



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-04-81-T
Date: 17 November 2008
Original: English

IN TRIAL CHAMBER I

Before: Judge Bakone Justice Moloto, Presiding Judge
Judge Pedro David
Judge Michèle Picard

Registrar: Mr. Hans Holthuis

Decision of: 17 November 2008

PROSECUTOR

v.

MOMČILO PERIŠIĆ

PUBLIC

**TRIAL CHAMBER'S RULING ON DEFENCE MOTION
TO CLARIFY WHETHER THE PROSECUTION MUST
REQUEST LEAVE TO AMEND ITS RULE 65 TER
EXHIBIT LIST**

The Office of the Prosecutor

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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”) is seised of “Momčilo Perišić’s Motion to Clarify Whether the Prosecution Must Request Leave to Amend the Rule 65 *ter* Exhibit List” filed publicly by the Defence on 15 October 2008 (“Motion”), and hereby renders its Decision.

I. BACKGROUND AND SUBMISSIONS

1. On 23 February 2007, the Prosecution filed an initial Rule 65 *ter* exhibit list in the present case.¹ The Prosecution was subsequently allowed to revise and file six supplements to this initial Rule 65 *ter* exhibit list.²

A. Defence

2. In its Motion, the Defence submits that since the commencement of the trial, the Prosecution has tendered for admission into evidence 25 documents not on the Rule 65 *ter* Exhibit List,³ “although the Prosecution assigned the documents 65*ter* numbers.”⁴ The Defence points out that no motion to amend the Rule 65 *ter* Exhibit List has been filed in relation to any of these 25 documents.⁵ According to the Defence, as of 15 October 2008, there were also 30 documents in the electronic court system (“eCourt”), which have been assigned Rule 65 *ter* numbers by the Prosecution, but do not appear on the Rule 65 *ter* Exhibit List.⁶

3. The Defence contends that of the documents which were not on the Rule 65 *ter* Exhibit List but admitted into evidence as exhibits, some were made available to the Defence in eCourt—shortly

¹ Prosecution’s Rule 65 *ter* Submission, 23 February 2007, Annex 3.

² On 22 October 2007, a revised list was filed, together with a first supplemental list; on 19 December 2007, a second supplemental list; on 26 February 2008, a third supplemental list; on 28 March 2008, a fourth supplemental list; on 1 July 2008, a fifth supplemental list (“Fifth Supplemental Exhibit List”); and on 29 September 2008, a sixth supplemental list (“Sixth Supplemental Exhibit List”). The Trial Chamber denied in part the Prosecution’s applications to file the Fifth and Sixth Supplemental Exhibit Lists. The operative Rule 65 *ter* exhibit list in this case (“Rule 65 *ter* Exhibit List”) thus consists of these items, as accepted by the Trial Chamber. See Decision on Prosecution’s Submission of Revised 65 *ter* Exhibit List and Prosecution’s Motion for Leave to File a Supplemental Rule 65 *ter* Exhibit List, 27 February 2008 (dealing with the revised list and the first and second supplemental lists); Decision on Prosecution Motions for Leave to File a Third Supplemental Rule 65 *ter* Exhibit List with Annex A and a Fourth Supplemental Rule 65 *ter* Exhibit List with Annex A, 30 May 2008; Decision on Prosecution Motion for Leave to File a Fifth Supplemental Rule 65 *ter* Exhibit List with Annex A, 29 August 2008; Decision on Prosecution Motion for Reconsideration of the Trial Chamber’s Decision of 29 August 2008, 29 October 2008; Decision on Prosecution Motion for Leave to File a Sixth Supplemental Rule 65 *ter* Exhibit List, 3 November 2008.

³ The Defence also argues that these documents are not on the Sixth Supplemental Exhibit List, which was then pending a decision of the Trial Chamber, Motion, para. 8.

⁴ Motion, para. 8

⁵ Motion, para. 8

⁶ Motion, para. 8. The Defence further points out that as of 15 October 2008, of the 199 documents released by the Prosecution in eCourt, 90 documents did not have 65 *ter* numbers, Motion, fn. 15.

before the relevant witness came to testify—although the exact disclosure date is unknown.⁷ The Defence also submits that such a manner of production of Prosecution exhibits may place the Defence in a position of having to seek an adjournment of the relevant witness’s testimony to adequately prepare for cross-examination, which would, however, conflict with the right of Momčilo Perišić (“Accused”) to an expeditious trial.⁸

4. The Defence further submits that “the manner in which the Prosecution has presented the majority of the documents not on the [Rule 65 *ter* Exhibit List] is such that the documents have not been shown in open court, but instead are simply submitted as part of a ‘package’.”⁹ The Defence therefore argues that “the relevance and or authenticity of the documents is not explained by the witness’s testimony, nor does the Trial Chamber have the opportunity to thoroughly assess their relevance or authenticity before they are admitted.”¹⁰

5. Consequently, the Defence requests the Trial Chamber to clarify the standards and practice with regard to amendment of the Rule 65 *ter* Exhibit List in order to assure that: (1) “all parties have adequate, fair notice that the Prosecution is, in fact, seeking to amend the [Rule 65 *ter* Exhibit List] to add new exhibits;” (2) the Prosecution “meets its burden to show good cause as to why such amendments are necessary, permissible, and not prejudicial” to the Accused; and (3) the right of the Accused to “reasonable notice and reasonable opportunity to review this new evidence prior to its presentation in court” is protected.¹¹

B. Prosecution

6. On 23 October 2008, the “Prosecution’s Response to Momčilo Perišić’s Motion to Clarify Whether the Prosecution Must Request Leave to Amend the Rule 65*ter* Exhibit List” (“Response”) was filed publicly. The Prosecution submits that the exhibits at issue do not require amendment of the Rule 65 *ter* Exhibit List since the majority of them “were uploaded into eCourt as Rule 92*ter* witness packages”¹² and the remaining exhibits consist of a pseudonym sheet of a protected witness¹³ and extracts of larger exhibits previously given a Rule 65 *ter* exhibit number.¹⁴

⁷ Motion, para. 9.

⁸ Motion, para. 17.

⁹ Motion, para. 18.

¹⁰ Motion, para. 18.

¹¹ Motion, paras 11, 19.

¹² 92 *ter* Package of Alma Mulaosmanović-Čehajić (including documents Rule 65 *ter* No. 9249-9255), 92 *ter* Package of MP-229 (including documents Rule 65 *ter* No. 9256-9263), 92 *ter* Package of Slavica Livnjak (including documents Rule 65 *ter* No. 9264-9268), 92 *ter* Package of Enes Jašarević (including documents Rule 65 *ter* No. 9270-9277). See Response, paras 2, 7-8.

¹³ Ex. P21 (Rule 65 *ter* No. 9269). See Response, paras 2, 11.

7. The Prosecution argues that whereas Rule 65 *ter*(E) of the Rules of Procedure and Evidence (“Rules”) “sets out the Prosecution’s pre-trial obligations with respect to the filing of witness and exhibit lists”, Rule 92 *ter* “relates to oral proceedings before a Trial Chamber” which allow a Trial Chamber to admit evidence of a witness in the form of a written statement or transcript from prior proceedings before the Tribunal, provided that the witness appears for cross-examination.¹⁵ Following the guidance given by the Pre-Trial Judge, the Prosecution released in eCourt so-called “Rule 92 *ter* packages”, which include Rule 92 *ter* witnesses’ statements, prior transcripts and accompanying exhibits, once the witnesses were scheduled for testimony.¹⁶ The Prosecution assigned a Rule 65 *ter* number for each of these items since it was technically necessary to place them in eCourt.¹⁷

8. The Prosecution also asserts that the Defence’s argument that the Prosecution has failed to establish the relevance and authenticity of the Rule 92 *ter* materials is “both untimely and unspecific”.¹⁸ In particular, the Prosecution submits that exhibits accompanying Rule 92 *ter* statements and/or transcripts were admitted on the ground that they form “an inseparable and indispensable part” of the statements and/or transcripts, and that any objections should have been made prior to the relevant witness testifying or the Rule 92 *ter* statement or transcript being admitted.¹⁹

II. DISCUSSION AND CLARIFICATION

9. As a preliminary matter, the Trial Chamber understands the Defence submission to be a request for clarification on certain procedural rules, and not an objection to or a motion to exclude the exhibits which have been already admitted into evidence.

A. Whether Amendment of the Rule 65 *ter* Exhibit List is Required Generally

10. Rule 65 *ter* (E)(iii) and (G)(ii) dictates that an exhibit list submitted under this Rule must list the exhibits a party “intends to offer” during the trial. The purpose of the Rule 65 *ter* exhibit list is to give notice to one party that the other party intends to rely on a particular item at trial.²⁰ It

¹⁴ Ex. P12 (Rule 65 *ter* No. 9281), which is an excerpt of document Rule 65 *ter* No. 532; Ex. 20 (Rule 65 *ter* No. 9306), which is an excerpt of document Rule 65 *ter* No. 3412. See Response, paras 2, 11.

¹⁵ Response, paras 3-4.

¹⁶ Response, paras 7-8.

¹⁷ Response, para. 8. The Prosecution also explains that “Prosecution documents found on eCourt without Rule 65 *ter* numbers are *translations* of documents which have received Rule 65 *ter* numbers”, Motion, para. 8 (emphasis in original). The Trial Chamber accepts this explanation.

¹⁸ Response, para. 9.

¹⁹ Response, paras 5, 9.

²⁰ *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, para. 3;

follows that, in principle, an exhibit to be tendered into evidence during the trial proceedings must be listed on the tendering party's Rule 65 *ter* exhibit list. According to the jurisprudence of the Tribunal, a 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 justice.²¹ In exercising its discretion, the Trial Chamber must balance 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.²²

11. As specified above, the Prosecution's operative Rule 65 *ter* Exhibit List in this case was amended on a number of occasions.²³ In this context, the Trial Chamber wishes to underscore that although the Prosecution assigns a so-called "Rule 65 *ter* number" to each item when placing it in eCourt, a list of released documents available in eCourt is not an exhibit list, nor is it tantamount to a motion for amendment, within the meaning of Rule 65 *ter*. Rather, this is a tool aimed at facilitating a smooth running of the trial and assisting the opposite party in its preparations for trial.²⁴

12. The Trial Chamber recognises that there are documents, such as pseudonym sheets, the use of which at trial without an application for amendment of the Rule 65 *ter* Exhibit List would not cause prejudice to the Defence since the information involved does not place an additional burden on the Defence in its preparation. Neither would the use of extracts from larger documents already included in the Rule 65 *ter* Exhibit List cause prejudice to the Defence, provided that they are indicated as such in advance to enable the opposite party to trace them back to the Rule 65 *ter* Exhibit List, rather than appearing as new documents. Except for this category of documents, a motion for amendment of the Rule 65 *ter* Exhibit List will, in principle, be required before the

Prosecutor v. Rasim Delić, Case No. IT-04-83-T, Decision on Urgent Prosecution Motion for Leave to Amend its Exhibit List, 17 October 2007, p. 4.

²¹ *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 ("*First Milošević* 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 of Procedure and Evidence ("Rules") concerning the variation of the number of witnesses after the commencement of trial.

²² 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; *First Milošević* 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, 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.

²³ See para. 1 *supra*.

²⁴ Response, para. 8; *Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84-T, Trial Chamber's Clarification on Whether the Prosecution Must Request Leave to Amend its Rule 65 *ter* Exhibit List, 25 May 2007 ("*Haradinaj* Decision"), para. 5.

Prosecution can make use of an item at trial, if that item is not originally listed on the Rule 65 *ter* Exhibit List.²⁵

13. However, considering that a Rule 65 *ter* exhibit list is primarily an instrument of notice, an item not on a Rule 65 *ter* exhibit list may be admitted into evidence under *exceptional* circumstances where the right of the Accused to have adequate time to prepare for his defence has not been prejudiced, good cause has been shown, and it is in the interests of justice to do so.

B. Whether Amendment of the Rule 65 *ter* Exhibit List is Required for Rule 92 *ter* Items

14. The Trial Chamber now turns to the question as to how the above-mentioned principles²⁶ should apply when the evidence is presented pursuant to Rule 92 *ter*. This Rule allows for the admission of a witness's written statements and/or transcripts of testimony given by a witness in prior proceedings before the Tribunal, provided that the witness is present in court, available for cross-examination and attests to the accuracy of the statements and/or transcripts.²⁷ Such written statements and transcripts have the effect of replacing the witness's testimony which would otherwise be led in direct examination. The Defence will have been on notice of the general contents of Rule 92 *ter* witnesses' expected evidence through the Prosecution's Rule 65 *ter* witness list and witness summaries,²⁸ as well as their written statements and/or transcripts disclosed to the Defence pursuant to Rule 66(A)(ii). For these reasons, and provided that the above requirements have been complied with, it is not necessary to amend the Rule 65 *ter* Exhibit List with Rule 92 *ter* statements and transcripts.

15. However, exhibits associated with statements and/or transcripts of a Rule 92 *ter* witness should be on the tendering party's Rule 65 *ter* exhibit list, as the other items to be proffered as evidence at trial. If an associated exhibit is not on the Rule 65 *ter* exhibit list, the tendering party is to seek leave to add it to the Rule 65 *ter* exhibit list. The Trial Chamber may allow admission into evidence of an associated exhibit not on the Rule 65 *ter* exhibit list only where the right of the Accused to have adequate time to prepare for his defence has not been prejudiced, good cause has been shown, and it is in the interests of justice to do so.

²⁵ *Haradinaj* Decision, para. 6.

²⁶ See paras 10-13 *supra*.

²⁷ See also *Prosecutor v. Rasim Delić*, Case No. IT-04-83-T, Decision on Prosecution Motion to Admit Written Witness Statements Under Rule 92 *ter*, 27 September 2008, para. 10.

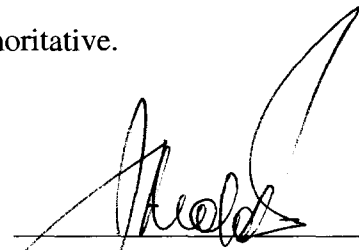
²⁸ Rule 65 *ter*(E)(ii)(a), (b) and (c).

III. DISPOSITION

16. For the reasons stated above and pursuant to Articles 20(1) and 21(4)(b) of the Statute and Rules 54 and 65 *ter* of the Rules, the Trial Chamber hereby

CLARIFIES that a party seeking to introduce into evidence an exhibit which is not on its Rule 65 *ter* exhibit list must seek leave of the Trial Chamber to amend its Rule 65 *ter* exhibit list.

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



Judge Bakone Justice Moloto
Presiding Judge

Dated this seventeenth day of November 2008

At The Hague

The Netherlands

[Seal of the Tribunal]