



International Tribunal for the Prosecution of
Persons Responsible for Serious Violations of
International Humanitarian Law Committed in
the Territory of Former Yugoslavia since 1991

Case No. IT-02-54-R77.5

Date: 12 June 2009

Original: English

IN A SPECIALLY APPOINTED CHAMBER

Before: Judge Bakone Justice Moloto, Presiding
Judge Mehmet Güney
Judge Liu Daqun

Registrar: Mr. John Hocking

Decision of: 12 June 2009

IN THE CASE

AGAINST

FLORENCE HARTMANN

PUBLIC

**DECISION ON DEFENCE MOTION TO AMEND
RULE 65 *TER* EXHIBIT LIST**

Amicus Curiae Prosecutor

Mr. Bruce MacFarlane, QC

Counsel for the Accused

Mr. Karim A. A. Khan, Counsel
Mr. Guénaél Mettraux, Co-Counsel

THE SPECIALLY APPOINTED CHAMBER (“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 “Defence Motion to Amend Rule 65*ter* List – Proposed Exhibits”, filed on 8 June 2009 (“Motion”), and hereby renders its Decision thereon.

I. SUBMISSIONS

1. The Defence seeks to add 59 documents to the Rule 65*ter* exhibit list. It submits that since filing its original Rule 65*ter* exhibit list,¹ it has conducted a number of interviews and reviewed a large amount of material, including an ongoing review of the Prosecution’s Electronic Disclosure Suite (“EDS”).² According to the Defence, each of the documents submitted is relevant, although it might not seek to tender all of them during trial.³

2. The Prosecution responded on 10 June 2009.⁴ It submits that the Defence has not demonstrated the relevance of each of the proffered documents sought to be added to the Rule 65*ter* exhibit list.⁵ The Prosecution adds that it has not received copies of any of the documents, that the trial is less than a week away, and that under these circumstances it has not been given reasonable notice.⁶ In its submission, granting the Motion would not be in the interests of justice, as it would cause prejudice to the Prosecution.⁷

3. On 11 June 2009, the Defence sought leave to reply to the Response, submitting that the information advanced in the Response is “incomplete and potentially misleading”.⁸ In the Reply, the Defence undertakes to provide the Prosecution with hard copies of the proffered documents by the end of 11 June 2009.⁹ Further, Annex A to the Reply generally sets out the relevance of the documents which the Defence seeks to add to its Rule 65*ter* exhibit list.¹⁰ Finally, the Defence submits that it will not seek to present Item 109 at trial.¹¹

¹ Pre-Trial Brief of Florence Hartmann, 15 January 2009, Annex B.

² Motion, para. 4; Reply, para 10.

³ Motion, para. 6.

⁴ Prosecutor’s Response to Defence Motion to Amend Rule 65*ter* List, 10 June 2009 (“Response”).

⁵ Response, paras 5, 8. As an example, the Prosecution list Item 109.

⁶ Response, para. 6.

⁷ Response, para. 7.

⁸ Reply *re* Defence Motion to Amend Rule 65*ter* list – Proposed Exhibits, 11 June 2009 (“Reply”), para. 5.

⁹ Reply, para. 18.

¹⁰ Reply, para. 16, Annex A.

¹¹ Reply, para. 7, *see* also Annex A.

II. LAW AND DISCUSSION

4. Pursuant to Rule 65ter (G) of the Rules of Procedure and Evidence (“Rules”), the Defence, is obliged to provide the Prosecution with a list of exhibits it intends to offer in the case and copies thereof, *after* the close of the Prosecution case.¹² In normal proceedings, it is not unusual for there to be an interval of a number of weeks or even months between the end of the Prosecution case and the start of the Defence case. As contempt proceedings before this Tribunal adhere to shortened time-frames in accordance with, *inter alia*, the Practice Direction on Contempt,¹³ in this particular proceeding, there will be no break between the Prosecution case and the start of the Defence case. In the view of the Chamber, it would not, therefore, accord with the principles of notice to the opposing party should the Defence only be obliged to provide the list of proposed exhibits at the end of the Prosecution case, in this case, at the end of 15 June 2009 or early 16 June 2009, as it may be. The Chamber also notes that in this trial, the Defence filed their original exhibit list along with their Pre-Trial Brief on 15 January 2009.¹⁴ It is not unreasonable for the Prosecution to have relied upon this list of exhibits as the complete list of exhibits the Defence sought to rely on for the purposes of its case.

5. The Chamber considers that the issue before it with respect to the Defence request to add 59 documents to its Rule 65ter exhibit list is one of adequate notice to the Prosecution, under the specific circumstances of this case. The primary purpose of the Rule 65ter exhibit list is to provide notice to the opposing party of the material the tendering party intends to rely on during trial. While tribunal jurisprudence relating to amendments to the Rule 65ter exhibit list predominantly concerns amendments to the Rule 65ter exhibit list sought by the Prosecution, the Chamber considers that the criteria set out as to when to grant such an amendment may be of equal guidance in the particular situation at hand. In this regard, the Chamber recalls that it may exercise its discretion on whether or not to allow an amendment to the Rule 65ter exhibit list, if such an amendment serves the interests of justice.¹⁵ In making this assessment, the Chamber may take into consideration whether the proffered documents are *prima facie* relevant and probative to the charges in the Indictment.¹⁶ A full assessment of relevance and probative value will occur at the stage of admission of these documents as exhibits at trial, governed by the rules of admissibility of evidence applied by the

¹² (*italics added*)

¹³ Practice Direction on Procedure for the Investigation and Prosecution of Contempt before the International Tribunal, IT/227, 6 May 2004 *see* para. 20.

¹⁴ Pre-Trial Brief of Florence Hartmann, 15 January 2009, Annex B.

¹⁵ *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-AR73.1, Decision on Appeals Against Decision Admitting Material related to Borovčaniin Questioning, 14 December 2007 (“*Popović et al. Appeals Decision*”), para. 37.

¹⁶ *Prosecutor v. Gotovina et al.*, Case No. IT-06-90-PT, Decision on Prosecution’s Motion to Amend the Exhibit List, 14 February 2008 (“*Gotovina Decision*”), para. 17; *Prosecutor v. Stanišić and Simatović*, Case No. IT-03-69-PT,

Tribunal.¹⁷ Further, the Chamber may take into account whether good cause has been shown to add the documents at this stage of the proceedings, and the extent to which the proposed documents create an additional burden for the opposing party.¹⁸

6. The Chamber notes that the Defence has set out, in Annex A to its Reply, how it considers the documents to be relevant to its case. It considers that for the purpose of adding the documents proffered by the Defence to the Rule 65ter exhibit list, the *prima facie* relevance and probative value of these documents has been demonstrated. Whether or not this is sufficient for the admission of these documents is a different matter, to be resolved at trial.

7. As regards good cause shown by the Defence for the addition of these documents to the Rule 65ter exhibit list at this stage of the proceedings, the Chamber notes that the trial in this case was initially due to commence in early February 2009 and the Defence should have been fully prepared to present their case at this stage. However, the Defence Pre-Trial Brief which contained the Rule 65ter exhibit list as Annex B, was filed on 15 January 2009, and the Chamber recalls that at the Status Conference held on 30 January 2009, the Defence had informed the then constituted Chamber of a number of interviews yet to be conducted in preparation for trial.¹⁹ In addition, the Chamber notes the Defence submission that it provided the Prosecution with the list of additional documents it now seeks to add to the Rule 65ter exhibit list immediately following the Status Conference on 19 May 2009.²⁰ Hence, the Prosecution has been aware of the Defence's intention to rely on these documents already for a number of weeks.²¹

8. In its determination of whether to grant the Motion, the Chamber also notes the undertaking of the Defence to provide hard copies of these documents to the Prosecution by 11 June 2009. The Chamber is not in possession of the proffered documents and cannot therefore make a determination as to the amount of time necessary for the Prosecution to review them. However, from their title and description, it would appear that for the most part, the documents are not exceedingly lengthy or legally complex, especially in the context of the relevance that the Defence has ascribed to these documents as detailed in Annex A of its Reply. The Chamber is therefore satisfied that, under these circumstances, granting the Motion would not cause an undue additional

Decision on Fifth, Sixth, Seventh and Eight Prosecution Motions for Leave to Amend its Rule 65ter Exhibit List, 24 April 2009, para. 6.

¹⁷ *Prosecutor v. Vlastimir Đorđević*, Case No. IT-05-87/1-T, Decision on Prosecution's Motion to Amend the Rule 65ter Exhibit List with Annexes A and B, 4 March 2009, para. 4.

¹⁸ *Gotovina* Decision, para.17.

¹⁹ Status Conference, 30 January 2009, T 69-70.

²⁰ Reply, para. 8(vi).

²¹ The Chamber also notes the Defence submission, in this regard, that almost all of the documents on the list are publicly available so that the Prosecutor could have at all times obtained copies of them (Reply, para. 13).

burden on the Prosecution. In the light of the above, the Chamber considers it to be in the interests of justice to allow for the addition of the 59 documents to the Defence Rule 65*ter* exhibit list.

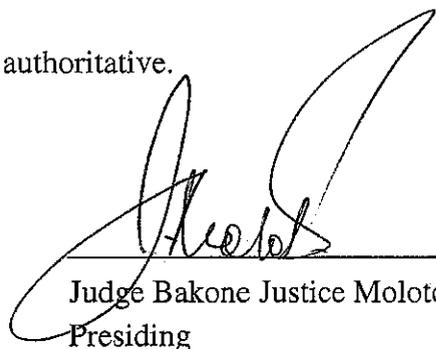
III. DISPOSITION

9. For the foregoing reasons, and pursuant to Rule 65*ter* (E) of the Rules, the Chamber

GRANTS

- (1) leave to reply to the Defence and
- (2) the Motion.

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



Judge Bakone Justice Moloto
Presiding

Dated this twelfth day of June 2009

At The Hague

The Netherlands

[Seal of the Tribunal]