

**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-09-92-T

Date:

9 January 2013

Original:

English

IT-09-92-T
DS0641-DS0632
09 January 2013

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IN TRIAL CHAMBER I

Before:

**Judge Alphons Orie, Presiding
Judge Bakone Justice Moloto
Judge Christoph Flügge**

Registrar:

Mr John Hocking

Decision of:

9 January 2013

PROSECUTOR

v.

RATKO MLADIĆ

PUBLIC

**DECISION ON PROSECUTION FOURTH MOTION TO ADD
EXHIBITS TO ITS 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 1 November 2012, the Prosecution filed a Motion to add 13 documents to its Rule 65 *ter* exhibit list, which the Prosecution intended to use during the testimony of its expert witness Richard Philipps.¹ On 5 November 2012, the Defence filed its Response to the Motion opposing the addition of the 13 documents on the grounds that no good cause had been shown for the request and that such addition would be overly burdensome on the Defence's ability to prepare for Witness Philipps's testimony.² On 16 November 2012, the Chamber partially granted the Motion with respect to two documents bearing Rule 65 *ter* numbers 28501 and 28488, which were admitted as Exhibits D94 and P462, respectively.³ The Chamber noted that these two documents were disclosed at an earlier stage of the case, and therefore did not overly burden the Defence's ability to prepare for Witness Philipps's testimony.⁴ The Chamber further considered that these documents were *prima facie* relevant and probative in relation to the command and reporting structure of the Sarajevo Romanija Corps ("SRK").⁵ The Chamber denied the Motion with respect to the remaining 11 documents relating to sniping in Sarajevo ("Oral Decision").⁶ The Chamber noted that these 11 documents were only disclosed through the Motion, and the Prosecution did not present good cause for such disclosure and requested their addition to its Rule 65 *ter* list only six days prior to the testimony of Witness Philipps.⁷ The Chamber further recalled that the adjudicated facts, including adjudicated facts 1860 to 1864, 1866, and 1868 to 1869, cover the chain of command within the SRK and its activities in Sarajevo, including sniping.⁸ Weighing the Prosecution's late disclosure of 11 documents and its late request to add them to its Rule 65 *ter* list against its submissions on their *prima facie* relevance and probative value, the Chamber found it to not be in the interests of justice to allow the addition of the 11 documents.⁹ The Chamber noted, however, that the Oral Decision was issued in relation to the testimony of Witness Philipps, and was without prejudice to a request made in a different context.¹⁰

2. On 20 November 2012, the Prosecution filed another Motion ("Motion") seeking to add the 11 documents whose addition to its Rule 65 *ter* list the Chamber previously denied in the Oral

¹ Prosecution Urgent Motion to Add Exhibits to its 65 *ter* Exhibit List, 1 November 2012, para. 1.

² Defence Response to Prosecution Urgent Motion to Add Exhibits to its 65 *ter* Exhibit List, 5 November 2012, paras 5-16.

³ T. 4670-4672, 4707, 4786-4787..

⁴ T. 4670-4672.

⁵ *Ibid.*

⁶ *Ibid.*

⁷ *Ibid.*

⁸ *Ibid.*

⁹ *Ibid.* The Parties were advised of this outcome by way of an informal communication on 15 November 2012.

¹⁰ T. 4672-4673.

Decision.¹¹ On 3 December 2012, the Defence filed its Response (“Response”), opposing the Motion.¹²

II. SUBMISSIONS OF THE PARTIES

3. The Prosecution seeks the addition of 11 documents bearing 65 *ter* numbers 28490, 28496, 28495, 28494, 28493, 28492, 28500, 28499, 28498, 28491, and 28497 to its Rule 65 *ter* list.¹³ The Prosecution submits that these documents are *prima facie* relevant and probative to establishing that the SRK had a well-functioning command structure during the Indictment period, which in turn is directly probative of the Accused’s effective control over the SRK forces, and therefore of his liability for the sniping campaign in Sarajevo.¹⁴ The Prosecution argues that the documents go beyond the adjudicated facts cited by the Chamber in its Oral Decision.¹⁵ In particular, the Prosecution indicates that the documents relate to the period when Stanislav Galić was the SRK Corps Commander, whereas the adjudicated facts on sniping largely concern the period when Dragomir Milošević was the SRK Corps Commander.¹⁶ The Prosecution further submits that adding the documents to its Rule 65 *ter* list will not impose an undue burden on the Defence, as the documents are brief and relate solely to the issue of SRK command and control with respect to sniping.¹⁷ The Prosecution explains that it only recently discovered the documents among the numerous SRK-related materials in its possession.¹⁸ In an informal communication sent on 13 December 2012, the Prosecution indicated that it would use the documents with witness Patrick Van Der Weijden, who is scheduled to be the first witness when hearings in this case resume on 10 January 2013.

4. In its Response, the Defence argues that the Prosecution has not shown good cause for its Motion and has not established that it exercised due diligence in identifying additional exhibits at the earliest possible opportunity.¹⁹ The Defence argues that the Prosecution assertion that the documents are probative of the Accused’s liability for crimes committed in the course of the sniping and shelling campaign in Sarajevo runs counter to its submission that the late disclosure of the documents does not prejudice the Defence.²⁰ While the Prosecution cites a *Popović* Appeals

¹¹ Prosecution Fourth Motion to Add Exhibits to its 65 *ter* Exhibit List, 20 November 2012.

¹² Defence Response to Prosecution Fourth Motion to Add Exhibits to its 65 *ter* Exhibit List, 3 December 2012.

¹³ Motion, Annex A.

¹⁴ Motion, para. 5.

¹⁵ Motion, para. 7.

¹⁶ *Ibid.*

¹⁷ Motion, para. 8.

¹⁸ Motion, para. 9.

¹⁹ Response, paras 4-7.

²⁰ Response, para. 8.

Decision in support of its contention that good cause is not dispositive where the material is relevant and the Defence has had sufficient time to familiarize itself with it, the Defence points out that the factual situation in that case was quite distinct from that at bar, as the material in the *Popović* case was disclosed two years prior to the request for its addition to the Rule 65 *ter* list.²¹ The Defence highlights that the Prosecution does not argue that the late disclosure of the documents was the result of an inadvertent omission.²²

III. APPLICABLE LAW

5. The Chamber recalls and refers to the applicable law governing amendments to the Rule 65 *ter* exhibit list as set out in a previous decision.²³

IV. DISCUSSION

6. The Chamber notes that the only explanation the Prosecution offers for seeking the documents' addition to its Rule 65 *ter* list at this point in time is that "it recently discovered the [d]ocuments amongst the numerous SRK-related materials in its possession."²⁴ The Chamber therefore considers that the Prosecution has not presented good cause for amending its Rule 65 *ter* exhibit list.

7. The Chamber observes, however, that the Defence does not dispute the documents' *prima facie* relevance and probative value. The Chamber finds the documents to be *prima facie* relevant and of probative value, as they relate to the chain of command within the SRK, which may have implications upon the liability of the Accused for the campaign of shelling and sniping by the SRK in Sarajevo. The Chamber considers that the Defence has not specifically addressed the prejudicial effect of each of the documents and in view of the time elapsed since 1 November 2012, the Chamber finds no undue prejudice to the Defence in allowing the documents to be added to the Prosecution's Rule 65 *ter* list. Moreover, the Defence will be able to further address any prejudice it may have suffered from the late addition to the Rule 65 *ter* list when the documents are used and tendered by the Prosecution. Despite the absence of good cause, the Chamber finds it to be in the interests of justice to allow the addition of the documents to the Prosecution's Rule 65 *ter* list.

²¹ Response, paras 9-10.

²² Response, para. 12.

²³ Decision on Prosecution Second Motion to Amend Rule 65 *ter* Exhibit List, 27 June 2012, paras 5-6.

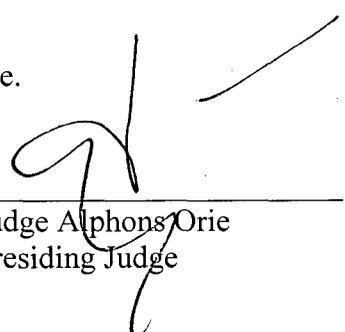
²⁴ Motion, para. 9.

8. The Chamber nevertheless notes that the Prosecution explains that while adjudicated facts 1860 to 1864, 1866, and 1868 to 1869 cited in the Oral Decision relate to Dragomir Milošević as the SRK commander, the documents concern Stanislav Galić's tenure in such position. The Chamber recalls in this regard that the adjudicated facts, including adjudicated facts 1787, 1790 to 1793, 1805 to 1811, and 1813, relate to the clear chain of command in the SRK up to Galić. The Chamber therefore expects the Prosecution to point out what the documents add to the adjudicated facts on the issue should it tender them into evidence.

V. DISPOSITION

9. 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.

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



Judge Alphons Orie
Presiding Judge

Dated this ninth day of January 2013
At The Hague
The Netherlands

[Seal of the Tribunal]