

**UNITED
NATIONS**

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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-04-75-T
Date: 19 February 2015
Original: English

IN THE TRIAL CHAMBER

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

Registrar: Mr. John Hocking

Decision: 19 February 2015

PROSECUTOR

v.

GORAN HADŽIĆ

PUBLIC

**DECISION ON FIFTH 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 “Fifth Defence Motion for Leave to Amend its Rule 65 *ter* Exhibit List” filed with a confidential annex on 19 November 2014 (“Motion”). The Prosecution filed the “Prosecution Response to Fifth Defence Motion for Leave to Amend its Rule 65 *ter* Exhibit List” with a confidential annex on 26 November 2014 (“Response”). The Defence filed its confidential “Reply to Prosecution Response to Fifth Defence Motion for Leave to Amend its Rule 65 *ter* Exhibit List” on 3 December 2014 (“Reply”).

A. Submissions

2. The Defence requests leave, pursuant to Rules 54, 65 *ter*, and 73 (A) of the Rules, to add 29 documents to its Rule 65 *ter* exhibit list (“Exhibit List”).¹ These documents fall into two categories: documents the Prosecution recently disclosed to the Defence and documents identified during pre-testimonial interviews.² The Defence asserts that good cause warrants adding 12 documents the Prosecution disclosed to it since 1 October 2014 to the Exhibit List (“Recently Disclosed Documents”).³ The Defence also asserts that good cause warrants adding 17 documents, identified during pre-testimonial interviews with DGH-049, DGH-019, and DGH-046, to the Exhibit List.⁴ With regard to the 17 documents it argues that the reasons for the late identification combined with the absence of prejudice to the Prosecution justify granting leave for the following documents:⁵ (a) a local judgment obtained and disclosed in support of the motion requesting safe conduct for DGH-049;⁶ (b) three documents containing laws published in the Official Gazette of the SFRY - two of which the Prosecution has had notice of since 6 November 2014 when it received the witness’s defence exhibit list;⁷ (c) five OG South Command orders signed by a colonel;⁸ and (d) six stills and two excerpts from previously admitted videos.⁹ With respect to the latter, the Defence contends that leave is not required to add stills and excerpts from previously admitted videos to an Exhibit List but seeks it out of an abundance of caution.¹⁰

¹ Motion, para. 1.

² Motion, paras 1-7, confidential Annex.

³ Motion, para. 7 *referring to* Rule 65 *ter* numbers 1D03789, 1D03790, 1D03791, 1D03792, 1D03793, 1D03794, 1D03795, 1D03796, 1D03797, 1D03798, 1D03799, and 1D03811.

⁴ Motion, para. 5.

⁵ Motion, para. 5.

⁶ Motion, para. 3 *referring to* Rule 65 *ter* number 1D03810.

⁷ Motion, para. 4 *referring to* Rule 65 *ter* numbers 1D03800, 1D03801, and 1D03809.

⁸ Motion, para. 4 *referring to* Rule 65 *ter* numbers 1D03812, 1D03813, 1D03814, 1D03815, and 1D03816.

⁹ Motion, para. 6 *referring to* Rule 65 *ter* numbers 1D03803, 1D03804, 1D03805, 1D03806, 1D03807, 1D03808, 1D03817, and 1D03818.

¹⁰ Motion, para. 6.

3. The Prosecution does not object to adding the Recently Disclosed Documents to the Exhibit List.¹¹ With respect to the documents identified during pre-testimonial interviews, the Prosecution objects to adding nine documents (“Disputed Documents”) on the grounds that the Defence failed to act with due diligence.¹² In this regard, it submits that given the copious amount of time the Defence had to prepare for its case the Disputed Documents should have been identified and added to the original Exhibit List.¹³ The Prosecution contends that the Trial Chamber must consider the *prima facie* relevance and probative value of materials in exercising its inherent discretion and asserts that the Defence has failed to explain the Disputed Documents’ relevance or probative value.¹⁴ The Prosecution also submits that: (a) two of the Disputed Documents have no English translations;¹⁵ (b) one of the Disputed Documents has an incorrect description and a legible part of the text is marked as “illegible”;¹⁶ and (c) the English translation of one of the Disputed Documents is only a small portion of the original and requests that superfluous pages of the original be removed.¹⁷ The Prosecution does not object to adding the remaining documents identified during pre-testimonial interviews, namely the six stills and two excerpts from previously admitted videos, but identifies parts of the two excerpts that have already been admitted into evidence.¹⁸

4. The Defence rejects the Prosecution’s argument that it failed to act with due diligence in neglecting to add the Disputed Documents to its original Exhibit List.¹⁹ It submits that the Trial Chamber allowed multiple amendments to the Prosecution’s exhibit list following pre-testimonial interviews and that it should be given the same opportunity absent identifiable prejudice.²⁰ It argues that no identifiable prejudice arises in relation to the Disputed Documents because five of the Disputed Documents were produced by the Prosecution and the other four will have long been in the Prosecution’s possession by the time they are tendered.²¹ The Defence further submits that the relevance of the Disputed Documents is clear when read in conjunction with the witness statements of the witnesses, whose pre-testimonial interviews led to the sought-after addition of these documents.²² The Defence also submits that: (a) the Prosecution’s concern about the breadth, and overlap with admitted exhibits, of some of the Disputed Documents is relevant to admissibility

¹¹ Response, para. 1, confidential Annex A, pp. 1-2.

¹² Response, para. 1 *referring to* Rule 65 *ter* numbers 1D03800, 1D03801, 1D03809, 1D03810, 1D03812, 1D03813, 1D03814, 1D03815, and 1D03816.

¹³ Response, paras 3-4.

¹⁴ Response, paras 1, 6.

¹⁵ Response, para. 5 *referring to* Rule 65 *ter* numbers 1D03812 and 1D03815.

¹⁶ Response, para. 7 *referring to* Rule 65 *ter* number 1D03813.

¹⁷ Response, para. 8 *referring to* Rule 65 *ter* number 1D03809.

¹⁸ Response, para. 9 *referring to* Rule 65 *ter* numbers 1D03817 and 1D03818.

¹⁹ Reply, paras 2-4.

²⁰ Reply, paras 2-3.

²¹ Reply, para. 4.

²² Reply, para. 7.

rather than addition to the Exhibit List;²³ (b) it has corrected the title for the Disputed Document with an incorrect description;²⁴ and (c) it has provided translations for two of the Disputed Documents.²⁵

B. Applicable Law

5. 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 the Prosecution with 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.²⁶ In the exercise of its inherent discretion to manage trial proceedings, if satisfied that this is in the interests of justice, a trial chamber may grant a Defence request to amend the filed exhibit list.²⁷ In doing so, a trial chamber must be satisfied that, taking into account the specific circumstances of the case, the Defence has shown good cause for amending the original list and that the newly offered material is relevant and of sufficient importance to justify the late addition.²⁸ A trial chamber need not assess an exhibit’s authenticity, relevance, and probative value in the same way as it would when determining its admission at trial,²⁹ however, leave should not be allowed to add exhibits that are obviously irrelevant.³⁰

C. Discussion

6. The Trial 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 Recently Disclosed Documents.³¹ The Recently Disclosed Documents

²³ Reply, para. 8, *referring* to Rule 65 *ter* numbers 1D0309, 1D03817 and 1D03818.

²⁴ Reply, para. 10, *referring* to Rule 65 *ter* number 1D03813.

²⁵ Reply, para. 9, *referring* to Rule 65 *ter* numbers 1D03812 and 1D03815.

²⁶ *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 (“*Boškoski and Tarčulovski* Decision”), para. 3.

²⁷ *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.

²⁸ *Popović* Appeal Decision, para. 37, *Hadžić* Decision, para. 5; *Tolimir* Decision, para. 4.

²⁹ *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Decision on Prosecution’s Motion for Leave to Amend its Exhibit List, 19 October 2011 (“*Karadžić* Decision”), para. 10; *Boškoski and Tarčulovski* Decision, para. 3; *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 (“*Delić* Decision”), p. 4.

³⁰ *Tolimir* Decision, para. 4; *Karadžić* Decision, para. 10; *Boškoski and Tarčulovski* Decision, para. 3.

³¹ Rule 65 *ter* numbers 1D03789, 1D03790, 1D03791, 1D03792, 1D03793, 1D03794, 1D03795, 1D03796, 1D03797, 1D03798, 1D03799, and 1D03811.

are relevant and of sufficient importance to justify adding them at this stage of the trial. Further, no undue prejudice to the Prosecution will arise as a result of their addition.

7. Turning to the Disputed Documents,³² the Trial Chamber notes that: (a) the Prosecution has been on notice of the Disputed Documents since at least 6 November 2014; (b) English translations are now available for all the Disputed Documents; (c) the Disputed Documents are not lengthy; and (d) hearings have been suspended since 20 October 2014 and will not resume before 23 February 2015.³³ For the reasons set out above, the Trial Chamber is satisfied that adding the Disputed Documents would not prejudice the Prosecution. Further, with regard to the relevance of the Disputed Documents, the Trial Chamber reiterates that when adding a document to an exhibit list it need not assess relevance and probative value in the same way as it would when determining admission.³⁴ Having itself reviewed the Disputed Documents, the Trial Chamber does not consider that they are obviously irrelevant. The Trial Chamber therefore considers that it is in the interests of justice to permit their addition.

8. Finally, with respect to the stills and excerpts from previously admitted videos,³⁵ the Trial Chamber considers that, although the greater specificity may assist the Prosecution to prepare its case, their addition to the Exhibit List is not required. There are, however, parts of the excerpts for which no transcripts or English translations have been admitted.³⁶ Accurate transcripts and/or English translations will be required should the Defence seek to admit these excerpts.

³² Rule 65 *ter* numbers 1D03800, 1D03801, 1D03809, 1D03810, 1D03812, 1D03813, 1D03814, 1D03815, and 1D03816.

³³ Email from the Trial Chamber to the parties and the Registry, 17 October 2014; email from the Trial Chamber to the parties and the Registry, 3 February 2015.

³⁴ *Boškoski and Tarčulovski* Decision, para. 3; *Delić* Decision, p. 4.

³⁵ Rule 65 *ter* numbers 1D03803, 1D03804, 1D03805, 1D03806, 1D03807, 1D03808, 1D03817, and 1D03818.

³⁶ See Rule 65 *ter* number 1D03817, 21:58-22:09, 25:56-27:50; Rule 65 *ter* number 1D03818, 00:16-09:02, 14:50-17:20, 18:05-19:00.

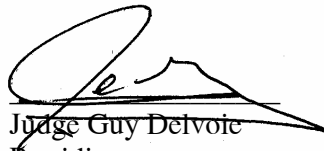
D. Disposition

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

- (a) **GRANTS** the Defence leave to file the Reply;
- (b) **GRANTS** the Motion and **ALLOWS** the Defence to add Rule 65 *ter* numbers 1D03789, 1D03790, 1D03791, 1D03792, 1D03793, 1D03794, 1D03795, 1D03796, 1D03797, 1D03798, 1D03799, 1D03800, 1D03801, 1D03810, 1D03811, 1D03812, 1D03814, 1D03815, and 1D03816; and
- (c) **ALLOWS** the Defence to add Rule 65 *ter* numbers 1D03809 and 1D03813 provided the Defence also uploads:
 - (i) a revised version of Rule 65 *ter* number 1D03809 in which the pages of the original correspond with the English translation; and
 - (ii) a revised English translation of Rule 65 *ter* number 1D03813.

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

Done this nineteenth day of February 2015,
At The Hague,
The Netherlands.



Judge Guy Delvoie
Presiding

[Seal of the Tribunal]