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:	23 October 2014
		Original:	English

IN TRIAL CHAMBER I

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

Registrar: **Mr John Hocking**

Decision of: **23 October 2014**

PROSECUTOR

v.

RATKO MLADIĆ

PUBLIC

DECISION ON PROSECUTION MOTION TO RE-OPEN ITS CASE-IN-CHIEF

Office of the Prosecutor
Mr Peter McCloskey
Ms Camille Bibles

Counsel for Ratko Mladić
Mr Branko Lukić
Mr Miodrag Stojanović

I. PROCEDURAL HISTORY AND SUBMISSIONS OF THE PARTIES

1. On 26 August 2014, the Prosecution requested a re-opening of its case-in-chief ("Motion").[1] The Prosecution seeks leave to re-open its case in order to present evidence in relation to the recently discovered Tomašica mass grave.[2] Specifically, the Prosecution intends to present the testimony of six expert witnesses (including the tendering of 17 documents) and seven fact witnesses (five of whom through Rule 92 *bis* of the Tribunal's Rules of Procedure and Evidence ("Rules")), as well as documentary evidence in the form of 43 documents ("Material").[3] The Prosecution requests nine hours for the presentation of the Material.[4] Lastly, the Prosecution seeks leave to exceed the word limit for motions.[5]

2. The Prosecution submits that the Material could not have been identified and presented during the Prosecution's case.[6] The Prosecution submits that it learned of the Tomašica grave in September 2013 and that forensic analysis began right away, continuing until April 2014.[7] DNA identifications were provided to the Prosecution in May and June 2014.[8] Witness statements in relation to the new evidence were taken until July 2014.[9] The Prosecution submits that it was more appropriate to wait until all investigations and expert analyses had been completed before filing the Motion as opposed to seeking to introduce the Material as it became available.[10] Furthermore, the Prosecution submits that the Material is highly probative and directly relevant to the charges in the Indictment, namely the joint criminal enterprise to permanently remove non-Serbs from Bosnian Serb-claimed territory in Bosnia-Herzegovina in 1992 through the commission of crimes.[11] According to the Prosecution, the Material reveals the significant role the VRS played in the murder, burial, and re-burial of non-Serbs in Prijedor municipality.[12] The Prosecution submits that the number of bodies exhumed from the mass grave, as well as the size and organised nature of the burials, bear on the planned, systematic, and large-scale nature of killings in the municipality of

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1 Prosecution Motion to Re-Open its Case-in-Chief, 26 August 2014.
2 Motion, paras 1, 4, 15, 38.
3 Motion, paras 4, 15-16, Annexes A-B. The Chamber understands that the Prosecution intends to tender these 60 documents in court through the witnesses and will seek to have them added to its Rule 65 *ter* exhibit list at that stage.
4 Motion, paras 5, 36.
5 Motion, para. 6.
6 Motion, para. 2.
7 Motion, paras 3, 10, 13, 17.
8 Motion, para. 17.
9 Motion, para. 18.
10 Motion, para. 19.
11 Motion, para. 22.
12 *Ibid.*

Prijedor.[13] Lastly, the Prosecution submits that the Defence is not unduly prejudiced by the proposed re-opening as the Defence has been on notice of the Prosecution's intention to tender evidence related to the newly discovered mass grave as of November 2013 and the Motion was filed early in the Defence case.[14]

3. The Defence responded on 9 September 2014 ("Response").[15] The Defence submits that the Prosecution did not present the Material as early as possible.[16] Further, the Defence states that re-opening the Prosecution's case would cause a significant delay in the trial.[17] The Defence announces its intention to request an adjournment of at least two months to prepare for the presentation of the Material.[18] The Defence further submits that a re-opening would cause it prejudice as the Defence case has already started.[19] The Defence acknowledges the general importance and probative value of the Material but considers it to be merely additional to other Prosecution evidence already presented, making it not crucial to the Prosecution's case against the Accused.[20] Lastly, the Defence submits that the Chamber should consider the *Karadžić* Trial Chamber's denial of a similar motion to re-open the Prosecution's case when deciding on the Motion.[21]

4. On 16 September 2014, the Prosecution requested leave to reply to the Response, attaching its reply ("Reply").[22] In its Reply, the Prosecution argues that it filed the Motion 'as early as possible', namely only a few days after the last expert report was received.[23] The Prosecution further states that the Defence's submissions regarding a significant delay in the trial as a result of

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13 *Ibid.*
14 Motion, para. 33.
15 Response to Prosecution Motion to Re-Open its Case-in-Chief, 9 September 2014.
16 Response, paras 2, 18.
17 Response, paras 4-8, 17. The Chamber notes some inaccuracies in the Defence's submissions in this respect: First, the Defence (as well as the Prosecution in its Reply, para. 5) speaks of 'rejoinder evidence' when addressing evidence which would challenge the Material (Response, paras 5, 7), whereas such evidence would be part of the Defence case considering that the Material would be evidence of the Prosecution's case-in-chief and not rebuttal evidence. Second, the Defence suggests that it had previously requested six months for the preparation of its case, starting from the date the Prosecution rested its case (Response, para. 6), whereas the Defence submissions on this point at T. 20030 were abundantly clear that the six-month request was to be counted as of the conclusion of the testimony of the last Prosecution witness, which occurred almost two-and-a-half months earlier than the Prosecution's notification that it rests its case.
18 Response, paras 7, 17.
19 Response, paras 10, 12, 17.
20 Response, paras 13, 15, 17.
21 Response, para. 18.
22 Prosecution Request for Leave to Reply to Defence Response to Prosecution Motion to Re-Open its Case-in-Chief, 16 September 2014.
23 Reply, paras 3-4.

the proposed re-opening are speculative and unsubstantiated.[24] Lastly, the Prosecution submits that the Defence minimises and misstates the relevance and probative value of the Material.[25]

II. APPLICABLE LAW

5. Rule 85 (A) of the Rules states:

> Each party is entitled to call witnesses and present evidence. Unless otherwise directed by the Trial Chamber in the interests of justice, evidence at the trial shall be presented in the following sequence:
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> i. evidence for the prosecution;
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> ii. evidence for the defence;
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> iii. prosecution evidence in rebuttal;
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> iv. defence evidence in rejoinder;
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> v. evidence ordered by the Trial Chamber pursuant to Rule 98; and
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> vi. any relevant information that may assist the Trial Chamber in determining an appropriate sentence if the accused is found guilty on one or more of the charges in the indictment.

6. In considering an application for reopening a case, the Chamber will first determine whether the evidence could, with reasonable diligence, have been identified and presented during the case-in-chief of the party making the application.[26] If not, the Chamber has the discretion to admit this 'fresh evidence', and will consider whether its probative value is substantially outweighed by the need to ensure a fair trial.[27] In making this determination, chambers have considered the stage of the trial at which the evidence is sought to be adduced and any potential delay that would be caused to the trial.[28]

7. Rule 54 of the Rules provides that at the request of either party or *proprio motu*, a Judge or a Trial Chamber may issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial.

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24 Reply, paras 5-6.

25 Reply, paras 8-9.

26 *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Prosecution Motion to Re-Open its Case and Prosecution Motion for Protective Measures for Witness KDZ614, 20 March 2014, para. 11; *Prosecutor v. Momčilo Perišić*, Case No. IT-04-81-T, Decision on Motion to Reopen the Prosecution Case and Tender Documents Through the Bar Table, 4 November 2010, para. 5; *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-AR73.6, Decision on Ivan Čermak and Mladen Markač Interlocutory Appeals Against Trial Chamber's Decision to Reopen the Prosecution Case, 1 July 2010, paras 23-24; *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-T, Decision on Motion to Reopen the Prosecution Case, 9 May 2008, paras 23-25; *Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21-A, Judgement, 20 February 2001, para. 283, with reference to Rule 89 (D) of the Rules.

III. DISCUSSION

8. At the outset, the Chamber is satisfied that the matter of re-opening the Prosecution's case requires detailed briefings by the parties. As such, the Chamber will grant the Prosecution's requests to exceed the word limit in the Motion and to reply to the Response.

9. The Chamber is satisfied that while the Tomašica mass grave was discovered in September 2013, at a time when the Prosecution's case-in-chief was ongoing, the necessary analysis of the grave, as well as the compiling of witness statements and expert reports continued up until August 2014. As such, the Prosecution was unable to present the Material as part of its case-in-chief. The Chamber also considers that the Material is so connected to each other that it would have been inefficient to tender individual parts of the Material as they became available. Under these circumstances, the Chamber finds that the Material is 'fresh evidence'.

10. While the Defence submits that the Material is not crucial to the Prosecution's case against the Accused, it acknowledges its general importance and probative value. The Chamber understands this to mean that the parties do not dispute the relevance and probative value of the Material, but merely disagree about the degree of the Material's importance. In any event, the Chamber considers the Material to be relevant to the charges in the municipalities' component of the case and of probative value. Specifically, the Chamber notes the Prosecution's submissions that the Material clarifies the organised and large-scale nature of killings in Prijedor, and the VRS's role therein. The Chamber has considered the Defence submissions about a delay in the trial and the stage of the proceedings. The Chamber has heard around 60 Defence witnesses, out of a total of over 300. Most of these witnesses testified in relation to the Sarajevo component of the case and no specific Defence evidence has been presented in relation to Prijedor. Considering this, the Chamber still considers that the Motion was filed early during the Defence case. The Defence will have ample opportunity to present any evidence in response to the Material as part of its case.[29] As for the Defence's submissions about a delay in the trial to be caused by the re-opening, the Chamber acknowledges that the re-opening would prolong the trial. However, considering the Material, the Chamber is satisfied that the suggested re-opening at this stage of the proceedings would not unduly prolong the trial. Therefore, the Chamber finds that the probative value of the Material is not outweighed by the need to ensure a fair trial.

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[27] *Ibid.*
[28] *Ibid.*
[29] This would still be the case if the re-opening were to be scheduled for some time in the first half of 2015.

11. In relation to the Defence's reference to the ruling of the *Karadžić* Trial Chamber, which denied a Prosecution motion to re-open its case to present evidence on the Tomašica mass grave, the Chamber clarifies that it has reviewed the decision in question, as well as other decisions on motions for re-opening, in its continuous effort to acquaint itself with the interpretation of the law by other chambers. Circumstances which chambers have to weigh when applying the law are usually different, each case being unique. Having analysed the referenced decision of the *Karadžić* Trial Chamber, the Chamber found no exception to this general rule. The disposition of that decision was therefore of no guidance to the Chamber in deciding the Motion.

IV. DISPOSITION

12. For the foregoing reasons, pursuant to Rules 54, 73 *bis*, 85, and 126 *bis*, the Chamber hereby

GRANTS the Prosecution leave to file a reply to the Response;

GRANTS the Prosecution's request to exceed the word limit in the Motion;

GRANTS the Motion;

DECIDES to hear the presentation of the Material *en bloc* at a time to be determined at a later stage;

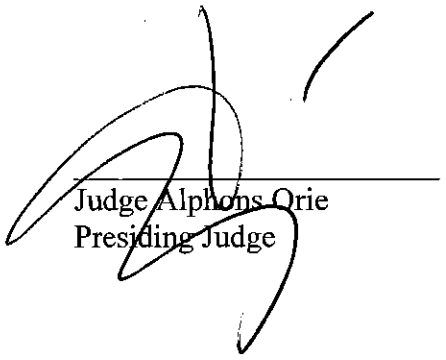
INSTRUCTS the Prosecution to file its Rule 92 *ter* motions without delay;

INSTRUCTS the Prosecution to file its Rule 92 *bis* motions within two weeks of the filing of this decision;

INFORMS the parties that it will issue a decision on the exact timing of the re-opening, including how much time will be available to the Prosecution, once any Rule 92 *bis* and Rule 94 *bis* applications have been decided upon; and

REMINDS the Defence that its Rule 94 *bis* notices are due on the sixtieth day after the filing of this decision.

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



Judge Alphons Orie
Presiding Judge

Dated this Twenty-third day of October 2014
At The Hague
The Netherlands

[Seal of the Tribunal]