

K-09-92-T
D 46517 - D 46513
02 November 2012

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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: 2 November 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: 2 November 2012

PROSECUTOR

v.

RATKO MLADIĆ

PUBLIC

**DECISION ON PROSECUTION THIRD MOTION TO AMEND
RULE 65 TER EXHIBIT LIST**

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 20 July 2012, the Prosecution filed a motion (“Motion”) seeking leave to add 194 documents (“Proposed Exhibits”) to its Rule 65 *ter* exhibit list of 10 February 2012 (“Exhibit List”).¹ The Defence responded on 3 August 2012 (“Response”).² The Prosecution requested leave to reply on 10 August 2012, attaching its reply (“Reply”).³ The Chamber orally granted leave to reply on 21 August 2012.⁴

II. SUBMISSIONS OF THE PARTIES

2. In its Motion, the Prosecution seeks leave to supplement the Exhibit List by adding different sorts of proof of death documents.⁵ The Prosecution submits that the Proposed Exhibits are *prima facie* relevant and important, as they help to establish the death of victims relevant to the Fourth Amended Indictment.⁶ The Prosecution argues that there exists good cause for not having sought to add the Proposed Exhibits at an earlier stage, and that it has exercised due diligence in identifying the Proposed Exhibits.⁷ According to the Prosecution, the documents were discovered during the ongoing document review only now due to the volume of material in this case.⁸ The Prosecution contends that at this stage of the proceedings, the proposed amendment would not prejudice the Defence, considering that the Proposed Exhibits have been disclosed to the Defence on 29 June 2012, are straightforward in their content, and do not involve material directly relating to the responsibility of the Accused.⁹

3. The Defence opposes the addition of the Proposed Exhibits to the Exhibit List and raises as a preliminary matter that the majority do not have an English or French translation attached.¹⁰ It argues that the Prosecution has not exercised due diligence in seeking to add the Proposed Exhibits at the earliest opportunity, as most of the Proposed Exhibits have been in the Prosecution’s possession for years.¹¹ The Defence adds that the Prosecution even admits that it knew about these documents, as it foreshadowed their addition multiple times.¹² It argues that the Prosecution has

¹ Prosecution Third Motion to Amend Rule 65 *ter* Exhibit List, 20 July 2012.

² Defense Response to the Prosecution Third Motion to Amend Rule 65 *ter* Exhibit List, 3 August 2012.
Prosecution Request for Leave to Reply to Defence Response to the Prosecution Third Motion to Amend Rule 65 *ter* Exhibit List, 10 August 2012;

⁴ T. 1285-1286.

⁵ Motion, para. 1.

⁶ Motion, paras 7-9.

⁷ Motion, paras 10-13.

⁸ Motion, paras 11-12; Reply, para. 6,

⁹ Motion, paras 14-17; Reply, paras 12, 17-18.

¹⁰ Response, paras 1-2.

¹¹ Response, paras 7-8, 12.

¹² Response, paras 11-12.

repeatedly violated its disclosure obligations, and that as a result thereof, the rights of the Accused would be unfairly and adversely affected should the Motion be granted.¹³ The Defence requests the Chamber to therefore deny the Motion in its entirety, or in the alternative, to adjourn the proceedings for five months to give it time to review the Proposed Exhibits.¹⁴

III. APPLICABLE LAW

4. The Chamber recalls and refers to the applicable law governing amendments to the Rule 65 *ter* exhibit list as it was previously set out in a decision.¹⁵

IV. DISCUSSION

5. As a preliminary matter, the Defence notes that the majority of the Proposed Exhibits have not been translated in an official language of this Tribunal.¹⁶ On 21 August 2012, the Chamber requested the Prosecution to upload English translations of all Proposed Exhibits into eCourt.¹⁷ On 3 October 2012, the Prosecution informed the Chamber and the Defence through an informal communication that all English translations had been uploaded into eCourt. The Chamber notes that the Defence has not argued that it would be prejudiced by the missing English translations. Further considering that the Proposed Exhibits have been uploaded in either BCS or English in eCourt since 6 July 2012, the Chamber finds that the Prosecution has provided the documents to the Defence in a language it understands. On 21 August 2012, the Chamber further requested the Prosecution to review the Proposed Exhibits so as to ensure that there is no overlap with any of the adjudicated facts of which the Chamber has taken judicial notice.¹⁸ On 21 September 2012, the Prosecution informed the Chamber through an informal communication that it had reviewed the Proposed Exhibits, and that it consequently withdrew its request to add the documents bearing Rule 65 *ter* nos 28185 and 28304 to its Exhibit List. These exhibits will therefore not be dealt with further.

6. The Prosecution categorised the Proposed Exhibits into four groups: 114 court rulings of death; 41 missing persons lists or reports; 16 photographs and/or sketches of autopsies and exhumation sites; and 21 other relevant exhibits such as autopsy reports, death certificates, exhumation reports, and identification reports.¹⁹

¹³ Response, paras 19-22.

¹⁴ Response, paras 22-23.

¹⁵ Decision on Prosecution Second Motion to Amend Rule 65 *ter* Exhibit List, 27 June 2012.

¹⁶ Response, para. 2.

¹⁷ T. 1285-1286.

¹⁸ Ibid.

¹⁹ Motion, paras 1, 7; Annex A.

7. The Chamber finds the Proposed Exhibits to be *prima facie* relevant and of probative value, as they go to the proof of the death of scheduled victims, or provide information on how victims have been identified. There is no dispute between the parties in this respect. The Chamber does, however, express its concern about the documents bearing Rule 65 *ter* nos 28118, 28196, and 28263. With regard to the document bearing Rule 65 *ter* no. 28118, a data-input form through which information on breaches of humanitarian law in the former Yugoslavia could be provided, the Chamber notes that the document has an original version which is both in BCS and in English, and an attachment which appears to be an extract thereof, containing only the answers to the questions. The Prosecution has indicated that this Proposed Exhibit is relevant with regard to a number of scheduled victims.²⁰ In addition, the Proposed Exhibit contains information on persons who are not listed as victims in the Schedules to the Indictment. Considering the length of the original version, and that the attachment also contains information on victims not listed in the Schedules to the Indictment, the Chamber invites the Prosecution, should it wish to tender this document into evidence, to excerpt it appropriately. With regard to the documents bearing Rule 65 *ter* nos 28196 and 28263, the Chamber notes that neither document contains any signature, and that the document bearing Rule 65 *ter* no. 28196 does not contain an official heading. The Chamber may therefore require more information with regard to the authors of these documents, should the Prosecution seek to tender these documents into evidence.

8. The Chamber notes that the Motion has been filed more than five months after the Prosecution filed its Exhibit List. However, the Prosecution's explanation for seeking leave to add the Proposed Exhibits at this stage of the proceedings is that the documents were discovered only now during the ongoing document review due to the volume of material in this case. Furthermore, in its assessment of whether the addition of the Proposed Exhibits to the Exhibit List at this stage of the proceedings will place an undue burden on the Defence, the Chamber has considered, *inter alia*, the importance of the Proposed Exhibits to the Prosecution case, the quantity and complexity of the Proposed Exhibits, as well as their availability to the Defence. It considers that, despite the large number of Proposed Exhibits, the documents are either of limited length, or are photographic materials. The Chamber further considers that the Proposed Exhibits do not appear to be of a complex nature. Additionally, the Proposed Exhibits have been available to the Defence in either BCS and/or English since 29 June 2012, thereby having given the Defence further time to examine them. Accordingly, the Chamber finds that the arguments raised by the Prosecution sufficiently support that the addition of the Proposed Exhibits to the Exhibit List will not unduly burden the Defence and does not, therefore, warrant an adjournment of the proceedings. Despite the late

²⁰ Motion; Annex A, p. 1.

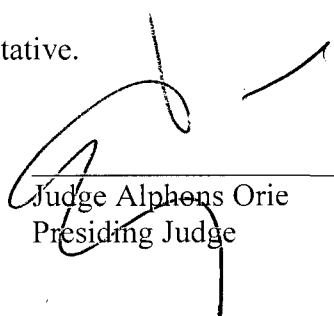
request to add the Proposed Exhibits to the Exhibit List and the objections raised by the Defence, the Chamber is satisfied that it is nevertheless in the interests of justice to grant the Motion.

9. Without further specification and elaboration, the Defence's argument that other disclosure violations would justify a denial of the Motion has not convinced the Chamber. To the extent disclosure obligations were not timely met by the Prosecution, the Chamber has ordered adequate remedies and the Chamber does not find that those instances have a bearing on the substance of the present motion.

V. DISPOSITION

10. For the foregoing reasons, pursuant to Articles 20 (1) and 21 (4) of the Statute and Rule 65 *ter* (E) (iii) of the Rules, the Chamber **GRANTS** the Motion in part, finds the Prosecution's request for the admission of the documents bearing Rule 65 *ter* nos 28185 and 28304 to be **MOOT**, and **DENIES** the Defence request for a five month adjournment of the proceedings.

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



Judge Alphons Orie
Presiding Judge

Dated this Second of November 2012.
At The Hague
The Netherlands

[Seal of the Tribunal]