

**UNITED
NATIONS**



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-04-75-T
Date: 28 August 2014
Original: English

IN THE TRIAL CHAMBER

Before: Judge Guy Delvoie, Presiding
Judge Burton Hall
Judge Antoine Kesia-Mbe Mindua

Registrar: Mr. John Hocking

Decision: 28 August 2014

PROSECUTOR

v.

GORAN HADŽIĆ

PUBLIC

**DECISION ON DEFENCE MOTION FOR LEAVE TO AMEND ITS RULE 65 *ter*
EXHIBIT LIST**

The Office of the Prosecutor:

Mr. Douglas Stringer

Counsel for Goran Hadžić:

Mr. Zoran Živanović

Mr. Christopher Gosnell

1. **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 hereby seised of the “Defence Motion for Leave to Amend its Rule 65 *ter* Exhibit List” with confidential Annex filed on 1 July 2014 (“Motion”). The Prosecution filed the “Prosecution Response to Defence Motion for Leave to Amend its Rule 65 *ter* Exhibit List” with confidential Annex on 14 July 2014 (“Response”). The Defence filed its “Reply to Prosecution Response to Defence Motion for Leave to Amend its Rule 65 *ter* Exhibit List” on 21 July 2014 (“Reply”).

A. Procedural History and Submissions

2. On 13 May 2014, the Defence filed the “Defence Notice of Rule 65 *ter* (G) Filings” which included, *inter alia*, the Defence exhibit list filed pursuant to Rule 65 *ter* (G)(ii) of the Rules of Procedure and Evidence (“Rules”). On 27 May 2014, the Defence filed the “Notice of Compliance with Trial Chamber Order to Assign Witnesses to Documents in 65 *ter* Exhibit List” (“Exhibit List”). On 3 July 2014, the Chamber granted a Defence motion to amend the Exhibit List.¹

3. In the Motion, the Defence requests leave, pursuant to Rules 54, 65 *ter*, and 73(A) of the Rules, to amend the Exhibit List by adding (a) Defence exhibits from the *Stanišić and Simatović* case which were disclosed by the Prosecution on 2 June 2014 (“*Stanišić and Simatović* Documents”); (b) documents from the Croatian Memorial and Documentation Centre that were received on 29 May 2014 (“Croatia Documents”); (c) documents from the County Public Prosecutor’s office in Beli Manastir that were provided to the Defence by the Serbian government on 3 January 2014 (“Serbia Documents”); and (d) documents that the Defence labels in the Annex as “other relevant documents” (“Other Documents”).² The Defence asserts that good cause exists to add these documents to the Exhibit List because 171 of the documents were not in the possession of the Defence at the time it filed the Exhibit List,³ and the relevance of the Serbia Documents only became apparent during the week of 23 June 2014 when preparing for the testimony of Goran Hadžić.⁴ The Defence adds that Rule 65 *ter* number 1D03578, one of the *Stanišić and Simatović* Documents, is an integral part of DGH-051’s witness statement and was inadvertently omitted from the Exhibit List.⁵ The Defence submits that the Prosecution will not be prejudiced given the early

¹ Procedural Matters, 3 July 2014, T. 9265-9266; Procedural Matters, 3 July 2014, T. 9267-9269.

² Motion, paras 1, 4, confidential Annex. The Chamber notes that in the Motion the Defence lists “Mr. Hadžić’s testimony in the *Dokmanović* case and associated exhibits” as a separate category. However, in the Annex, these documents are included in the category “*Stanišić and Simatović* Exhibits”.

³ Motion, para. 2. The Defence does not indicate in the Motion to which 171 documents it is referring.

⁴ Motion, para. 4. The Defence also submits that it has recently identified seven documents—Rule 65 *ter* numbers 1D03564, 1D03565, 1D03566, 1D03567, 1D03568, 1D03610, and 1D03611—as being important. The Chamber notes however that these documents were already added to the Exhibit List in its oral decision of 3 July 2014.

⁵ Motion, para. 6.

stage of the trial, the extent of the notice for the use of these documents, and the Prosecution's prior possession of many of the documents.⁶ The Defence further submits that the documents are highly relevant and will assist the Chamber in the determination of issues in this case.⁷ Finally, the Defence sought an expedited ruling in relation to 47 documents that it indicated may be used with Goran Hadžić during his testimony.⁸

4. On 2 July 2014, the Prosecution notified the Defence and Chamber, *via* email, that an English translation was not available for 26 of the documents for which the Defence sought an expedited response.⁹ On 8 July 2014, the Defence notified the Prosecution and Chamber that an English translation had been provided in eCourt for all 26 of the documents.¹⁰

5. In the Response, filed on 14 July 2014, the Prosecution submits that this Chamber has considered that a lack of due diligence on the part of a party requesting to add a document to its Rule 65 *ter* exhibit list can be tantamount to the party not having demonstrated good cause justifying the late addition.¹¹ The Prosecution does not object to the addition of the *Stanišić and Simatović* Documents in general, but takes no position in relation to 14 documents for which no English translation had been provided at the time of the Response and in relation to one document, Rule 65 *ter* number 1D03459, which has not been uploaded in eCourt.¹² The Prosecution asserts that the Defence has not shown due diligence and good cause for the addition of the Croatia Documents and objects to the addition of all but the document with Rule 65 *ter* number 1D02619 to the Exhibit List.¹³ In relation to the Serbia Documents, the Prosecution notes that the Defence received the documents on 3 January 2014 and that it has been on notice of the allegation to which they are relevant from the beginning of the trial. The Prosecution therefore asserts that it is unclear why the relevance of these documents only became apparent at this stage in the proceedings.¹⁴ The Prosecution asserts that the Defence did not exercise due diligence in reviewing the materials and objects to the addition of the Serbia Documents in general.¹⁵ In relation to the Other Documents, the Prosecution objects to the addition of the documents with Rule 65 *ter* numbers 1D03571 and

⁶ Motion, para. 2.

⁷ Motion, paras 3-6.

⁸ Motion, para. 7. In an email dated 1 July 2014, the Defence clarified that it requested an expedited response for the 48 documents identified in the Annex to the Motion as documents which may be used with Goran Hadžić as well as the document with Rule 65 *ter* number 1D03571. The Chamber notes that the Defence indicated that there were a total of 49 documents for which it sought an expedited ruling. However, multiple documents were listed more than once on the list.

⁹ Email from Douglas Stringer, 2 July 2014. *See also* Procedural Matters, 3 July 2014, T. 9266-9267.

¹⁰ Procedural Matters, 8 July 2014, T. 9533-9534. The Chamber notes, however, that an English translation had not been added for Rule 65 *ter* number 1D01935, *see* Ruling, 16 July 2014, T. 9878-9879.

¹¹ Response, para. 7, *citing* Decision on Prosecution Bar Table Motion, 28 November 2013, para. 233; Ruling, 7 October 2013, T. 8699-8700.

¹² Response, para. 9.

¹³ Response, para. 10.

¹⁴ Response, para. 11.

1D03569.¹⁶ The Prosecution notes that the Defence has not explained how or when it came into possession of Rule 65 *ter* number 1D03571,¹⁷ that Rule 65 *ter* number 1D03569 was disclosed to the Defence on 3 November 2011, and that the Defence has provided no explanation or justification as to why neither document was added to the Exhibit List earlier.¹⁸ The Prosecution further notes that the Defence was given four months to prepare for its case and that the Chamber should consider this delay when exercising its discretion.¹⁹

6. In the Reply, the Defence indicates that an English translation has been uploaded for four of the *Stanišić and Simatović* Documents²⁰ and that it will notify the Chamber as and when the 11 remaining translations are received.²¹

7. The Defence asserts that “due diligence” is not tantamount to “good cause”, especially at the beginning of the presentation of a party’s evidence, and that the Chamber has not articulated such a sweeping principle.²² The Defence asserts that diligence ought to be assessed in relation to the totality of the circumstances and that the Chamber has, either expressly or implicitly, considered multiple factors in relation to its decisions on Prosecution motions to amend its exhibit list.²³ Further, the Defence asserts that it has acted with due diligence in relation to the Croatia Documents and the Serbia Documents. The Defence submits that the Croatia Documents were received two days prior to the deadline for filing the Exhibit List and that, given the competing demands on Defence resources, it was unable, even with maximum diligence, to identify and propose these documents until the date of the Motion.²⁴ Further, while the Defence received the Serbia Documents in January 2014, it was not until the end of April 2014, three weeks before the deadline for the Defence to file its Rule 65 *ter* submissions, that it received confirmation from the Serbian government that more complete documents were not available.²⁵ The Defence used this time to select the most relevant of those documents, which were included on the Exhibit List.²⁶

8. Finally, the Defence asserts that the relevance and probative value of the Other Documents with Rule 65 *ter* numbers 1D03571 and 1D03569, the early stage of the case, and the lack of

¹⁵ Response, para. 11.

¹⁶ Response, para. 13.

¹⁷ Response, confidential Annex, p. 30.

¹⁸ Response, para. 13, confidential Annex, p. 30.

¹⁹ Response, para. 13.

²⁰ Documents with Rule 65 *ter* numbers 1D03500, 1D03462, 1D03459, and 1D01935.

²¹ Reply, para. 3.

²² Reply, paras 6-7.

²³ Reply, para. 8.

²⁴ Reply, para. 5.

²⁵ Reply, para. 9.

²⁶ Reply, para. 9.

prejudice to the Prosecution, warrant their addition to the Exhibit List.²⁷ The Defence explains that the Prosecution has been in possession of the documents for some time as they were disclosed to the Defence by the Prosecution through the electronic disclosure system.²⁸

9. On 3 and 16 July 2014, the Chamber issued oral rulings in which it allowed the addition of 45 of the documents for which the Defence sought an expedited response.²⁹

B. Applicable Law

10. Rule 65 *ter* (G)(ii) of the Rules provides, *inter alia*, that the Defence shall file “a list of exhibits the defence intends to offer in its case”, serving on the Prosecution copies of the listed exhibits. The primary purpose of such an exhibit list is to give notice to the Prosecution of the documents to be used during the Defence case, which will allow the Prosecution to prepare its case accordingly and to ensure an efficient presentation of evidence during trial.³⁰ In the exercise of its inherent discretion in managing the trial proceedings, and if satisfied that this is in the interests of justice, a Trial Chamber may grant a Defence request to amend the filed exhibit list.³¹ In doing so, a Trial Chamber must be satisfied that, taking into account the specific circumstances of the case, good cause is shown for amending the original list and that the newly offered material is relevant and of sufficient importance to justify the late addition.³²

C. Discussion

11. As a preliminary matter, the Chamber notes that at the time the Defence filed the Motion, 40 documents—including 26 for which the Defence sought an expedited ruling—did not have an English translation attached in eCourt and that no notice of this fact was included in the Motion. The Chamber recalls that it is the responsibility of each party to ensure that an English translation is

²⁷ Reply, para. 11.

²⁸ Reply, para. 11.

²⁹ Ruling, 3 July 2014, T. 9329-9330 (including documents with the following Rule 65 *ter* numbers: 1D03518, 1D03559, 1D03560, 1D03561, 1D03562, 1D03563, 1D03564, 1D03565, 1D03566, 1D03567, 1D03568, 1D03570, 1D03610, and 1D03611); Ruling, 16 July 2014, T. 9878-9879 (including documents with the following Rule 65 *ter* numbers: 1D01824, 1D01825, 1D01844, 1D01847, 1D01848, 1D01858, 1D01876, 1D01877, 1D01878, 1D01881, 1D01883, 1D01884, 1D01906, 1D01924, 1D01946, 1D01947, 1D01957, 1D01963, 1D02013, 1D02035, 1D02038, 1D02044, 1D02049, 1D02086, 1D02092, 1D02101, 1D02106, 1D02142, 1D02144, 1D02145, and 1D01818).

³⁰ *Prosecutor v. Tolimir*, Case No. IT-05-88/2-T, Decision on Third, Fourth and Fifth Motions by the Accused for Admission of Documents from the Bar Table, 22 March 2012 (“*Tolimir* Decision”), para. 3; *Prosecutor v. Boškoski and Tarčulovski*, Case No. IT-04-82-T, Decision on Tarčulovski Motion for Permission to Add Additional Exhibits to its 2D Defence Exhibit List, 12 March 2008, para. 3.

³¹ *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* Appeal Decision”), para. 37; *Prosecutor v. Hadžić*, Case No. IT-04-75-T, Decision on Third Prosecution Motion for Leave to Amend Prosecution Rule 65 *ter* Exhibit List, 23 October 2012 (“*Hadžić* Decision”), para. 5; *Tolimir* Decision, para. 4.

³² *Popović* Appeal Decision, para. 37, *Hadžić* Decision, para. 5; *Tolimir* Decision, para. 4.

uploaded and released in eCourt for any Bosnian/Croatian/Serbian document it wishes to use.³³ Going forward, the Chamber expects that each party will clearly indicate in any filing if such a translation is not provided and the date by which it will be, particularly when the party is requesting an expedited response or decision.

1. *Stanišić and Simatović Documents*

12. In the Annex attached to the Motion, the Defence lists a total of 166 documents as *Stanišić and Simatović Documents*.³⁴ In the Response, the Prosecution states that eight of these documents were not Defence exhibits from the *Stanišić and Simatović* case and notes that the eight documents are also listed as Other Documents in the Annex to the Motion.³⁵ In the Reply, the Defence clarifies that “[t]he four documents that erroneously appear twice on the Defence’s list of documents belong in the [Other Documents] sub-category”, without indicating the four documents to which it is referring.³⁶ The Chamber notes that there are, in fact, eight documents listed in the Motion’s Annex as both *Stanišić and Simatović Documents* and Other Documents.³⁷ The Chamber will consider these eight documents as Other Documents. The Chamber further notes that in the Reply the Defence withdraws its request to add the document with Rule 65 *ter* number 1D03574 to its Exhibit List because it is a duplicate of another document also included in the Motion.³⁸ Finally, the Chamber recalls that six of the *Stanišić and Simatović Documents* were added to the Exhibit List in the Chamber’s oral ruling of 3 July 2014.³⁹ The Chamber will now consider the addition of the remaining 151 *Stanišić and Simatović Documents*.

13. The Chamber notes that the document with Rule 65 *ter* number 1D03459 has not been uploaded and released in eCourt and that the document with Rule 65 *ter* number 1D02506.1 does not have an English translation attached. The Chamber will therefore not allow addition of these documents to the Exhibit List. The Chamber further notes that an English translation has now been uploaded for the remaining *Stanišić and Simatović Documents*.

14. The Chamber is satisfied that, taking into account the specific circumstances of the case and the lack of opposition from the Prosecution, good cause has been shown for amending the Exhibit List to include the remaining 149 *Stanišić and Simatović Documents*. The documents sought to be

³³ See Order on Guidelines for Procedure for Conduct of Trial, 4 October 2012, Annex, para. 12.

³⁴ Motion, para. 1, confidential Annex.

³⁵ Response, para. 9, confidential Annex in relation to documents with the following Rule 65 *ter* numbers 1D03564, 1D03565, 1D03566, 1D03567, 1D03568, 1D03569, 1D03570, and 1D03571.

³⁶ Reply, para. 3.

³⁷ This includes documents with the following Rule 65 *ter* numbers: 1D03564, 1D03565, 1D03566 1D03567, 1D03568, 1D03569, 1D03570, and 1D03571.

³⁸ Reply, fn. 3.

included are relevant and of sufficient importance to justify their addition at this stage of the trial. The Chamber is satisfied that the addition of the documents will not result in undue prejudice to the Prosecution.

2. Croatia Documents

15. The Defence requests the addition of five Croatia Documents. While the Chamber notes the Defence submission that the documents were received two days prior to the deadline for filing the Exhibit List, the Chamber also notes that the Defence has not provided submissions in relation to the efforts that it undertook in order to obtain these documents. The Defence has therefore not satisfied the Chamber that it acted diligently in adding these documents to the Exhibit List. However, the Chamber considers that the documents are relevant and of sufficient importance to justify their addition to the Exhibit List at this stage of the trial and that the addition of the documents will not result in undue prejudice to the Prosecution. The Chamber is therefore satisfied that, taking into account the specific circumstances of this case, good cause has been shown for amending the Exhibit List to include the Croatia Documents.

3. Serbia Documents

16. The Chamber recalls that in its oral ruling of 16 July 2014 it allowed the addition of 31 of the 32 requested Serbia Documents.⁴⁰ The document with Rule 65 *ter* number 1D01935 was not allowed at that time because no English translation was attached. An English translation has subsequently been released. While the Chamber notes the Defence submission that it did not receive confirmation from the Serbian government that the files were complete until the end of April 2014, the Chamber also notes that the Defence has not provided sufficient submissions in relation to the efforts that it undertook in order to obtain the Serbia Documents, including Rule 65 *ter* number 1D01935, in order to satisfy the Chamber that it acted diligently in adding Rule 65 *ter* number 1D01935 to the Exhibit List. However, the Chamber also considers that this document is relevant and of sufficient importance to justify its addition to the Exhibit List at this stage of the trial and is satisfied that the addition of the document will not result in undue prejudice to the Prosecution. The Chamber is therefore satisfied that, taking into account the specific circumstances of this case, good cause has been shown for amending the Exhibit List to include Rule 65 *ter* number 1D01935.

³⁹ Ruling, 3 July 2014, T. 9329-9330 (including documents with the following Rule 65 *ter* numbers: 1D03518, 1D03559, 1D03560, 1D03561, 1D03562, and 1D03563).

⁴⁰ Ruling, 16 July 2014, T. 9878-9879 (including documents with the following Rule 65 *ter* numbers: 1D01824, 1D01825, 1D01844, 1D01847, 1D01848, 1D01858, 1D01876, 1D01877, 1D01878, 1D01881, 1D01883, 1D01884, 1D01906, 1D01924, 1D01946, 1D01947, 1D01957, 1D01963, 1D02013, 1D02035, 1D02038, 1D02044, 1D02049, 1D02086, 1D02092, 1D02101, 1D02106, 1D02142, 1D02144, 1D02145, and 1D01818).

4. Other Documents

17. The Chamber recalls that it allowed the addition of eight of the 11 Other Documents in its oral ruling of 3 July 2014.⁴¹ The Defence has not explained why the documents with Rule 65 *ter* numbers 1D03569, 1D03571, and 1D03600 were not included on the Exhibit List earlier. The Chamber therefore considers that the Defence has not demonstrated due diligence in adding the documents to the Exhibit List. However, Rule 65 *ter* numbers 1D03569 and 1D03571 were originally disclosed by the Prosecution and therefore have been in its possession. The Prosecution does not object to the addition of Rule 65 *ter* number 1D03600.⁴² The Chamber is satisfied that the addition of the documents will not result in undue prejudice to the Prosecution. The documents are relevant and of sufficient importance to justify addition at this stage of the trial. The Chamber is therefore satisfied that, taking into account the specific circumstances of this case, good cause has been shown for amending the Exhibit List to include Rule 65 *ter* numbers 1D03569, 1D03571, and 1D03600.

⁴¹ Ruling, 3 July 2014, T. 9329-9330 (including documents with the following Rule 65 *ter* numbers: 1D03564, 1D03565, 1D03566, 1D03567, 1D03568, 1D03570, 1D03610, and 1D03611).

⁴² Response, confidential Annex, p. 31.

D. Disposition

18. Accordingly, the Trial Chamber, pursuant to Rules 54, 65 *ter*, and 126 *bis* of the Rules hereby:

GRANTS the Defence leave to file the Reply;

DISMISSES the Motion with respect to the documents with Rule 65 *ter* numbers 1D03459 and 1D02506.1; and

GRANTS the Motion, in all other respects.

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

Done this twenty-eighth day of August 2014,
At The Hague,
The Netherlands.



Judge Guy Delvoie
Presiding

[Seal of the Tribunal]