

IT-09-92-T
D41109-D41103
27 JUNE 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: 27 June 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: 27 June 2012

PROSECUTOR

v.

RATKO MLADIĆ

PUBLIC

**DECISION ON PROSECUTION SECOND 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 10 May 2012, the Prosecution filed a motion seeking leave to add 71 exhibits (“Proposed Exhibits”) to its Rule 65 *ter* exhibit list of 10 February 2012 (“Exhibit List”) (“Motion”).¹ On 22 May 2012, the Defence requested a 14-day extension of the time for filing its response.² The Prosecution did not object and noted that the documents addressed in the Motion had all been uploaded into E-court.³ On 25 May 2012, the Chamber granted the requested extension of time.⁴ On 7 June 2012, the Defence responded (“Response”).⁵ On 14 June 2012, the Prosecution requested leave to reply to the Defence Response, attaching its reply as an annex (“Reply”).⁶ On 20 June 2012, the Chamber granted leave to reply and decided to consider the attached Reply.⁷

II. SUBMISSIONS OF THE PARTIES

2. In its Motion, the Prosecution requests to add 71 exhibits, categorised in four groups, to its Exhibit List: 16 recordings of intercepted phone conversations between Mr Mladić (“Accused”) and various interlocutors (“Category A”); an exhibit seized from the Accused’s residence in 2008 (“Category B”); 39 exhibits which may be tendered through witnesses who are expected to testify during the First Segment of the Prosecution case-in-chief⁸ (“Category C”); and 15 other “highly relevant” exhibits (“Category D”).⁹ Additionally, it anticipates that it will seek to further amend the exhibit list as the case continues.¹⁰ The Prosecution argues that the exhibits in Categories A and B are *prima facie* relevant and “important”, as they show the acts and conduct of the Accused during the Indictment period.¹¹ The exhibits contained in Category C are relevant in order to understand

¹ Prosecution Second Motion to Amend Rule 65 *ter* Exhibit List, 10 May 2012 (Confidential with Confidential Annexes).

² Urgent Motion to Enlarge Time for Response to Prosecution Second Motion to Amend Rule 65 *ter* Exhibit List, 22 May 2012 (Confidential).

³ Prosecution’s Response to Defence Urgent Motion to Enlarge Time for Response to Prosecution Second Motion to Amend Rule 65 *ter* Exhibit List, 24 May 2012 (Confidential), para. 2.

⁴ The decision was communicated to the parties through an informal communication on 25 May 2012, and is hereby put on the record.

⁵ Defense Response to Second Motion to Amend Rule 65 *ter* Exhibit List, 7 June 2012 (Confidential).

⁶ Prosecution Request for Leave to Reply to Defence Response to Prosecution Second Motion to Amend Rule 65 *ter* Exhibit List, 14 June 2012 (Confidential with Confidential Annex A); Prosecution Reply to Defence Response to Prosecution Second Motion to Amend Rule 65 *ter* Exhibit List, 14 June 2012 (Confidential).

⁷ The decision was communicated to the parties through an informal communication on 20 June 2012, and is hereby put on the record.

⁸ Amended Notice of Presentation of Prosecution Case in Chief: First Segment, 4 May 2012. The Chamber notes that this Notice was further amended on 30 May and on 26 June 2012, see Amended Notice of Presentation of Prosecution Case in Chief: First Segment, 30 May 2012, and Revised Notice of Presentation of Prosecution Case in Chief: First Segment, 26 June 2012.

⁹ Motion, paras 1, 8, 20, Annexes A-D.

¹⁰ Motion, para. 3.

¹¹ Motion, paras 8-9.

the evidence of the “First Segment” witnesses.¹² Furthermore, the relevance and “importance” of many of the exhibits included in Category D stem from their connection to the functioning and implementation of the alleged Joint Criminal Enterprise (“JCE”) in Bosnia and Herzegovina, or is set out specifically in Annex D to the Motion.¹³ Concerning the reason for not including some of the Proposed Exhibits in the Exhibit List, the Prosecution contends that this was due to an inadvertence.¹⁴ In relation to other exhibits, the Prosecution argues that they either were not identified earlier due to the volume of the material in this case, or could not have been identified before the filing of the Exhibit List because they resulted from the later testimony of Witnesses RM-215 and RM-350 in the *Karadžić* case.¹⁵ Finally, the Prosecution submits that the proposed amendment would not significantly prejudice the Defence, considering the stage of the case and the fact that many of the Proposed Exhibits have already been or will be, as soon as possible, disclosed to the Defence.¹⁶

3. In its Response, the Defence requests that the Chamber deny the Motion in respect of 27 exhibits which have not been properly disclosed to the Defence.¹⁷ The Defence argues that it is prevented from responding in relation to these exhibits and reserves its right to do so, upon the re-filing of the Motion and availability of these documents.¹⁸ While the Defence does not oppose the Motion in relation to the exhibits it has access to, it notes that the Prosecution fails to show good cause for their late addition to the Exhibit List.¹⁹ Should the Chamber decide to grant the Motion, the Defence requests a 90-day delay of the hearing of evidence, to permit the Defence to review the exhibits affected by disclosure problems and to prepare for the trial.²⁰

4. In its Reply, the Prosecution reiterates that the Defence has had access to all of the Proposed Exhibits for several weeks via E-court, as they were uploaded shortly after the filing of the Motion.²¹ While it is unclear whether the Defence requests a continuance of the hearing of evidence on the basis of disclosure issues relating specifically to the Proposed Exhibits or in relation to general disclosure issues, the Prosecution contends that the Defence request in this respect would be

¹² Motion, paras 8-9.

¹³ Motion, para. 11.

¹⁴ Motion, para. 12.

¹⁵ Motion, paras 12-14; Reply, para. 8.

¹⁶ Motion, paras 18-19; Reply, para. 9.

¹⁷ Response, paras 6-8.

¹⁸ Response, para. 8.

¹⁹ Response, para. 9.

²⁰ Response, paras 9-13, p. 9.

²¹ Reply, paras 3-5, 12.

best addressed in the Chamber's decision on a separate Defence motion, in which the Defence has also requested a continuance.²²

III. APPLICABLE LAW

5. It is the established jurisprudence of the Tribunal that a Chamber may, in the exercise of its inherent discretion in managing the trial proceedings, authorise requested additions to the exhibit list submitted pursuant to Rule 65 *ter* (E) (iii) if it is satisfied that it is in the interests of justice to do so.²³

6. When exercising its discretion, the Chamber must balance the Prosecution's duty to present the available evidence to prove its case with the rights of the Accused to a fair and expeditious trial and to have adequate time and facilities for the preparation of the defence, as set forth in Articles 20 (1) and 21 (4) (b) of the Tribunal's Statute ("Statute").²⁴ The Chamber will consider whether the documents sought to be added are *prima facie* relevant to and probative of issues raised in the Indictment in order to justify their late addition to the Rule 65 *ter* exhibit list.²⁵ In its determination as to whether it is in the interests of justice to add the requested documents to the Rule 65 *ter* exhibit list, the Chamber will also consider whether the Prosecution has shown good cause for adding the documents to the list at this stage and the extent to which the new documents create an additional burden on the Defence.²⁶

IV. DISCUSSION

7. The Prosecution indicated that the Defence has had access to all of the Proposed Exhibits for several weeks.²⁷ While the Defence has not indicated when or how it checked the availability of the Proposed Exhibits, all of the Proposed Exhibits designated in the Response as inaccessible were accessible in E-court to Chamber staff on 8 June 2012, in at least one of the two languages, through

²² Reply, paras 3, 11-12. See also Defence Motion to Reconsider Decision of 24 May 2012, 31 May 2012.

²³ *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-T, Decision on Fourteenth Prosecution Motion for Leave to Amend Its Rule 65 *ter* Exhibit List, 16 April 2010 ("*Stanišić and Simatović* 16 April 2010 Decision"), para. 14. See also *Prosecutor v. Vujadin Popović, Ljubiša Beara, Drago Nikolić, Ljubomir Borovčanin, Radivoje Miletić, Milan Gvero and Vinko Pandurević*, Case No. IT-05-88-AR73.1, Decision on Appeals Against Decision Admitting Material related to Borovčanin's Questioning, 14 December 2007 ("*Popović* Appeal Decision"), para. 37.

²⁴ *Stanišić and Simatović* 16 April 2010 Decision, para. 15; *Prosecutor v. Ante Gotovina, Ivan Čermak and Mladen Markač*, Case No. IT-06-90-T, Decision on Prosecution's Motion to Admit Documents into Evidence and to Add Two Documents to the Prosecution's Rule 65 *ter* Exhibit List, 25 November 2008 ("*Gotovina* Decision"), para. 9; *Popović* Appeal Decision, para. 37.

²⁵ *Gotovina* Decision, para. 9; *Popović* Appeal Decision, para. 37.

²⁶ *Stanišić and Simatović* 16 April 2010 Decision, para. 15; *Gotovina* Decision, para. 9; *Popović* Appeal Decision, para. 37.

²⁷ Prosecution's Response to Defence Urgent Motion to Enlarge Time for Response to Prosecution Second Motion to Amend Rule 65 *ter* Exhibit List, 24 May 2012 (Confidential), para. 2; Reply, paras 3-4.

their 65 *ter* number and/or their ERN numbers, and were, according to the information available therein, created on or before 15 May 2012.²⁸ On this basis, the Chamber finds the Defence contention that it was unable to respond to the Motion in respect of these exhibits to be unfounded.

8. There is no dispute between the parties concerning the *prima facie* relevance and probative value of the Proposed Exhibits. The Chamber finds that Category A exhibits are *prima facie* relevant and of probative value, as they indicate, *inter alia*, the role of the Accused in the Army of Republika Srpska, which is alleged to have been “one of the organs used to implement the objective of the joint criminal enterprise”.²⁹ Category B of the Proposed Exhibits is a photo album, allegedly marked as “Serbian Tradition”, which was seized from the Mladić residence in 2008 and comprises 18 photographs, depicting, among others, the Accused and two other alleged members of the JCE, namely Radovan Karadžić and Momčilo Krajišnik, during the war in Bosnia and Herzegovina.³⁰ Therefore, the Chamber finds the exhibit *prima facie* relevant and of probative value. The Chamber also considers Category C of the Proposed Exhibits, consisting of exhibits which will be tendered through witnesses who will testify during the “First Segment” of the Prosecution case, to be *prima facie* relevant and of probative value. Namely, the Chamber accepts the Prosecution’s submission that they are relevant to understanding these witnesses’ *viva voce* and Rule 92 *ter* evidence, and notes that some of the Proposed Exhibits in this category go directly to the acts and conduct of the Accused during the Indictment period.³¹ In relation to Category D of the Proposed Exhibits, the Chamber is satisfied that they are *prima facie* relevant and of probative value as the Prosecution submits that many of them relate to the functioning and implementation of the alleged JCE in Bosnia and Herzegovina.

9. The Chamber considers that the Prosecution has failed to show good cause for the requested late additions, with the exception of 8 exhibits which surfaced through the testimony of certain witnesses in the *Karadžić* case after the filing of the Exhibit List.³² The Chamber also accepts that, due to the volume of the materials in the case, the Prosecution identified some of the Proposed Exhibits only after the filing of the Exhibit List. The Chamber urges the Prosecution to exercise due diligence in the future to prevent further “inadvertent” oversights of exhibits which it might wish to add to its Exhibit List. This applies particularly to the Prosecution’s prediction of additional motions to be filed, as they have, depending on their frequency and the nature of exhibits proposed to be added therein, the potential to unduly burden the Defence.

²⁸ For Proposed Exhibits 65 *ter* nos 28056, 28057 and 28085, and for Proposed Exhibits 65 *ter* nos 28029-28030, 28032 and 28034-28035, surrogate sheets and transcripts, respectively, in E-court were created on 14 May 2012.

²⁹ Fourth Amended Indictment, 16 December 2011 (“Indictment”), para. 13; Motion, Annex D.

³⁰ Indictment, para. 10; 65 *ter* no. 28045.

³¹ See, *e.g.*, 65 *ter* nos 28048-28050, 28052, 28057.

³² Motion, Annex C; see, *e.g.*, 65 *ter* nos 28063, 28064, 28065, 28069-28073.

10. The number of the Proposed Exhibits, their average length, and the fact that many of them are photographic materials, are significant factors in the Chamber's assessment as to whether their addition to the Exhibit List will place an undue burden on the Defence at this stage of the trial proceedings. While many of the Proposed Exhibits are not intended to be tendered into evidence in the immediate future, thereby giving the Defence sufficient time to examine them, the Motion also relates to 39 exhibits which may be tendered in the First Segment of the Prosecution case-in-chief. The Prosecution has made further amendments to the order of its "First Segment" witnesses after the filing of the Motion, and, as a result, 24 of these 39 exhibits relate to witnesses whose testimony will not be heard before the summer recess.³³ In addition, 3 of the remaining 15 exhibits contain maps or photographs, and the volume of the documentary evidence amounts to 69 pages in total. Accordingly, the Chamber finds that the addition of the Proposed Exhibits to the Exhibit List will create a very limited additional burden on the Defence and does not, therefore, warrant any continuance of the hearing of evidence. Additionally, the Chamber considers the Defence request for a continuance, to the extent it relates to other ongoing general disclosure issues and not specifically to the Proposed Exhibits, to be moot, as it is a subject of a separate decision.³⁴

11. Balancing the Prosecution's duty to present the available evidence to prove its case with the Accused's right to a fair and expeditious trial and to adequate time and facilities for the preparation of his defence, the Chamber is satisfied that it is in the interests of justice to grant the requested leave to add the Proposed Exhibits to the Prosecution's Exhibit List.

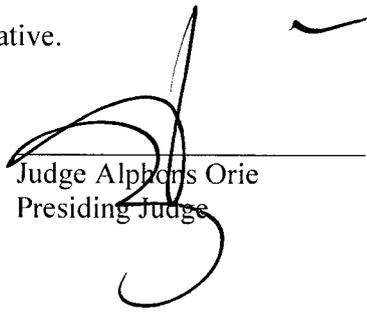
³³ Namely 65 *ter* nos: 28046, 28055-28062, 28069-28082, 28084. See also Revised Notice of Presentation of Prosecution Case in Chief: First Segment, 26 June 2012.

³⁴ Decision on Defence Motion for Reconsideration, 22 June 2012.

V. DISPOSITION

12. 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, and **DECLARES** moot, in part, and **DENIES**, in part, the Defence request for a 90-day continuance of the hearing of evidence.

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



Judge Alphons Orie
Presiding Judge

Dated this Twenty-seventh day of June 2012
At The Hague
The Netherlands

[Seal of the Tribunal]