

IT-09-92-T
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24 MAY 2012

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/s/

**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: 24 May 2012
Original: English

IN TRIAL CHAMBER I

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

Registrar: Mr John Hocking

Decision of: 24 May 2012

PROSECUTOR

v.

RATKO MLADIĆ

PUBLIC

**DECISION ON URGENT DEFENCE MOTION OF 14 MAY 2012
AND REASONS FOR DECISION ON TWO DEFENCE
REQUESTS FOR ADJOURNMENT OF THE START OF TRIAL
OF 3 MAY 2012**

Office of the Prosecutor

Mr Dermot Groome
Mr Peter McCloskey

Counsel for Ratko Mladić

Mr Branko Lukić
Mr Miodrag Stojanović

I. PROCEDURAL HISTORY

1. At a status conference on 6 October 2011, the Chamber set the deadline for disclosure of material pursuant to Rule 66 (A) (ii) of the Tribunal's Rules of Procedure and Evidence ("Rule 66 (A)(ii) material") to the same day as the Prosecution deadline for filing its Rule 65 *ter* witness list ("Witness List").¹ On 8 December 2011, the Chamber set the deadline for the filing of the Witness List and list of exhibits the Prosecution intends to offer at trial, as required under Rule 65 *ter* (E) (iii) ("Exhibit List"), to 10 February 2012.² On 10 February 2012, the Prosecution filed its Witness and Exhibit Lists, and filed a notice of compliance with its Rule 66 (A)(ii) disclosure obligations.³
2. On 15 February 2012, the Chamber, after considering the parties' submissions, decided that the trial would start on 14 May 2012⁴ and the presentation of the Prosecution's evidence would begin on 29 May 2012 ("Scheduling Order").⁵
3. On 2 March 2012, the Prosecution filed a request to add 123 documents to its Exhibit List.⁶ On 12 April 2012, the Defence filed its response, in which it submitted that the Prosecution had not properly disclosed to the Defence all of the material listed on its Exhibit List, and requested a 90-day adjournment of the start of trial ("Exhibit List material" and "First Adjournment Request", respectively).⁷ According to the Prosecution, the Exhibit List material was accessible to the Defence via the Tribunal's electronic-court system ("e-court") as of the evening of 26 April 2012.⁸ On 2 May 2012, the Prosecution filed a response to the Defence's complaints, contesting the Defence assertions ("Response to First Request").⁹ The First Adjournment Request was reiterated

¹ T. 78.

² T. 127.

³ Prosecution Witness List, 10 February 2012 (Confidential); Prosecution Exhibit List, 10 February 2012 (Confidential with Confidential Annex A); Prosecution Notice of Rule 65 *ter* (E) Filings, 10 February 2012; Prosecution Notice of Compliance with Rule 66 (A)(ii), 10 February 2012, para. 3.

⁴ For various reasons, the Chamber later decided to move the date of the start of trial to 16 May 2012 (see T. 327-328).

⁵ Scheduling Order, 15 February 2012, paras 18, 21.

⁶ Corrigendum to Prosecution Rule 65 *ter* (E) Exhibit List, 2 March 2012 (Public with Confidential Annexes). The corrigendum corrected certain errors and requested the addition of 123 exhibits to the Exhibit List. The Chamber informed the Prosecution that it did not consider the filing of a corrigendum to be the appropriate manner to add exhibits to the Exhibit List and that it would interpret the corrigendum as a request to add exhibits to its Exhibit List (T. 220). Accordingly, the Defence was instructed to file a response to the request within 2 weeks (*ibid.*). The Chamber later granted the addition of the 123 documents (T. 331).

⁷ Defence Response to the Prosecution "Corrigendum" Seeking Addition of Documents to the Rule 65*ter* Exhibit List, 12 April 2012, paras 3, 7-10. The complaints and requests contained therein were repeated in later filings and reports.

⁸ Report on Disclosure and Motion to Continue Trial, 1 May 2012 (Confidential with Confidential Annexes A and B) ("1 May 2012 Motion to Continue Trial"), Annex B, p. 2. On 26 April 2012, through an informal communication, the Prosecution had informed the Chamber that all Exhibit List material had been successfully uploaded into the e-court system and released to the Defence, with the exception of certain residual errors resulting in the failure to upload certain exhibits. See Eighth Prosecution Report on Pre-Trial Preparations, 1 May 2012 (Confidential with Confidential Annexes A to C) ("Eighth Pre-Trial Report"), para. 31; T. 359; For additional information on the e-court upload process, see T. 308-312; Rule 65 *ter* meeting, T. 378-384 (closed session).

⁹ Prosecution Response to Defence Report on Disclosure and Motion to Continue Trial, 2 May 2012 (Confidential).

and argued in additional filings and oral submissions, and the Prosecution also responded in additional submissions.¹⁰

4. On 10 April 2012, the Defence filed a notice in which it requested, in relevant part, that the Chamber compel the Prosecution to disclose all Rule 66 (A)(ii) material and to delay the start of trial by 90 days from the date of compliance with Rule 66 (A)(ii) disclosure (“Second Adjournment Request”).¹¹ On 16 April 2012, the Prosecution responded, requesting that the Chamber deny the Second Adjournment Request (“Response to Second Request”).¹² On 24 April 2012, the Defence requested leave to reply to the Response to Second Request.¹³ The Chamber granted the Defence leave to reply and hereby places this decision on the record.

5. On 25 April 2012, the Prosecution notified the Chamber and the Defence that it had discovered that, due to an upload error, a substantial part of the Rule 66 (A) (ii) material, contained in disclosure batch 5 of the 11 November 2011 disclosure schedule (“Batch 5”),¹⁴ had not in fact been disclosed to the Defence in November 2011.¹⁵ The Prosecution then decided to re-disclose all Rule 66 (A) (ii) material to the Defence and, on 27 April 2012, re-disclosed the material from Batch 5 in relation to the witnesses scheduled to testify before the summer court recess (“First Witnesses”), with the exception of 15 BCS translations.¹⁶ At the pre-trial conference on 3 May 2012, the Defence confirmed that it received these materials on 27 April 2012.¹⁷ The Second Adjournment Request was reiterated and argued in additional filings and oral submissions, and the Prosecution also responded in additional submissions.¹⁸

6. On 3 May 2012, the Chamber denied the First and Second Adjournment Request, stating that written reasons would follow (“3 May 2012 Decision”).¹⁹

¹⁰ For the Defence, See Rule 65 *ter* meeting, 19 April 2012, T. 378 (Closed Session); 1 May 2012 Motion to Continue Trial, paras 7-9, Annex B, p. 5. For the Prosecution, See Rule 65 *ter* meeting, 19 April 2012, T. 373-374 (Closed Session); Rule 65 *ter* meeting, 2 May 2012, T. 440 (Closed Session); T. 363-367.

¹¹ Notice Pursuant to Chamber Direction of 29 March 2012, and Urgent Motion to Compel, 10 April 2012 (Confidential), para. 16, IV. Relief Sought.

¹² Prosecution Response to Defence Notice Pursuant to Trial Chamber Direction and Urgent Motion to Compel, 16 April 2012 (Confidential), paras 1, 24.

¹³ Defence Request to File Reply in Support of Defence Notice Pursuant to Chamber Direction and Urgent Motion to Compel, 24 April 2012 (Confidential).

¹⁴ See Eighth Pre-Trial Report, Annex A, p. ii. Batch 5 is listed in “Table 2: Major Disclosures” under the Third Major Disclosure, item no. 1. According to the table, this Major Disclosure occurred on 11 November 2011.

¹⁵ See Eighth Pre-Trial Report, para. 6; Transcript of 2 May 2012 Rule 65 *ter* meeting, T. 405-410 (Closed Session).

¹⁶ Eighth Pre-Trial Report, para. 9; Transcript of 2 May 2012 Rule 65 *ter* meeting, T. 447-448.

¹⁷ T. 343. The Defence was not able to yet confirm whether the audio material was all disclosed. The Chamber instructed the Defence to communicate immediately to it and the Prosecution if, upon verification, any material was missing (T. 343-344).

¹⁸ T. 242-253, 295-307.

¹⁹ Decision on Two Defence Requests for Adjournment of the Start of Trial, 3 May 2012. The Chamber notes that on the same day the Defence filed a request for leave to reply. Since this request was received after the Chamber’s decision had already been taken, it is hereby declared moot.

7. On 11 May 2012, the Prosecution informed the Defence that a specific portion of the Exhibit List material, namely one third of disclosure batch 4-c of the 11 November 2011 disclosure schedule (“Batch 4-c”),²⁰ had for technical reasons not been disclosed to the Defence.²¹ Following questions communicated by the Chamber to the Prosecution on 11 May 2012, the Prosecution specified to what extent the non-disclosure had affected the witnesses scheduled to testify before the summer court recess.²² The exchange between the Prosecution and the Chamber on 11 and 14 May 2012 was done through informal communication and copied to the Defence.

8. On 14 May 2012, the Defence filed its urgent motion to adjourn or, in the alternative, bar the Prosecution from presenting certain evidence (“Third Adjournment Request”).²³ On 16 May 2012, the Prosecution responded to the Third Adjournment Request.²⁴ On 17 May 2012, the Chamber decided to suspend the start of the presentation of evidence.²⁵ On the same day, the Chamber conducted a Rule 65 *ter* meeting with the parties to discuss the latest developments with regard to disclosure. At this meeting, the Prosecution informed the Chamber that the Defence had returned the hard disk with Batch 5 to the Prosecution in order to convert it into searchable format through the Optical Character Recognition (“OCR”) software.²⁶ On 18 May 2012, the Chamber met with the Prosecution with regard to the technical matter of insufficient computer capacity in order to OCR Batch 5 and took administrative initiatives in order to facilitate the speeding up of the technical process of OCR’ing.²⁷ Between 21 and 23 May 2012, the Prosecution filed reports, giving further updates on the extent of the disclosure failures and submitting that the overall impact on the Defence is limited.²⁸

II. APPLICABLE LAW

9. Article 20 (1) of the Tribunal’s Statute (“Statute”) provides:

²⁰ See Eighth Pre-Trial Report, Annex A, p. ii. Batch 4-c is listed in “Table 2: Major Disclosures” under the Second Major Disclosure, item no. 3. According to the table, this Major Disclosure occurred on 3 October 2011.

²¹ Prosecution’s Submission of Informal Correspondence, 16 May 2012, Annex A.

²² Prosecution’s Submission of Informal Correspondence, 16 May 2012, Annex B.

²³ Urgent Defence Motion to Adjourn and Continue Trial and in the Alternative Bar the Prosecution from Presenting Any Witnesses or Exhibits that were Untimely Disclosed, 14 May 2012.

²⁴ Prosecution Response to Urgent Defence Motion to Adjourn and Continue Trial, 16 May 2012 (“Third Response”).

²⁵ T. 524.

²⁶ Rule 65 *ter* meeting, 17 May 2012, T. 494.

²⁷ The Chamber informed the Defence of this meeting, what was discussed, and its initiatives that same day through an informal communication.

²⁸ Prosecution Submission on Status of Disclosure, 21 May 2012, paras 1-2, 5, 25; Addendum to 21 May 2012 Prosecution Submission on Status of Disclosure, 22 May 2012; Corrigendum to Annex A of the Addendum to 21 May 2012 Prosecution Submission on Status of Disclosure, 23 May 2012.

The Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

10. Article 21 (4) of the Statute provides, in relevant part:

In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:

(b) To have adequate time and facilities for the preparation of his defence.

11. Rule 65 *ter* (E)(iii) of the Tribunal's Rules of Procedure and Evidence ("Rules") provides, in relevant part, that the pre-trial Judge shall order the Prosecutor to file the list of exhibits the Prosecutor intends to offer at trial, and that the Prosecutor shall serve on the defence copies of the exhibits so listed.

12. Rule 66 (A)(ii) of the Rules provides:

within the time-limit prescribed by the Trial Chamber or by the pre-trial Judge appointed pursuant to Rule 65 *ter*, copies of the statements of all witnesses whom the Prosecutor intends to call to testify at trial, and copies of all transcripts and written statements taken in accordance with Rule 92 *bis*, Rule 92 *ter*, and Rule 92 *quater*; copies of the statements of additional prosecution witnesses shall be made available to the defence when a decision is made to call those witnesses.

13. Rule 68 (ii) of the Rules provides:

[Subject to the provisions of Rule 70,] without prejudice to paragraph (i), the Prosecutor shall make available to the defence, in electronic form, collections of relevant material held by the Prosecutor, together with appropriate computer software with which the defence can search such collections electronically;

14. 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 to ensure that a trial is fair and expeditious and that the accused has adequate time for the preparation of his case.²⁹

15. 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.³⁰ A Trial Chamber's assessment of the amount of pre-trial preparation requires an in-depth consideration of all facts.³¹ The Appeals Chamber has included preparation time during trial as one factor as to whether a defence team was given adequate total preparation time.³² Other means to ensure that an

²⁹ *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.

³⁰ *Ngirabatware Decision*, para. 28.

³¹ See *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-AR73.5, Decision on Radovan Karadžić's Appeal of the Decision on Commencement of Trial, 13 October 2009 ("*Karadžić Trial Commencement Decision*"), para. 19.

³² *Karadžić Trial Commencement Decision*, para. 24, citing *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, para. 23.

accused's rights are not prejudiced by late disclosure may also be relevant factors for the Trial Chamber to consider.³³

III. DISCUSSION

Reasons for 3 May 2012 Decision

16. In relation to the First Adjournment Request (alleged non-disclosure of certain Rule 65 *ter* material), the Chamber noted that the parties, each relying on its own records, did not agree on whether the material had been disclosed. In the absence of any such agreement, the Chamber was not in a position to verify whether certain disclosures had occurred, unless called upon to engage in a process of auditing. While the Chamber offered its good offices for such an exercise,³⁴ the parties did not request the Chamber to intervene in such a way. Whether there was belated disclosure remained unclear, and in that situation the Chamber was not inclined to grant an adjournment. Moreover, the Chamber considered that as of 27 April 2012, the Defence has access via e-court to almost all of the Rule 65 *ter* documents.³⁵

17. In relation to the Second Adjournment Request (non-disclosure of certain Rule 66 (A) (ii) material), the Chamber was satisfied that, although later than envisaged, the material for the first 23 witnesses intended to be called before the summer court recess was disclosed on 27 April 2012 in folders organised by witness names. Thus, the Chamber considered that this material was in the Defence's possession in an organised form at least one month prior to the start of the presentation of evidence. Furthermore, there were no submissions by the Defence demonstrating that the belated disclosure *specifically* prejudiced its preparations for the testimony of certain witnesses.

18. The Chamber concluded that neither on their own, nor considered in combination, did the (alleged) disclosure failures reach a degree which warranted a delay in the start of trial.

19. Generally, the Chamber will always assess what the appropriate remedy, if any, for disclosure violations should be. Such remedy would depend on the specifics of each situation. For example, granting a temporary adjournment, postponing a specific witness's testimony, or ordering the re-call of a witness are all possible remedies, depending on the circumstances, for late disclosure.

³³ See *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-AR73.7, Decision on Appeal from Decision on Motion for Further Postponement of Trial, 31 March 2012, paras 25, 28.

Third Adjournment Request

20. On 11 May 2012, the Prosecution conceded that there had been a disclosure failure in relation to Batch 4-c, stating that it had inadvertently failed to disclose around 7,000 possible exhibits from its Rule 65 *ter* exhibit list. Subsequently, the Defence filed the Third Adjournment Request. This request seeks an adjournment of the trial, repeating earlier submissions on the Prosecution's disclosure failures in relation to Rules 65 *ter* and 66 (A) (ii) of the Rules, but adding the Prosecution's latest concession.³⁶ Further, at the Rule 65 *ter* meeting on 17 May 2012, the Prosecution stated that its 27 April 2012 disclosure of missing documents from Batch 5 in relation to the first 23 witnesses did not contain *searchable* documents. It argued that due to capacity limits it was only able to provide searchable documents in relation to these Batch 5 documents in mid or late June 2012.³⁷ The disclosure failure in relation to Rule 66 (A) (ii) material, as well as the - at the time alleged - disclosure failure in relation to Rule 65 *ter* material, had already been considered by the Chamber in its 3 May 2012 Decision with reasons set out above in paragraphs 16 through 19.

21. Through the Prosecution's updates on the witness-specific effects of the disclosure failures, the Chamber has gained a better understanding of the specific impact on the Defence preparation for trial. This better enables the Chamber to determine the appropriate remedy.

22. In relation to Batch 5, the missing Rule 66 (A) (ii) material, at least for the First Witnesses, was disclosed to the Defence on 27 April 2012. Searchable, OCR'd versions of these documents have not yet been disclosed, however the Prosecution's operational capacity was increased on 21 May 2012, specifically to address this aspect of the Batch 5 problem. The Chamber further considers that even though the process of disclosing searchable documents is ongoing, the Defence is already in possession of all the documents and could, for the time being, employ search methods other than its preferred one, at least for some of the documents.³⁸ The Chamber further considers that the affected documents of Batch 5 contain transcripts, which are to a large extent available on the Tribunal's public website. Considering the above, the Chamber further finds that there is no need for an order to compel disclosure in this regard.

23. In relation to Batch 4-c, the missing documents were disclosed to the Defence on 17 May 2012. Documents from this batch which related to the First Witnesses were also released in e-court

³⁴ See Rule 65 *ter* meeting, 19 April 2012, T. 371-372.

³⁵ See *supra* para. 3.

³⁶ The Defence also bases its request on the fact that it is generally overburdened with the current workload, Third Adjournment Request, paras 12-13. Such aspects were considered by the Chamber when it determined that the case could commence and will not be further considered herein.

³⁷ In the Prosecution's latest update of 21 May 2012, it estimates that this process will be concluded by 29 May 2012.

between 27 April and 14 May 2012. Searchable, OCR'd versions of these documents were disclosed on 22 May 2012.³⁹ The disclosure failure within Batch 4-c mainly related to documents in the English language, meaning that the same documents in BCS had been disclosed to the Defence. Therefore, the actual impact of the Batch 4-c problem on the First Witnesses is limited. Some witnesses are not at all affected, while the effect for many others is very small. For example, many of the documents which had not been disclosed are photographs or maps which generally take less time to review. Considering the above, the Chamber further finds that the request to compel disclosure is moot in this regard.

24. Finally, the Chamber also considered the Prosecution's submission that the disclosure failures "may have an impact on the fairness of the trial if the Defence does not have a reasonable opportunity to review the recently disclosed materials prior to the commencement of the presentation of related evidence".⁴⁰ Considering that the Prosecution is, at this stage, more familiar with any evidence to be presented during its case-in-chief, the Chamber places some weight on this submission.

25. The disclosure failures discussed above have an impact on the Defence's preparations for trial. Defence preparations to date have not been in vain but may need to be supplemented by additional searches and further reviews. All of this requires additional time. On the other hand, the effect of the disclosure failures is sometimes very small or even non-existent. For example, illustrative photo or video material takes relatively little time to review and the non-disclosure of English translations of documents for a Defence team that works primarily in BCS places a limited burden on the Defence. The Chamber further notes that the Prosecution has facilitated Defence preparations in some respects beyond its disclosure obligations. For example, the Prosecution has amended its order of witnesses so as to give the Defence more time to prepare for certain witnesses. It also has arranged for parallel hard-disk disclosure of all documents – in addition to disclosure on the Electronic Disclosure System – in order to accommodate the Defence's preferences. The Prosecution also disclosed certain materials in an organized manner, sorted by witness names, to further assist Defence preparations. Moreover, the Chamber considers that preparing a Defence is not exclusively done during the pre-trial stage. Defence team members will continue to support counsel in the weeks and months following the start of the trial, including with the analysis of evidentiary material the Prosecution will present in relation to specific witnesses. Lastly, the Chamber recalls that there are other remedies available to the Defence. As expressed above, should

³⁸ The Chamber understands that the Defence prefers to use Zylab but notes that some documents, such as transcripts, can also be searched (within as well as across documents) with Microsoft Word.

³⁹ Prosecution Notification of Disclosure Batch 4-C, 24 May 2012.

⁴⁰ Third Response, para. 3.

further analysis of belatedly disclosed material reveal that another remedy is warranted, the Defence may ask for an additional adjournment, postponements of specific witnesses or a later re-calling of specific witnesses.

26. Based on the foregoing, the Chamber finds that the appropriate remedy is the postponement of the presentation of evidence in this trial. While the Chamber finds that a postponement is justified, it does not consider that the requested amount of six months should be granted. In determining the length of the adjournment to be granted, the Chamber has considered the work required to be performed by counsel and their support staff due to the disclosure failures of the Prosecution.

IV. DISPOSITION

27. For the foregoing reasons, the Chamber

GRANTS in part the Third Adjournment Request;

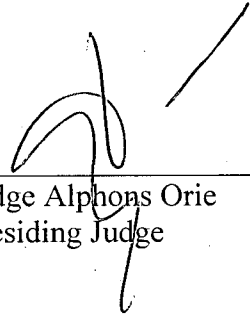
POSTPONES the start of hearing the Prosecution's first witness until 25 June 2012;

INFORMS the parties that the week of 16 July 2012 will be a sitting week in this case;

INSTRUCTS the Prosecution, after having consulted the Defence, to schedule before the summer court recess those witnesses least impacted by the disclosure failures; and

INSTRUCTS the Prosecution to file a new witness order for its First Witnesses by 30 May 2012.

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



Judge Alphons Orie
Presiding Judge

Dated this Twenty-fourth day of May 2012
At The Hague
The Netherlands

[Seal of the Tribunal]