

IT-04-84-T
D25565 - D25559
22 NOVEMBER 2007

25565
AT



**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-04-84-T
Date: 22 November 2007
Original: English

IN TRIAL CHAMBER I

Before: Judge Alphons Orie, Presiding
Judge Frank Höpfel
Judge Ole Bjørn Støle

Registrar: Mr Hans Holthuis

Decision of: 22 November 2007

PROSECUTOR

v.

**RAMUSH HARADINAJ
IDRIZ BALAJ
LAHI BRAHIMAJ**

PUBLIC

**DECISION ON THE ORAL APPLICATION TO ADD DOCUMENTS TO THE
PROSECUTION'S RULE 65 TER EXHIBITS LIST AND THE ADMISSION OF
DOCUMENTS TENDERED THROUGH WITNESS ŽIVANOVIĆ**

Office of the Prosecutor

Mr David Re
Mr Gramsci di Fazio
Mr Gilles Dutertre
Mr Philip Kearney

Counsel for Ramush Haradinaj

Mr Ben Emmerson, QC
Mr Rodney Dixon
Ms Susan L. Park

Counsel for Idriz Balaj

Mr Gregor Guy-Smith
Ms Colleen Rohan

Counsel for Lahi Brahimaj

Mr Richard Harvey
Mr Paul Troop

I. Procedural history and parties' submissions

1. Dragan Živanović, a former high-ranking officer of the Yugoslav Army ("VJ"), commenced his testimony in this case on 11 October 2007. Just before his testimony, the Balaj Defence raised an objection in court to 25 (out of a total of 90) annexes attached to Mr Živanović's Rule 92 *ter* statement. It argued that they were not on the Prosecution's Rule 65 *ter* exhibits list, that no application had been made for their inclusion on that list, and that no good cause had been shown for their addition to the list.¹ The Balaj Defence notified the Chamber that a written motion expanding on its arguments was being filed.²

2. The Chamber asked the Prosecution to respond to the matter, bearing in mind that a similar issue had arisen during the same week in relation to a different witness.³ On that occasion, the Chamber had reminded the Prosecution of an earlier clarification from 25 May 2007 on the making of amendments to the Rule 65 *ter* exhibits list, by reading out paragraph 6 of that clarification, where the Chamber held that:

In relation to the documents concerned by the Motion (such as pseudonym sheets or maps), the Chamber agrees that the "flexible" approach to introduce such documents described by the Prosecution is suited to trials of this kind and does not compromise the rights of the Accused. However, as conceded by the Prosecution, if any new documents are of substantive nature, a formal motion for amendment of the Rule 65 *ter* exhibit list will be in order. The Chamber will then decide whether any such documents could be presented and tendered before it on the basis of the parties' submissions and the law.⁴

3. In view of this, the Prosecution made an oral application to add the 25 contested documents to its Rule 65 *ter* exhibits list.⁵ It argued that no prejudice to the Defence arose, that the Defence had the documents in its possession for a sufficient amount of time to prepare its investigations, and that the Defence was on notice of the Prosecution's intention to use the contested documents with Mr Živanović.⁶ The Balaj Defence responded that the Prosecution had failed to follow the procedure for the amendment of its exhibits list set out by

¹ T. 9258-9259.

² *Ibid.*

³ T. 9278.

⁴ T. 9096; Trial Chamber's Clarification on Whether the Prosecution Must Request Leave to Amend its Rule 65 *ter* Exhibit List, 25 May 2007 ("Clarification").

⁵ T. 9279.

⁶ T. 9279-9281.

the Chamber and frequently disclosed material late, which made it difficult for the Defence to adequately prepare.⁷

4. In its written filing of 11 October 2007, the Balaj Defence reiterated its arguments set out above and specified the annexes it objected to as being annexes: 1, 2, 3, 9, 11, 15, 16, 18, 25, 26, 28, 30, 32, 48, 49, 50, 52, 56, 57, 58, 60, 62, 75, 84 and 88.⁸ These were assigned, respectively, the following MFI (marked for identification) numbers by the Registrar: P1019, P1020, P1021, D168 (see below), P1028, P1032, P1033, P1035, P1042, P1043, P1045, P1046, P1048, P1062, P1063, P1064, P1066, D165 (see below), P1069, P1070, P1071, P1073, P1085, P1094 and P1098.

5. On 23 October 2007, the Chamber's legal staff sent an email to the parties on behalf of the Chamber, asking the Defence teams to inform the Chamber whether they had any further objections to the admission of any of the annexes tendered by the Prosecution through witness Živanović. The Prosecution was also asked to indicate whether it had any objections to the admission of any documents tendered by the Defence through the same witness, and to make further submissions showing good cause for its oral application of 11 October 2007. Also in that email, the Balaj Defence was allowed to file a reply to any such submissions by the Prosecution.

6. On 28 October 2007, the Haradinaj Defence notified the Chamber, by email, that it had no objection to the admission of the Prosecution's proposed exhibits through Mr Živanović. It requested that MFI documents D179, D180, and D182 be admitted into evidence.

7. On 30 October 2007, the Prosecution filed further submissions arguing that good cause existed to add the contested documents to its exhibits list, that the documents are relevant and "highly probative", that it would be in the interests of justice to allow the Prosecution's oral application, that the documents are integral to the understanding of Mr Živanović's testimony, and that the Balaj Defence would suffer no procedural prejudice by the addition of these documents to the Prosecution's exhibits list.⁹

8. The Prosecution specified that it had obtained 16 of the 25 documents in mid-March 2007, after the start of the trial, and that they were disclosed to the Defence on 10 April 2007

⁷ T. 9282-9284.

⁸ Idriz Balaj's Objections to Annexes to 92ter Statement of Dragan Živanović, 11 October 2007.

⁹ Prosecution's Further Submissions on Its Motion to Add Military Documents to Its Rule 65 *ter* List", 30 October 2007, paras 2, 6, 9, 10.

through the Electronic Disclosure Suite (“EDS”).¹⁰ According to the Prosecution, the Defence was on notice by 24 August 2007, at the latest, that the Prosecution planned to use these 16 documents with Mr Živanović as that was the date on which all annexes attached to Mr Živanović’s Rule 92 *ter* statement were disclosed to the Defence.¹¹ The Prosecution specified that annex 56 had already been admitted into evidence as a Defence exhibit and that further seven documents were identified as relevant only during the interview with Mr Živanović.¹² According to the Prosecution, these seven documents were attached to Mr Živanović’s first statement dated 23 January 2007 and were disclosed to the Defence, together with that statement, on 13 February 2007.¹³ The Prosecution added that the Balaj Defence was therefore on notice of the Prosecution’s intention to use these seven documents with Mr Živanović, “some eight months” before his testimony which, as mentioned above, commenced on 11 October 2007.¹⁴ It further added that the Haradinaj Defence used some of the contested documents in its cross-examination of Mr Živanović.¹⁵

9. The Prosecution indicated that it had no objections to the admission of any documents tendered by the Defence through Mr Živanović.¹⁶

10. On 31 October 2007, the Balaj Defence filed its Reply to the Prosecution’s Further Submissions arguing that the Prosecution had still failed to show good cause for its application.¹⁷ According to the Balaj Defence, the Prosecution had not shown good cause why it had waited “almost seven months” to seek to add 16 of the 25 documents to its exhibits list.¹⁸ The Balaj Defence submitted that Rule 65 *ter* requires the Prosecution to “identify and file its trial exhibits” before the start of the trial and that it is not up to the Defence to go through all the material disclosed to it by the Prosecution pursuant to the Rules, guessing which documents may be used at trial.¹⁹ It further submitted that the disclosure through the EDS does not relieve the Prosecution to show good cause for any amendments to its exhibits list.²⁰ Finally, the Balaj Defence submits that “the point of Rule 65 *ter* is to provide adequate notice to the Defence and an opportunity to prepare for and meet the Prosecution case” and

¹⁰ Ibid., paras 2-4.

¹¹ Ibid., para. 4.

¹² Ibid., paras 2-3.

¹³ Ibid., para. 5.

¹⁴ Ibid., para. 5.

¹⁵ Ibid., para. 8.

¹⁶ Ibid., para. 12.

¹⁷ Idriz Balaj’s Reply to Prosecution’s Further Submissions on Its Motion to Add Military Documents to Its Rule 65*ter* List”, 31 October 2007.

¹⁸ Ibid., para. 8.

¹⁹ Ibid., para. 11.

that this “notice is essential to afford Mr. Balaj his rights, under Article 21 of the Statute, to adequate time and facilities to prepare and present a defence”.²¹

11. The Brahimaj Defence made no submissions on this matter.

II. Discussion

12. The Rule 92 *ter* statement of Mr Živanović was admitted into evidence as exhibit P1017, under seal, on 11 October 2007. The public version of this exhibit, concealing the name of a protected witness was given the MFI number P1018. P1102 (MFI) is a concordance table linking the annex numbers of the Rule 92 *ter* statement with MFI or exhibit numbers. These two documents, which are not subject to any objections, are hereby admitted into evidence.

13. In total, 90 annexes, all of which are VJ military documents, were attached to the Rule 92 *ter* statement of Mr Živanović. In relation to the admission of 65 of these 90 annexes, there are no objections from any of the Defence teams. Six out of these 65 annexes are already Defence exhibits; in particular, annexes 29, 36, 46, 53, 59 and 66 are, respectively, exhibits D70, D73, D75, D80, D82 and D83.²² The Chamber considers the remaining 59 documents relevant, as they tend to provide information about the background to the indictment, in particular, the alleged armed conflict, the organization of the VJ, and the control of territory. They are also necessary for the full understanding of Mr Živanović’s evidence. These documents are therefore admitted into evidence.

14. As to the documents used by the Haradinaj Defence with Mr Živanović, the Chamber notes that D179 is a letter from General Perišić to Slobodan Milošević which discusses the relationship between the VJ and the Serbian Ministry of Interior units in Kosovo/Kosova; D180 and D182 are video excerpts from BBC news items about Kosovo/Kosova, with the accompanying transcripts; and D181 is a map used with the witness. MFI documents D184, D185 and D186 used by the Balaj Defence with Mr Živanović are reports of the Council for the Defence of Human Rights and Freedoms dated July and August 1998. All of these documents assist the Chamber in understanding Mr Živanović’s evidence and the situation in Kosovo/Kosova at the relevant time and are therefore admitted into evidence.

²⁰ Ibid., para. 12.

²¹ Ibid., para. 15.

²² See P1102.

15. MFI document D183 tendered by the Brahimaj Defence contains only the English translation of what seems to be a Serbian military document and is missing the original. It is therefore not admitted into evidence.

16. Of the 25 documents objected to by the Balaj Defence, two have already been admitted into evidence as Defence exhibits (annex 56 as D165 and annex 9 as D168). The objection therefore concerns 23 documents.

17. Requests for the amendment of the Rule 65 *ter* exhibits list after the commencement of a trial are a common occurrence at the Tribunal and there is extensive jurisprudence on the question when such a request may be granted.²³ The Chamber has held that “such requests must be considered with full respect to the Accused’s right to a fair and expeditious trial and his right to adequate notice of the case against him, as well as to other rights guaranteed by Articles 20 and 21 of the Statute”.²⁴

18. The Chamber is of the view that the 23 documents concerned are part of a larger body of evidence which relates to the alleged armed conflict, organization of the VJ, and control of territory in Kosovo/Kosova at the relevant time and to which the 59 documents discussed above also belong. This evidence is of a kind which the Defence could reasonably expect to receive from Mr Živanović. The Balaj Defence did not refer to any specific information in the 23 documents that was new, unforeseeable or prejudicial to it, or that would have required further investigation. The Chamber finds that, despite the late oral application by the Prosecution to use the contested documents in this case, the addition of the 23 documents is not prejudicial to the Defence. The Chamber therefore decides to allow the Prosecution’s application to add the 23 documents to the Prosecution’s exhibits list. For the reasons set out above, the Chamber considers these documents to be relevant for this case and for the understanding of Mr Živanović’s evidence, and decides to admit them into evidence.

²³ Clarification, para. 4.

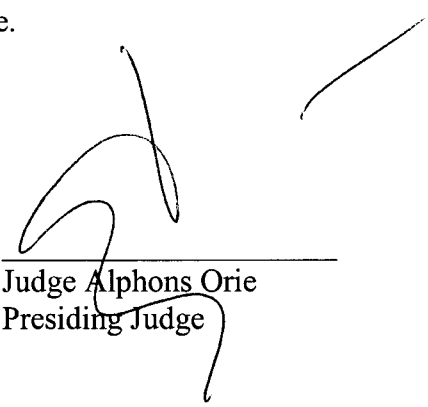
²⁴ *Ibid.*, para. 4.

III. Disposition

19. For the foregoing reasons, the Chamber:

1. **ALLOWS** the Prosecution's application to add the 23 documents discussed above to its Rule 65 *ter* exhibits list;
2. **ADMITS** all exhibits tendered by the Prosecution through Mr Živanović;
3. **ADMITS** all exhibits tendered by the Defence through Mr Živanović, with the exception of MFI D183 whose status is to be changed by the Registrar to MNA (marked not admitted).

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



Judge Alphons Orié
Presiding Judge

Dated this 22nd day of November 2007
At The Hague
The Netherlands

[Seal of the Tribunal]