



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: 19 October 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: 19 October 2011

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON PROSECUTION'S MOTION FOR LEAVE
TO AMEND ITS 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 “Prosecution’s Motion for Leave to Amend its Exhibit List,” filed on 4 October 2011 (“Motion”), and hereby issues its decision thereon.

I. Background and Submissions

1. On 18 May 2009, the Office of the Prosecutor (“Prosecution”) filed its “Submission Pursuant to Rule 65 *ter* (E)(i)-(iii)”, containing a list of exhibits it intended to tender in these proceedings. On 8 October 2009, the 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the Prosecution to file a revised Rule 65 *ter* exhibit list after removing those exhibits related to the 62 witnesses withdrawn from its witness list.¹ In compliance with this decision, the Prosecution filed the “Prosecution’s Submission of its Revised 65 *ter* Exhibit List with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 (“Original Exhibit List”). On 14 December 2009, the Prosecution filed a motion seeking leave to supplement the Original Exhibit List, 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. 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 On 30 December 2010, the Prosecution filed the “Third Prosecution Motion for Leave to Amend its Rule 65 *ter* Exhibit List with Confidential Appendix A” (“Third Motion”), which the Chamber granted in part on 28 January 2011.⁴ In accordance with that decision, the Prosecution filed a second consolidated Rule 65 *ter* exhibit list on 11 February 2011 (“Second Revised Exhibit List”).

2. In the Motion, the Prosecution requests that it be allowed to further amend the Second Revised Exhibit List to include six new proposed items bearing 65 *ter* numbers 40582, 23463, 35043A, 23464, 23465, and 23466.⁵

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 Decision on the Third Prosecution Motion for Leave to Amend its Rule 65 *ter* Exhibit List, 28 January 2011 (“Third Decision”).

⁵ Motion, paras. 1, 24.

3. First, according to the Prosecution, proposed 65 *ter* 40582 is an updated version of the “Srebrenica Trial Video” (65 *ter* 40010), which includes at least four video clips on the Second Revised Exhibit List, one clip already admitted into evidence, and a clip of 2 minutes and 36 seconds not on the Second Revised Exhibit List (“New Srebrenica Clip”).⁶ The New Srebrenica Clip depicts General Ratko Mladić, Colonel Petar Salapura, and Zvonko Bajagić in the centre of Srebrenica on 13 July 1995.⁷ The Prosecution argues that it has good cause for requesting the addition of this video clip because it received the new footage after filing the Original Exhibit List.⁸ The Prosecution also contends that the New Srebrenica Clip was not included in the Third Motion because the “Srebrenica Trial Video” was not yet fully compiled and the decision had not yet been made to include the New Srebrenica Clip in the compilation.⁹

4. Second, according to the Prosecution, proposed 65 *ter* 23463 is a 1996 order from RS MUP Minister Dragan Kijac to the RS MUP to issue false identification documents to eight members of the VRS 10th Sabotage Detachment.¹⁰ The Prosecution argues that this order is relevant and of sufficient importance to justify adding it to the Second Revised Exhibit List because, *inter alia*, it shows that the MUP and VRS were protecting members of the 10th Sabotage Detachment from prosecution by the Tribunal.¹¹ The Prosecution contends that it has good cause for adding the document because the order came into its possession after the filing of the Original Exhibit List.¹² It also argues that the order was not included in the Third Motion because its relevance became apparent only during the Prosecution’s preparation for the testimony of Colonel Petar Salapura, the Chief of the VRS Main Staff Sector for Intelligence Affairs, in another case in May 2011.¹³ The Prosecution argues that the addition of this document will not prejudice the Accused because it was disclosed to him over one year ago, is one page in length, and is not proposed to be used until the Srebrenica component of the case.¹⁴

5. Third, according to the Prosecution, proposed 65 *ter* 35043A is a tape containing a conversation between the Accused and VRS Drina Corps Commander General Milenko Živanović on or around 8 July 1995 regarding Srebrenica.¹⁵ The Prosecution argues that the conversation is relevant and of sufficient importance to justify its addition to the Second Revised

⁶ Motion, para. 6.

⁷ Motion, para. 7.

⁸ Motion, para. 7.

⁹ Motion, para. 7.

¹⁰ Motion, para. 9.

¹¹ Motion, para. 10.

¹² Motion, para. 11.

¹³ Motion, para. 11.

¹⁴ Motion, para. 12.

¹⁵ Motion, paras. 13–23.

Exhibit List because it relates to, *inter alia*, the Accused's command and control over the Drina Corps and his real-time awareness of events in Srebrenica.¹⁶ The Prosecution contends that the tape came into its possession after the filing of the Original Exhibit List and that it had not completed its analysis of the tapes by the time of the Third Motion.¹⁷ The Prosecution argues that the addition of this item to the Second Revised Exhibit List will not cause unfair prejudice to the Accused because it was already disclosed to him one year ago, the Accused was granted adjournment to review it, and the Prosecution will not use the document until the Srebrenica component of the case.¹⁸

6. Finally, the Prosecution argues that proposed 65 *ter* numbers 23464, 23465, and 23466 are each relevant and of sufficient importance to justify their inclusion to the Second Revised Exhibit List because each assists in dating the New Srebrenica Clip.¹⁹ The Prosecution argues that there is good cause for its request because of these items' relevance, their brief length of four pages total, the fact that they will not be used until the Srebrenica component of the case, and the fact that they were disclosed to the Accused on 21 December 2010 (in the case of 65 *ter* 23464) or have been available on the Electronic Disclosure System ("EDS") since 2008 (in the cases of 65 *ter* numbers 23465 and 23466).²⁰

7. In his "Response to Motion for Leave to Amend Exhibit List", filed on 5 October 2011 ("Response"), the Accused states that he has no objection to the Motion.²¹ He notes that he reserves the right to object to the admission of individual documents when they are tendered in court.²²

II. Applicable Law

8. 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 items to its exhibit list later than six weeks before the Pre-Trial Conference, the Chamber may authorise this addition in the exercise of its

¹⁶ Motion, para. 15.

¹⁷ Motion, para. 16.

¹⁸ Motion, para. 16; Decision on Accused's Motion for Suspension of Proceedings, 18 August 2010, para. 8.

¹⁹ Motion paras. 18, 20.

²⁰ Motion, paras. 19, 23.

²¹ Response, para. 1.

²² Response, para. 1.

inherent discretion to manage the trial proceedings and if satisfied that this is in the interests of justice.²³

9. When exercising this discretion, the 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.²⁴ The Chamber may also take into account other factors which militate in favour of, or against, a requested addition,²⁵ including whether the proposed evidence is *prima facie* relevant and of probative value to the charges against an accused,²⁶ the complexity of the case, on-going investigations, and translation of documents and other materials.²⁷ Finally, the Chamber must carefully balance any amendment to the Prosecution's exhibit list with an adequate protection of the rights of the accused.²⁸ That is, the 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.²⁹

10. 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 its admission into evidence. 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 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 exhibits items that are obviously irrelevant and would, therefore, ultimately be denied admission into evidence.³⁰

²³ First Decision, para. 7; Second Decision, para. 7; Third Decision, para. 6. 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").

²⁴ *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.

²⁵ *Stanišić & Simatović* Decision, para. 6.

²⁶ *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").

²⁷ *Popović et al.* Decision, p. 7.

²⁸ *Stanišić & Simatović* Decision, para. 6.

²⁹ *Dragomir Milošević* Decision, p. 3.

³⁰ *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.

III. Discussion

11. The 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 nine months after the Prosecution had filed the Third Motion. As such, in determining whether the addition of the proposed exhibits to the Second Revised 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 item to the issues in this case, the dates of disclosure to the Accused, and the number and size of the additional proposed documents.

12. The Chamber first considers each of the six proposed items to be generally relevant to the Srebrenica component of the case, including events that transpired in Srebrenica and the Accused's alleged knowledge of, and involvement in, such events.

13. The Chamber reiterates 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.³¹ The Chamber considers that all six proposed items were in the Prosecution's possession prior to the filing of the Third Motion and that many of the 123 proposed items in the Third Motion were related to the Srebrenica component of the case. However, the Chamber considers that the Srebrenica component of the case has not yet been reached, that the documents come to a total of eight pages, and that the New Srebrenica Clip lasts two and a half minutes. The Chamber also considers that items bearing 65 *ter* numbers 40582, 23463, 35043A, and 23464 were disclosed to the Accused between May and December 2010.

14. With regard to proposed 65 *ter* numbers 23465 and 23466, the Chamber notes the Prosecution's submission that the items were not disclosed to the Accused but were available on the EDS since 2008. The Prosecution has not, however, specified the manner in which it has made those items available to the Accused on EDS and, in particular, whether it has used the same system as it has been using with Rule 68 material.³² Nonetheless, the Chamber notes that these items are not of great length, that the Srebrenica component of the case has not yet been reached, and that therefore the Accused will not be prejudiced by their late addition to the Second Revised Exhibit List. The Chamber therefore considers that it is in the interests of justice to permit the Prosecution to add all six items to the Second Revised Exhibit List.

³¹ Third Decision, para. 13.

³² See Decision on Motions for Disclosure of Rule 68 Material and Reconsideration of Decision on Adequate Facilities, 10 March 2009, para. 20.

IV. Disposition

15. Accordingly, the Chamber, pursuant to Articles 20(1) and 21(4)(b) of the Tribunal's Statute and Rules 54 and 65 *ter* of the Rules, hereby **GRANTS** the Prosecution leave to add the six new proposed items bearing 65 *ter* numbers 40582, 23463, 35043A, 23464, 23465, and 23466 to the Second Revised Exhibit List.

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



Judge O-Gon Kwon
Presiding

Dated this nineteenth day of October 2011
At The Hague
The Netherlands

[Seal of the Tribunal]