UNITED
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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-03-68-AR73.2

Date: 20 July 2005

Original: English

IN THE APPEALS CHAMBER

Before: **Judge Theodor Meron, Presiding**
Judge Fausto Pocar
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Wolfgang Schomburg

Registrar: **Mr Hans Holthuis**

Decision: **20 July 2005**

PROSECUTOR

v.

Naser ORIĆ

INTERLOCUTORY DECISION ON LENGTH OF DEFENCE CASE

Counsel for the Defense
Vasvija Vidović
John Jones

Prosecution
Jan Wubben

1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ("Tribunal") is seized of the "*Urgent* Appeal of Trial Chamber's Decision on Length of Defence Case," filed by Naser Orić on 7 July 2005.

Background

2. According to the Third Amended Indictment,[1] Orić was named the commanding officer of all Bosnia and Herzegovina (BiH) forces in Srebrenica municipality in May 1992. In November of that year, he was promoted to Commander of the Joint Armed Forces of BiH in the "Sub-Region Srebrenica," an area in Eastern Bosnia encompassing Srebrenica, Bratunac, Vlasenica, and Zvornik municipalities.[2] Orić remained in that position until August 1995, when he left the BiH Army.[3] He currently faces four separate criminal charges in connection with his military service. Counts 1 and 2 of the Third Amended Indictment rely on Orić's position of command to charge him with the murder of six Serbs and the cruel treatment of ten more Serbs in the Srebrenica Police Station.[4] Counts 3 and 5 of the Third Amended Indictment rely on both direct culpability and command responsibility to charge him with wanton destruction of at least fifty predominantly Serb villages and hamlets during military operations by Bosnian Muslims against Bosnian Serb forces in the area.[5]

3. This interlocutory appeal arises from a dispute regarding the framework for the presentation of the Defence case. After the Prosecution rested, Orić served notice of his intention to call 73 witnesses in his defense and estimated that his examination-in-chief

[1] Third Amended Indictment, 30 June 2005 ("Third Amended Indictment").
[2] Third Amended Indictment, paras. 5-10.
[3] Third Amended Indictment, para. 10.
[4] Third Amended Indictment, paras. 22-26

would take 249 hours.[6] He contended that this was a reasonable allotment in light of the fact that the Prosecution had called 50 witnesses and had taken roughly 260 hours of court time.[7]

4. The Trial Chamber rejected Orić's proposed framework. The Trial Chamber found that a number of "areas of evidence" had been "sufficiently addressed during the Prosecution case in a manner and to an extent which in the Trial Chamber's opinion does not require any further evidence on the part of the Defence."[8] These areas were:

> "- The historical and political background which led to the armed conflict in Bosnia-Herzegovina in April 1992;
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> "- The large number of attacks by Bosnian Serb forces on Bosnian Muslim villages within the geographical scope of the Indictment, including the wanton destruction and plunder of Bosnian Muslim villages and hamlets and the laying of mines by Bosnian Serb forces in and around destroyed Bosnian Muslim villages and hamlets;
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> "- The killing and inhumane treatment of Bosnian Muslims, whether civilians or non-civilians, by Bosnian Serbs or Bosnian Serb forces;
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> "- The policy of 'ethnic cleansing' by Bosnian Serb political or military authorities before, during and after the crimes charged in the Indictment, in and around Srebrenica;
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> "- The positive treatment of Serbs – whether civilians or non-civilians, hostages or wounded, in Bosnian Muslim hospitals – by Bosnian Muslims, unless relating to persons identified in Counts 1 and 2 of the Indictment;
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> "- The situation of Srebrenica during the period relevant to the Indictment, namely the positioning of Bosnian Serb forces in and around Srebrenica, and the isolation of Srebrenica from the rest of Bosnia and Herzegovina while being under constant siege and suffering from air and artillery bombardment;
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> "- The influx of refugees in Srebrenica and the critical condition under which the population of Srebrenica had to live during the period relevant to the

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[5] Third Amended Indictment, paras. 27-37.
[6] Defence Filing Pursuant to Scheduling Order, 17 June 2005; Second Defence Filing Pursuant to Scheduling Order, 28 June 2005.
[7] *Urgent* Appeal of Trial Chamber's Decision on Length of Defence Case, 7 July 2005, paras. 10, 22 ("Orić's Brief").
[8] Decision on First and Second Defence Filings Pursuant to Scheduling Order, 4 July 2005, p. 3 ("Trial Chamber Decision").

Indictment, to include food and medical shortages, hygiene issues, security concerns, sporadic electricity and telecommunications shortages;

"- The genocide committed against Bosnian Muslims in Srebrenica in 1995;

"- The military superiority of the Bosnian Serbs at the time relevant to the Indictment, namely that the Bosnian Serbs were better equipped militarily than the Bosnian Muslims and that, in addition, the Bosnian Serbs benefited from the support of the former JNA and from Serbia;

"- The Bosnian Military capacity in Srebrenica was largely dependent on weapons that could be captured from the Bosnian Serb forces; and

"- The urgent necessity for Bosnian Muslims to attack villages and hamlets named in the Indictment in order to try and secure food, medicine and weapons, for the purpose of the survival of the Muslim population in Srebrenica. (This limitation does not in any way mean that the Trial Chamber does not require any further evidence that the Defence may wish to adduce in relation to the aspect of military necessity to engage in wanton destruction as alleged in Counts 3 and 5 of the Indictment);"[9]

The Trial Chamber went on to decide that, "in view of [its] conclusions [regarding the above topics]," "the Defence case can be concluded" with a much shorter presentation of evidence than the schedule proposed by Orić. The Trial Chamber ordered Orić to file a new witness list with no more than 30 witnesses, and ordered that the Defense case must finish on 30 September 2005.[10]

5. Orić filed an oral request for certification to appeal the decision[11] and a written motion for a stay of proceedings pending appeal.[12] The Trial Chamber determined that this issue "would significantly affect the fair and expeditious conduct of the proceedings in this case" and that "an immediate resolution by the Appeals Chamber may materially advance the proceedings."[13] The Trial Chamber therefore granted certification for an interlocutory appeal of its scheduling order under Rule 73(B) of the Tribunal's Rules of Procedure and Evidence

[9] Trial Chamber Decision, pp. 3-4.
[10] Trial Chamber Decision, p. 5. The Trial Chamber Decision allows for an additional three days at the end of that time, if the Defense chooses, to present mitigating evidence.
[11] *See* Decision on Request for Certification to Appeal Trial Chamber's Decision on Defence Filings, 4 July 2005, p. 1 ("Certification of Appeal").
[12] Urgent Defence Motion for a Stay of Proceedings Pending Appeal, 4 July 2005.

("Rules").[14] In an oral decision rendered on 4 July 2005, however, the Trial Chamber declined to stay the proceedings and refused to certify this latter issue for appeal.[15]

Analysis: Restrictions on Subject Matter

6. In his Appeal, Orić challenges both the Trial Chamber's allocation of time and witnesses and its limitation of the subject matter he may address while presenting his case. The Appeals Chamber turns first to the limitations on subject matter. Some of the topical restrictions, such as those on evidence regarding the general historical and political background of the Balkan conflict, are defensible as a reasonable exercise of the Trial Chamber's Rule 73 *ter* responsibility to "set the number of witnesses the defence may call" and "determine the time available to the defense for presenting evidence." Others, however, are unreasonable in light of the fact that the defense of military necessity may play a central role in Orić's defense on Counts 3 and 5 of the indictment.[16] Unless the Trial Chamber decides in his favor on those counts and issues a formal acquittal under Rule 98 *bis*, there is simply no way to justify restricting Orić from presenting information regarding, at a minimum:

- The military situation, broadly construed, throughout the Srebrenica region, including the placement of Bosnian Serb forces, equipment, and artillery; the isolation of Bosnian Muslim forces; and the alleged military superiority of Bosnian Serbs at the time relevant to the indictment
- The allegedly desperate situation of the region's Bosnian Muslim population
- The alleged reliance of Bosnian Muslims on weapons that could be captured from Bosnian Serb forces

[13] Certification of Appeal, p. 1.
[14] Certification of Appeal, p. 1.
[15] T. 4 July 2005, pp. 9148-9149, 9152-9153 (unofficial and uncorrected transcript).
[16] *See, e.g.*, Orić's Brief, para. 28.

- Any facts that could cast non-trivial doubt on the credibility of Prosecution witnesses

This is not to say, of course, that Orić is free to present unnecessarily repetitive or irrelevant evidence just because it arguably fits within these categories. But unless the Trial Chamber is prepared to reconsider its Rule 98 *bis* ruling and grant a partial judgment of acquittal, it must give Orić a reasonable opportunity to present reliable and relevant evidence on at least these issues.

Analysis: Restrictions on Witnesses and Time

7. The question of time limits and witness allocation is somewhat less straightforward. The Appeals Chamber has long recognized that "the principle of equality of arms between the prosecutor and accused in a criminal trial goes to the heart of the fair trial guarantee."[17] 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 equity.[18] This is not to say, however, that an Accused is necessarily entitled to precisely the same amount of time or the same number of witnesses as the Prosecution. The Prosecution has the burden of telling an entire story, of putting together a coherent narrative and proving every necessary element of the crimes charged beyond a reasonable doubt. Defense strategy, by contrast, often focuses on poking specifically targeted holes in the Prosecution's case, an endeavor which may require less time and fewer witnesses. This is sufficient reason to explain why 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.

[17] *Prosecutor v. Duško Tadić*, Case No. IT-94-1-A, Judgement, 15 July 1999, para. 44 ("*Tadić* Appeal Judgement").
[18] *Tadić* Appeal Judgement, paras. 48, 50 (discussing principles laid down by the European Court of Human Rights and by the Human Rights Committee); *see also id.* at para. 52 ("[U]nder the Statute of the International Tribunal the principle of equality of arms must be given a more liberal interpretation than that normally upheld

8. In addition, it should be noted that although Rule 73 *ter* gives the Trial Chamber the authority to limit the length of time and number of witnesses allocated to the defense case, such restrictions are always subject to the general requirement that the rights of the accused pursuant to Article 21 of the Statute of the International Tribunal be respected. Thus, in addition to the question whether, relative to the time allocated to the Prosecution, the time given to the Accused is reasonably proportional, a Trial Chamber must also consider whether the amount of time is objectively adequate to permit the Accused to set forth his case in a manner consistent with his rights.[19]

9. The question, then, is whether, taking into account the complexity of the remaining issues, the amount of time and the number of witnesses allocated to Orić's defense are reasonably proportional to the Prosecution's allocation and sufficient to permit Orić a fair opportunity to present his case. The Trial Chamber's order leaves Orić nine weeks to present 30 witnesses.[20] In an effort to make a rough comparison between the respective allotments for his case and for the Prosecution's case, Orić offers the following analysis:

> The Prosecution case in *Orić* lasted 15,491 minutes. Dividing this figure by the number of days when witnesses were heard (i.e. excluding opening speeches and Rule 98 *bis* submissions), *i.e.* 100 days, gives an average of 2.5 hours per day of sitting. The Trial Chamber also sat only 3 days on average over the 35 weeks of the trial during the Prosecution case. This means that if the Chamber were to sit as it has been doing during the Prosecution case (and there is no reason to suppose otherwise), that over the 9 weeks scheduled for the Defence case, there would only be 67.5 available hours. Assuming that the Defence would have approximately half of that time to examine its witnesses in chief (the rest of the time being occupied by cross-examination, judges' questions and administrative matters), the Defence will have 33.75 hours to examine in chief its allotted

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with regard to proceedings before domestic courts."); *see generally* Antonio Cassese, *International Criminal Law*, pp. 395-397.

[19] Plainly, it may not be possible to predict with precision before the Defense begins how much time will be necessary; thus, as the Trial Chamber correctly noted, Rule 73 *ter* allows for additional time to be granted later "in the interests of justice."

[20] Orić's Brief, para. 4; *see also* T. 4 July 2005, p. 9148 (unofficial and uncorrected transcript) (noting that the 30 September 2005 deadline leaves the Defense nine weeks to present its case).

> 30 witnesses. This comes to little more than one hour to examine in chief each of its 30 witnesses[.][21]

If Orić's calculations are correct – and the Prosecutor does not seriously contest them[22] – Orić can expect to be allotted only 30 witnesses and 27 days of testimony, as compared to the 50 witnesses and 100 days of testimony that were allotted to the Prosecution. This allocation is not remotely proportional to the time that was allotted to the Prosecution. The Prosecution is of course correct that the Defense must ordinarily articulate specific prejudice in challenging a Trial Chamber's order.[23] But since the Appeals Chamber has struck down most of the subject matter restrictions imposed by the Trial Chamber,[24] the disparity in this instance is so great that no specific prejudice need be shown.[25] Given the complexity of the issues at stake, particularly regarding military necessity, such disproportion cannot be justified.[26]

10. In recalculating the period of time and the number of witnesses that will be allocated to the Defense case, the Trial Chamber should include enough time to allow Orić to begin presenting his case again, if he so chooses. As the Appeals Chamber has previously discussed,[27] Orić's case has proceeded under a cloud of uncertainty while this appeal has been

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[21] Orić's Brief, para. 22 (emphasis eliminated).
[22] The Prosecution claims that "the 9 weeks allocated to the Defence to present its case is exclusive of administrative matters." Prosecution Response to the Defence Urgent Appeal of the Trial Chamber's Decision on the Length of the Defence Case, 12 July 2005, para. 14 ("Prosecution Response"). Its citations, however, do not support this proposition, *see id.* (citing T. 1 July 2005, p. 97, lines 7-14; T. 4 July 2005, pp. 1-2; T. 4 July 2005, pp. 11-12), and in any case it is not clear what it would mean for the September 30th deadline to be "exclusive of administrative matters."
[23] Prosecution's Response, para. 11.
[24] *Supra*, para. 6.
[25] Assuming that the Trial Chamber's forthcoming allocation of time and witnesses does not replicate the extreme disparity of the Trial Chamber Decision, any future challenge should rest on specific allegations of prejudice: *i.e.*, a list of specific witnesses and specific documentary evidence precluded by the Trial Chamber ruling, and the reasons that excluding those witnesses would be prejudicial to the Defense case.
[26] The Appeals Chamber does note that in its oral ruling on Orić's Rule 98 *bis* motion, the Trial Chamber entered a judgement of acquittal as to two counts of plunder, one alleged murder, one alleged episode of cruel treatment, and the alleged wanton destruction of two villages. *See* T. 8 June 2005, pp. 9032. This certainly supports some reduction in the time that the Defense might otherwise have expected to present its case. But it does not appear from the Trial Chamber's oral ruling that evidence on these charges accounted for a major portion of the evidence presented by the Prosecution; indeed, the paucity of evidence on these counts was part of the reason for the acquittals. *See* T. 8 June 2005, pp. 8993, 9003, 9012, 9028-9029. In any event, the Prosecution did not raise this point in the Prosecution Response, so any argument on this basis has been waived.
[27] Order Varying Time Limits for Filings in Interlocutory Appeal, 7 July 2005, para. 4.

pending. If the Trial Chamber had allocated more time for Orić's case in the first instance, his strategy with the witnesses presented so far – both in terms of the subject matter discussed and in terms of the amount of time taken for examination – might have been very different. It is therefore only fair to allow Orić, should he so choose, to put these witnesses on again in order to fully address all issues that he deems necessary. While such re-examinations will very likely re-cover some old ground, the Appeals Chamber cautions the Defense that it should not abuse this right, but should focus on the relevant issues of its case.

Disposition

11. The Trial Chamber's decision is reversed, and the case is remanded to the Trial Chamber for further proceedings not inconsistent with this decision.

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

Dated this 20th day of July 2005,
At The Hague,
The Netherlands.

Judge Theodor Meron
Presiding Judge

[Seal of the International Tribunal]