

IT-09-92-T  
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29 JUNE 2012

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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-09-92-T  
Date: 29 June 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:** 29 June 2012

**PROSECUTOR**

v.

**RATKO MLADIĆ**

***PUBLIC***

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**REASONS FOR DECISION ON DEFENCE MOTION FOR  
RECONSIDERATION**

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**Office of the Prosecutor**

Mr Dermot Groome  
Mr Peter McCloskey

**Counsel for Ratko Mladić**

Mr Branko Lukić  
Mr Miodrag Stojanović

## I. PROCEDURAL HISTORY AND SUBMISSIONS OF THE PARTIES

1. On 24 May 2012, the Chamber provided reasons for its 3 May 2012 decision denying two Defence requests for adjournment, and granted a third Defence request for adjournment, thereby postponing the start of hearing the Prosecution's first witness until 25 June 2012 ("Adjournment Decision").<sup>1</sup>

2. On 31 May 2012, the Defence filed a motion seeking reconsideration of the Adjournment Decision, in which it requested that the Chamber postpone the start of the presentation of evidence by six months in light of disclosure irregularities, and in which it also requested leave to exceed the word limit ("Motion").<sup>2</sup> The Defence mentioned in its Motion an alternative request for leave to appeal the Adjournment Decision, although this alternative was not made part of its request for relief.<sup>3</sup> On 5 June 2012, the Defence filed a supplement to the Motion, in which it reiterated its request for reconsideration in light of additional factors that had arisen since the filing of the Motion ("Supplement").<sup>4</sup> The Supplement contains no alternative request for certification to appeal the Adjournment Decision.<sup>5</sup>

3. The Defence submitted that the Adjournment Decision was made in haste and that the Chamber neither sought nor took into account any Defence input on the issues.<sup>6</sup> It further submitted that it was not until after the Adjournment Decision had been issued that the Prosecution acknowledged additional non-disclosure of material that it previously claimed to have disclosed. This included materials subject to disclosure under Rule 66 (A)(ii) of the Tribunal's Rules of Procedure and Evidence ("Rules") relating to witnesses other than those scheduled for the period before the summer court recess and potentially exculpatory material pursuant to Rule 68 (i) of the Rules.<sup>7</sup> The Defence provided additional information regarding the alleged inaccessibility in E-court of some 8,000 Rule 65 *ter* exhibits and the lack of identifying meta-data for disclosed material.<sup>8</sup> According to the Defence, analysis of such information would have led to a different

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<sup>1</sup> 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, 31 May 2012.

<sup>2</sup> Motion to Reconsider Decision of 24 May 2012, 31 May 2012, para. 5, Part III. Conclusion.

<sup>3</sup> Motion, para. 7.

<sup>4</sup> Supplement to Motion to Reconsider Decision of 24 May 2012, 5 June 2012 (Public with Confidential Annexes A and B), paras 2-3, 16.

<sup>5</sup> Supplement.

<sup>6</sup> Motion, paras 9-10.

<sup>7</sup> Motion, para. 11.

<sup>8</sup> Motion, para. 13.

result in the Adjournment Decision.<sup>9</sup> It also submitted that documents were not properly processed through the Optical Character Recognition program (“OCR”), making searches impossible and leading to an erroneous conclusion in the Adjournment Decision.<sup>10</sup>

4. In its Supplement, the Defence submitted that subsequent to the Adjournment Decision, the Prosecution disclosed previously unknown Rule 66 (A)(ii) material, specifically five documents which relate to witnesses scheduled for the period before the summer court recess (“First Segment”).<sup>11</sup> The Defence argued that the Chamber’s Adjournment Decision was based on an understanding that “all” Rule 66 (A)(ii) material had been disclosed, including that for the First Segment witnesses,<sup>12</sup> and that this incorrect understanding led the Chamber to issue an erroneous decision in the Adjournment Decision.<sup>13</sup> The Defence further submitted that the Prosecution made additional “significant” disclosures subsequent to the Adjournment Decision, including Rule 66 (A)(ii) material, and that other “critical” material still had not been disclosed.<sup>14</sup> According to the Defence, the Adjournment Decision was, therefore, based on erroneous representations.<sup>15</sup>

5. On 14 June 2012, the Prosecution filed its response, in which it did not oppose reconsideration given the existence of new facts, and deferred to the Chamber’s determination as to an appropriate remedy (“Response”).<sup>16</sup> The Response included, as an annex, the results of an audit of its disclosure material conducted by the OTP Chief of Operations (“OTP Memo”).<sup>17</sup> According to the audit results, 5,284 documents (“Batch 25”) were disclosed on the General Electronic Disclosure System (“EDS”), to which the Defence had access, but to which it had not previously been directed.<sup>18</sup> An additional 4,498 documents (“Batch 26”) were not previously disclosed, which the Prosecution stated were being assembled for disclosure “as soon as possible next week”.<sup>19</sup>

6. On 18 June 2012, the Chamber notified the parties through an informal communication that it had decided to suspend the presentation of evidence until further notice. In order to determine the

<sup>9</sup> Ibid.

<sup>10</sup> Motion, para. 14.

<sup>11</sup> Supplement, paras 4-9, Confidential Annex A. The Defence referred to an e-mail from the Prosecution of 31 May 2012.

<sup>12</sup> Supplement, para. 4.

<sup>13</sup> Supplement, para. 8.

<sup>14</sup> Supplement, paras 10-14. The Defence referred to an e-mail of 30 May 2012 where the Prosecution disclosed errors in Rule 66 (A)(ii) disclosure for witnesses other than First Segment witnesses and another e-mail of the same date in which the Prosecution apparently accepts that certain documents are missing from its Rule 65 *ter* re-disclosure, though it states that the “vast majority” of the documents were provided.

<sup>15</sup> Supplement, para. 15.

<sup>16</sup> Prosecution Response to Defence Motion for Reconsideration, 14 June 2012 (Public with Public Annex A), paras 2, 15.

<sup>17</sup> Response, Annex A.

<sup>18</sup> Response, para. 13.

appropriate start date, the Chamber instructed the Prosecution to respond to questions regarding the disclosure status of the 9,782 documents mentioned in the Response, and instructed the Defence to subsequently verify, to the extent possible, the Prosecution's answers.

7. On 19 June 2012, the Prosecution provided answers to the Chamber's questions along with additional information ("19 June Prosecution Memo") and followed up with a supplemental memorandum on 20 June 2012 ("20 June Prosecution Memo"). On 21 June 2012, the Defence provided its answers ("21 June Defence Memo") and the Prosecution provided a further memorandum ("21 June Prosecution Memo").<sup>20</sup> The 21 June Defence Memo indicated that the Defence has received only Batch 26 on hard disk, and not Batch 25.<sup>21</sup> Through an informal communication on 22 June 2012, the Defence confirmed that it had subsequently received Batch 25 on hard disk on the evening of 21 June 2012.

8. On 22 June 2012, the Chamber granted the Motion in part, with reasons to follow. It scheduled the presentation of evidence to begin on 9 July 2012 and instructed the Prosecution to file a new witness order for the period of 9 July 2012 until 20 July 2012 by 26 June 2012. It further instructed the Prosecution, after consulting the Defence, to schedule for the period of 9 July 2012 until 20 July 2012 those witnesses least impacted by any disclosure failures and instructed the Prosecution not to call Witness RM-319 to testify until after 20 August 2012 ("Reconsideration Decision").<sup>22</sup>

9. The following are the reasons for the Reconsideration Decision.

## II. APPLICABLE LAW

10. A Chamber's decision to reconsider a previous interlocutory decision is discretionary.<sup>23</sup> In order to succeed in a request for reconsideration, an applicant must satisfy the relevant Trial Chamber of "the existence of a clear error of reasoning in the [d]ecision, or of particular circumstances justifying its reconsideration in order to avoid injustice".<sup>24</sup> Such circumstances may

<sup>19</sup> Response, paras 3, 14; OTP Memo, paras 4, 13, fn. 2. The Prosecution initially identified 7,605 documents as unavailable on the case-specific EDS, but having located 5,284 of those documents on the General EDS, it includes the remaining 2,321 among the 4,498 to which the Defence had no access.

<sup>20</sup> On 21 June 2012, the Prosecution also sent a corrigendum indicating that the 19 June 2012 Memo had erroneously stated that a courtesy copy of two batches of documents had been placed in the Defence locker at the time the 19 June Memo was sent out.

<sup>21</sup> 21 June Defence Memo, p. 3.

<sup>22</sup> Decision on Defence Motion for Reconsideration, 22 June 2012.

<sup>23</sup> *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR73.16, Decision on Jadranko Prlić's Interlocutory Appeal Against the Decision on Prlić Defence Motion for Reconsideration of the Decision on Admission of Documentary Evidence, 3 November 2009 ("Prlić Decision"), para. 6.

<sup>24</sup> *Prlić Decision*, para. 18; *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Decision on Defence's Request for Reconsideration, 16 July 2004 ("Galić Decision"), p. 2.

include new facts or new arguments.<sup>25</sup> The applicant must demonstrate how these new facts or arguments justify reconsideration, and where the applicant fails to do so, it is within the Trial Chamber's discretion to refuse reconsideration.<sup>26</sup>

### III. DISCUSSION

11. The Chamber found it appropriate to grant the Defence request to exceed the word limit, in consideration of the seriousness of the subject matter of the Motion and, under these specific circumstances, the interests of the parties and the Tribunal to proceed with the present decision as expeditiously as possible, avoiding further unnecessary filings.

12. As outlined below, the Chamber first considered whether a clear error in reasoning and second whether any new facts or circumstances justified reconsideration of the Adjournment Decision.

#### A) Error in Reasoning

13. In relation to the Defence's assertion that its input was not taken into account, the Chamber considered that at the Rule 65 *ter* meeting of 17 May 2012, it repeatedly invited the Defence to express its position or particular concerns regarding disclosure, to indicate whether it had found any of the Prosecution's statements regarding disclosure to date to be inaccurate, and to raise such inaccuracies as it may come across in the future.<sup>27</sup> The Defence immediately heard the questions the Chamber put to the Prosecution, and the Prosecution's answers, during the meeting.<sup>28</sup> Further, the Chamber noted in particular the Defence's argument that it was alerted to an *ex parte* meeting of 18 May 2012 between the Chamber and the Prosecution, regarding advancing the estimated date of completion of the OCR process of disclosure material, only after the meeting took place.<sup>29</sup> As explained in the Adjournment Decision, the Chamber considered that the meeting with the Prosecution on 18 May 2012 was to follow up on the technical and administrative elements of matters it had discussed with both parties in the Rule 65 *ter* meeting the previous day with the goal of speeding up the OCR process, a matter of great concern to the Defence.<sup>30</sup>

14. In the Reconsideration Decision, the Chamber considered that it had provided a standing invitation to the Defence to provide its input. Therefore it took the Adjournment Decision, which

<sup>25</sup> Ibid.

<sup>26</sup> *Prlić* Decision, paras 18-19; *Galić* Decision, p. 2.

<sup>27</sup> See, for example, Transcript of Rule 65 *ter* meeting of 17 May 2012, T. 452-457, 492-496, 502-503 (Confidential).

<sup>28</sup> Transcript of Rule 65 *ter* meeting of 17 May 2012, T. 456 (Confidential). This was a meeting convened specially, after the Prosecution's opening statement had taken place.

<sup>29</sup> See Motion, para. 9 (paragraph "b").

<sup>30</sup> See Adjournment Decision, para. 8. At the Rule 65 *ter* meeting of 17 May 2012, the Prosecution had argued that it would only be able to complete the OCR process in relation to Batch 5 by mid or late June 2012. See para. 20.

was based on the facts as known at the time, neither in error due to haste, nor without seeking or considering the Defence's input. Thus, the Chamber found no clear error in reasoning in the Adjournment Decision.

### B) Existence of New Facts or Arguments

15. In the Adjournment Decision, the Chamber did not consider that "all" Rule 66 (A)(ii) material had been disclosed, but rather that the Prosecution had decided to re-disclose all such material. The Chamber understood this to be all Rule 66 (A)(ii) material for the First Segment witnesses.<sup>31</sup> The 19 June Prosecution Memo stated that six of the Batch 26 documents are Rule 66 (A)(ii) documents, and that none relate to First Segment witnesses.<sup>32</sup> Similarly, the 30 May 2012 e-mail referred to in the Defence Supplement relates to "Rule 66 material for witnesses other than the First Segment witnesses."<sup>33</sup> As the Chamber was aware that non-First Segment Rule 66 (A)(ii) material would still be disclosed at the time of the Adjournment Decision, the Chamber did not consider that the subsequent disclosure of these documents constituted a new circumstance for the purpose of reconsideration.<sup>34</sup> However, the Prosecution also stated that on 31 May 2012, notes from interviews with four First Segment witnesses were disclosed.<sup>35</sup> The Chamber considered that this constituted a new circumstance justifying reconsideration, as it had considered in the Adjournment Decision that such materials had been disclosed by 27 April 2012.<sup>36</sup>

16. In relation to Rule 65 *ter* documents, the Prosecution stated that 667 out of the 5,284 Batch 25 documents are Rule 65 *ter* documents, and that Batch 25 was uploaded into the case-specific EDS on 20 June 2012.<sup>37</sup> Of these 667 Batch 25 documents, 337 were already available to the Defence in E-court, although the Prosecution did not indicate when they had been released.<sup>38</sup> Similarly, the Prosecution stated that 2,095 out of the 4,498 Batch 26 documents are Rule 65 *ter* documents, and that Batch 26 was available in the case-specific EDS as of 21 June 2012.<sup>39</sup> Of these 2,095 Batch 26 documents, 749 were already available to the Defence in E-court, although the Prosecution did not

<sup>31</sup> Adjournment Decision, para. 5. "The Prosecution [...] 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".

<sup>32</sup> 19 June Prosecution Memo, pp. 2-3 (Answers 2 and 4).

<sup>33</sup> See Supplement, para. 12.

<sup>34</sup> The deadline for re-disclosure of these materials is 29 June 2012.

<sup>35</sup> 19 June Prosecution Memo, p. 3 (paragraph "a"); The Chamber notes that the disclosure of the BCS versions and the parallel hard drive disclosure of these notes occurred after 31 May 2012. See 21 June Prosecution Memo, para. 7. This is the disclosure noted in the Defence's Supplement. *Supra* para. 4, fn. 10.

<sup>36</sup> Adjournment Decision, paras 5, 20, 22. In the Adjournment Decision, the Chamber expected that the OCR process would be completed by 29 May 2012.

<sup>37</sup> 19 June Prosecution Memo, p. 2 (Answer 2); 20 June Prosecution Memo. Batch 25 was also put on a hard drive with a spreadsheet and, on 22 June 2012, the Defence confirmed receipt of the hard drive.

<sup>38</sup> 19 June Prosecution Memo, p. 2 (Answer 3).

<sup>39</sup> 19 June Prosecution Memo, p. 2 (Answer 2); 20 June Prosecution Memo; 21 June Prosecution Memo, para. 3. Batch 26 was also put on a hard drive and has been received by the Defence.

indicate when they had been released.<sup>40</sup> In the Adjournment Decision, the Chamber relied on the Prosecution's notification of 24 May 2012 that it had disclosed all Rule 65 *ter* material.<sup>41</sup> As such, in the Reconsideration Decision, the Chamber considered the fact that at least 330 of the Batch 25 documents<sup>42</sup> and 1,346 of the Batch 26 documents<sup>43</sup> had not been disclosed by at least the filing of the Response or the 19 June Prosecution Memo, and that this therefore constituted a new circumstance justifying reconsideration of the Adjournment Decision.

17. The general deadline for disclosure of non-First Segment Rule 68 (i) documents was 8 June 2012, and in the Adjournment Decision, the Chamber considered that this deadline would be respected.<sup>44</sup> The 19 June Prosecution Memo stated that 43 Batch 26 documents are Rule 68 (i) documents, none of which relate to First Segment witnesses.<sup>45</sup> The Chamber considered that this information constituted a new circumstance for the purpose of reconsideration. The Prosecution additionally stated that 62 Rule 68 (i) documents relating to five First Segment witnesses, 49 of which relate to witness RM-319, were disclosed on 15 June 2012.<sup>46</sup> In the Reconsideration Decision, the Chamber considered that this disclosure also constituted a new circumstance justifying reconsideration.

18. The Chamber also noted that 4,617 (of 5,284) Batch 25 and 2,354 (of 4,498) Batch 26 documents are identified by the Prosecution as Rule 68 (ii) materials.<sup>47</sup> The Chamber believed these documents to have been made available in previous disclosure batches<sup>48</sup> and, as such, their non-availability also constituted a new circumstance for the purpose of reconsideration.

<sup>40</sup> 19 June Prosecution Memo, p. 2 (Answer 3).

<sup>41</sup> Adjournment Decision, para. 23, fn. 39; Prosecution Notification of Disclosure Batch 4-C, 24 May 2012. This notification stated that the Defence was provided with the materials on hard drive in searchable format (OCR'd) and that they were also placed on the EDS on 22 May 2012.

<sup>42</sup> 667 mentioned in the 19 June Prosecution Memo minus 337 available in E-court at the time of the 19 June Prosecution Memo.

<sup>43</sup> 2,095 mentioned in the 19 June Prosecution Memo minus 749 available in E-court at the time of the 19 June Prosecution Memo.

<sup>44</sup> In its 1 May 2012 Report on Status of Rule 68 (i) Disclosure for First Segment of the Case, at paragraphs 11-12, the Prosecution stated that some residual material may be disclosed after 30 April 2012 (the deadline for First Segment Rule 68 (i) disclosure) and that it would file a notice of compliance only once it was sure that everything had been disclosed. The Prosecution had not made any further filings in respect of this First Segment disclosure, nor any filings about the 8 June 2012 deadline for non-First Segment disclosure.

<sup>45</sup> 19 June Prosecution Memo, pp. 2-3 (Answers 2 and 4). Of these 43 documents, 27 are listed as relating to Rule 68 (i), and 16 are listed as relating to "Rule 68 (i) and Rule 68 (ii)". See p. 2

<sup>46</sup> 19 June Prosecution Memo, p. 3 (paragraph "b").

<sup>47</sup> 19 June Prosecution Memo, p. 2 (Answer 2).

<sup>48</sup> The Prosecution uploaded materials in batches into the Case Specific EDS and onto the hard disk provided to the Defence on a monthly basis. See, for example, First Prosecution Report on Pre-Trial Preparations, 19 September 2011 (Confidential with Confidential Annexes A and B), paras 16-21; Second Prosecution Report on Pre-Trial Preparations, 1 November 2011 (Confidential with Confidential Annexes A to C), paras 8-11, Annex A, Table 2.

19. Finally, the Chamber considered the Defence's submission that, in order to prepare for cross-examination of witnesses, it must be able to search for and locate other documents that it will use.<sup>49</sup> The Chamber understood that by 22 June 2012 the Defence had access to Batches 25 and 26 both in the case-specific EDS and on hard disk, and thus that it had access to these documents in searchable format and to the accompanying meta-data and ERNs. Further, the Chamber was aware of the process of parallel disclosure on hard drive with spreadsheets and the lack of meta-data on the EDS at the time of the Adjournment Decision, and therefore did not consider this to constitute a new circumstance justifying reconsideration.

20. In light of the aforementioned new circumstances, the Chamber decided to reconsider its Adjournment Decision.

*Reconsideration of the Adjournment Decision*

21. The Chamber recalled and referred to the applicable law as set out in the Adjournment Decision, specifically to Articles 20 and 21 of the Tribunal's Statute ("Statute") and Rules 65 *ter* (E), 66 (A)(ii), and 68 (ii) of the Rules.<sup>50</sup> The Chamber recalled and referred to the Tribunal's jurisprudence on an accused's right to adequate time to prepare a defence and the Tribunal's jurisprudence on the Chamber's discretionary authority over trial scheduling matters also as set out in the Adjournment Decision.<sup>51</sup>

22. Rule 68 (i) of the Rules provides that, as soon as practicable, the Prosecutor shall disclose to the Defence 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".

23. The Chamber considered the new circumstances that had arisen, specifically those relating to Rule 65 *ter* documents in Batches 25 and 26, as well as a small number of Rule 66 (A)(ii) documents in those batches. It noted that the remainder and vast majority of Batches 25 and 26 are Rule 68 (ii) documents, which have neither been identified as exculpatory, nor relate to First Segment witnesses. It also considered the new circumstances relating to Rule 68 (i) materials for First Segment witnesses, especially the relatively large number of documents for Witness RM-319. The Chamber considered again that preparing a Defence is not exclusively done at the pre-trial stage, but that Defence team members will continue to support counsel in the weeks and months

<sup>49</sup> Motion, paras 12-13 (sub-paragraph "c"); 21 June Defence Memo, p. 4 (Answer 4). See also Supplement, paras 7-8, 11. The Prosecution acknowledged the possibility that the Defence might seek to use in its cross-examination materials missing as a result of disclosure deficiencies. See Response, para. 10.

<sup>50</sup> Adjournment Decision, paras 9-13.

<sup>51</sup> Adjournment Decision, paras 14-15.



following the start of the trial.<sup>52</sup> Moreover, it considered the impact of these new circumstances on Defence preparations, with a focus on the First Segment of the case and also taking into account the upcoming summer court recess.<sup>53</sup>

24. Based on the foregoing, the Chamber found that the appropriate remedy was two-fold. First, the Chamber decided to postpone the presentation of evidence in this trial. While the Chamber found that a postponement was justified, it did not consider that the requested amount of six months should be granted. In determining the length of the adjournment to be granted, the Chamber considered the additional work required to be performed by Defence counsel and their support staff due to the disclosure failures of the Prosecution as well as the type of material at issue, particularly under which Rule the material falls and whether they relate to the First Segment of the present case. Secondly, in consideration of the material at issue and its date of disclosure to the Defence, the Chamber also considered it appropriate to postpone the hearing of Witness RM-319 until after the summer court recess.<sup>54</sup> In this respect, the Chamber again noted that the later re-calling or postponements of specific witnesses, including for the First Segment of the case, may be an appropriate remedy for belated disclosure of materials, once the impact has been shown.<sup>55</sup>

#### IV. DISPOSITION

25. For the foregoing reasons, the Chamber

**GRANTED** the Motion;

**GRANTED IN PART** the requested relief contained in the Motion;

**SCHEDULED** the presentation of evidence to begin on 9 July 2012;

**INSTRUCTED** the Prosecution, after having consulted the Defence, to schedule for the period of 9 July 2012 until 20 July 2012 those witnesses least impacted by any disclosure failures;

**INSTRUCTED** the Prosecution to file a new witness order for the period of 9 July 2012 until 20 July 2012 by 26 June 2012;

**INSTRUCTED** the Prosecution not to call Witness RM-319 to testify until after 20 August 2012; and

<sup>52</sup> Adjournment Decision, para. 25.

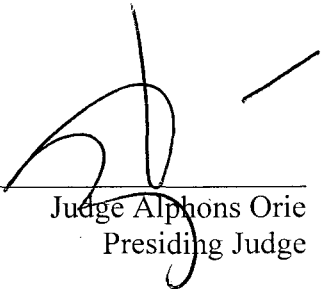
<sup>53</sup> The First Segment was scheduled to last until 20 July 2012.

<sup>54</sup> See Scheduling Order, 15 February 2012, para. 19.

<sup>55</sup> Adjournment Decision, para. 25. See also T. 390-391.

**INSTRUCTS** the parties to file the 19 June Prosecution Memo, 20 June Prosecution Memo, 21 June Defence Memo, and the 21 June Prosecution Memo within one week of the filing of these Reasons.

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



Judge Alphons Orié  
Presiding Judge

Dated this Twenty-ninth of June 2012  
At The Hague  
The Netherlands

**[Seal of the Tribunal]**