

IT-09-92-T
D41247-D41241
05 July 2012

41247
SMS

**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: 5 July 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: 5 July 2012

PROSECUTOR

v.

RATKO MLADIĆ

PUBLIC

**DECISION ON DEFENCE OBJECTION TO REVISED NOTICE
OF PRESENTATION OF THE PROSECUTION CASE IN
CHIEF: FIRST SEGMENT**

Office of the Prosecutor

Mr Dermot Groome
Mr Peter McCloskey

Counsel for Ratko Mladić

Mr Branko Lukić
Mr Miodrag Stojanović

I. PROCEDURAL HISTORY

1. On 22 June 2012, the Chamber issued a decision, which set the start of the Prosecution's presentation of evidence to 9 July 2012 and instructed the Prosecution to file, after consulting with the Defence, a revised notice of the order of witnesses it intends to call to testify ("Witness Order") for the period of court prior to the Summer Recess, i.e. from 9 July 2012 until 20 July 2012 ("First Segment").¹ On 26 June 2012, the Prosecution filed a Witness Order for the seven witnesses it intends to call during the First Segment.² On 2 July 2012, the Defence filed a motion, requesting that the testimony of three of the witnesses who are listed in the Witness Order, namely David Harland, Richard Dannatt, and Joseph Kingori, be delayed or, in the alternative, that the Defence cross-examination of these witnesses be delayed until a later date ("Motion").³ On that same day, the Prosecution responded, requesting that the Motion be dismissed and that it be permitted to call the aforementioned witnesses as indicated in the Witness Order ("Response").⁴

II. SUBMISSIONS OF THE PARTIES

2. The Defence raises a general objection to all witnesses proposed for the First Segment under Rule 92 *ter* of the Tribunal's Rules of Procedure and Evidence ("Rule 92 *ter* witness" and "Rules", respectively) on the grounds that it has had insufficient time to prepare due to the fact that there are pending Chamber decisions on Prosecution applications.⁵ The Defence also raises the general objection that the Prosecution's recent additional disclosure of material prevents it from adequately preparing to cross-examine any First Segment witnesses.⁶ Notwithstanding these general objections, the Defence submits in relation to proposed Rule 92 *ter* witnesses Christina Schmitz and Eelco Koster that it "may be able to overcome these difficulties and be prepared for these witnesses".⁷

3. The Prosecution takes no position as to the alleged effect of the pending Chamber decisions in relation to the Defence's ability to prepare.⁸ In relation to the recent additional disclosure of material, the Prosecution submits that it has taken sufficient steps to accommodate the Defence's

¹ Decision on Defence Motion for Reconsideration, 22 June 2012, p. 2.

² Revised Notice of Presentation of Prosecution Case in Chief: First Segment, 26 June 2012.

³ Defence Response and Objection to Revised Notice of Presentation of Prosecution Case in Chief: First Segment, 2 July 2012 (Public with Public Annex A), paras 15, 18, 20, III. Conclusion, Annex A. The Motion is characterized as a response to the Prosecution's Witness Order. However, the Chamber considers the Defence filing, which contains requests for relief and for which there is no motion being responded to, to be a motion.

⁴ Prosecution Response to Defence Response and Objection to Revised Notice of Presentation of Prosecution Case in Chief: First Segment, 2 July 2012, para. 11. The Chamber notes the Prosecution's submissions regarding the characterization of the Motion and its Response. See para. 2. The Chamber considers the Prosecution submission to be a response to the Motion, see *supra* fn. 3.

⁵ Motion, paras 7-9.

⁶ Motion, paras 10-13.

⁷ Motion, paras 21-24.

right to prepare for cross-examination, namely by making senior members of its staff available to assist the Defence and by agreeing not to oppose any “reasonable” application to recall a witness for additional cross-examination.⁹ The Prosecution’s agreement not to oppose a reasonable application to recall a First Segment witness includes the three witnesses at issue in the Motion and the Prosecution asserts that this agreement ameliorates any possible prejudice to the Defence.¹⁰

A. Witness David Harland

4. The Defence objects to the calling of witness Harland on the grounds that 1) no decision has been issued on the Defence objections to the witness statement tendered with the Rule 92 *ter* motion; 2) witness Harland was originally proposed as the ninth witness on a prior order of witnesses for the First Segment; and 3) Defence preparations for witness Harland are affected by additional Prosecution disclosures, which allegedly involve at least 24 new documents to review.¹¹

5. The Prosecution submits that the Defence has had “significant” preparation time, given that the relevant Rule 92 *ter* motion was filed approximately three months ago.¹² It further submits that any recent disclosures have been insubstantial, in that they comprise two witness statements disclosed respectively in late April and May 2012, four documents identified as Rule 68 (i) material which were disclosed on 15 June 2012, and the majority of the remainder are testimonies in other proceedings which mention the witness or his reports.¹³

B. Witness Richard Dannatt

6. The Defence objects to the calling of witness Dannatt on the grounds that 1) the Rule 94 *bis* process has not been completed for this witness, noting in particular that the Defence Notice of Objection was not due until 2 July 2012; 2) witness Dannatt was originally proposed as the final witness on a prior order of witnesses for the First Segment; and 3) witness Dannatt is a “key” Prosecution expert for whom the Defence has not yet found a “counter-expert” to review the witness’s findings and prepare for effective cross-examination and potential objections.¹⁴

7. The Prosecution submits that the Defence has had sufficient notice and time to prepare and, in response to the Defence objections, asserts that 1) witness Dannatt’s report was timely provided to the Defence and the Defence objections relate to the timing of litigation, as opposed to any

⁸ Response, para. 10.

⁹ Response, paras 3-6.

¹⁰ Response, paras 7-8.

¹¹ Motion, paras 14-15, Annex A, pp. 2-3.

¹² Response, para. 8.

¹³ *Ibid.*

¹⁴ Motion, paras 16-18, Annex A, p. 3.

disclosure issues, and 2) the projected date for witness Dannatt's testimony has not changed since the first order of witnesses for the First Segment was filed.¹⁵

C. Witness Joseph Kingori

8. The Defence objects to the calling of witness Kingori on the grounds that 1) no decision has been issued on the Defence objections to the witness statement and associated exhibits tendered with the relevant Rule 92 *ter* motion, and 2) Defence preparations for witness Kingori are affected by the additional Prosecution disclosures, which the Defence alleges involve at least 25 new documents.¹⁶

9. The Prosecution submits that any recent disclosures in relation to this witness have been insubstantial and should not require significant additional preparation time, in that they mainly concern limited and discrete matters regarding witness Kingori.¹⁷

III. APPLICABLE LAW

10. Article 20 (1) of the Tribunal's Statute ("Statute") provides:

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

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

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

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

12. A Trial Chamber decision regarding the scheduling of trial is discretionary; however, this discretion is limited by the obligations of Articles 20 and 21 of the Statute to ensure that a trial is fair and expeditious and that the accused has adequate time for the preparation of his case.¹⁸

IV. DISCUSSION

13. As a preliminary matter, the Chamber notes that, on 3 July 2012, it issued its decision in relation to the Prosecution's Rule 92 *ter* motion for witness Harland.¹⁹ However, the Chamber

¹⁵ Response, para. 8.

¹⁶ Motion, paras 19-20, Annex A, p. 4.

¹⁷ Response, para. 8.

¹⁸ *Augustin Ngirabatware v. the Prosecutor*, Case No. ICTR-99-54-A, Decision on Augustin Ngirabatware's Appeal of Decisions Denying Motions to Vary Trial Date, 12 May 2009 ("*Ngirabatware Decision*"), para. 22.

understands the Defence argument to be that it has had insufficient time to prepare due to the close temporal proximity of any decision and the anticipated date of the witness's testimony, not necessarily that no decision would be issued at all prior to the witness's testimony. In relation to this general objection, the Chamber recalls the discussion in its decision in relation to witness Harland, in which it stated that "[i]n general, the Chamber understands Rule 92 *ter* motions to be instruments notifying the opposing party and the Chamber of evidence to be presented in written form. The opposing party prepares for the witness's testimony on the basis of the Rule 65 *ter* summary, but also on the basis of a Rule 92 *ter* motion. As a general rule, the opposing party should prepare for a witness's testimony assuming that the witness's full statement will be admitted into evidence."²⁰ The Chamber does not find that the absence, or only recent issuance, of a decision on any Rule 92 *ter* motion should have affected the Defence's ability to prepare for these, or any, witnesses. The Chamber will therefore not further consider this objection in relation to the specific witnesses whose scheduled date of testimony is opposed by the Defence.

14. In relation to the general objection regarding the Prosecution's recent additional disclosures for all First Segment witnesses, the Chamber notes that the Defence has, at this time, only requested specific relief in relation to witnesses Harland and Kingori. The Chamber will therefore evaluate this objection below. Finally, in relation to whether the additional disclosures are or are not "insubstantial", the Chamber cautions the parties that they should refrain from merely presenting the Chamber with conclusory statements and should focus on ensuring that the Chamber has all of the needed facts and information for it to make its own determination. In this respect, the Chamber notes that there are a number of factors, outside of the quantity of documents at issue, which impact its evaluation of additional disclosures in terms of the potential effect on Defence preparations, for example, the kind of preparation or need for investigation that is evoked by a particular document.

A. Witnesses Harland and Kingori

15. In relation to the scheduling date of witness Harland, the Chamber recalls that the Defence has been aware that this witness was proposed to be called to testify during the First Segment since 13 April 2012, when the Prosecution filed its original order of witnesses for the First Segment.²¹ The Chamber also notes that witness Harland was originally proposed to testify on 25 June 2012 and that the Witness Order comprises a total of seven witnesses, whereas the original comprised

¹⁹ See Decision with Regard to Prosecution Motion for Admission into Evidence of Witness Harland's Statement and Associated Documents, 3 July 2012 ("Witness Harland Decision").

²⁰ Witness Harland Decision, para. 5.

²¹ See Presentation of Prosecution Case in Chief: First Segment, 13 April 2012 (Public with Confidential Annex A) ("13 April 2012 Witness Order").

twenty-three witnesses for the First Segment.²² The Chamber therefore does not consider the fact that witness Harland was originally proposed as the ninth witness out of twenty-three and is now the second out of seven to have impeded or affected the Defence's ability to prepare for his testimony or to warrant delaying his testimony.

16. In relation to the recent additional disclosure concerning witnesses Harland and Kingori, the Chamber considers that the Defence has had the vast majority of the additional material at issue for several weeks in advance of the witnesses' testimony and that the total number of additional documents is less than thirty for each witness. Further, the Chamber notes that the vast majority of the total material disclosed for these witnesses was disclosed on or before late April 2012, not later than approximately two months prior to the witnesses' anticipated date of testimony. Further, the Chamber considers that the information it has received from the parties does not show, at this time, that the additional material is of such a nature as to necessitate delaying the testimony and/or cross-examination of these witnesses. The Chamber therefore considers that delaying the testimony or cross-examination of these witnesses is unwarranted. In so stating, the Chamber stresses the distinction between a delay in the initial testimony and/or cross-examination of these witnesses and a potential recall for further cross-examination. The Chamber will consider any request by the Defence to recall witnesses Harland and Kingori for further cross-examination, taking into account the Prosecution's agreement not to oppose any reasonable application to recall a witness

B. Witness Dannatt

17. In relation to the scheduling date of witness Dannatt, the Chamber reiterates the same considerations as those for witness Harland and further notes that the anticipated date of witness Dannatt's testimony has not changed since 13 April 2012.²³ The Chamber therefore does not consider that this should have affected the Defence's ability to prepare for witness Dannatt's testimony or to warrant delaying his testimony.

18. In relation to the Rule 94 *bis* process objection, the Chamber considers that the relevant factors in terms of Defence preparations are that: 1) the Defence has been aware of the Prosecution's intention to call the witness as an expert and had witness Dannatt's prior expert reports since at least 25 November 2011;²⁴ 2) witness Dannatt is listed on the Prosecution's witness list, which contains his Rule 65 *ter* witness summary and was filed on 10 February 2012;²⁵ 3) the

²² See 13 April 2012 Witness Order, para. 6, Annex A, p. v; Witness Order, para. 3, Annex A, p. i.

²³ See 13 April 2012 Witness Order, Annex A, p. vii.

²⁴ See Third Prosecution Report on Pre-Trial Preparations, 25 November 2011 (Confidential with Confidential Annexes A to C), Annex C, pp. xiv-xv.

²⁵ See Prosecution Witness List, 10 February 2012 (Confidential), pp. 16, 33, 37, 39.

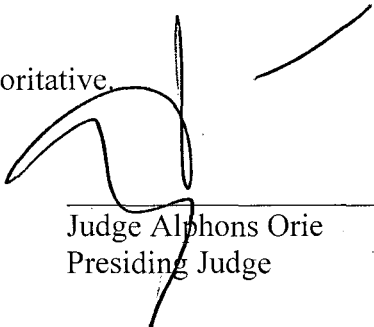
Defence has had the English version of witness Dannatt's proposed expert report since 24 April 2012 and the BCS since 2 June 2012,²⁶ and 4) as mentioned above, the Defence has been aware that the Prosecution intended to call witness Dannatt to testify in the First Segment since 13 April 2012. The Chamber considers that the parties should prepare for a Rule 94 *bis* witness's testimony on the basis of the Rule 65 *ter* summary, prior reports, and the proposed expert report. The Chamber therefore does not consider that delaying the testimony or cross-examination of witness Dannatt is warranted. Finally, the Chamber does not consider that Articles 20 and 21 of the Statute require, for the purposes of ensuring adequate time for Defence preparations or a fair trial, that the Defence be given additional time to find a "counter-expert" before the testimony of a proposed expert. However, in so stating, the Chamber reiterates the distinction between a delay in the initial testimony and/or cross-examination of a witness and a potential recall for further cross-examination, as stated in paragraph 16 of this decision.

V. DISPOSITION

19. For the foregoing reasons, the Chamber

DENIES the requested relief in the Motion.

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



Judge Alphons Orié
Presiding Judge

Dated this Fifth day of July 2012
At The Hague
The Netherlands

[Seal of the Tribunal]

²⁶ See Prosecution's Notice of Disclosure of Expert Report of General Sir Richard Dannatt (RM607) Pursuant to Rule 94 *bis*, 24 April 2012. On 2 June 2012, through an informal communication, the Defence confirmed that it was in receipt of the BCS version of the expert report. See also Motion, Annex A, p. 3.