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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-T

Date: 26 February 2010

Original: English

IN THE TRIAL CHAMBER

Before: **Judge O-Gon Kwon, Presiding Judge**
Judge Howard Morrison
Judge Melville Baird
Judge Flavia Lattanzi, Reserve Judge

Registrar: **Mr. John Hocking**

Decision of: **26 February 2010**

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

DECISION ON THE ACCUSED'S MOTION FOR POSTPONEMENT OF TRIAL

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused

Mr. Radovan Karadžić

Appointed Counsel

Mr. Richard Harvey

THIS TRIAL CHAMBER of the 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 ("Tribunal") is seised of the Accused's "Motion for Postponement of Trial" , filed on 1 February 2010 ("Motion"), and hereby issues its decision thereon.

I. Background and Submissions

1. At the Status Conference held on 20 August 2009, the Pre-trial Judge indicated that the case "was now ready for trial", following which, on 3 September 2009, the Accused filed his "Submission on Commencement of Trial". In this Submission, the Accused requested a ten-month delay in the commencement of the trial. At the Status Conference held on 8 September 2009, the Chamber denied the Accused's request, finding that he had had sufficient time to prepare his case, and setting 19 October 2009 as the date for the commencement of trial.[1] On appeal, the Appeals Chamber upheld the Trial Chamber's assessment, and ordered the Chamber to postpone the commencement of the trial until one week after the Prosecution filed a marked up indictment to ensure that the Accused had sufficient time to read it before the commencement of trial.[2] The Trial Chamber then set a deadline of 19 October 2009 for the filing by the Prosecution of the marked up indictment, and ordered that "the latest the trial should start is 26 October 2009".[3]

2. On 21 October 2009, the Accused filed a further "Submission on Commencement of Trial", which informed the Chamber that he would not appear for the scheduled commencement of the trial because, in his view, his defence was not ready. Following the Accused's refusal to appear on 26 October, 27 October, and 2 November 2009, and warnings given to him by the Chamber regarding the possible consequences of his obstructive conduct, the Chamber ordered the Registrar to appoint a counsel to prepare to represent the interests of the Accused at trial, should that become necessary, and adjourned the trial until 1 March 2010.[4] On 19 November 2009, the Registrar appointed Mr. Richard Harvey as counsel.[5]

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[1] Hearing, 8 September 2009 (T. 454-456).

[2] *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Decision on Radovan Karadžić's Appeal of the Commencement of Trial, 13 October 2009 ("Appeals Chamber Decision on Commencement of Trial"), para. 26, and Disposition.

[3] Scheduling Order, 14 October 2009.

[4] Decision on Appointment of Counsel and Order on Further Trial Proceedings, 5 November 2009. *See* this Decision for a full account of the procedural history on this issue. The Trial Chamber denied the Accused's request for certification to appeal this decision, *see* Decision on Accused's Application for Certification to Appeal Decision on Appointment of Counsel and Order on Further Trial Proceedings, 23 November 2009.

[5] Registrar's Decision, 19 November 2009.

3. In the "Decision on Accused's Motion to Vacate the Appointment of Richard Harvey" ("Decision on Motion to Vacate"), the Chamber upheld the Registrar's Decision appointing Richard Harvey.[6] It subsequently granted the Accused leave to appeal the Decision on Motion to Vacate.[7] On 12 February 2010, the Appeals Chamber dismissed the Accused's appeal in all respects.[8]

4. In addition to the above proceedings, the President has recently been seised of two requests by the Accused for judicial review of decisions of the Registry's Office for Legal Aid and Detention Matters ("OLAD") regarding the remuneration of members of the Accused's defence team: (i) at the pre-trial stage;[9] and (ii) in the period between the adjournment of the trial and 1 March 2010 ("adjournment period"), and for the period after 1 March 2010.[10]

5. In relation to (i) above, on 17 December 2009, the President found that the Registrar had failed to take into account relevant factors and that no reasonable person could have arrived at the Registrar's decision to allocate a maximum of 4,000 remunerable hours for the Accused's defence team during the pre-trial phase of the case. The President then ordered the Registrar to allocate to the Accused a total of 7,500 remunerable hours for the entire pre-trial phase.[11]

6. In relation to (ii) above, in the "Decision on Request for Review of OLAD Decision on Trial Phase Remuneration", issued on 19 February 2010 ("President's Decision"), the President found that the Registrar had failed to take into account relevant factors or give sufficient weight to certain factors, and that no reasonable person could have arrived at the Registrar's decision to allocate a maximum of 250 remunerable hours per month to the Accused in the adjournment period, and thereafter a maximum of 150 remunerable hours per month in addition to any time spent by his team in the courtroom. The President ordered "the Registrar to allocate to Karadžić's defence team 1,200 remunerable hours per month until the resumption of the trial, 750 remunerable hours per month during trial", and to remunerate Mr. Peter Robinson, one of the Accused's legal advisors, at a rate of 71 Euros per hour during the trial.[12]

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[6] Decision on Accused's Motion to Vacate the Appointment of Richard Harvey, 23 December 2009.

[7] Decision on Accused's Application for Certification to Appeal the Trial Chamber's Decision on Motion to Vacate Appointment of Richard Harvey, 13 January 2010.

[8] *Prosecutor v. Karadžić*, Case No. IT-95-5/18-AR73.6, Decision on Radovan Karadžić's Appeal From Decision on Motion to Vacate Appointment of Richard Harvey, 12 February 2010 ("Appeals Chamber Decision on Appointment of Richard Harvey").

[9] Appeal of OLAD Decision in Relation to Additional Pre-trial Funds, 11 November 2009.

[10] Request for Review of OLAD Decision on Trial Phase Remuneration, 14 January 2010.

[11] *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Decision on Appeal of OLAD Decision in Relation to Additional Pre-Trial Funds, 17 December 2009.

[12] *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Decision on Request for Review of OLAD Decision on Trial Phase Remuneration, 19 February 2010, Disposition.

7. At the Status Conference held on 28 January 2010, the Accused indicated that he would be presenting his opening statement on 1 March 2010, if the Chamber determined that the trial should resume on that date, and that he would file a further motion for the postponement of the trial.[13] The Accused then filed the present Motion, suggesting that the Chamber not make any determination of the matter until the Appeals Chamber had ruled on his appeal of the appointment of Mr. Harvey, and the President had issued his decision on defence funding.[14] He submits that if the President were to decide in his favour, the trial should be postponed until the Accused "can be restored to the position he would be in but for the Registrar's error."[15] He also submits that he has been unable to continue to prepare himself for trial in the period of adjournment because the Registrar "sabotaged" his preparation by "cutting off all funds for his defence team", which reduced the team to one full-time member and one part-time legal advisor.[16] Furthermore, the Accused argues that disclosure by the Prosecution since the adjournment of the trial and its filing of a number of voluminous motions have impeded his trial preparation in the context of not having the assistance of case managers and investigators.[17] In addition, the Accused states that he has not "benefited whatsoever by the work" of the appointed counsel, in light of the manner in which Mr. Harvey was appointed by the Registrar.[18]

8. On 3 February 2010, the Prosecution filed the "Prosecution's Response to Karadžić's Motion for Postponement of Trial" ("Response"), stating that the Motion should be denied, and refuting the submissions made by the Accused. It argues that the Accused has failed to demonstrate "how his preparedness has regressed in the intervening months" since the Trial Chamber and Appeals Chamber found him to be ready for trial.[19] The Prosecution states that any decision on postponement should be made as soon as possible in light of the arrangements it must make for witnesses.[20] It further argues that the decisions of the President and the Appeals Chamber are irrelevant to the date of the resumption of trial.[21]

9. Also on 3 February 2010, the Chamber issued the "Order Setting Deadlines for Further Submissions" ("Order Setting Deadlines"), in which it noted the Accused's arguments in the Motion relating to recent disclosure by the Prosecution, and expressed a desire to receive

[13] Hearing, 28 January 2010 (T. 737-738).
[14] Motion, paras. 15, 16, 20.
[15] Motion, para. 17.
[16] Motion, para. 13. *See also* paras. 2, 6-11.
[17] Motion, paras. 14, 11.
[18] Motion, paras. 12-13.
[19] Response, paras. 5, 13. *See also* para. 2.
[20] Response, para. 12.
[21] Response, paras. 11-12.

submissions from the Accused and the Prosecution on particular disclosure matters relevant to the adjournment period.[22]

10. On 9 February 2010, the Prosecution filed the "Prosecution's Further Response to Karadžić's Motion for the Postponement of Trial Pursuant to Trial Chamber's Order of 3 February 2010 with Confidential Appendices A-F" ("Prosecution Further Response"), arguing that disclosure of certain material to the Accused since 16 October 2009 does not provide any grounds for postponing the resumption of the trial.[23]

11. The Prosecution first addresses disclosure made pursuant to Rule 66(B) of the Tribunal's Rules of Procedure and Evidence ("Rules"), arguing that it has responded to the Accused's requests for such material as soon as possible, and in a constructive manner.[24] Furthermore, the Prosecution submits that most of the Accused's Rule 66(B) requests have been for material "that is only remotely relevant to the Prosecution's case or may relate to arguments he intends to make in his defence case."[25] In relation to Rule 66(A)(ii) and Rule 65 *ter* disclosure, the "vast majority" has been "routine" disclosure.[26] The Prosecution also submits that the Accused has not suffered prejudice because a small number of these items were disclosed to him in December 2009.[27]

12. In addition to the information provided in the Prosecution Further Response, on 16 February 2010, the Prosecution filed its Disclosure Report for 16 January to 15 February 2010 ("Prosecution February Disclosure Report"), in which it provides details of the disclosure made to the Accused in that time period. Confidential Appendices A and B note the documents disclosed pursuant to Rules 65 *ter* and 66(A)(ii) since the filing of the Prosecution Further Response, and the reasons for their untimely disclosure.

13. On 22 February 2010, the Accused filed the "Supplemental Submission on Motion for Postponement of Trial Following President's Decision" ("Accused's Supplemental

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[22] Order Setting Deadlines, paras. 1-2, 4, 5, 6. The Accused's deadline was within three days of the President's decision, and the Prosecution's deadline was within three days of the Accused's further submissions, *see* Order Setting Deadlines, para. 7.

[23] Prosecution Further Response, paras. 20-21.

[24] Prosecution Further Response, paras. 7-8, 10. *See also* confidential Appendices A and B. Note that the Prosecution states that in the cases of Rule 70 restrictions on certain documents "the Prosecution has been proactive in obtaining timely consent", and "[e]ven in those cases, the majority of disclosure in response to the request has often been made much earlier." *See* Prosecution Further Response, para. 9.

[25] Prosecution Further Response, paras. 11, 15; Response, paras. 6-7. *See also* Appendix C, where the Prosecution encloses the correspondence from the Accused and one of his Legal Advisors in which the requests are made.

[26] Prosecution Further Response, para. 17.

[27] Prosecution Further Response, para. 17. Note that the exact numbers are not clear. The Prosecution refers to the fact that 49 of the 621 items were not previously disclosed due to clerical errors, but then states, "[w]ith the

Submission"), in which he argues that the consequences of the President's Decision must be a postponement of the trial for a further three and three-quarter months to allow his full defence team to recover the preparation time "lost" as a result of the Registrar's unreasonable decision to restrict their monthly remunerable hours to 250 during the adjournment period.[28] While reiterating his intention to make his opening statement on 1 and 2 March 2010, the Accused requests that the evidentiary phase of the trial should be postponed until 17 June 2010, to enable him to prepare with the assistance of his full defence team.[29]

14. On 22 February, the Accused also filed his "Submission Pursuant to the Trial Chamber's Order Setting Deadlines for Further Submissions" ("Accused's Further Submission"), in which he sets out his position in relation to the volume and nature of material disclosed to him by the Prosecution in the adjournment period. In addition to giving details as to the relevance to his case of the Rule 66(B) material he has requested and received from the Prosecution during the adjournment period, he also sets out the time he requires to review the Rule 65 *ter*, Rule 66(A)(ii), and Rule 68 material disclosed in the same period, which he states amounts to 47,790 pages. He argues that, as a result of the Registry's decision on funding for his defence team, he has only been assisted by one and a half people during the adjournment period, rendering it impossible to read and analyse the disclosure material provided by the Prosecution, as well as to do the other daily tasks necessary for the case.[30] According to the Accused, the President's Decision demonstrates that as a result of the Registrar's decision on remuneration it was "impossible for Dr. Karadžić to review the disclosed material, let alone read it and analyse it" and, consequently, the trial should be postponed.[31]

15. The Prosecution has indicated that it would not file any further submissions on these matters.

II. Applicable Law

16. Article 20 of the Statute of the Tribunal ("Statute") requires a Trial Chamber to "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." Article 21 of the Statute then sets out the rights of an

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exception of five items disclosed on 15 January 2010, these fifty items have been in the possession of the Accused since at least December last year."

[28] Accused's Supplemental Submission, para. 2.

[29] Accused's Supplemental Submission, paras. 3-4.

[30] Accused's Further Submission, paras. 4, 6.

[31] Accused's Further Submission, para. 8.

accused person, including minimum guarantees, such as "to have adequate time and facilities for the preparation of his defence [...]."

17. Rules 65 *ter*, 66, and 68 of the Rules establish certain Prosecution disclosure obligations *vis-à-vis* an accused person, and are fundamental to a fair trial.[32] Among these, Rule 65 *ter*(E)(ii) provides that the Prosecution shall serve on the defence copies of the exhibits listed in its Rule 65 *ter* exhibit list. According to Rule 66(A)(ii), the Prosecution shall make available to the defence (a) copies of all statements of the witnesses whom it intends to call to testify at trial, and (b) copies of all transcripts and written statements taken in accordance with Rule 92 *bis*, Rule 92 *ter*, and Rule 92 *quater*, within the time-limit prescribed by the Trial Chamber or pre-trial judge.

18. Under Rule 66(B), "the Prosecutor shall, on request, permit the defence to inspect any books, documents, photographs and tangible objects in the Prosecutor's custody or control" which: (i) are material to the preparation of the defence, or (ii) are intended for use by the Prosecution as evidence at trial, or (iii) were obtained from or belonged to the accused.

19. Finally, Rule 68(i), subject to the provisions of Rule 70, places an independent obligation upon the Prosecution to disclose to the defence, "as soon as practicable [...] any material which in the actual knowledge of the Prosecutor may suggest the innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence". The disclosure of Rule 68 material is an ongoing obligation on the Prosecution.[33]

20. The Chamber also notes that, under Rule 54, it may, at the request of either party or *proprio motu*, 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.

III. Discussion

21. The Trial Chamber had determined that the case was trial-ready in September 2009, and this was confirmed by the Appeals Chamber. However, should there have been a change in circumstances that the Accused could not be expected to address before the resumption of the trial with only 250 hours of defence assistance per month, it would be appropriate for the Trial Chamber to reconsider its decision as to the date for that resumption.

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[32] *See*, for example, *Prosecutor v. Lukić et al.*, Case No. I-98-32/1-T, Decision on Milan Lukić's Motion to Suppress Testimony for Failure of Timely Disclosure with Confidential Annexes A and B, 3 November 2008, para. 15.

[33] *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Appeal Judgement, 29 July 2004, para. 264.

22. In assessing the Motion, the Chamber notes that the Appeals Chamber has indicated a number of factors that should be taken into account by a Trial Chamber when determining what constitutes an adequate time to prepare a defence when setting a date for the start of trial, including the volume of disclosure material and the staffing of the defence team.[34] As was confirmed by the Appeals Chamber in its Decision on Commencement of Trial, issued on 13 October 2009, all these factors were taken into consideration by the Trial Chamber when setting the date of 19 October 2009 for the commencement of the trial.[35] However, in light of the Accused's submissions and the President's Decision, the Chamber will consider the volume and nature of material disclosed to the Accused in the adjournment period, as well as the effect of the President's Decision in relation to the staffing of his defence team.

23. It was open to the President to conclude, as he did, that the Registrar acted unreasonably in deciding the level of remuneration for the Accused's defence team during the adjournment period. However, the judicial review undertaken by the President in his Decision was confined to the issue of defence remuneration, and it did not and could not address the timing of the resumption of the trial, as this is a matter within the discretion of the Trial Chamber alone.[36] It does not follow, therefore, purely from the President's Decision that there *must* be a further postponement of the trial to allow the Accused's defence team to recover the time "lost" during November, December, January, and February. Rather, the question for this Chamber to address is whether the current circumstances concerning Prosecution disclosure and other developments since the beginning of the adjournment period, are such as to require additional time for the Accused to prepare, assisted by his defence team.

(i) Disclosure

24. The President in his Decision, the Accused, and the Prosecution, have all mentioned the figure of approximately 300,000 pages of disclosure material that have been provided by the Prosecution to the Accused since mid-October 2009.[37] At first blush, this figure indeed appears large in light of the fact that the case was found to be trial-ready in September 2009. It was for this reason that the Chamber issued the Order Setting Deadlines, requiring the Accused and the Prosecution to make further, detailed submissions concerning which categories of disclosure

[34] Appeals Chamber Decision on Ngirabatware's Trial Date Appeal, para. 28.

[35] Appeals Chamber Decision on Commencement of Trial, paras. 21–22.

[36] Appeals Chamber Decision on Commencement of Trial, para. 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 ("Appeals Chamber Decision on Ngirabatware's Trial Date Appeal"), paras. 8, 22.

[37] The Chamber notes that in the Accused's Supplemental Submission, the Accused revises this figure to 400,000 following further disclosure made to him.

material these pages fall into, and the reasons for their disclosure at this stage of the proceedings.

25. The Chamber has reviewed the Prosecution Disclosure Reports from 16 October 2009 to 16 February 2010 ("Prosecution Disclosure Reports"), as well as the Prosecution's Further Submission, the Accused's Further Response and the Accused's Further Submission, and will use the overall figures, including the page numbers, provided in the Prosecution Disclosure Reports. The Chamber notes that the Prosecution has only provided reasons for its ongoing disclosure of material falling under Rules 65 *ter* and 66(A)(ii), and to how much of the material each reason applies, in the Prosecution Further Response and the Prosecution February Disclosure Report. Unfortunately, in relation to how much of the material each reason applies, the Prosecution has only provided numbers of items, and not the total numbers of pages involved.[38]

26. According to the Prosecution Disclosure Reports, the Prosecution has disclosed to the Accused a total of 414,965 pages of material since mid-October 2009. Of that total, 1.5% (6,362 pages; 399 items) is material falling under Rule 65 *ter* of the Rules, 2.5% (10,577 pages; 318 items) is material falling under Rule 66(A)(ii), 88.5% (367,453 pages; 4,334 items) is material falling under Rule 66(B), and 7.4% (30,573 pages; 869 items) is material falling under Rule 68.

27. Thus, despite the fact that the Pre-trial Judge set 18 May 2009 as the deadline for Rule 65 *ter* disclosure,[39] items continued to be disclosed under this Rule during the adjournment period. Explaining the late disclosure of these items, the Prosecution states that: (i) 100 items were disclosed as potential Prosecution exhibits, relating to the "Prosecution's Motion for Leave to File a Supplemental Rule 65 *ter* Exhibit List", filed on 14 December 2009; (ii) 11 were subject to delayed disclosure; (iii) two were subject to Rule 70 restrictions and were disclosed when consent of the Rule 70 provider was received; (iv) one item is a collation of documents bound into a "Sarajevo Map Book"; (v) 81 were "disclosed to correct omissions in previously-disclosed exhibits", for example, to replace exhibits where pages were missing, or were not disclosed in a timely way because of "clerical oversight"; and (vi) 186 were disclosed because they are alternative versions of a previously-disclosed exhibit, the majority being alternate

[38] The Chamber further notes that the headings of Appendices A and B of the Prosecution February Disclosure Report state that they relate to the period 16 January to 15 February 2010, but it is stated in the main body of the Report that these Appendices relate to the period after the filing of the Prosecution's Further Response, that is, 6 February to 16 February 2010. The Chamber assumes the latter to be correct.

[39] Prosecution Further Response, para. 19, confidential Appendix F; Prosecution February Disclosure Report, para. 1(a), confidential Appendix A. *See also* Order Following Status Conference and Appended Work Plan, 6 April 2009 ("Order Following Status Conference").

transcripts for intercepts but also including items such as map books, thus "essentially disclosing previously disclosed exhibits in a different format".[40]

28. Again, despite the fact that the deadline set by the Pre-trial Judge for disclosure of such material was 7 May 2009,[41] material falling under Rule 66(A)(ii) continued to be disclosed in the relevant period.[42] According to the Prosecution, of these items: (i) 108 were only recently received by the Prosecution; (ii) 42 were subject to delayed disclosure protective measures; (iii) 21 were subject to Rule 70 restrictions and were disclosed when consent of the Rule 70 provider was received; (iv) 45 were disclosed under this Rule as "witness specific disclosure", that is, they relate to witnesses, but they "do not technically fall within the ambit of the Rule";[43] (v) two relate to potential future Prosecution witnesses; (vi) 57 "augment previously disclosed items", including translations and transcripts of audio or video material; and (vii) 16 were not disclosed in a timely way because of "clerical oversight".[44]

29. The Prosecution submits that the "vast majority" of Rules 65 *ter* and 66(A)(ii) disclosure since mid-October 2009 has been "routine".[45] While the Prosecution may continue to disclose materials throughout the proceedings in specific instances, the Chamber reiterates that the deadlines for disclosure of all material falling under Rule 65 *ter* and Rule 66(A)(ii) were in May 2009. Any disclosure of material falling into these categories that occurs after the deadlines should be exceptional and only for reasons such as those set out by the Chamber in its 1 October 2009 "Decision on Accused's Motion to Set Deadlines for Disclosure" ("Decision on Deadlines for Disclosure"), namely: (a) witness statements subject to delayed disclosure; (b) statements provided to the Prosecution, or transcripts of testimony given, after the deadline for disclosure of Rule 66(A)(ii) material; (c) materials relating to witnesses added to the Prosecution's witness list after the deadline for disclosure of Rule 66(A)(ii) material; and (d) items which the

[40] The Chamber notes that the number of items presented in this paragraph does not accord with the number of items noted in the preceding paragraph because the numbers of items presented in this paragraph are those provided by the Prosecution in the Prosecution Further Response. By contrast, the numbers of items noted in the previous paragraph are drawn from the Prosecution Disclosure Reports. The difference in figures is the result of, according to the Prosecution, the fact that the Prosecution Disclosure Reports' figures include references to documents previously disclosed, and the Prosecution Further Response figures do not. *See* Prosecution Further Response, para. 6.

[41] *See* Order Following Status Conference.

[42] Prosecution Further Response, para. 18, confidential Appendix E; Prosecution February Disclosure Report, para. 1(b), confidential Appendix B. An example of the letters from the Prosecution that accompany the Rule 66(A)(ii) disclosure is provided in Prosecution Further Response, confidential Appendix D.

[43] With regard to (iv), the Prosecution states that these items included unsigned information sheets and proofing notes, and that it disclosed them in Rule 66(A)(ii) batches to assist the Accused by grouping "witness specific disclosure", *see* Prosecution Further Response, para. 18.

[44] The reason for the difference in the figures presented here and those set out in paragraph 26 is provided above, *see* fn. 40.

[45] Prosecution Further Response, para. 18.

Prosecution might seek to add to its Rule 65 *ter* exhibit list after the deadline for disclosure of Rule 65 *ter* material.

30. Nonetheless, approximately 16,939 pages have been disclosed to the Accused under Rule 65 *ter* and Rule 66(A)(ii) since mid-October 2009, which is not an inconsiderable amount.[46] The Chamber is concerned that some of this material has been disclosed late for reasons other than those set out above. While it sees nothing improper or unreasonable about the disclosure at this stage of items pertaining to delayed disclosure witnesses, subject to Rule 70 provider consent, recently received items, or witness specific disclosure, this material still forms part of the total amount of disclosure made during the adjournment period, which the Accused must be able to review and analyse in order to be able to prepare his defence.

31. Furthermore, the Chamber does not view mistakes made in relation to disclosed items or "clerical oversight" as appropriate justifications for disclosure of material months after the relevant deadlines have passed. However, while certainly undesirable, some errors are inevitable. The Chamber considers that, although the number of pages cannot be determined, the number of items concerned is small, amounting to 97 out of a total of 672 Rule 66(A)(ii) and Rule 65 *ter* items.

32. In respect of the other reasons provided by the Prosecution, the number of items that have been disclosed to augment previously-disclosed Rule 66(A)(ii) material is also relatively small (57 items), while, by contrast, the number of items that were disclosed as alternative versions of a previously-disclosed exhibit is comparatively quite high (186 items). These items should not contain new information, and the Chamber expects that they could be reviewed quickly, provided the reason for their additional disclosure has been made clear. The Chamber is satisfied of the latter after examining the letter to the Accused, which accompanied a recent disclosure batch, attached in Appendix D, and the list of Rule 65 *ter* disclosure since 16 October 2009, attached in Appendix F, of the Prosecution Further Response.

33. During the adjournment period, 30,573 pages (869 items) have been disclosed to the Accused under Rule 68. As the Chamber has previously stated, the Prosecution's obligation to disclose exculpatory material pursuant to Rule 68 is a continuous one, as it remains even after a trial judgement has been rendered, and throughout the appeals proceedings.[47] In these circumstances, it cannot be said that the Accused has a right to have reviewed before the trial

[46] *See* Prosecution Further Response, paras. 18, 19, where the Prosecution states that approximately 9,339 pages of Rule 66(A)(ii) and 6,305 pages of Rule 65 *ter* material, which comes to a total of 15,644, has been disclosed to the Accused since mid-October 2009.

[47] Decision on Deadlines for Disclosure, para. 19.

begins *all* Rule 68 material disclosed to him, although clearly such material should be disclosed to him as soon as it is identified by the Prosecution and he should be able to seek appropriate relief from the Trial Chamber should he be provided with Rule 68 material shortly before, or during the trial, which impacts his cross-examination or examination of witnesses. The Chamber reiterates that it is essential that the Prosecution disclose, as soon as possible, all the Rule 68 material currently in its possession, and that it expedites the search for additional exculpatory material.[48]

34. In relation to Rule 66(B) material, the Prosecution has disclosed 3,562 items, amounting to 252,244 pages since 16 October 2009.[49] This material constitutes the overwhelming proportion of the disclosure made to the Accused during the adjournment period, and its volume is substantial. The Chamber has reviewed the Rule 66(B) requests made by the Accused, as set out in the Accused's Further Submission and the Prosecution Further Response. The requests themselves vary from being small in size to being extensive in terms of the number of categories of information sought, and the nature of the information sought also varies from the specific to the relatively broad. The largest request was made on 8 July 2009, and includes many categories of information that the Accused has also requested from certain states pursuant to Rule 54 *bis*.

35. In the period from 16 October 2009 to 5 February 2010, the Prosecution has disclosed Rule 66(B) material to the Accused stemming from requests made on 8 July 2009, 14 August 2009, 23 September 2009, 9 October 2009, 30 November 2009, 3 December 2009, 14 January 2010, and 15 January 2010.[50] According to the Prosecution:

- in response to the large 8 July 2009 request, while the first disclosure was made on 16 October 2009, the majority of the material was disclosed on 21 October 2009, in large part upon clearance from the relevant Rule 70 providers.[51] Other material generated by this request was disclosed on 2 February 2010, and, again, in most instances it was disclosed upon clearance from the relevant Rule 70 provider.[52]

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[48] *See also* Decision on Deadlines for Disclosure, para. 20.

[49] Prosecution Further Response, para. 5. The Chamber also notes that the Prosecution has not made any Rule 66(B) disclosure in the period 5 to 16 February 2010. *See* Prosecution February Disclosure Report, para. 2. The Chamber further notes that the equivalent figure provided in the Prosecution Disclosure Reports is 367,453 pages.

[50] Prosecution Further Response, confidential Appendix A. The Chamber notes that the Accused additionally refers to the disclosure of "Batches 201-203", but these batches were disclosed on 16 and 19 February 2010, *see* Accused's Further Submission, fn. 6.

[51] Prosecution Further Response, confidential Appendix A, pp. 2-4.

[52] Prosecution Further Response, confidential Appendix A, pp. 7-8. The Chamber notes that with regard to one request, the Prosecution states that the original search produced no results, and it had to refine its search,

- in response to the 14 August 2009 request, on 28 August 2009, the Prosecution informed the Accused that it had already disclosed some of the material that the Accused had requested under Rule 68, but it disclosed a further 50 items on 21 October 2009.[53]

- in response to the 23 September 2009 request, the first disclosure was made on 16 October 2009, and the majority of items were disclosed on 21 October, including those that were disclosed upon clearance from the relevant Rule 70 provider. Items were also disclosed on 30 October 2009 and 2 February 2010, in the latter batch mostly upon clearance from the relevant Rule 70 provider.[54]

- in response to the 9 October 2009 request, the original search produced "a vast amount of unrelated material", and it disclosed the eight relevant documents "after a review of the full search results".[55]

- in response to the 30 November 2009 request, four items were disclosed on 8 December 2009.[56]

- in response to the 3 December 2009 request, one item was disclosed on 8 December 2009.[57]

- in response to the 14 January 2010 request, 36 items were disclosed on 28 January 2010.[58]

- in response to the 15 January 2010 request, three items were disclosed on 5 February 2010.[59]

36. The Prosecution also submits that much of what the Accused has requested under Rule 66(B) has marginal relevance to the case against him or that it may relate to arguments that he intends to make during his defence case, and that the amount of material that may bear relevance

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following which it disclosed the relevant documents on 2 February 2010. *See* Prosecution Further Response, confidential Appendix A, p. 8.

[53] Prosecution Further Response, confidential Appendix A, p. 3.

[54] Prosecution Further Response, confidential Appendix A, pp. 2-4, 7-8.

[55] Prosecution Further Response, confidential Appendix A, p. 5.

[56] Prosecution Further Response, confidential Appendix A, p. 5.

[57] Prosecution Further Response, confidential Appendix A, p. 5. The Chamber notes that it appears that the DNA profile information held on the International Commission on Missing Persons has still not been disclosed to the Accused (*see* Accused's Further Submission, Annex C). This is an issue that is distinct from that at hand, and the Chamber will address it with the parties separately.

[58] Prosecution Further Response, confidential Appendix A, p. 6.

to the Prosecution's case has been "relatively small".[60] Under Rule 66(B), books, documents, photographs and tangible objects requested for inspection by the defence must be, *inter alia*, "material to the preparation of the defence". The Appeals Chamber has, in the context of appellate proceedings, stated that under Rule 66(B), "the Prosecution, on request of the Defence, has to permit the inspection of any material that is capable of being admitted on appeal or which may lead to the discovery of material which is capable of being admitted on appeal".[61] On this basis, the Trial Chamber considers that "material to the preparation of the defence" denotes a lower standard than "relevance", and that, for the purposes of Rule 66(B), the Accused is entitled to make requests, and receive materials, that fall within this broader category.

37. Furthermore, the Accused cannot be penalised for exercising in a reasonable way this entitlement provided for under the Rules. It is the Chamber's duty to balance the right of an accused to request material falling within the ambit of Rule 66(B), and the need to also ensure a fair and expeditious trial. In that regard, it is also clear that there is a direct correlation between making numerous, and often, large requests for information, some at a relatively late stage, and the disclosure of a considerable quantity of material. Moreover, a Trial Chamber cannot place a deadline on the disclosure of material falling under Rule 66(B) because the defence can make requests for such material at any stage, nor can there be a right on the part of the defence to have reviewed all Rule 66(B) material provided to it prior to the hearing of evidence in the case.[62] Otherwise, the defence could dictate when the trial should start simply by delaying its requests for Rule 66(B) material, and could argue that the trial should be adjourned whenever it makes requests for, and is given, additional Rule 66(B) material once the proceedings have begun.

38. Bearing in mind the above, the Chamber now turns to consider whether the Accused should be granted additional time to review the disclosed material, with the assistance of his full defence team, prior to the resumption of the trial. The Chamber is satisfied that much of the disclosure made to the Accused during the adjournment period was unavoidable, particularly that relating to necessary ongoing disclosure of Rule 65 *ter* and Rule 66(A)(ii) material. Furthermore, as the Chamber has noted above, Rule 65 *ter* and Rule 66(A)(ii) material will continue to be disclosed to the Accused throughout the proceedings in specific instances, and the

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[59] Prosecution Further Response, confidential Appendix A, p. 9. The Chamber notes that these three items were searchable databases comprising 87,284 pages, *see* Prosecution Further Response, para. 16.

[60] Prosecution Further Response, paras. 11, 15.

[61] *Prosecutor v. Radislav Krstić,* Case No. IT-98-33-A, Decision on the Prosecution's Motion to be Relieved of Obligation to Disclose Sensitive Information Pursuant to Rule 66(C), filed confidentially on 27 March 2003, p. 4. The Appeals Chamber provided the following criteria for determining whether material is "material to the preparation of the defence": (i) whether the issues to which the material relates are the subject of a ground of appeal; or (ii) whether the material could reasonably lead to further investigation by the Defence and the discovery of additional evidence under Rule 115 of the Rules.

[62] *See also Prosecutor v. Ngirabatware*, Case No. ICTR-99-54-T, Decision on Trial Date, 12 June 2009, para. 43.

obligation on the Prosecution to continue to disclose Rule 68 material is an ongoing one. As such, it cannot be expected that the Accused will have reviewed *all* material falling into any of these categories before the presentation of evidence begins. Rule 66(B) disclosure was similarly unavoidable, being made on the Accused's request. Further, in relation to the Rule 66(B) material, the Chamber is satisfied, on the basis the information contained in Appendix A to the Prosecution Further Response, that the Prosecution has responded in a timely manner to requests for Rule 66(B) material made by the Accused. The volume, and timing, of the Rule 66(B) disclosure to the Accused has not been the result of any impropriety on the part of the Prosecution. As such, postponement of the hearing of evidence at trial is not justified on the basis that disclosure by the Prosecution has been, in some way, unreasonable.

39. The Chamber is also not convinced that the volume of the additional disclosure justifies another delay to the hearing of evidence, particularly given that the Accused has now had 18 months to prepare. In particular, in the present circumstances, the Trial Chamber does not consider that the trial should be further delayed in order for the Accused and his defence team to review all of the Rule 66(B) material recently disclosed by the Prosecution in response to his requests. A further postponement would be a drastic measure that would, concurrently, have real repercussions for the parties' rights to a fair and expeditious trial.

40. Moreover, there are other means of ensuring that the Accused's rights are not prejudiced in any way by the late disclosure of a particular item or items by the Prosecution, or his inability to review all disclosure material prior to the hearing of evidence. As the trial progresses, should the Accused make a reasoned request for more time to prepare for his cross-examination of a particular witness, or to deal with a particular document which the Prosecution seeks to introduce into evidence, on the basis that relevant material was only recently disclosed to him, the Chamber will consider such a request and may grant appropriate relief. Similarly, should the Accused, following his review of material disclosed to him at a late stage, discover new areas of relevant questioning that he would wish to put to a witness brought by the Prosecution, he may apply to the Chamber for the recall of that witness for further cross-examination. Such requests should clearly demonstrate good cause for the relief sought, including the reasons why the Accused considers he needs the additional time, or a witness to be recalled, with specific reference to the nature of the new information and how it is relevant to the particular witness. Furthermore, in light of the fact that the President's Decision, finding that the Accused should have benefited from the assistance of a full defence team of eight people during the adjournment period, was only issued one week prior to the end of the adjournment period, the Trial Chamber notes that it is open to the Accused to make a reasoned request to the Registry for remuneration

for all eight of his defence team members during the first few weeks of the resumed trial, in order for them to be able to regain some of the time "lost" during the adjournment period, and to make progress in the review of the provided Rule 66(B) material.[63]

(ii) Additional tasks

41. In the President's Decision, the President considered the additional disclosure material provided during the adjournment period in the context of a number of "additional tasks" that the Accused was required to undertake in that period to further prepare for the trial. These "additional tasks" were:

(i) the fact that the Accused had to respond, during the adjournment phase, to the various motions filed by the Prosecution, which, on the basis of the description provided in the President's Decision, the Chamber assumes to be the "Prosecution's First Motion for Judicial Notice of Documentary Evidence Related to the Sarajevo Component with Confidential Appendix A", filed on 19 October 2009 ("Prosecution Motion for Judicial Notice of Documentary Evidence – Sarajevo"), the "Prosecution's Motion for Leave to File a Supplemental Rule 65 *ter* Exhibit List" ("Prosecution Supplemental Exhibit List Motion"), the "Prosecution's First Bar Table Motion",[64] and the "Fifth Prosecution Motion for Judicial Notice of Adjudicated Facts" ("Fifth Prosecution Adjudicated Facts Motion"), all of which were filed on 14 December 2009;[65]

(ii) "the fact that over 200 Rule 92 *bis* witnesses remain to be interviewed and over 2,000 adjudicated facts will likely need to be rebutted";

(iii) "the need to identify and interview defence witnesses"; and

(iv) "the need to challenge over 26 Prosecution experts".[66]

42. With regard to the need of the Accused to respond to certain Prosecution motions, the Chamber notes that ongoing motion practice is a normal part of any proceedings before the Tribunal. The Chamber has previously granted the Accused extensions of time to respond to the particular motions referred to by the President. It granted the Accused additional one-month periods to respond to the Prosecution Motion for Judicial Notice of Documentary Evidence –

[63] *See* President's Decision, para. 46.

[64] The Chamber notes that this motion requests the admission of 321 documents, and not 700, which is the figure relied upon by the President in paragraph 36 of the President's Decision.

[65] *See* President's Decision, para. 36.

Sarajevo and the Prosecution Supplemental Exhibit List Motion, and it granted the Accused additional periods of approximately six weeks to respond to the Prosecution's First Bar Table Motion and the Fifth Prosecution Adjudicated Facts Motion.[67] The Chamber also notes here that the Accused, in fact, filed a substantive response to the Fifth Prosecution Adjudicated Facts Motion on 5 February 2010.[68]

43. However, the Chamber acknowledges that it granted this additional time to the Accused because of the voluminous nature of these motions, and that it rejected the argument put forward by the Accused that additional time was justified as a result of members of his defence team not working during the adjournment period because of the dispute with OLAD regarding their remuneration. The President has come to a different conclusion. In taking this into account, the Chamber considers that the Accused's inability to respond to the motions because of the funding of his defence team is not a reason to further postpone the trial. Any difficulty the Accused faced in responding to these motions because of the reduced amount of assistance he was receiving can be remedied by providing the Accused further time to respond, with the exception of the Fifth Prosecution Adjudicated Facts Motion, in respect of which the Accused has filed his response. In this regard, the Chamber notes that, following the President's Decision, the eight defence team members will be funded for the adjournment period. While the President envisaged that, once the trial resumes, this number could be somewhat reduced, as the Chamber has noted above, the Accused could make a reasoned request to the Registry for the continued funding of all eight members of his defence team for a certain period following the resumption of trial in order to complete certain specific tasks.

44. With regard to the remaining "additional tasks" cited by the President, the Chamber considers that while they were relevant to issues of the funding of the Accused's defence team, they do not have any bearing on the issue of postponement of trial. Most specifically, all three tasks are typical aspects of the preparation of any accused's case, and they do not have to be completed before a trial can reasonably begin.

45. In relation to the Rule 92 *bis* witnesses, the previously-composed Trial Chamber clearly stated that it was not necessary for the Accused or his defence team to interview each and every one of the proposed Rule 92 *bis* witnesses in order for him to be able to respond to the relevant

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[66] President's Decision, para. 36.

[67] *See* Decision on Motion for Extension of Time to File Response to Prosecution Motion for Judicial Notice of Documents, 30 October 2009; Decision on the Accused's Motion for Extension of Time to Respond to Prosecution Motions, 24 December 2009.

[68] *See* Response to Fifth Prosecution for Judicial Notice of Adjudicated Facts, 5 February 2010.

motions from the Prosecution.[69] The Chamber is similarly of the view that the Accused does not have to interview all these witnesses before the resumption of the trial. It sees no reason why, should the Accused continue to wish to interview each of the Prosecution Rule 92 *bis* witnesses, this, as well as the interviewing of potential defence witnesses, could not form part of the ongoing work of his defence team.

46. With regard to the Prosecution expert witnesses, the Chamber recalls that, since at least mid-2009, the Accused has been actively working on both engaging his own experts and contracting a number of experts to challenge the Prosecution experts.[70] Furthermore, upon request by the Accused, OLAD granted the Accused an exceptional number of hours in the pre-trial phase for his experts to could carry out their work, some of which have still not been used. The Chamber is satisfied that should there have been any impact on the work of the experts who the Accused has engaged, including any co-ordination and review of their work, as a result of the Registrar's decision on funding during the adjournment period, it would have been minimal. Furthermore, the impact, if any, could be fairly rapidly overcome now that the Accused has a full team working for him again.

47. Finally, the Chamber has considered that the President has determined that the disclosure made during the adjournment period *together with* the "additional tasks" rendered the Registrar's decision unreasonable. In assessing these factors, taken together and in light of the level of defence assistance being provided to the Accused during the adjournment period, the Chamber remains satisfied that these factors do not justify a further postponement of trial. There are remedies that will effectively address any prejudice that the Accused may suffer in respect of the volume of disclosure made to him, and he will be provided sufficient extensions of time to respond to the motions identified by the President and noted above. Furthermore, given the nature of the "additional tasks", the Accused's defence team can reasonably continue to work on them despite the trial resuming.

(iii) Accused's submission regarding appointed counsel

48. The Chamber now turns to the final submission of the Accused, that is, his inability to choose a counsel from the Rule 45(B) list meant that the Registrar appointed a counsel, Mr. Harvey, who he cannot trust and, consequently, the Accused has not "benefited whatsoever by the work" of the appointed counsel. The Chamber recalls that the Appeals Chamber Decision

[69] Order Following Upon Rule 65 *ter* Meeting and Decision on Motions for Extension of Time, 18 June 2009, para. 4.

[70] *See* Letters from OLAD to the Accused dated 2 July 2009, 21 July 2009, 22 July 2009, 12 August 2009, 25 August 2009.

on the Appointment of Richard Harvey affirmed that the Accused did not have a right to choose the appointed counsel, and thus the Registrar did not violate any such a right by not providing the Accused with the Rule 45(B) list. Furthermore, while the Chamber encourages co-operation between the Accused and Mr. Harvey, a determination by the Accused that he will not collaborate with Mr. Harvey is a decision made by him and for which he must therefore bear the consequences. The Chamber also, once again, reiterates the purpose for which Mr. Harvey was appointed, that is, to prepare himself to represent the Accused's interests at trial, should that become necessary. In that regard, he was not appointed as another member of the Accused's defence team to assist the Accused during the adjournment period in the preparation of the Accused's case. For these reasons, the Chamber considers that the fact that the Accused has not benefited from the work of the appointed counsel has no bearing on its determination of the Motion.

IV. Disposition

49. Accordingly, the Trial Chamber, pursuant to Articles 20 and 21 of the Statute, and Rules 54, 65, 66 and 68 of the Rules, hereby **DENIES** the Motion, and **ORDERS** as follows:

a) The Accused's opening statement shall be heard on 1 and 2 March 2010, following which the trial proceedings will continue on 3 March 2010 with the hearing of evidence;

b) During the Accused's opening statements, Mr. Harvey shall be present in the courtroom, and may be accompanied by up to two members of his team;

c) Following the Accused's opening statement, the role to be played by Mr. Harvey in the further trial proceedings shall be determined;

d) The Accused may respond to the Prosecution Motion for Judicial Notice of Documentary Evidence – Sarajevo, the Prosecution Supplemental Exhibit List Motion, and the Prosecution's First Bar Table Motion by Friday, 12 March 2010;

e) The Accused and/or the Prosecution shall make any request for certification to appeal this Decision by Monday, 1 March 2010.

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

Judge O-Gon Kwon
Presiding

Dated this twenty-sixth day of February 2010
At The Hague
The Netherlands

[Seal of the Tribunal]