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-09-92-T
		Date:	27 March 2015
		Original:	English

IN TRIAL CHAMBER I

Before: **Judge Alphons Orie, Presiding**
Judge Bakone Justice Moloto
Judge Christoph Flügge

Registrar: **Mr John Hocking**

Decision of: **27 March 2015**

PROSECUTOR

v.

RATKO MLADIĆ

PUBLIC

DECISION ON DEFENCE REQUEST TO ADOPT MODALITY FOR PROSECUTION RE-OPENING

Office of the Prosecutor
Mr Peter McCloskey
Mr Alan Tieger

Counsel for Ratko Mladić
Mr Branko Lukić
Mr Miodrag Stojanović

I. PROCEDURAL HISTORY

1. On 23 October 2014, the Chamber issued a decision granting a Prosecution motion to re-open its case-in-chief ("Decision").[1] The Chamber decided to hear the presentation of the Prosecution's re-opening evidence *en bloc* at a time to be determined at a later stage and informed the parties that it would issue a decision on the exact timing of the re-opening, including how much time will be available to the Prosecution, once any applications pursuant to Rule 92 *bis* and Rule 94 *bis* of the Tribunal's Rules of Procedure and Evidence ("Rules") have been decided upon.[2] On 5 February 2015, the Chamber informed the parties of its inclination to hear the Prosecution's re-opening evidence in May or June 2015.[3] On 9 March 2015, the parties made oral submissions about the suggested timing of the re-opening.[4] On 12 March 2015, the Defence filed a submission containing a proposed modality for hearing the Prosecution's re-opened case ("Request").[5] The Registry filed a submission related to the Request on 13 March 2015.[6] The Prosecution responded to the Request on 19 March 2015 ("Response").[7] On 20 March 2015, the Defence requested leave to reply to the Response, attaching its reply ("Reply").[8] On 23 March 2015, the Prosecution requested leave to file a sur-reply, attaching it ("Sur-Reply").[9]

II. SUBMISSIONS OF THE REGISTRY AND THE PARTIES

2. The Defence submits that the Chamber, in its Decision, acknowledged that the 'trial would have to be delayed to permit the [D]efence to prepare for re-opening'.[10] The Defence then argues for an adjournment from 1 May 2015 until the summer recess of 2015 and that the Prosecution's re-opening evidence should be heard immediately after the summer recess.[11] The Defence presents the following reasons for this requested adjournment: (i) most of its Prijedor witnesses have already testified thus precluding it from responding to the Prosecution's re-opening evidence and necessitating additional interviews and preparation; (ii) all of the Prosecution's re-opening experts have been allowed to testify, requiring it to seek additional funding for its experts; (iii) it needs to

1 Decision on Prosecution Motion to Re-Open its Case-in-Chief, 23 October 2014.
2 Decision, para. 12.
3 T. 31255.
4 T. 32741-32744.
5 Defence Submission as to Proposed Modality of Prosecution Re-Opening, 12 March 2015.
6 Deputy Registrar's Submission Regarding Defence Remuneration, 13 March 2015 ("Submission").
7 Prosecution Response to Defence Submission as to Proposed Modality of Prosecution Re-Opening, 19 March 2015.
8 Defence Request for Leave to Reply to Prosecution Response to Defence Submission as to Proposed Modality of Prosecution Re-Opening, 20 March 2015.
9 Prosecution Request for Leave to Sur-Reply to Defence Reply on Submission on Modality of Prosecution Reopening, 23 March 2015.
10 Request, para. 1.
11 Request, paras 7-8.

seek additional funding from the Registry for this additional 'Prosecution case phase'; and (iv) the Prosecution's Rule 92 *bis* motion has been granted, leading to more evidence for it to address.[12] The Defence further submits that its full-time engagement in the presentation of the Defence case-in-chief has prevented it from undertaking certain efforts to prepare for the re-opening.[13] The Defence submits that the Prosecution's disclosure with regard to the re-opening evidence has suffered from technical difficulties only resulting in full disclosure as late as 10 February 2015.[14] Lastly, the Defence stresses that the Prosecution, operating with a much larger team than the Defence, required over two years to collect and over one year to process the re-opening evidence, suggesting that the time sought by the Defence is reasonable.[15]

3. The Registry clarified that the Defence continues to receive uninterrupted legal aid funding, with the case having been ranked at the highest level of complexity.[16] The Registry notes that the first Defence communication to the Registry on additional funding related to the re-opening occurred on 11 March 2015.[17] The Registry also informs the Chamber that on the same date the Defence submitted a request for additional funding to challenge the Prosecution's re-opening experts, but that this request was incomplete and therefore returned to the Defence.[18]

4. The Prosecution objects to the Request and submits that it is grounded on a number of incorrect or misleading claims.[19] In particular, the Prosecution challenges the Defence's claims that its disclosure was defective.[20] The Prosecution asserts that in August 2014 it disclosed material to the Defence together with a corresponding excel spreadsheet containing the material's meta-data, therefore in a format that is in line with all previous disclosures and which was also upheld by the Appeals Chamber.[21]

5. Replying to the Response, the Defence repeats that the time it requested is reasonable when compared to the time the Prosecution required to prepare the re-opening evidence.[22] The Defence further disputes that in August 2014 all the material was disclosed with meta-data.[23] It submits that the material could be opened but not imported to another location, thus rendering it unusable.[24]

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12 Request, paras 6-8.
13 Request, paras 9, 11.
14 Request, para. 12.
15 Request, para. 13.
16 Submission, para. 3.
17 Submission, para. 4, n. 1.
18 Submission, para. 7.
19 Response, paras 1-2.
20 Response, para. 4.
21 *Ibid.*
22 Reply, para. 3.
23 Reply, para. 5.
24 Reply, paras 5, 8.

Lastly, the Defence submits that the Registry had an obligation to provide a new budget on its own initiative once additional time had been allocated to the Prosecution.[25]

6. In its Sur-Reply, the Prosecution submits that it never claimed that all disclosure related to the re-opening occurred in August 2014.[26] The Prosecution notes further that the Defence's complaints appear to relate to the format of the disclosure, and not to any lack of disclosure.[27]

III. APPLICABLE LAW

7. Article 20 (1) of the Tribunal's Statute ("Statute") provides that the trial chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the Rules, with full respect for the rights of the accused and due regard for the protection of victims and witnesses. Article 21 (4) of the Statute provides that in the determination of any charge against an accused pursuant to the present Statute, an accused shall be entitled to have adequate time and facilities for the preparation of his defence.

8. A trial chamber has discretion regarding trial scheduling matters; however, this discretion is limited by the obligations of Articles 20 and 21 of the Statute.[28] It is not possible to set a standard of what constitutes adequate time to prepare a defence. The length of the preparation period depends on a number of factors specific to each case.[29]

IV. DISCUSSION

9. The Chamber considers it appropriate to grant the Defence an opportunity to reply to the Prosecution's submissions that the Request is based on a number of incorrect or misleading arguments and will therefore grant it leave to reply. The Chamber considered the Reply in coming to its decision. The Chamber also considered the Sur-Reply in an effort to receive all factual information about the alleged disclosure problems.

10. At the outset, the Chamber corrects a number of inaccuracies in the Request. At the time of filing the Request, the Chamber had only permitted the Prosecution to call four of its six proposed

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25 Reply, para. 13.
26 Sur-Reply, para. 2.
27 Sur-Reply, paras 2-3.
28 *Augustin Ngirabatware v. the Prosecutor*, Case No. ICTR-99-54-A, Decision on Augustin Ngirabatware's Appeal of Decisions Denying Motions to Vary Trial Date, 12 May 2009 ("*Ngirabatware* Decision"), para. 22
29 *Ngirabatware* Decision, para. 28.

expert witnesses. Decisions on the expertise of witnesses Franjić and Karahasanović had not been delivered. Similarly, the Prosecution's Rule 92 *bis* motion related to its re-opening is still pending. Moreover, the Chamber never acknowledged that the re-opening would necessitate a delay in the trial for further Defence preparations as the Defence suggests. In the Decision, the Chamber merely acknowledged that the re-opening would prolong the overall length of the trial.[30] Lastly, the Chamber notes the Defence's repeated argument that the Prosecution has a larger team and that any time given to the Defence should be compared to the time the Prosecution required to analyse the re-opening evidence. This submission appears to ignore the difference in the evidentiary burden between the parties, which has an impact on preparation time for the presentation of evidence.

11. With regard to the Defence's submission that it was too engaged in the presentation of the Defence case to meaningfully prepare for the re-opening, the Chamber has serious concerns about the management and organisation of the Defence. The Defence should have reconsidered the allocation of its resources as soon as it was informed of what the Prosecution intended to present and, at the latest, once the Chamber had decided to grant a re-opening of the Prosecution's case. To the extent needed, the Defence should also have immediately sought additional funding or facilities or even requested the intervention of the Chamber. The Defence submission blaming the Registry for not initiating a further funding process is wholly misplaced. Regardless of who has to initiate any further funding, it was incumbent upon the Defence to inform the Chamber at an early stage of any potential problems in relation to funding. Instead, the Chamber notes with concern that Defence requests for additional funding were only made in March 2015, after the Chamber had inquired whether the parties would be ready to hear the re-opening evidence in May or June 2015. In addition, the Defence could and should have ensured that the Prosecution's expert reports, which had been disclosed in August 2014, be reviewed by experts or others so as to avoid unnecessary delays. Lastly, the Defence's submission does not identify in detail what kind of preparations need to be conducted: for example, the Defence does not specify which witnesses it intends to interview prior to the re-opening or what kind of documents it needs to review. The Chamber finds on account of the above that the Defence has not demonstrated due diligence in preparing for the re-opening.

12. With regard to the Defence's submission about disclosure, the Chamber understands that the dispute between the parties is not about whether material was disclosed, but rather whether material was disclosed in an acceptable format. The Chamber notes that this issue has been litigated at

[30] Decision, para. 10.

length in the past, including on appeal.[31] In addition, the Chamber is perplexed that potential disclosure problems, which apparently lasted for six months, were only brought to the attention of the Chamber in the Request. Throughout this case, and especially during its pre-trial phase, the Chamber has shown a willingness to intensively work with the parties to avoid and resolve any disclosure problems. In particular because of this history, it was incumbent upon the Defence to inform the Chamber of such problems at an early stage in order to seek an expeditious resolution so as to avoid the problems the Defence submits it is now facing.

13. Despite the concerns expressed above, the Chamber recognises that granting the Defence an additional adjournment to further prepare for the re-opening, including further reviewing the disclosed material, is justified. To that end, the Chamber previously granted a separate Defence request for a non-sitting week in April 2015 and held that the Defence should use that time to also prepare for the re-opening.[32] In light of the above, the Chamber will grant a short adjournment. However, the time granted to the Defence should not only be used as preparation for any cross-examination of re-opening witnesses, but also as preparation for any Defence evidence (as part of the Defence case) challenging the Prosecution's re-opening evidence.

14. The Chamber clarifies that it will decide on the time to be allocated to the Prosecution to present its re-opening evidence once it has decided on the pending motion for admission of evidence pursuant to Rule 92 *bis* of the Rules.

V. DISPOSITION

15. For the foregoing reasons, the Chamber

GRANTS the Defence leave to reply to the Response;

GRANTS the Prosecution leave to sur-reply to the Reply;

GRANTS the Request in part; and

DECIDES as follows:

- There will be no court hearings between 22 May and 22 June 2015;
- The presentation of the Prosecution's re-opening evidence shall commence on 22 June 2015;

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[31] *Decision on Submission Relative to the Proposed "EDS" Method of Disclosure, 26 June 2012; Prosecutor v. Mladić*, Case no. IT-09-92-AR73.2, Decision on Defence Interlocutory Appeal Against the Trial Chamber's Decision on EDS Disclosure Methods, 28 November 2013.

[32] T. 32797.

- The week of 20 July 2015 shall be a non-sitting week; and
- The week of 10 August 2015 shall be a sitting week.

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

Judge Alphons Orie
Presiding Judge

Dated this twenty-seventh day of March 2015
At The Hague
The Netherlands

[Seal of the Tribunal]