

**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-AR73.5
Date: 22 May 2015
Original: English

IN THE APPEALS CHAMBER

Before: Judge Liu Daqun, Presiding
Judge Arlette Ramaroson
Judge Bakhtiyar Tuzmukhamedov
Judge Guy Delvoie
Judge Koffi Kumelio A. Afande

Registrar: Mr. John Hocking

Decision of: 22 May 2015

PROSECUTOR

v.

RATKO MLADIĆ

PUBLIC

**DECISION ON INTERLOCUTORY APPEAL AGAINST
THE 27 MARCH 2015 TRIAL CHAMBER DECISION ON
MODALITY FOR PROSECUTION RE-OPENING**

The Office of the Prosecutor:

Mr. Peter McCloskey
Mr. Alan Tieger

Counsel for Ratko Mladić:

Mr. Branko Lukić
Mr. Miodrag Stojanović

1. The Appeals 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 (“Appeals Chamber” and “Tribunal”, respectively) is seised of the “Interlocutory Appeal of the 27 March 2015 Decision on Defence Request to Adopt Modality for Prosecution Re-Opening” filed by Ratko Mladić (“Mladić”) on 24 April 2015 (“Appeal”) against the “Decision on Defence Request to Adopt Modality for Prosecution Re-Opening” issued by Trial Chamber I of the Tribunal (“Trial Chamber”) on 27 March 2015 (“Impugned Decision”). The Office of the Prosecutor (“Prosecution”) filed a response on 1 May 2015.¹ The Deputy Registrar filed a submission on 5 May 2015.² Mladić did not file a reply.

I. BACKGROUND

2. On 26 August 2014, the Prosecution requested to re-open its case in order to present new evidence in relation to the Tomašica mass grave (“Prosecution re-opening”).³ The proffered evidence included 43 documents and the testimony of six expert witnesses and seven fact witnesses, five of whom were proposed pursuant to Rule 92 *bis* of the Tribunal’s Rules of Procedure and Evidence (“Rules”).⁴ On 23 October 2014, the Trial Chamber granted the request and decided to hear the presentation of the re-opening evidence “*en bloc* at a time to be determined at a later stage”.⁵ In the same decision, the Trial Chamber also informed the parties that it would issue a decision on the exact timing of the Prosecution re-opening, including how much time will be available to the Prosecution, once any Rule 92 *bis* and Rule 94 *bis* applications had been ruled upon.⁶

3. During a hearing held on 5 February 2015, the Trial Chamber informed the parties of its inclination to hear the Prosecution re-opening evidence in May or June 2015 and invited the parties to respond.⁷ On 9 March 2015, the parties made oral submissions concerning the proposed timing of the Prosecution re-opening.⁸

¹ Prosecution Response to Interlocutory Appeal of the 27 March 2015 Decision on Defence Request to Adopt Modality for Prosecution Re-Opening, 1 May 2015 (“Response”).

² Deputy Registrar’s Submission Regarding Interlocutory Appeal of Decision on Modality for Prosecution Re-Opening, 5 May 2015 (“Deputy Registrar Submission”).

³ *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Prosecution Motion to Re-Open its Case-in-Chief, 26 August 2014 (with confidential annexes A and B) (“Re-Opening Motion”), para. 1.

⁴ Re-Opening Motion, para. 4.

⁵ *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Decision on Prosecution Motion to Re-Open its Case-in-Chief, 23 October 2014 (“Re-Opening Decision”), para. 12.

⁶ Re-Opening Decision, para. 12.

⁷ *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, T. 31255 (5 February 2015).

⁸ *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, T. 32742-32944 (9 March 2015).

4. On 12 March 2015, Mladić filed a submission, in which he suggested an adjournment from 1 May 2015 until the court summer recess of 2015 in order to adequately prepare for the Prosecution re-opening, and that the re-opening evidence be heard after the court summer recess.⁹ On 27 March 2015, the Trial Chamber issued the Impugned Decision, in which it granted Mladić's request in part and decided that: (i) the trial hearing will be adjourned between 22 May and 22 June 2015; and (ii) the presentation of the Prosecution re-opening shall commence on 22 June 2015.¹⁰

5. On 17 April 2015, the Trial Chamber granted Mladić's application for certification to appeal the Impugned Decision.¹¹ The Trial Chamber recognised, *inter alia*, that the determination of the amount of time necessary for Mladić to prepare for the Prosecution re-opening significantly affected the fair and expeditious conduct of the proceedings or the outcome of the trial.¹² On 21 April 2015, the Trial Chamber orally determined that, in relation to the Prosecution re-opening, the Prosecution will have nine hours for a total of eight witnesses, consisting of two *92 ter* witnesses and six expert witnesses.¹³

II. STANDARD OF REVIEW

6. Trial Chambers enjoy considerable discretion in relation to the management of the proceedings before them, including scheduling of trials, to which the Appeals Chamber accords deference.¹⁴ Such deference is based on the recognition by the Appeals Chamber of a trial chamber's "organic familiarity with the day-to-day conduct of the parties and practical demands of the case".¹⁵ In order to successfully challenge a discretionary decision, a party must demonstrate that the trial chamber has committed a discernible error resulting in prejudice to that party.¹⁶ The Appeals Chamber will only overturn a trial chamber's discretionary decision where it is found to be: (i) based on an incorrect interpretation of governing law; (ii) based on a patently incorrect conclusion of fact; or (iii) so unfair or unreasonable as to constitute an abuse of the trial chamber's

⁹ *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Defence Submission as to Proposed Modality of Prosecution Re-Opening, 12 March 2015 ("Modality Request"), paras 6-8.

¹⁰ Impugned Decision, para. 15.

¹¹ *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Decision on Defence Motion for Certification to Appeal the Decision on Defence Request to Adopt Modality for Prosecution Re-Opening, 17 April 2015 ("Certification Decision"), para. 8.

¹² Certification Decision, para. 6. *See also* Certification Decision, para. 7.

¹³ *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, T. 34539 (21 April 2015).

¹⁴ *See, e.g., Prosecutor v. Nikola Šainović et al.*, Case No. IT-05-87-A, Judgement, 23 January 2014 ("Šainović et al., Appeal Judgement"), para. 29; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-AR73.10, Decision on Appeal from Decision on Duration of Defence Case, 29 January 2013, para. 7.

¹⁵ *See, e.g., Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-AR73.6, Decision on Ivan Čermak and Mladen Markač Interlocutory Appeals Against Trial Chamber's Decision to Reopen the Prosecution Case, 1 July 2010, para. 5.

¹⁶ *See, e.g., Prosecutor v. Goran Hadžić*, Case No. IT-04-75-AR65.1, Decision on Urgent Interlocutory Appeal From Decision Denying Provisional Release (with confidential annex), 13 April 2015 ("Hadžić Decision"), para. 5; *Šainović et al.*, Appeal Judgement, para. 29.

discretion.¹⁷ The Appeals Chamber will consider whether the trial chamber has given weight to extraneous or irrelevant considerations or has failed to give weight or sufficient weight to relevant considerations in reaching its decision.¹⁸

III. DISCUSSION

A. Submissions of the parties

7. Mladić argues that the Trial Chamber, in adjourning the trial until 22 June 2015, failed to consider factual circumstances of his case and thus failed to grant “proportionally adequate” time for the Defence to prepare for the Prosecution re-opening.¹⁹ Mladić requests the Appeals Chamber to reverse the Impugned Decision and either: (i) determine a more reasonable time period for the adjournment of the trial; or (ii) remand the matter to the Trial Chamber to allocate “a more fair and reasonable time period” for the adjournment of the trial.²⁰

8. In support of his Appeal, Mladić first submits that the Trial Chamber infringed the principle of equality of arms.²¹ He claims that the Trial Chamber created “its own formulation of the standard” for determining a proportionally adequate amount of preparation time when it stated that Mladić’s submissions ignored “the difference in the evidentiary burden between the parties, which has an impact on preparation time for the presentation of evidence”.²² He maintains that by adopting and strictly applying this erroneous standard, the Trial Chamber incorrectly implied that he was seeking the same amount of time as that granted to the Prosecution for preparing its re-opening, when in fact he requested an amount of time proportional to that of the Prosecution.²³

9. Mladić further submits that the Trial Chamber failed to adequately consider the “factual matrix” of his case in its entirety,²⁴ including: (i) the fact that his Defence team had been engaged in significant work in his ongoing case;²⁵ (ii) difficulties obtaining funding for Defence experts and in preparing expert evidence;²⁶ and (iii) the Trial Chamber’s own delays in deciding motions relevant

¹⁷ *Hadžić* Decision, para. 5; *Šainović et al.*, Appeal Judgement, para. 29.

¹⁸ *Hadžić* Decision, para. 5; *Šainović et al.*, Appeal Judgement, para. 29.

¹⁹ Appeal, paras 21, 23-24, 32.

²⁰ Appeal, p. 13.

²¹ Appeal, paras 21, 32. *See also* Appeal, paras 9, 16-20, 25-26.

²² Appeal, para. 21, *referring to* Impugned Decision, para. 10. *See also* Appeal, paras 9, 25-26, 32.

²³ Appeal, paras 25-26.

²⁴ Appeal, paras 21, 22.

²⁵ Appeal, para. 27.

²⁶ Appeal, para. 28. In this regard, Mladić submits that the Trial Chamber failed to consider time required for significant administrative steps to obtain funding and approval for Defence experts. He further argues that beyond saying that the Defence should have brought the funding problems to the attention of the Trial Chamber sooner, the Impugned Decision took no steps to assist the Defence to obtain funding from the Tribunal’s Registry. *See* Appeal, para. 28.

to the Prosecution's re-opening²⁷ and other matters that were "beyond the control of the Defence", such as the lack of Rule 92 *ter* filings.²⁸ Mladić avers that the Trial Chamber unfairly required him to use the short adjournment for the purposes of preparing for cross-examination of Prosecution witnesses for the Re-Opening and for preparing any Defence evidence to be presented in rebuttal during his case.²⁹ He further contends that the Trial Chamber failed to provide a reasoned opinion as to how it determined that this short adjournment, from 22 May to 22 June 2015, was sufficient and adequate for both purposes under the factual circumstances of the case.³⁰

10. Finally, Mladić submits that the Trial Chamber "mis-states and misapprehends" the disclosure issue regarding the Tomašica-related materials when it found that "the dispute between the parties is not about whether material was disclosed, but rather whether this material was disclosed in acceptable format".³¹ He argues that the materials disclosed by the Prosecution were "not usable".³² He further asserts that the Prosecution has made additional disclosures, including on 17 April 2015 (the date of the Certification Decision), and therefore the Trial Chamber's assumption regarding the disclosure issue in the Impugned Decision is "erroneous and premature".³³

11. The Prosecution responds that the Appeal should be dismissed as Mladić fails to show any discernible error in the Trial Chamber's exercise of its discretion.³⁴ In this regard, it submits that: (i) the Trial Chamber's interpretation of the applicable law on the equality of arms is consistent with the Tribunal's jurisprudence;³⁵ (ii) granting Mladić a one-month adjournment was based on a number of carefully reasoned factors;³⁶ (iii) the Trial Chamber did not err in expecting Mladić to use the adjournment for both the preparation of the Prosecution re-opening evidence and his own Defence evidence to challenge the re-opening evidence;³⁷ and (iv) the Tomašica-related materials were disclosed in a usable format in accordance with standard procedure, which the Appeals

²⁷ Appeal, para. 29.

²⁸ Appeal, paras 29-30. *See also* Appeal, para. 32. In this regard, Mladić argues that the Trial Chamber unfairly held that the Defence was lacking in due diligence. Appeal, paras 29-30.

²⁹ Appeal, paras 22, 24, 31.

³⁰ Appeal, paras 22-24.

³¹ Appeal, paras 33-34.

³² Appeal, para. 34.

³³ Appeal, para. 35.

³⁴ Response, paras 1, 18.

³⁵ Response, paras 3-4.

³⁶ Response, para. 5. The Prosecution submits that the Trial Chamber made a correct determination of the length of the adjournment, taking into account relevant factors such as the time required for obtaining further funding, the time needed for reviewing and producing expert evidence, and trial scheduling and disclosure issues. Response, paras 8-9, *referring to* Impugned Decision, paras 11-12.

³⁷ Response, para. 12. The Prosecution maintains, *inter alia*, that Mladić had already prepared for and cross-examined three of the same expert witnesses who had previously testified and whom the Prosecution intends to recall during the Prosecution re-opening. Response, para. 13. In addition, the Prosecution submits that contrary to Mladić's claim, it filed applications pursuant to Rule 92 *ter* in November 2014. Response, para. 13.

Chamber has confirmed to be satisfactory.³⁸ The Prosecution further explains that, while the vast majority of the Tomašica-related materials were disclosed in August 2014, it continues to disclose new materials, including 69 individual victim identification documents that were provided to the Defence on 17 April 2015.³⁹ The Prosecution submits that disclosure “on a continuous basis does not establish any error in the Trial Chamber’s analysis”.⁴⁰

B. Analysis

12. Turning to Mladić’s contention regarding the principle of equality of arms, the Appeals Chamber is not persuaded that the Trial Chamber committed a discernible error of law. The Impugned Decision reflects that the Trial Chamber correctly recalled the applicable law and the principle of equality of arms.⁴¹ It explicitly referred to its obligation to ensure a fair and expeditious trial as well as to the accused’s right to have adequate time and facilities for the preparation of the defence enshrined in Articles 20(1) and 21(4) of the Statute of the Tribunal (“Statute”).⁴² The Trial Chamber further stated that it has discretion regarding trial scheduling matters, but it noted that this discretion was limited by obligations under Articles 20 and 21 of the Statute.⁴³ The Trial Chamber also recalled the Tribunal’s jurisprudence that “[i]t is not possible to set a standard of what constitutes adequate time to prepare a defence” and that the “length of the preparation period depends on a number of factors specific to each case”.⁴⁴ On this basis, the Appeals Chamber is satisfied that the Trial Chamber was duly aware of its obligations regarding equality of arms.

13. The Appeals Chamber observes that, in response to Mladić’s repeated submission that “the Prosecution has a larger team and that any time given to the Defence should be compared to the time the Prosecution required to analyse the re-opening evidence”, the Trial Chamber stated that Mladić “ignore[d] the difference in the evidentiary burden between the parties, which has an impact on preparation time for the presentation of evidence”.⁴⁵ Contrary to Mladić’s assertion, the Appeals Chamber is not convinced that the Trial Chamber created its own standard for equality of arms. Rather, the Trial Chamber was considering and reminding Mladić of a relevant circumstance,

³⁸ Response, para. 15, citing *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-AR73.3, Decision on Defence Interlocutory Appeal Against the Trial Chamber’s Decision on EDS Disclosure Methods, 28 November 2013 (“*Mladić* Decision of 28 November 2013”), paras 25, 28. The Prosecution states that it assisted Mladić through several re-disclosures of the same material in various formats as requested. Response, para. 15. According to the Prosecution, Mladić’s contention about an unusable format pertains to this afore-mentioned re-disclosure process of the material in a format suitable to him, which has no bearing on the issues raised in the Appeal. Response, para. 15.

³⁹ Response, paras 16-17.

⁴⁰ Response, para. 17.

⁴¹ Impugned Decision, para. 7.

⁴² Impugned Decision, para. 7.

⁴³ Impugned Decision, para. 8.

⁴⁴ Impugned Decision, para. 8, citing *Prosecutor v. Augustin Ngirabatware*, Case No. ICTR-99-54-A, Decision on Augustin Ngirabatware’s Appeal of Decisions Denying Motions to Vary Trial Date, 12 May 2009, para. 28.

⁴⁵ Impugned Decision, para. 10.

the Prosecution's heavier evidentiary burden. The Appeals Chamber recalls that unlike the case of the Prosecution, which bears the burden of proof, defence strategies often focus on poking specifically targeted holes in the Prosecution's case, an endeavour which may require less time and fewer witnesses.⁴⁶ On this basis, Mladić fails to demonstrate how the Trial Chamber committed a discernible error in its interpretation of the governing law. He also does not show how the Trial Chamber incorrectly implied that he was seeking the same amount of time granted to the Prosecution rather than a proportional time.

14. The Appeals Chamber is further not convinced that the Trial Chamber, in granting an adjournment from 22 May 2015 until 22 June 2015, failed to adequately consider the factual circumstances of Mladić's case, thus amounting to an error in the exercise of its discretion. Contrary to Mladić's assertion, the Trial Chamber expressly considered his argument that his Defence team was "too engaged in the presentation of the Defence case to meaningfully prepare for the re-opening".⁴⁷ It stated that the Defence should have reconsidered the allocation of its resources once it was informed of the anticipated evidence that the Prosecution intended to present in its re-opening, and at the latest, once the Trial Chamber granted the Prosecution re-opening in October 2014.⁴⁸ The Trial Chamber also considered his submissions on the difficulties in obtaining further funding for experts.⁴⁹ The Trial Chamber observed that Mladić's requests for additional funding to challenge the experts in the Prosecution re-opening were only made in March 2015, subsequent to the Trial Chamber's inquiry, in February 2015, about the timing of the Prosecution re-opening.⁵⁰ According to the Trial Chamber, Mladić "could and should have ensured that the Prosecution's expert reports, which had been disclosed in August 2014, be reviewed by experts or others so as to avoid unnecessary delays".⁵¹ In addition, the Appeals Chamber observes that on 13 March 2015 and 17 April 2015 the Registry contacted Mladić's Lead Counsel to obtain the necessary information regarding the Defence's proposed experts, but that the Defence has not responded.⁵² Finally, the Appeals Chamber is also not persuaded that the Trial Chamber, in stating that the Defence team has not demonstrated due diligence in preparing for the Prosecution re-opening, ignored other factors of delay.⁵³ In this regard, the Trial Chamber explicitly noted

⁴⁶ See, e.g., *Šainović et al.*, Appeal Judgement, para. 132; *Prosecutor v. Naser Orić*, Case No. IT-03-68-AR73.2, Interlocutory Decision on Length of Defence Case, 20 July 2005, para. 7.

⁴⁷ Impugned Decision, para. 11.

⁴⁸ Impugned Decision, para. 11.

⁴⁹ Impugned Decision, para. 11. The Appeals Chamber understands that Mladić does not challenge the conduct of the Registry in this regard, nor does he argue that it failed to provide him with the necessary funding for the preparation of his Defence. See Appeal, paras 5, 23, 28.

⁵⁰ Impugned Decision, para. 11. See also Impugned Decision, para. I.

⁵¹ Impugned Decision, para. 11.

⁵² Deputy Registrar Submission, para. 4.

⁵³ Appeal, para. 29.

pending matters, including the “Prosecution’s Rule 92 *bis* motion related to its re-opening”.⁵⁴ The Appeals Chamber, therefore, finds no errors in the Trial Chamber’s assessment and dismisses Mladić’s arguments in this respect.

15. Mladić also does not demonstrate that the Trial Chamber failed to provide a reasoned opinion in requiring him to use the adjournment, from 22 May 2015 until 22 June 2015, to prepare his Defence witnesses and Defence case for the Prosecution re-opening. As noted above, the Trial Chamber considered that the Defence team should have started preparing for the re-opening, at the latest, when the Re-Opening Decision was issued.⁵⁵ In this regard, the Appeals Chamber notes that at the time of the filing of the Re-Opening Motion, in August 2014, the Prosecution disclosed its proposed evidence for the re-opening to Mladić.⁵⁶ The Appeals Chamber considers that from the issuance of the Re-Opening Decision until 22 June 2015, Mladić would have had more than eight months to review and prepare for the Prosecution re-opening. In light of the foregoing, including the Trial Chamber’s careful consideration of the relevant factual circumstances, the Appeals Chamber is not persuaded by Mladić’s argument that the Trial Chamber erred in not providing a reasoned opinion.

16. Mladić’s argument that the Trial Chamber “misapprehend[ed]”⁵⁷ his submissions regarding the disclosure of the Tomašica-related materials is also unpersuasive. As already noted, the Prosecution disclosed materials relevant to its re-opening in August 2014;⁵⁸ however, the problem appeared to be related to the electronic format of the disclosure.⁵⁹ Accordingly, it is unclear to the Appeals Chamber how the Trial Chamber misapprehended his submissions when it stated that the disclosure issue was in relation to whether the material disclosed was “in an acceptable format”.⁶⁰ Beyond disagreeing with the Trial Chamber’s characterisation of the issue, Mladić fails to demonstrate any error in this regard. The Appeals Chamber is also not convinced that the Impugned Decision was “erroneous and premature” on the basis that the Prosecution made additional disclosures following this decision.⁶¹ Given the timing of the disclosures, the Trial Chamber could not have considered the materials in its Impugned Decision. In the Appeals Chamber’s view, Mladić’s contention in no way demonstrates that the Impugned Decision was based on a patently

⁵⁴ Impugned Decision, paras 10, 14.

⁵⁵ Impugned Decision, para. 11.

⁵⁶ Re-Opening Motion, confidential Annexes A and B.

⁵⁷ Appeal, para. 34.

⁵⁸ Re-Opening Motion, confidential Annexes A and B.

⁵⁹ See Impugned Decision, para. 12; Response, paras 14-15. See also Modality Request, para. 12.

⁶⁰ Impugned Decision, para. 12. The Trial Chamber further noted that the formatting issue had been litigated at length, including on appeal, and that the disclosure problems, which lasted for six months, were only brought to the Trial Chamber’s attention in Mladić’s Modality Request on 12 March 2015. See Impugned Decision, para 12, referring to, *inter alia*, Mladić Decision of 28 November 2013.

incorrect conclusion of fact, or was so unfair as to constitute an abuse of discretion. On this basis, Mladić has failed to demonstrate any discernible error to warrant the Appeals Chamber's intervention.

IV. CONCLUSION

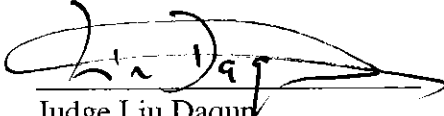
17. In light of the above, the Appeals Chamber finds that Mladić has failed to show that the Trial Chamber's discretionary decision to adjourn the hearing of the Prosecution re-opening until 22 June 2015 was based on an incorrect interpretation of law or on a patently incorrect conclusion of fact, or so unfair or unreasonable as to constitute an abuse of discretion. Since no discernible error has been demonstrated, there is no prejudice to Mladić, and therefore, no need to discuss a remedy.

V. DISPOSITION

18. For the foregoing reasons, the Appeals Chamber **DISMISSES** the Appeal.

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

Dated this 22th day of May 2015,
At The Hague,
The Netherlands.



Judge Liu Daqun
Presiding Judge

[Seal of the Tribunal]

⁶¹ According to Mladić, "the Prosecution has made additional disclosures, including on 17 April 2015". See Appeal, para. 35.