taking away its case.⁹⁶

43. The Appeals Chamber has sufficiently considered and rejected these submissions as unfounded in the Appeals Chamber's Decision⁹⁷ and declines to consider them any further.

IV. DISPOSITION

44. On the basis of the foregoing, the Appeals Chamber finds that the Prosecution has failed to demonstrate the commission of a discernible error on the part of Trial Chamber in reducing its allocated time for the presentation of its case by 107 hours. The Prosecution's Interlocutory Appeal and Interlocutory Appeal Following Remand are therefore **DISMISSED** in their entirety.

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

Done this 11th day of May 2007,
At The Hague,
The Netherlands.



Fausto Pocar,
Presiding Judge

[Seal of the International Tribunal]

⁹⁶ Interlocutory Appeal, para. 26.

⁹⁷ Appeals Chamber's Decision, paras. 20-23.