



International Tribunal for the Prosecution of
Persons Responsible for Serious Violations of
International Humanitarian Law Committed in
the Territory of Former Yugoslavia since 1991

Case No. IT-04-83-T

Date: 17 October 2007

Original: English

IN TRIAL CHAMBER I

Before: Judge Bakone Justice Moloto, Presiding
Judge Frederik Harhoff
Judge Flavia Lattanzi

Registrar: Mr. Hans Holthuis

Decision of: 17 October 2007

PROSECUTOR

v.

RASIM DELIĆ

PUBLIC

**DECISION ON URGENT PROSECUTION MOTION
FOR LEAVE TO AMEND ITS EXHIBIT LIST**

The Office of the Prosecutor

Mr. Daryl A. Mundis
Ms. Laurie Sartorio
Mr. Kyle Wood
Mr. Aditya Menon

Counsel for the Accused

Ms. Vasvija Vidović
Mr. Nicholas David Robson

TRIAL CHAMBER I (“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”);

BEING SEISED of the “Urgent Prosecution Motion for Leave to Amend its Exhibit List” filed on 25 September 2007 (“Motion”), whereby the Prosecution requests leave to amend its Rule 65 *ter* exhibit list with the addition of the audio portion of a video clip which allegedly contains a speech given by Rasim Delić (“Accused”) to the El Mujahed Detachment (“Audio Clip”),¹ as well as the English and B/C/S transcripts of the Audio Clip (“Transcripts”);²

NOTING that the Prosecution intends to present the Audio Clip during the testimony of Witness Aiman Awad, who is expected to testify sometime after October 2007;³

NOTING that in support of its Motion the Prosecution *inter alia* submits that:

- 1) On 14 September 2007, the Prosecution was made aware of the posting of the video clip in question on the “open source website ‘You Tube’” which is accessible to the general public (“You Tube Video Clip”),⁴ and on the same day the Prosecution orally informed the Defence of the existence of the You Tube Video Clip;⁵
- 2) As it appears that the You Tube Video Clip was originally recorded as an audio tape and that video images were added to it subsequently, the Prosecution “seeks to rely *only* on the [Audio Clip]”;⁶
- 3) The Prosecution disclosed to the Defence the Audio Clip and its Transcripts on 17 and 24 September 2007, respectively, and the Prosecution is in the process of transcribing and translating the Arabic portions of the Audio Clip;⁷

NOTING the “Defence Response to Urgent Prosecution Motion for Leave to Amend its Exhibit List” filed on 4 October 2007 (“Response”), whereby the Defence objects to the addition of the Audio Clip to the Rule 65 *ter* exhibit list;

¹ Attached as Annex A to the Motion.

² Attached as Annex B to the Motion.

³ Motion, paras 1, 6. The testimony of Witness Aiman Awad was initially scheduled to commence on 2 October 2007. However, at the request of the Defence, the Trial Chamber ordered the Prosecution to reschedule his testimony so as to allow the Defence the full 14 days to respond to the Motion, as set out in Rule 126 *bis* of the Rules of Procedure and Evidence (“Rules”), Hearing, 26 September 2007, T. 3107-3116.

⁴ Motion, para. 2.

⁵ Motion, para. 4.

⁶ Motion, para. 2 (emphasis in original).

⁷ Motion, para. 5 and footnotes 4 and 5.

NOTING that the Defence in the Response *inter alia* submits that:

- 1) In determining whether to allow the addition of evidence to a Rule 65 *ter* exhibit list, the Trial Chamber “could take into account [...] whether the proposed evidence is *prima facie* relevant and of probative value”, and that the test for this consideration should be similar to the standard applicable to the admissibility of evidence, namely the proposed evidence “should bear a *sufficient indicia of reliability and authenticity*”;⁸
- 2) Based on this understanding of the applicable law, the Defence “strenuously challenges the authenticity of the recordings”, *inter alia* on the ground that the You Tube Video Clip is an amalgamation of several different audio recordings and visual images, which any person with minimal resources could relatively quickly and easily fabricate;⁹
- 3) There are Arabic parts of the Audio Clip which have not been translated;¹⁰ and
- 4) The You Tube Video Clip “should not be altered” to extract only the Audio Clip, as the Prosecution proposes, since it is already a “highly edited item”;¹¹

CONSIDERING that the Trial Chamber may grant a motion requesting an amendment of a Rule 65 *ter* exhibit list where it is satisfied that the amendment is in the interests of justice¹² and in balancing the Prosecution’s duty to present the available evidence to prove its case with the right of the accused to have adequate time and facilities to prepare a defence;¹³

CONSIDERING that the Trial Chamber may also take into account additional criteria, including whether the proposed evidence is *prima facie* relevant and of probative value to issues raised in the indictment, and whether good cause for amending the Rule 65 *ter* list has been shown;¹⁴

⁸ Response, paras 5-10 (emphasis in original).

⁹ Response, paras 12-18.

¹⁰ Response, para. 26.

¹¹ Response, paras 21, 23.

¹² *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-T, Decision on Prosecution’s Motions for Leave to Amend Rule 65 *ter* Witness List and Rule 65 *ter* Exhibit List, 6 December 2006 (“*Popović Decision*”), p. 6; *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-T, Decision on Prosecution’s Third Motion for Leave to Amend its Rule 65 *ter* Exhibit List, 23 April 2007 (“*Milošević April Decision*”), p. 3; *Prosecutor v. Rasim Delić*, Case No. IT-04-83-PT, Decision on Motion for Leave to Amend the Prosecution’s Witness and Exhibit Lists, 9 July 2007, (“*Delić Decision*”) p. 6. See also Rule 73 *bis* (F) of the Rules concerning the Prosecutor’s motion to vary the number of witnesses.

¹³ Articles 20(1) and 21(4)(b) of the Statute of the Tribunal (“*Statute*”). *Popović Decision*, p. 6, with further references; *Delić Decision*, p. 6; *Milošević April Decision*, p. 3; *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-T, Decision on Prosecution’s Second Motion for Leave to Amend its Rule 65 *ter* Exhibit List, 14 February 2007 (“*Milošević February Decision*”), p. 3, with further references; *Prosecution v. Jadranko Prlić et al.*, Case No. IT-04-74-T, Decision on List of Exhibits, 1 June 2007, p. 3.

¹⁴ *Popović Decision*, p. 7, with further references; *Delić Decision*, p. 6; *Milošević February Decision*, p. 3, with further references.

CONSIDERING that there is a significant difference in law between allowing a party to add an item to its Rule 65 *ter* list, and admitting an item into evidence as an exhibit, the purpose of the Rule 65 *ter* list merely being to give notice to one party that the other party intends to rely on the item at trial;¹⁵

CONSIDERING therefore that there is no need for the Trial Chamber to now assess the relevance and probative value of the Audio Clip to the same extent as if it was being tendered into evidence, although it must be satisfied that a party does not submit an item which is obviously irrelevant;¹⁶

CONSIDERING that the Defence will not be prejudiced in preparing their cross-examination, as the Audio Clip and the English and B/C/S transcripts thereof have been duly disclosed to the Defence,¹⁷ and as Witness Aiman Awad will only testify after October 2007, by which time the limited Arabic portions of the Audio Clip are expected to be fully and officially translated;

CONSIDERING that the Defence challenges to the authenticity of the Audio Clip may be considered when the Prosecution seeks to tender it into evidence, and, if applicable, when weighing the evidence at the end of the trial;

CONSIDERING that the Audio Clip is *prima facie* relevant to the charges against the Accused, and that in order to conduct a meaningful examination of the authenticity of this item at a later stage, the Trial Chamber is of the view that it needs to be provided not only with the Audio Clip, but rather with the entire You Tube Video Clip, as it originally appeared on the internet;

FINDING therefore, that it is in the interests of justice to order the addition of the You Tube Video Clip, instead of the Audio Clip, to the Prosecution Rule 65 *ter* exhibit list;

FOR THE FOREGOING REASONS,

PURSUANT TO Articles 20(1) and 21(4)(b) of the Statute and Rule 54 of the Rules,

HEREBY GRANTS the Motion, and

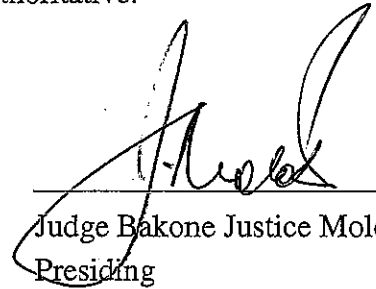
¹⁵ *Prosecutor v. Ljube Bošković and Johan Tarčulovski*, Case No. IT-04-82-T, Decision on Prosecution's Fifth Motion to Amend its Exhibit List and on its Second Motion to Remove Witnesses from its Witness List, 20 April 2007 ("*Bošković and Tarčulovski* Decision"), para. 3; *Delić* Decision, p. 7.

¹⁶ *Bošković and Tarčulovski* Decision, para. 3; *Delić* Decision, p. 7.

¹⁷ The You Tube Video Clip was subsequently removed from the website following the Prosecution's request to the You Tube. The Defence could not make a copy of the You Tube Video Clip before its removal. However, the Defence has received a copy from the Prosecution some time before the filing of its Response, Response, para. 19.

ORDERS the Prosecution to add to its Rule 65 *ter* exhibit list the You Tube Video Clip containing both the audio recording and visual images and the transcripts thereof.

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



Judge Bakone Justice Moloto
Presiding

Dated this seventeenth day of October 2007

At The Hague

The Netherlands

[Seal of the Tribunal]