



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-95-5/18-T

Date: 28 January 2011

Original: English

IN THE TRIAL CHAMBER

Before: Judge O-Gon Kwon, Presiding Judge
Judge Howard Morrison
Judge Melville Baird
Judge Flavia Lattanzi, Reserve Judge

Registrar: Mr. John Hocking

Decision of: 28 January 2011

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON THE THIRD PROSECUTION MOTION FOR LEAVE TO
AMEND ITS RULE 65 TER EXHIBIT LIST**

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused

Mr. Radovan Karadžić

Standby Counsel

Mr. Richard Harvey

THIS 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 the “Third Prosecution Motion for Leave to Amend its Rule 65 *ter* Exhibit List with Confidential Appendix A”, filed by the Office of the Prosecutor (“Prosecution”) on 30 December 2010 (“Motion”), and hereby renders its decision thereon.

I. Background and Submissions

1. On 18 May 2009, the Prosecution filed its “Submission Pursuant to Rule 65 *ter* (E)(i)-(iii)”, with partly confidential Appendix III, containing a list of exhibits which it intended to offer into evidence in these proceedings. On 8 October 2009, the Trial Chamber rendered its “Decision on the Application of Rule 73 *bis*” in which it ordered the Prosecution to file a revised Rule 65 *ter* exhibit list after removing those exhibits related to the 62 witnesses removed from its witness list.¹ In compliance with this decision, the Prosecution filed the “Prosecution’s Submission of its Revised 65 *ter* Exhibit List with Confidential Appendix A” on 19 October 2009. On 14 December 2009, the Prosecution filed a motion seeking leave to supplement its exhibit list (“First Motion”), which was granted by the Chamber in a decision issued on 18 March 2010.² In accordance with that decision, the Prosecution filed a consolidated Rule 65 *ter* exhibit list on 31 March 2010 (“Revised Exhibit List”). On 17 May 2010, the Prosecution filed the “Second Prosecution Motion for Leave to Amend its Rule 65 *ter* Exhibit List (Mladić Notebooks)”, which was granted by the Chamber in a decision issued on 22 July 2010.³

2. In the Motion, the Prosecution requests the Trial Chamber’s permission to further amend its Revised Exhibit List. In particular, the Prosecution seeks leave to add 123 proposed exhibits listed in confidential Appendix A of the Motion. It submits that all of the proposed exhibits are relevant and of sufficient importance to justify their late addition to the Revised Exhibit List. The Prosecution further submits that adding them to its exhibit list “will enable the Prosecution to present a more complete set of material relevant and probative to the allegations in the Indictment” and will not cause any prejudice to the Accused because all of the items have been disclosed to the Accused and “this request is filed well before any of the items are proposed to be used in court”.⁴

¹ Decision on the Application of Rule 73 *bis*, 8 October 2009, para. 10.

² Decision on the Prosecution’s Motion for Leave to File a Supplemental Rule 65 *ter* Exhibit List, 18 March 2010 (“First Decision”).

³ Decision on the Second Prosecution Motion for Leave to Amend its Rule 65 *ter* Exhibit List (Mladić Notebooks), 22 July 2010 (“Second Decision”).

⁴ Motion, para. 1.

3. According to the Prosecution, the additional proposed exhibits it seeks to include in its exhibit list fall into two broad categories: (a) 37 items obtained by the Prosecution after 14 December 2009, when it filed the First Motion; and (b) 86 items determined by the Prosecution to be relevant on the basis of its continued analysis of material in its possession.⁵ In confidential Appendix A of the Motion, the Prosecution provides the following information for each proposed addition to its Revised Exhibit List: (a) the date the item was obtained by the Prosecution; (b) the date it was disclosed to the Accused; (c) the reason it was not included on the Prosecution's original Rule 65 *ter* exhibit list; (d) the witness(es) who will comment on the proposed item; and (e) its relevance to the case against the Accused.⁶

4. The Prosecution asserts that each proposed item has significant probative value to a live or anticipated issue in the case and/or to the Accused's participation in the joint criminal enterprises alleged in the Indictment.⁷ It further argues that all of the items proposed to be added have already been disclosed to the Accused and that he has had a "considerable period of time to review and evaluate the proposed exhibits".⁸ The Prosecution submits that the majority of the proposed exhibits are short and require little time to review and will be shown to witnesses called at a later stage of the case, allowing the Accused further time to review each item before it is tendered. Finally, as the Prosecution intends to tender the majority of the proposed exhibits through witnesses, it argues that this will allow the Accused an opportunity to challenge them in court.⁹

5. In his "Response to Third Prosecution Motion for Leave to Amend its Rule 65 *ter* Exhibit List", filed on 6 January 2011 ("Response"), the Accused states that he has no objection to the Motion.¹⁰ He notes that he reserves the right to object to the admission of individual exhibits when they are offered in court.¹¹

II. Applicable Law

6. As noted by the Trial Chamber in its First Decision, Rule 65 *ter* (E)(iii) of the Tribunal's Rules of Procedure and Evidence ("Rules") provides, *inter alia*, that the Prosecution shall file the list of exhibits it intends to offer within a time-limit set by the pre-trial Judge and not less than six weeks before the Pre-Trial Conference. If the Prosecution requests the addition of some

⁵ Motion, para. 5.

⁶ Motion, para. 6.

⁷ Motion, para. 7.

⁸ Motion, para. 10.

⁹ Motion, paras. 10–11.

¹⁰ Response, para. 1.

¹¹ Response, para. 2.

items to its exhibit list later than six weeks before the Pre-Trial Conference, the Trial Chamber may authorise this addition in the exercise of its inherent discretion to manage the trial proceedings, and if satisfied that this is in the interests of justice.¹²

7. When exercising this discretion, the Trial Chamber examines whether the Prosecution has shown good cause for its request and whether the items sought to be added are relevant and of sufficient importance to justify their late addition.¹³ The Trial Chamber may also take into account other factors which militate in favour of or against a requested addition,¹⁴ including whether the proposed evidence is *prima facie* relevant and of probative value to the charges against an accused,¹⁵ the complexity of the case, on-going investigations, and translation of documents and other materials.¹⁶ Finally, the Trial Chamber must carefully balance any amendment to the Prosecution's exhibit list with an adequate protection of the rights of the accused.¹⁷ That is, the Trial Chamber must be satisfied that amendments to the exhibit list at that stage of the proceedings provide an accused sufficient notice, and do not adversely affect his ability to prepare for trial.¹⁸

8. The Chamber emphasises again that there is a clear difference between the addition of an item to the Prosecution's list of potential exhibits pursuant to Rule 65 *ter* of the Rules and the admission of an item into evidence as an actual exhibit. By adding an item to its list of exhibits, the Prosecution gives notice to the Defence that it intends to rely on that item at trial, which will allow the Defence to prepare its case accordingly. Thus, in deciding whether to grant leave to add a particular item to the Rule 65 *ter* exhibit list the Trial Chamber need not assess its authenticity, relevance and probative value in the same way as it would when determining its admission at trial. However, the Prosecution should not be granted leave to add to its list of

¹² First Decision, para. 7; Second Decision, para. 7. See *Prosecutor v. Popović et al.*, Case No. IT-05-88-AR73.1, Decision on Appeals Against Decision Admitting Material Related to Borovčanin's Questioning, 14 December 2007 ("*Popović et al.* Appeal Decision"), para. 27; *Prosecutor v. Perišić*, Case No. IT-04-81-PT, Decision on Prosecution Motion for Leave to File a Fifth Supplemental Rule 65 *ter* Exhibit List with Annex A (Confidential), 29 August 2008, para. 10; *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, p. 3 ("*Dragomir Milošević* Decision").

¹³ *Popović et al.* Appeal Decision, para. 37; *Prosecutor v. Stanišić and Simatović*, Case No. IT-03-69-T, Confidential Decision on Prosecution Motion for Leave to Amend its Rule 65 *ter* Exhibit List, 8 May 2008 ("*Stanišić & Simatović* Decision"), para. 6.

¹⁴ *Stanišić & Simatović* Decision, para. 6.

¹⁵ *Dragomir Milošević* Decision, p. 3; *Prosecutor v. Popović et al.*, Decision on Prosecution's Motions for Leave to Amend Rule 65 *ter* Witness List and Rule 65 *ter* Exhibit List (Confidential), 6 December 2006, p. 7 ("*Popović et al.* Decision").

¹⁶ *Popović et al.* Decision, p. 7.

¹⁷ *Stanišić & Simatović* Decision, para. 6.

¹⁸ *Dragomir Milošević* Decision, p. 3.

exhibits items that are obviously irrelevant and would, therefore, ultimately be denied admission into evidence.¹⁹

III. Discussion

9. The Trial Chamber notes that the Motion was filed a considerable time after the commencement of the trial proceedings and of the hearing of evidence in this case, as well as over a year after it filed its First Motion. As such, in determining whether the addition of the proposed exhibits to the Prosecution's Rule 65 *ter* exhibit list is in the interests of justice, the Chamber will carefully consider the reasons provided by the Prosecution for its late request, the relevance of each proposed exhibit to the issues in this case, the dates of disclosure to the Accused, and the number and size of the additional proposed exhibits. The discussion below is therefore divided into two sections grouped by the reason given by the Prosecution for the late addition of each item to its Rule 65 *ter* exhibit list.

(i) Items received after the filing of the First Motion

10. The Prosecution seeks to add 37 items, listed in confidential Appendix A to the Motion, that it states were received after the filing of the First Motion. The proposed exhibits in this category include, *inter alia*, orders, reports, minutes from the 14th Session of the Supreme Command, articles, letters, photographs, maps, medical certificates, and videos relevant to events alleged in the Indictment and the Accused's alleged knowledge or involvement in such events, primarily related to the Srebrenica and Municipalities phases of the Prosecution's case. The Trial Chamber accepts that receipt of relevant, new items following the filing of a Rule 65 *ter* exhibit list can constitute good cause for the late addition of those items to the list. Having reviewed the descriptions of these items provided by the Prosecution, the Chamber considers that they appear generally relevant to the issues in this case.

11. Of the 37 items proposed by the Prosecution under this category, 30 are not yet available in the e-court system. Without access to these documents, the Trial Chamber is unable to examine their nature, relevance, and size in any detail. Although only one of the documents which is available in e-court is of a considerable length in pages,²⁰ the Trial Chamber has not been able to review the majority of the remaining documents to determine their length and can only refer to the Prosecution's submission in the Motion that the majority of the documents are

¹⁹ *Stanišić & Simatović* Decision, para. 7; *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; *Boškoski & Tarčulovski* Decision, para. 3.

²⁰ As noted by the Prosecution in the Motion, this document is the Minutes from the 14th Session of the Supreme Command, dated 5 April 1995 (assigned Rule 65 *ter* number 22049), and is 100 pages.

of fewer than three pages. However, most of the documents were disclosed to the Accused on, or before, 9 July 2010, providing him with notice that they were likely to become part of the Prosecution's case against him.²¹ The Chamber notes that the Prosecution lists the item assigned Rule 65 *ter* number 22957 as a "delayed disclosure exhibit" in the Motion. The Prosecution further submits that it received this item on 26 August 2010, but it has not yet been disclosed to the Accused. The Prosecution has not provided any description for this item in the Motion and it is not available in court; as such, the Chamber has been unable to determine its *prima facie* relevance. Despite the absence of an objection from the Accused, the Chamber finds that the information provided by the Prosecution in the Motion related to Rule 65 *ter* number 22957 is insufficient. Therefore, the Chamber denies the Prosecution's request to add this item to its Rule 65 *ter* exhibit list without prejudice; the Prosecution may reapply for its addition once it provides the Chamber with further information regarding the relevance of the item and how it fits into its case. With the exception of this item, the Trial Chamber is satisfied that the addition of the remaining 36 items to the Prosecution's Rule 65 *ter* exhibit list would not prejudice the Accused and therefore grants the Motion insofar as it pertains to the remaining items included in this first category.

(ii) Items determined to be relevant on the basis of continued analysis

12. The Prosecution seeks to add 86 items to its Rule 65 *ter* exhibit list that were received before the filing of the First Motion, but were only subsequently determined to be relevant to its case on the basis of "continued analysis". The proposed exhibits in this category include, *inter alia*, orders, decisions, reports, maps, news reports, intercepts, and letters relevant to events alleged in the Indictment, the Accused's alleged command and control of Bosnian Serb forces, the flow of communication within the municipalities, as well as the Accused's alleged role in the joint criminal enterprises alleged in this case. The Chamber also notes that the proposed items in this second category primarily relate to the Municipalities and Srebrenica phases of the Prosecution's case, though a small number of them relate to the Hostages phase of its case. Having reviewed the descriptions of these items provided by the Prosecution, the Chamber considers that they appear generally relevant to the issues in this case.

13. Once again, the Chamber considers that while it may be inevitable that certain items are only found to be relevant to the Prosecution's case at a late stage in its trial preparations, these cases should be exceptional, particularly when the Prosecution has been in possession of the items in question for a long time. The Chamber must assess whether it would be fair to the

²¹ Four additional items were disclosed to the Accused after 9 July 2010, and the most recent disclosure was of one document on 29 December 2010 (assigned Rule 65 *ter* number 22975).

Accused to allow the 86 items in this category to be added to the Prosecution's Rule 65 *ter* exhibit list at this stage. Most of these 86 items were disclosed to the Accused on, or prior to, 24 June 2010. However, 14 of them were only recently disclosed to the Accused, between October and December 2010.²²

14. For those items disclosed to the Accused prior to October 2010, the Chamber considers that he would have been put on notice, by their disclosure, that they might form part of the Prosecution's case against him and that he has had sufficient time to analyse them. For the remaining 14 items disclosed only between October and December 2010, the Chamber would normally consider the size or length of these items in assessing whether the Accused has had sufficient time to analyse them, as well as consider their relevance to the Prosecution's case. Again, it is unable to do so for four of these 14 items, as 72 of the total 86 items in this category have not been made available to the Chamber through the e-court system or otherwise. In reviewing the 14 items which are available in e-court, which include 10 items which were only disclosed to the Accused between October and December 2010, one document (assigned Rule 65 *ter* number 23069) is 116 pages,²³ but the remainder of the documents are of no more than a few pages in length. Finally, the Prosecution requests leave to add the item assigned Rule 65 *ter* number 23031 to its exhibit list; however, this document is a duplicate of Rule 65 *ter* number 09163, which is already included on the Revised Exhibit List. Therefore, the Chamber denies the Prosecution leave to add Rule 65 *ter* number 23031 to its exhibit list.

15. In light of the fact that the Accused has not argued that his rights would be prejudiced by the addition of these items to the exhibit list, the Trial Chamber is satisfied that, except for the document assigned Rule 65 *ter* number 23031, it is in the interests of justice to permit the Prosecution to add all of the remaining items listed in this second category to its Rule 65 *ter* exhibit list. The Chamber further notes that the Prosecution submits that the document assigned Rule 65 *ter* number 22050 will be tendered through witness KDZ281 (Ekrem Suljević), who has already testified in this case.²⁴ It is thus unclear how the Prosecution intends to tender this document once it is added to its Rule 65 *ter* exhibit list, although this does not affect the Chamber's decision that it should be so added.

²² Five of the aforementioned items disclosed in November 2010 were disclosed upon permission being granted by Rule 70 providers.

²³ The Chamber notes that an English translation for the document assigned Rule 65 *ter* number 23069 is not available in e-court.

²⁴ The Prosecution submitted that it would tender the document assigned Rule 65 *ter* number 22050 through Ekrem Suljević in the notification filed for this witness; however, the Prosecution did not seek leave to add it to its Rule 65 *ter* exhibit list at that point, and did not ultimately tender this document through the witness. Prosecution Notification of Submission of Written Evidence Pursuant to Rule 92 *ter* with Appendix A: Witness Ekrem Suljević, 8 June 2010.

IV. Disposition

16. For the reasons set out 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:

- a) **DENIES** the Prosecution leave to add the documents assigned Rule 65 *ter* numbers 23031 and 22957 (without prejudice) to its Rule 65 *ter* exhibit list;
- b) **GRANTS** the Prosecution leave to add the remaining 121 items listed in confidential Appendix A to the Motion to its Rule 65 *ter* exhibit list; and
- c) **ORDERS** the Prosecution to file a consolidated Rule 65 *ter* exhibit list by 11 February 2011, which shall include all of the proposed exhibits listed in the Revised Exhibit List; the items permitted to be added to the Prosecution's Rule 65 *ter* exhibit list by the Second Decision; and those items added in accordance with the present Decision, and to ensure that all items on the new Rule 65 *ter* exhibit list are available to the Chamber through the e-court system.

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



Judge O-Gon Kwon,
Presiding

Dated this twenty-eighth day of January 2011
At The Hague
The Netherlands

[Seal of the Tribunal]