

**UNITED
NATIONS**

International Tribunal for the
Prosecution of Persons
Responsible for Serious Violations of
International Humanitarian Law
Committed in the Territory of the
former Yugoslavia since 1991

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

Date: 5 October 2009

IN THE APPEALS CHAMBER

Before: Judge Mehmet Güney
Judge Fausto Pocar
Judge Liu Daqun
Judge Andrézia Vaz
Judge Theodor Meron

Registrar: Mr. John Hocking

THE PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**PROSECUTION RESPONSE TO KARADŽIĆ'S APPEAL OF
DECISION ON COMMENCEMENT OF TRIAL**

The Office of the Prosecutor:

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused:

Mr. Radovan Karadžić

**THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA**

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

THE PROSECUTOR

v.

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I. OVERVIEW

1. Karadžić fails to show that the Trial Chamber abused its discretion by deciding that the trial in the present case should commence on 19 October 2009.¹ The Trial Chamber's Decision should be viewed in the context of the pre-trial proceedings as a whole. The assessment of trial readiness was the culmination of a trial preparation period lasting over thirteen months. During this time there were 11 status conferences, three Rule 65ter conferences, three initial appearances and numerous decisions all directed at preparing the case for trial. Throughout this period, the Trial Chamber actively monitored trial preparations. It considered Karadžić's concerns, took measures to address them and reminded Karadžić of the need to focus on trial preparations. The Prosecution complied with and often went beyond the requirements of the Rules to assist Karadžić's trial preparations. It is artificial to isolate the

¹ Oral Decision on Commencement of Trial, Status Conference of 8 September 2009, T.454-456, 461-462 (Decision).

Decision from this context of focused and active pre-trial proceedings.² Against this background, the Trial Chamber's Decision does not constitute an abuse of its discretion.

2. Karadžić's appeal, in which he argues that the Trial Chamber has not afforded him adequate time to prepare his defence, suffers from the following six shortcomings:

- Although he asked the Trial Chamber for a 10-month delay, on appeal Karadžić does not specify what period of time he considers necessary for his trial preparations and simply requests "adequate" time;
- He challenges the Trial Chamber's reference to the possibility of further reductions in the scope of the Indictment, but the Trial Chamber's Decision did not depend on this;
- He focuses on the overall volume of material and complexity of the case, but he fails to acknowledge the many pre-trial steps that have assisted him in focusing his preparations;
- He fails to acknowledge that many of the difficulties he faces stem from his choices about the conduct of his defence;
- His argument that there must be complete preparation prior to the commencement of trial is contrary to Appeals Chamber case-law;
- He relies on comparisons with pre-trial detention for other accused persons brought before the Tribunal, but this is not an accurate guide to what is reasonable in Karadžić's case.

² *Contrast* Appeal of Decision on Commencement of Trial, 25 September 2009 (Appeal), paras.29-39.

II. KARADŽIĆ FAILS TO SHOW THAT THE TRIAL CHAMBER'S DECISION, VIEWED IN ITS PROPER CONTEXT, CONSTITUTES AN ABUSE OF DISCRETION

A. The Decision should be assessed in the context of the pre-trial proceedings as a whole

3. In addressing Karadžić's appeal, the Appeals Chamber should not isolate the Decision from its context but rather should look to the pre-trial proceedings as a whole. The *Milošević* Appeals Chamber took a similar approach when ruling on a challenge to the date set by the Trial Chamber for the defence case to commence.³ The Appeals Chamber stated:

In examining whether the Trial Chamber has considered appropriate factors in sufficient measure, the Appeals Chamber is not limited to the text of the order issued by the Trial Chamber. While 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. The verbal commentary by the Presiding Judge which accompanied the announcement of the ruling and the colloquy which took place during the preceding Status Conference are also relevant to the question of whether the Trial Chamber gave the issues involved due consideration.⁴

Similarly, in the present proceedings it would be artificial to focus exclusively on the content of the Trial Chamber's Decision without looking to the pre-trial proceedings as a whole.

4. The Decision explicitly refers back to Judge Bonomy's determination at the previous status conference that "this case is now ready for trial".⁵ Judge Bonomy's determination was the culmination of the discussions and litigation concerning trial preparations up to that point. These pre-trial proceedings should be taken into account in determining the present Appeal.

³ *Prosecutor v. Slobodan Milošević*, Case No.IT-02-54-T, 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* Interlocutory Appeal), para.7.

⁴ *Milošević* Interlocutory Appeal, para.7 (internal quotations omitted).

⁵ Decision, T.461-462, referring to Status Conference of 20 August 2009, T.434.

B. The Trial Chamber took into consideration and addressed the relevant considerations throughout the pre-trial proceedings

5. The Trial Chamber's assessment that the trial should start on 19 October 2009 was the outcome of an extensive pre-trial process. During this period, the Trial Chamber addressed the considerations relevant as to whether Karadžić has had adequate time to prepare his defence, namely: (1) status and scale of Prosecution disclosure; (2) number of counts and charges; (3) complexity of the case; (4) gravity of the crimes charged; (5) individual circumstances of the accused; and (6) staffing of the defence team.⁶ These factors were regularly discussed by the Trial Chamber and the parties at oral hearings and in written decisions, and measures were taken to ameliorate related problems.

1. Status and scale of Prosecution disclosure

6. The status and scale of Prosecution disclosure was closely managed by the Trial Chamber throughout pre-trial proceedings right up to its determination that the case was ready for trial. Pursuant to a Trial Chamber order of 19 December 2008,⁷ the Prosecution has kept the Trial Chamber, as well as Karadžić, apprised of the state of disclosure in these proceedings by periodic reports.⁸ During status conferences, the Trial Chamber actively managed the disclosure process, for example by ensuring that disclosure was provided on an ongoing basis rather than in one large batch.⁹ The Trial Chamber addressed concerns raised by Karadžić over disclosure during pre-trial proceedings and implemented measures to facilitate Karadžić's review of documents.¹⁰

⁶ *Prosecutor v. Ngirabatware*, Case No. ICTR-99-54-A, Decision on Augustin Ngirabatware's Appeal of Decisions Denying Motions to Vary Trial Date, 12 May 2009 (*Ngirabatware AD*), para.28. See also *Milošević* Interlocutory Appeal, paras.8-19.

⁷ Order on Proposed Disclosure Report, 19 December 2008.

⁸ Decision on Accused Motion for Disclosure of Rule 68 Material obtained under Rule 70(B) and Order on Prosecution Disclosure Report, 15 January 2009, p.2 (noting the Prosecution's offer, and Karadžić's acceptance of the Prosecution providing regular disclosure reports).

⁹ Status Conference of 2 April 2009, T.155 ("JUDGE BONOMOY: So all I'm looking for is the application of some common sense in the disclosure process so that it's not all lumped on the accused on the last day. MR. TIEGER: No, I understood the Court's request in that light, and I think there was an indication already at the 65th Conference that we intended to disclose seriatim rather than wait for the final dead-line and disclose them all in one lump.")

¹⁰ See *below*, paras.20-29.

2. Number of counts and charges

7. The Trial Chamber took the number of counts and charges in the Indictment into consideration in determining that the case is ready for Trial. This is evident in the extensive litigation surrounding the Indictment and the use of Rule 73*bis*, as discussed below.¹¹

3. Complexity of the case

8. The Trial Chamber recognised the complexity of the case in determining that the case is ready for trial. For example, in addressing trial preparation at the status conference of 2 April 2009, it acknowledged that it was “conscious of the size of the case, the volume of material, the difficulty for an individual in that situation to prepare adequately and conduct his own defence.”¹²

4. Gravity of the crimes charged

9. The Trial Chamber recognised the gravity and seriousness of the crimes charged during its discussion of issues related to trial preparation. For example, during the Rule 65*ter* conference of 24 March 2009, Judge Bonomy specifically referred to the “serious” nature of the trial.¹³

5. The individual circumstances of the accused

10. In deciding that the case is ready for trial, the Trial Chamber expressly took Karadžić’s individual circumstances into account.¹⁴ It noted that the Registry has accommodated the payment of his assistants and investigators beyond the levels envisaged in the remuneration scheme.¹⁵ When addressing trial preparation in prior

¹¹ *Below*, para.35.

¹² Status Conference of 2 April 2009, T.146 (“JUDGE BONOMOY: So the picture that the Chamber has is one of an accused person at the moment doing a pretty good job of representing himself on legal challenges. However, we remain conscious of the size of the case, the volume of material, the difficulty for an individual in that situation to prepare adequately and conduct his own defence. But you know also that the Trial Chamber recognises that there are disadvantages, too, that go with self-representation. And that road having been chosen, then there may be certain difficulties that we all have to address as best we can as we proceed through the trial.”)

¹³ *See, e.g.*, Rule 65*ter* Conference of 24 March 2009, T.47 (“JUDGE BONOMOY: I hope that you’ve detected a flavour of the way in which we would like the pre-trial work to proceed and the cooperation we hope that parties can give each other to try to minimize the pointless examination of material that really is not in issue for the purposes of what is a serious trial on clearly identifiable and identified issues.”)

¹⁴ *Contrast Appeal*, para.30.

¹⁵ *Decision*, T.455.

status conferences, the Trial Chamber consistently acknowledged Karadžić's status as a self-represented accused.¹⁶ Where Karadžić voiced concerns about the effects of his status on his trial preparation, the Trial Chamber addressed these in a proactive manner.¹⁷

11. Although Karadžić submits that the Trial Chamber did not take into account the fact that English is not his native language,¹⁸ the Trial Chamber addressed this issue at length in dealing with preparations for trial.¹⁹ Furthermore, a significant proportion of the materials provided to Karadžić have been translated into BCS. For example, all the materials disclosed to Karadžić under Rule 66(A)(i) and the large majority of materials disclosed under Rule 66(A)(ii) have been provided to him in BCS as well as English.²⁰

¹⁶ See, e.g., Status Conference of 2 April 2009, T.144 (“JUDGE BONOMOY: And you are being given what is exceptional in legal systems throughout the world, and that is additional facilities at the expense of this Tribunal to assist you in your venture to represent yourself. Now, quite rightly, you identify that there are limitations on that, and these limitations are recognised and have been there for some time throughout your period here. You have outstanding an appeal against the Chamber's decision in relation to this issue, and I can appreciate your frustration at the time that legal proceedings tend to take. But at the same time, you must recognise your obligation to prepare for the possibility that your appeal will be unsuccessful. And it is, I think, surprising to us that you have not made any further applications other than for Mr. Sladojević to be assigned in this way. And unless you make applications, then it won't be possible for the Registry to deal with any.”)

¹⁷ See, e.g., Status Conference of 2 April 2009, T.156: (“JUDGE BONOMOY: in dealing with a case involving a self-represented accused, the Court behaves differently from the way in which it would behave in relation to a case where a counsel appears. And I think the Prosecution has to do the same and, in a sense, provide assistance to the accused above and beyond what would be done in the case of a represented accused. And the reason for that is purely practical, that the system in general will function less efficiently and, indeed, could inhibit a fair and expeditious trial if exceptional arrangements were not taken in a situation like this. So we're asking that you do your utmost to stagger the presentation of material so that it's coming as soon as possible and identify as clearly as possible what that material relates to in his case.”); Status Conference of 20 August 2009, T.432 ((in response to Karadžić's complaints about his computer, the claimed non-systematic nature of the Prosecution disclosure of victims' names, and other associated issues) “JUDGE BONOMOY: Dr. Karadzic, this has come as quite a surprise to me. It's the first time since you've first appeared before me that I have formed the impression that you're not in complete control of your case. You've given a clear indication that you are not making proper use of the facilities that this Tribunal has provided for you. You have a *pro se* liaison officer who relays your concerns to the Registry. You've mentioned a number of basic technological difficulties you have. None of these have been raised with me in any form in the recent past, and there are avenues for you to raise these matters with the officials of the Tribunal.”)

¹⁸ Appeal, para.52.

¹⁹ See, e.g., Decision on Prosecution Motion Seeking Determination that the Accused Understands English for the Purposes of the Statute and the Rules of Procedure and Evidence, 26 March 2009.

²⁰ The translated material under Rule 66(A)(ii) excludes transcripts of witnesses' testimony from previous cases before the Tribunal, disclosed under Rule 66(A)(ii), which have generally been provided in English. However, Karadžić has been provided with audio recordings of the testimony in BCS; see *below*, para.27.

6. Defence team staffing

12. In deciding that the case is ready for trial, the Trial Chamber expressly took the staffing of Karadžić's defence team into account.²¹ The Trial Chamber noted that Karadžić was assisted by a number of paid and unpaid legal advisers and assistants, and that Karadžić received more remuneration for his assistants and investigators than that envisaged under the remuneration scheme for self-represented accused. The Trial Chamber further noted that the level of support provided to Karadžić had been discussed constantly during pre-trial proceedings.²²

C. Karadžić fails to show that the Trial Chamber abused its discretion

13. On 20 August 2009, three weeks prior to the Trial Chamber's Decision, Judge Bonomy determined that "this case is now ready for trial".²³ By 19 October 2009, Karadžić will have had 14 months of trial preparation time and an additional two months from the point when Judge Bonomy declared the case ready for trial.²⁴ In its Decision, the Trial Chamber did not explicitly refer to all of the points raised in Karadžić's Submission of 3 September 2009.²⁵ However, the Trial Chamber has addressed the relevant considerations as to whether Karadžić has had adequate time to prepare his defence throughout the pre-trial period.

14. In assessing the exercise of the Trial Chamber's discretion, it is also relevant that the Trial Chamber repeatedly reminded Karadžić of the need to focus on trial preparations.²⁶ The Trial Chamber encouraged Karadžić to organise his defence team to adequately deal with the necessary preparations for trial.²⁷ Viewed in its proper

²¹ *Contrast Appeal*, para.30.

²² Decision, T.455-456.

²³ Status Conference of 20 August 2009, T. 434.

²⁴ *See* Decision, T.461-462.

²⁵ Submission on Commencement of Trial, 3 September 2009 (Submission).

²⁶ *See, e.g.*, Status Conference of 3 June 2009, T.275 ("JUDGE BONOMY: Now, I know that you can't be faulted for the hours that you and your many helpers put in in this case, but I can't at the moment gauge just how much of it is being spent in preparation, direct preparation, for the trial. But it is important to emphasize now that your concentration ought to be very specifically on dealing with the evidence that the Prosecution allege they are going to present and focusing for the Trial Chamber the issues in relation to the evidence"); Status Conference of 20 August 2009, T.434 ("JUDGE BONOMY: I encourage you to pay close attention and direct your legal associates, who will be much more aware, I suspect, than you of the point, but to direct as much of your time and attention as you can to preparing to deal with the evidence that will be led.")

²⁷ *See, e.g.*, Status Conference of 20 February 2009, T.128 ("JUDGE BONOMY: You know what the facilities are and what your entitlement is. It's a management exercise on your part to get them organised into suitable sections to deal with the various parts of your case that you feel they can assist you with"); Status Conference of 3 June 2009, T.276 ("JUDGE BONOMY: It may be a question, of course, of focusing the resources on the right issues.")

context, the Trial Chamber's Decision was not so unfair or unreasonable as to constitute an abuse of its discretion.²⁸

III. ON APPEAL KARADŽIĆ DOES NOT REQUEST A SPECIFIC AMOUNT OF TIME FOR FURTHER PREPARATIONS

15. Rather than asking for a specific period of time for further preparations, Karadžić requests that the Trial Chamber be ordered to “calculate an adequate period of pre-trial preparation before the trial commences.”²⁹ If by “adequate” Karadžić means the ten-month delay that he requested from the Trial Chamber,³⁰ this is excessive. If by “adequate” Karadžić now means something less than ten months, but more than the 1.5 months the Trial Chamber effectively granted him,³¹ his lack of specificity undermines his position that “[t]he task of calculating the required time is objective and scientific.”³²

IV. THE DECISION DID NOT DEPEND ON A FURTHER REDUCTION IN THE INDICTMENT

16. In challenging the Trial Chamber's reference to possible further reductions in the scope of the Indictment, Karadžić alleges an error with no impact on the Decision.³³ The Trial Chamber's assessment that the case would be ready to start on 19 October 2009 was not dependent on the assumption that the scope of the Indictment would be further reduced. As the Trial Chamber expressly stated, it considered the 19 October 2009 start date to be appropriate “even if the size of the trial were to remain the same.”³⁴

²⁸ *Ngirabatware* AD, para.8.

²⁹ Appeal, para.88. *See also* para.40 (claiming that “a start date of 19 October 2009 would fall hopelessly short of ensuring Dr Karadžić has adequate time to prepare for his trial”).

³⁰ Submission, paras.1, 35. *See also* Appeal, para.28 (claiming that Karadžić had provided the Trial Chamber with “a realistic and reasonable timeframe” to complete his trial preparations).

³¹ Karadžić's Submission was filed on 3 September 2009. The start date for the trial is scheduled as 19 October 2009.

³² Appeal, para.31.

³³ *See* Appeal, paras.23(C), 67-70.

³⁴ Decision, T.455.

V. KARADŽIĆ FAILS TO ACKNOWLEDGE THE MANY STEPS TAKEN TO FOCUS THE TRIAL PREPARATIONS

17. A number of pre-trial developments, initiated by the Trial Chamber and the Prosecution, have facilitated Karadžić's trial preparations. Karadžić fails to acknowledge these numerous initiatives in his assessment of whether he has had adequate time to prepare.

A. Interim Pre-Trial Brief

18. On 8 April 2009, the Prosecution provided Karadžić with an Interim Pre-trial Brief.³⁵ The Brief set out a concise outline of the nature of the case against Karadžić and included appendices outlining the allegations in each municipality and for each incident charged. As Judge Bonomy stated when he ordered the Prosecution to file the Interim Pre-Trial Brief, it was a procedure designed to communicate the Prosecution's approach to the trial at the earliest opportunity.³⁶

19. Karadžić makes no reference to the Prosecution's Interim Pre-trial Brief. He incorrectly maintains that he could not commence focused preparations until after May 2009 when he received the Prosecution's Pre-trial Brief.³⁷ That is not the case. As Judge Bonomy intended, the material in the Interim Pre-trial Brief provided Karadžić with a vehicle for fast-tracking his trial preparations before the Pre-trial Brief was filed.

B. Timing and manner of disclosure

20. The Prosecution has carried out its disclosure obligations in a manner designed to assist Karadžić in expeditiously organising and digesting the material.

1. Rule 68 disclosure

21. Karadžić received over 87 *per cent* of the material disclosed to date under Rule 68 by 16 March 2009.³⁸ Rule 68 material has been disclosed *via* the Electronic

³⁵ Prosecution's Submission of Interim Pre-Trial Brief, 8 April 2009.

³⁶ Status Conference of 20 February 2009, T.119, 120, 122.

³⁷ *See* Appeal, para.81.

³⁸ By 16 March 2009, the Prosecution had disclosed 14,284 Rule 68 items. Since that date, a further 2126 items have been disclosed under Rule 68.

Disclosure System (“EDS”) to allow Karadžić and his defence team to conduct focused electronic searches. Rule 68 material is placed into a special folder on the EDS and the Prosecution provides written notification to Karadžić of updates to this folder. The Trial Chamber specifically considered and approved this procedure.³⁹

22. Karadžić relies on the “incomplete” state of Rule 68 disclosure as a reason for delaying the trial.⁴⁰ His submission fails to recognise that the Prosecution’s Rule 68 obligations are ongoing. Rule 68 disclosure is never “complete” before the commencement of trial. In accordance with the Tribunal’s Rules and jurisprudence, the Prosecution will continue to disclose Rule 68 material as soon as practicable after becoming aware of its existence.

(a) Rule 66(A)(ii) disclosure

23. By 7 May 2009, the Prosecution had completed almost all disclosure required under Rule 66(A)(ii). For witnesses with relatively large amounts of material to disclose, such as experts and international witnesses, disclosure was completed well before this date.⁴¹ These items were disclosed electronically, on a hard drive or on CDs, and were divided into specific witness folders to assist Karadžić’s review.

24. The Trial Chamber addressed Karadžić’s request for an order imposing modalities on the Prosecution’s disclosure under Rule 66(A)(ii) going beyond the requirements of the Rules. The Trial Chamber noted that a significant amount of the Rule 66(A)(ii) material had been provided well in advance of the deadline.⁴² It approved of the Prosecution’s offer to partially satisfy Karadžić’s requests by providing further Rule 66(A)(ii) material to Karadžić (1) on an external hard drive, (2) organised into folders for each witness, (3) including in each folder the prior statements and transcripts of the relevant witness, with indexes attached.⁴³ On 7 May 2009, the Prosecution provided Karadžić with a hard drive containing a large amount of Rule 66(A)(ii) disclosure material organized into folders with indexes attached. The Prosecution also provided the materials on a hard-drive directly to Karadžić’s

³⁹ See Decision on Motions for Disclosure of Rule 68 Material and Reconsideration of Decision on Adequate Facilities, 10 March 2009 (Decision on Rule 68 Disclosure), para.20.

⁴⁰ Appeal, para.55.

⁴¹ Over 42 *per cent* of Rule 66(A)(ii) material was disclosed by 16 March 2009 and 52 *per cent* by 15 April 2009.

⁴² Decision on Modalities of Rule 66(A)(ii) Disclosure, 27 April 2009 (Decision on Disclosure Modalities), para.4.

associates. Rule 66(A)(ii) material provided to Karadžić before and after this date was put on CDs with indexes attached.

25. At the status conference of 6 May, the Trial Chamber checked to ascertain that disclosure was functioning correctly. Upon hearing of the delayed disclosure of some corrupted audio files, the Trial Chamber ordered the interim disclosure of the uncorrupted audio files and imposed a new deadline for the disclosure of the corrupted files.⁴⁴

26. Karadžić complains that the Rule 66 (A)(i) (indictment supporting material) disclosed to him was of limited assistance because he did not know which witnesses would be called at trial.⁴⁵ However, he fails to acknowledge the large volume of Rule 66(A)(ii) material he received in an organized manner, as described above. While the final witness list was filed on 18 May 2009, the Rule 66(A)(ii) disclosure related to already selected witnesses.⁴⁶ The Prosecution gave Karadžić the materials in a manner that enabled him to link the materials with specific witnesses. In particular, he received a disclosure letter setting out the Rule 66(A)(ii) material being disclosed to him, with an attached table listing the documents under each witness.

27. Karadžić's argument that, since 7 May 2009, 1519 new items have been disclosed pursuant to Rule 66(A)(ii) is inaccurate. Karadžić has double-counted 400 documents, which were provided in both English and BCS. In addition, Karadžić's figure includes approximately 900 BCS audio files disclosed after 7 May 2009 with leave of the Trial Chamber. The English transcripts of these audio files had previously been disclosed.

2. Rule 65ter Disclosure

28. On 18 May 2009, in accordance with Rule 65ter the Prosecution provided Karadžić with a final Pre-trial Brief, the exhibit and witness lists, and summaries for each witness.⁴⁷ Over and above the requirements of Rule 65ter, the Prosecution also

⁴³ Decision on Disclosure Modalities, para.5.

⁴⁴ Status Conference of 6 May 2009, T.188, 192.

⁴⁵ Appeal, para.12.

⁴⁶ Only in a very few instances did the Prosecution disclose the material of a witness who was subsequently withdrawn from the final witness list.

⁴⁷ Prosecution's Submission Pursuant to Rule 65ter (E)(i)-(iii), 18 May 2009.

informed Karadžić which exhibits would be associated with each witness, identified the victims and perpetrators for each scheduled incident and gave notice of the evidence the Prosecution will call to prove each scheduled incident.

29. Rule 65*ter* items were disclosed electronically to Karadžić to assist the review process. The Prosecution also provided the materials on a hard-drive directly to Karadžić's associates. The Prosecution has frequently assisted the defence team in locating items, on a case-by-case basis.

C. Measures to facilitate the work of Karadžić's defence team

30. During the pre-trial proceedings, the Trial Chamber took measures to facilitate the Karadžić's defence team's access to information necessary for trial preparations. The Trial Chamber granted access to confidential information and protected information to persons assisting Karadžić who were willing to provide the requisite confidentiality undertakings to the Registry.⁴⁸ It noted that the Prosecution did not oppose granting EDS access to those assisting Karadžić and encouraged the parties and the Registry to reach an arrangement to allow access to the EDS, including confidential material, to a reasonable number of others assisting Karadžić in his defence.⁴⁹

31. Karadžić asserts that the Trial Chamber erred in referring to the numerous unpaid legal advisors and assistants that aide his defence team.⁵⁰ However, this was a relevant consideration. Irrespective of whether these individuals directly assist his trial preparation, their drafting assistance on legal issues frees up those members of his team that carry out trial preparation to focus on their work.

D. Efforts since September 2008 to streamline the Prosecution's case

1. Reduced and streamlined Indictment

32. On 22 September 2008, the Prosecution filed an amended indictment, with extensive supporting materials.⁵¹ The Third Amended Indictment (Indictment) was

⁴⁸ Decision on Rule 68 Disclosure, paras.22, 25.

⁴⁹ Decision on Rule 68 Disclosure, paras.22.

⁵⁰ Appeal, para.36.

⁵¹ Motion to Amend the First Amended Indictment, 22 September 2008.

filed on 27 February 2009.⁵² The Indictment reduces the scope of the case (the number of municipalities in which criminal conduct is alleged was reduced from 41 to 27) and clarifies the case against Karadžić, providing additional and more precise particulars as well as seven schedules specifying the underlying criminal acts.

2. Further reductions in the number of Prosecution witnesses

33. Karadžić states that the Prosecution's Pre-trial Brief lists 542 witnesses,⁵³ but he fails to acknowledge that the Prosecution has subsequently reduced the number of witnesses to be called at trial. The amount of time that Karadžić must spend preparing for cross-examination of these witnesses is correspondingly less.

34. The number of Prosecution witnesses is now 409. The witnesses who will not be called consist of:

- A significant number of "Reserve List" witnesses (witnesses whose evidence is cumulative to other witnesses or who are covered by adjudicated facts – this number may rise depending on the outcome of pending adjudicated facts motions),⁵⁴ and
- 62 witnesses who relate to municipalities that have now been removed from the case, as described below.⁵⁵

3. Further reductions in the number of municipalities and crime incidents

35. Pursuant to a Prosecution proposal under Rule 73bis,⁵⁶ a further eight municipalities have been removed from the case against Karadžić.⁵⁷ No evidence of crimes (with the exception of two detention facilities) will be led in two other municipalities.⁵⁸ A further twenty crime sites and incidents have been removed from

⁵² Third Amended Indictment, 27 February 2009.

⁵³ Appeal, para.14.

⁵⁴ See Prosecution Second Submission Pursuant to Rule 73bis(D), 18 September 2009.

⁵⁵ Prosecution Submission Pursuant to Rule 73bis(D), 31 August 2009 (73bis Submission), paras.10-13.

⁵⁶ 73bis Submission, paras.10-13. See also Status Conference of 8 September 2009, T.451 (Judge Kwon accepting the Prosecution proposal).

⁵⁷ Bosanska Krupa; Bosanski Petrovac; Čajnice; Donji Vakuf; Kalinovik; Kotor Varoš; Ilijaš; Višegrad.

⁵⁸ Banja Luka (except Manjača camp), Brčko (except Luka camp).

the remaining municipalities and the Sarajevo and Srebrenica components of the case.⁵⁹

E. Proposed disclosure of witness-related packages prior to witness testimony

36. In its submission on Trial Guidelines, the Prosecution has proposed to re-disclose witness related materials to Karadžić ten days prior to the anticipated start of the relevant witness testimony.⁶⁰ This material will comprise packages of statements, associated exhibits or other materials for Rule 92*ter* witnesses or for witnesses in direct examination. The proposed procedure will direct Karadžić to the relevant exhibits and Rule 66(A)(ii) materials and allow him a substantial amount of time to read through them and to focus his cross-examination.

37. Karadžić incorrectly refers to Rule 92*ter* packages and exhibit binders as "additional material".⁶¹ Rather, these resources will consist of Rule 66(A)(ii) material already disclosed to him that has been reorganised, trimmed down and focused to facilitate his preparations.

VI. MANY OF KARADŽIĆ'S DIFFICULTIES ARISE FROM HIS CHOICES ABOUT THE CONDUCT OF HIS DEFENCE

A. Self-representation

38. Karadžić relies on his choice to represent himself as a factor justifying his claim to additional preparation time.⁶² His argument fails to recognise the warning issued by the *Milošević* Appeals Chamber. In considering a similar argument by Slobodan Milošević, the Appeals Chamber found that where an accused elects self-representation, concerns about fairness of proceedings "are, of course, heightened", but also emphasised that

[t]here is no doubt that, by choosing to conduct his own defence, the Accused deprived himself of resources a well-equipped defence team could have provided. A defendant who decides to represent himself relinquishes many of the benefits associated with

⁵⁹ *Contrast*, Appeal para.47 (failing to acknowledge the reduction in the number of incidents).

⁶⁰ Prosecution's Submission on Trial Guidelines, 28 September 2009 (Submission on Trial Guidelines), paras.5, 10.

⁶¹ *See* Appeal, para.74.

⁶² Appeal, paras.51, 53.

representation by counsel. The legal system's respect for a defendant's decision to forgo assistance of counsel must be reciprocated by the acceptance of responsibility for the disadvantages that this choice may bring.⁶³

39. Karadžić is exercising his right to self-representation, but this does not equate with a right to excessive pre-trial preparation time.

B. Decision to seek disclosure of large volumes of tangential Rule 66(B) material

40. Pursuant to Rule 66(B), Karadžić has requested a considerable amount of materials⁶⁴ and continues to do so. By 15 September 2009 the Prosecution had disclosed 192,037 pages under Rule 66(B) pursuant to these requests.

41. The Prosecution has dealt with these requests as quickly as possible and will continue to do so. However, the Prosecution has asked that Karadžić prioritize his Rule 66(B) requests to the maximum extent possible.⁶⁵ The material he has requested relates to arguments he intends to make in his defence case that are only remotely relevant to the Prosecution's case. A full review of this material is not necessary before the commencement of the trial.

C. Choice in allocation of work to his legal assistants

42. In addition to the official members of his defence team, Karadžić retains a large group of volunteers to assist him with his case.⁶⁶ The Trial Chamber correctly took this factor into account in assessing whether Karadžić has had adequate time to prepare for trial.⁶⁷

43. Karadžić states that his team of volunteers has worked on legal issues rather than trial preparation.⁶⁸ He offers no valid explanation as to why these volunteers could not have been deployed to assist with at least some aspects of trial preparation.

⁶³ *Milošević* Interlocutory Appeal, para.19.

⁶⁴ By 17 August 2009 the Prosecution had disclosed 133,646 pages of material pursuant to Karadžić's requests under Rule 66(B).

⁶⁵ Submission on Trial Guidelines, para.36.

⁶⁶ Status Conference of 20 August 2009, T. 430 ("KARADŽIĆ: I have to conduct contacts with 30 or 40 of my associates"). *See also, e.g.*, Prosecution's Response to Karadžić's Submission on Commencement of Trial, 7 September 2009, para.4, fn.4 (citing Nidzara Ahmetasevic, "Powerful Team Backs Up Karadžić's Invisible Ally", *Balkan Investigative Reporting Network*, 21 July 2009; "All the President's Men", *Sense-Tribunal*, 27 May 2009).

⁶⁷ Decision, T. 455. *See also above*, para.31.

⁶⁸ Appeal, paras.7, 10, 83.

While Karadžić is free to divide his and his team's preparation-time in any manner he chooses, he must bear the consequences of devoting considerable attention to matters unrelated to the factual evidence in the forthcoming trial.⁶⁹ In directing his resources almost exclusively towards legal issues, Karadžić acted at his peril in disregarding Judge Bonomy's instructions to ensure that he was adequately preparing for trial.⁷⁰

D. Recent requests for large volumes of material from third parties

44. Karadžić refers to his request for information from 25 states and two international organisations as a basis for delaying the proceedings.⁷¹ However, many of these requests were only made in the last few months. It is unreasonable for Karadžić to be given time to review this material prior to the commencement of trial.

VII. CONTINUED PREPARATION DURING TRIAL IS RELEVANT IN ASSESSING WHETHER KARADŽIĆ HAS ADEQUATE TIME TO PREPARE HIS DEFENCE

45. Contrary to Karadžić's argument,⁷² the notion of "adequate time" under Article 21(4)(b) of the Tribunal's Statute does not mean that Karadžić's preparation must be "completed" prior to trial. This is implicit in the *Krajišnik* Appeals Chamber's consideration of both pre-trial and in-trial time when rejecting the argument that *Krajišnik* had not been given adequate preparation time.⁷³ The Appeals Chamber declared as reasonable the Trial Chamber's finding that "adequate time had been allowed for the preparation of cross-examination of witnesses" during the Prosecution case, "and that in other areas the *Krajišnik* Defence would have sufficient time during preparation of the defence case, and in the presentation of it, to prepare adequately."⁷⁴ The two Defence requests for adjournment during the *Krajišnik*

⁶⁹ For example, Karadžić's use of his pre-trial resources includes the filing of a "frivolous and vexatious" motion. *See* Decision on Motion to Exclude Testimony of War Correspondents, 20 May 2009, para.3.

⁷⁰ *See, e.g.*, Status Conference of 20 August 2009, T. 434 ("JUDGE BONOMOY: it is important to devote adequate time to preparing to deal with the factual evidence that will be led in the trial.")

⁷¹ Appeal, para.43. These requests mirror Rule 66(B) requests made to the Prosecution.

⁷² Appeal, paras.73-78.

⁷³ *Prosecutor v. Krajišnik*, Case No.IT-00-39-AR73.1, Decision on Interlocutory Appeal of Decision on Second Defence Motion for Adjournment, 25 April 2005 (*Krajišnik* Interlocutory Appeal).

⁷⁴ *Krajišnik* Interlocutory Appeal, para.23.

proceeding were rejected by the Trial Chamber⁷⁵ and these decisions were upheld on appeal.⁷⁶

46. Equally, counsel does not have to be “provided with the necessary time and facilities to serially peruse the collected material for there to be a fair trial.”⁷⁷ The Appeals Chamber upheld the *Krajišnik* Trial Chamber’s finding that

a defence strategy will draw upon the knowledge of the accused himself or herself, and in large or complex cases the defence will rely on labour-saving strategies, documentation, and technologies which zero in on material relevant to that strategy.⁷⁸

This strategy is assisted by the progress of the Prosecution case which helps “differentiate contested from uncontested or secondary issues.”⁷⁹

47. Karadžić’s reliance on the *Krajišnik* case as a precedent does not assist him.⁸⁰ Rather the case undermines his position, given the Appeals Chamber’s conclusion that *Krajišnik* had received adequate preparation time when pre-trial and in-trial time was taken into account.

48. Contrary to Karadžić’s argument, the Trial Chamber did not find that inadequate pre-trial preparation time could be “cured” by reduced sitting hours.⁸¹ The Trial Chamber simply noted that Karadžić’s Submission seeking a ten month delay assumed that the Trial Chamber would sit five days *per* week. However, that factor aside, the Trial Chamber was not convinced that Karadžić had justified the delay claimed.⁸²

⁷⁵ See *Prosecutor v. Krajišnik*, Case No.IT-00-39-T, Decision on Defence Motion for Adjournment (Written Reasons), 21 September 2004; *Prosecutor v. Krajišnik*, Case No.IT-00-39-T, Decision on (Second) Defence Motion for Adjournment, 4 March 2005 (*Krajišnik* Decision on Second Motion).

⁷⁶ See *Krajišnik* Interlocutory Appeal; *Prosecutor v. Krajišnik*, Case No.IT-00-39-A, Judgement, paras.85 – 87.

⁷⁷ *Krajišnik* Decision on Second Motion, para.13.

⁷⁸ *Krajišnik* Decision on Second Motion, para.13.

⁷⁹ *Krajišnik* Decision on Second Motion, para.13.

⁸⁰ See Appeal, para.75.

⁸¹ See Appeal, para.23(D).

⁸² Decision, T.455.

VIII. THE LENGTH OF PRE-TRIAL DETENTION FOR OTHER ACCUSED IS NOT AN ACCURATE GUIDE TO THE ADEQUACY OF KARADŽIĆ'S PREPARATION TIME

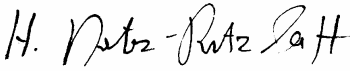
49. The average pre-trial detention period for accused persons brought before this Tribunal is not a valid guide to the adequacy of Karadžić's preparation time.⁸³ The length of pre-trial detention may vary depending on a range of factors extraneous to Article 21 (4)(b), such as the joinder of cases, court room and trial chamber availability, provisional release and Rule 11*bis* proceedings. Karadžić's attempted comparison with other Tribunal cases is further undermined by the fact that the trial of Slobodan Milošević began eight months after the accused was arrested. As Karadžić acknowledges, the case against Milošević is more comparable than most others in terms of size and complexity.⁸⁴

50. Karadžić's comparison with other cases also fails to account for the many initiatives implemented in this case that have facilitated his trial preparations.⁸⁵

IX. CONCLUSION

51. The 14 month long pre-trial proceedings in this case have been actively managed with a view to getting the case ready for trial within a reasonable time period. During this time, the Trial Chamber considered and addressed Karadžić's concerns, including the size and complexity of the case, the volume of materials to review and the resources available to his defence team. Viewed in its proper context, the Trial Chamber's Decision that the trial should start on 19 October 2009 does not constitute an abuse of discretion. Karadžić's appeal should be dismissed.

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Dated this 5th day of October 2009
At The Hague, The Netherlands

⁸³ *Contrast*, Appeal, para.38.

⁸⁴ Appeal, para.41.

⁸⁵ *Above*, paras.17-37.